Local Government Antitrust Act: A Comment on the Constitutional Questions, The

Thomas Wm. Mayo
THE LOCAL GOVERNMENT ANTITRUST ACT: A COMMENT ON THE CONSTITUTIONAL QUESTIONS

Thomas Wm. Mayo*

I.

In 1978 the United States Supreme Court held for the first time, in City of Lafayette v. Louisiana Power & Light Co.,¹ that municipalities do not enjoy a blanket exemption from the coverage of the federal antitrust laws. Although a majority of the Justices agreed that Congress had intended to exempt some conduct of local governments under the antitrust laws,² there was no majority support for either of the two proposed formulations of the exemption.³ It was not until 1982, in Community Communications

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This article is taken from a larger work-in-progress that deals with a number of the questions — some of which are identified infra note 18 — that have been left unresolved by the Local Government Antitrust Act of 1984. While preparing this article for publication in the Faculty issue of the Journal, I have had the benefit of discussions with my colleagues Matthew Finkin, Jeffrey Gaba, and Paul Rogers. In addition, Sara Beth Watson, a 1985 graduate of the Southern Methodist University School of Law, provided invaluable research and editorial assistance.


² Justice Brennan delivered the opinion for the Court, writing for himself and Justices Marshall, Powell, and Stevens. Chief Justice Burger concurred in the result and in Part I of the plurality opinion, thus providing majority support for the rejection of the cities' "implicit [contention] that, apart from the question of their exemption as agents of the state under the Parker doctrine, Congress never intended to subject local governments to the antitrust laws." Id. at 394. Justice Marshall wrote a separate concurring opinion. Justice Stewart wrote a dissenting opinion in which Justices White, Rehnquist, and (except as to Part II-B) Blackmun joined, and Justice Blackmun wrote a separate dissenting opinion.

³ Writing for the plurality, Justice Brennan "conclude[d] that the Parker doctrine [see Parker v. Brown, 317 U.S. 341 (1943)] exempts only anticompetitive con-
Co. v. City of Boulder,\(^4\) that the Court agreed on the requirements for state-action exemption for municipalities: a state acting in its sovereign capacity is immune from the antitrust laws under Parker v. Brown,\(^5\) while a local government is immune if it acts "in furtherance or implementation of clearly articulated and affirmatively expressed state policy."\(^6\)

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\(^4\) Community Communications Co. v. City of Boulder, 455 U.S. 40, 52 (1982).


\(^6\) In Boulder, the Court held that the legislature's grant of home-rule powers to a municipality was such a general and broad grant of authority that it could not be characterized as clearly articulating and affirmatively expressing any specific state policy. In Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985), the Court concluded that Wisconsin's statute granting authority to cities to construct and maintain sewage systems and to refuse to serve unannexed areas satisfied the Boulder test. Specifically, the legislature clearly contemplated that municipalities would engage in anticompetitive conduct such as that alleged in Hallie, i.e., the tying of sewage treatment services to the provision of sewage collection and transportation services. Both Hallie and Southern Motor Carriers Rate Conference, Inc. v. United States, 105 S. Ct. 1721 (1985), represent major advances in the Court's treatment of the "state action" doctrine of Parker v. Brown. Both cases provide examples of state statutes that satisfy the Midcal-Boulder requirement of a clearly articulated and affirmatively expressed "state policy favoring anticompeti-
A wave of antitrust litigation against local governments followed the City of Lafayette decision, one that became larger and more menacing — at least from the point of view of the municipalities — after Boulder, although hard figures showing the extent of post-Lafayette and post-Boulder antitrust claims are difficult to come by. The "1981 Annual Report to the National Institute of Municipal Law Officers" discusses forty-three pending antitrust cases against local governments. In March 1982, the National Journal reported that "70 or more" antitrust actions had been brought against local governments. And in a statement before the Senate Judiciary Committee little more than a year later, a representative of the United States Conference of Mayors testified that 200 to 300 antitrust cases were then pending against local governments.

The response of local governments to this new litigation and to the Supreme Court's decisions was a two-year lobbying effort that culminated in the signing of Public Law No. 98-544, the Local Government Antitrust Act of 1984 ("Act"), in October 1984. Unlike bills introduced during the 98th Congress that would have adjusted the Court's activity-oriented exemption standard, the Act...
focuses instead on limiting the remedy that may be assessed against a local governmental defendant. Section 3(a) of the Act, for example, provides that "[n]o damages, interest on damages, costs, or attorney's fees may be re-

No. 1158, 98th Cong., 2d Sess. (1984); H.R. 6027 (as amended and passed by the House, August 8, 1984); H.R. 6027, 98th Cong., 2d Sess. (1984); H.R. 5993, 98th Cong., 2d Sess. (1984); S. 1578 (Calendar No. 997), 98th Cong., 2d Sess. (1984); H.R. 5992, 98th Cong., 2d Sess. (1984); H.R. 5573, 98th Cong., 2d Sess. (1984); H.R. 3368, 98th Cong., 1st Sess. (1983); S. 1578, 98th Cong., 1st Sess. (1983); H.R. 3361, 98th Cong., 1st Sess. (1983); H.R. 2981, 98th Cong., 1st Sess. (1983). Most of the bills proposed to immunize local governments for certain activities by attempting to define the class of activities as to which immunity would apply. Some attempted to describe the type of conduct to which exemption would apply. See, e.g., H.R. 5992, supra (local government not liable for "official conduct . . . reasonably undertaken to protect or provide for the public health, safety, or welfare"); H.R. 5993, supra (no liability for "action [taken] in the reasonable exercise of [its] legislative, regulatory, executive, administrative or judicial powers"); H.R. 6027 (no liability for action that officials "could reasonably have . . . construed to be within the . . . authority of [the local government]"). Other proposed bills tied immunity either to the existence of state authorization or to the availability of Parker immunity for similar activity if undertaken by the state itself. See, e.g., H.R. 2981, supra; H.R. 3361, supra; S. 1578 (as amended), supra; H.R. 5573, supra.

Public Law No. 98-544 (1984) provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the “Local Government Antitrust Act of 1984.”

Sec. 2. For purposes of this Act —

(1) The term “local government” means —

(A) a city, country, parish, town, township village, or any other general function governmental unit established by State law, or

(B) a school district, sanitary district, or any other special function governmental unit established by State law in one or more States.

(2) the term “person” has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(A)), but does not include any local government as defined in paragraph (1) of this section, and

(3) the term “State” has the meaning given it in section 4g(2) of the Clayton Act (15 U.S.C. 15g(2)).

Sec. 3(a). No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4a, or 4c of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government or official or employee thereof acting in an official capacity.

(b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case.

In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall
covered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. § 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity."  

Section 4(a) of the Act established a similar limitation on the remedy that is available "against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity." Moreover, section 3(b) of the Act permits the limitation on remedy in section 3(a) — but not section 4(a) — to be given retrospective effect. Section 3(b) allows section 3(a)'s prohibition against damages (and costs, including attorney's fees) to be applied "to cases commenced before the effective date of this Act [if] the defendant be deemed to be prima facie evidence that subsection (a) shall not apply.

Sec. 4(a). No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

(b) Subsection (a) shall not apply with respect to cases commenced before the effective date of this Act.

Sec. 5. Section 510 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriation Act, 1985 (Public Law 98-411), is repealed.

Sec. 6. This Act shall take effect thirty days before the date of the enactment of this Act.

13 Id. § 3(a).
14 Id. § 4(a).
15 The effective date of the Act is "thirty days before the date of enactment of this Act." "Enactment" does not appear in the Constitution, and its meaning may be debated. Some secondary sources state that "enactment" refers to legislative rather than executive action, 4 The Guide to American Law 291 (West 1984), or use "enactment," "passage" and "effective date" interchangeably, 73 AM. JUR. 2D Statutes § 362 (1964). Few federal courts have addressed the question of what enactment means, probably because most bills either are silent on the issue or specify precisely an effective date. Federal courts appear to interpret "enactment" as occurring when the legislation receives executive approval or otherwise becomes law. E.g., Bradley v. Richmond School Bd., 416 U.S. 696 (1974) (date of enactment and effective date used interchangeably in case where no issue was presented by the possible difference in meaning); Central Freight Lines, Inc. v. United States, 669 F.2d 1065, 1067 (5th Cir. 1982) (court distinguished between "passage" by Congress and enactment). This interpretation also is supported by state cases, see Staddle v. Township of Battle Creek, 77 N.W.2d 329, 331 (Mich. 1956); State v. Gibbons, 203 P. 390, 393 (Wash. 1922), and is consistent with the
establishes and the court determines, in light of all the circumstances, including the state of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply [section 3(a)] to a pending case.”

In addition, section 6 provides for a limited, “automatic” retrospectivity by providing that the Act shall become effective thirty days prior to approval by the President.

Sections 3 and 4 of the Act pose a number of difficult problems of construction, most of which can be resolved only by reference to the state-action immunity doctrine and the legislative history of the Act. One issue, how-

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In light of the conflicting authority, however, an argument could be made that the Act’s effective date is 30 days prior to passage by Congress, or September 11, 1984, thereby providing the immunity in § 3(a) for cases filed between September 11 and September 24, 1984, as well as those cases filed between September 24 and October 24. The apparent purpose of the 30-day, automatic retrospectivity was to defeat the last-minute attempts of antitrust plaintiffs to file their actions before the Act became law. See 47 BNA Antitrust Rep. 647 (1984) (statement of Rep. Seiberling). Thus, Congress may have intended that the 30 days be measured from the date H.R. 6027 passed both houses, a date certain, rather than the more uncertain date of presidential approval. On the other hand, the Constitution requires that the President approve or return all bills within 10 days, U.S. Const. art. I, § 7, cl. 2, and even when Congress’s adjournment prevents a bill’s return, a bill that is not signed by the tenth day after presentation, excluding Sundays, is vetoed. See The Pocket Veto Case, 279 U.S. 672, 674, 691-92 (1929) (if Congress’ adjournment prevented the President from returning a bill on the tenth day after presentation, “it did not become law”). Cf. Wright v. United States, 302 U.S. 583, 593 (1938) (President’s time for consideration of bill expires on tenth day); Kennedy v. Sampson, 511 F.2d 430, 437 (D.C. Cir. 1974) (failure to approve bill within 10 days, even during adjournment that prevents the bill’s return, constitutes pocket veto). Thus, “30 days prior to passage by Congress,” is as ascertainable a date as “30 days prior to approval” and just as efficaciously accomplished the purpose of the 30 days’ retrospectivity.

H.R. 6027 passed both houses on October 11, 1984, was presented to the President on October 19, see 130 Cong. Rec. H12287 (daily ed. Nov. 14, 1984), and the President approved it on October 24, 1984 (four days after presentation, excluding one intervening Sunday, cf. U.S. Const. art. I, § 7, cl. 2), which makes the effective date of the Act September 24, 1984. Thus, by its terms, the Act provides for a limited retrospectivity; the limitation of remedy in § 3(a) applies to all cases filed up to 30 days before the date on which the Act was signed into law.

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Public L. No. 98-544, supra note 12, § 3(b) (footnote added).

§ 3(b) (footnote added).

17 See supra note 15.

The questions raised by the Act include the following:

(a) What is the extent of the limitation of remedy with respect to officials and
ever, stands more or less alone in that crowd, an issue that has little to do with the *Parker* doctrine and that was not debated by Congress before it enacted the immunity legislation: Whether Congress’ retroactive elimination of the damage remedy for antitrust violations by local governments or their officials or employees constitutes a deprivation of property without due process or, as Senator Symms suggested, a taking of property without just compensation.

II.

The retrospective application of section 3(a) of the Act — reflected in both the effective date provided by section 6, which precedes enactment by thirty days, and section 3(b)’s balancing test — was the result, in Senator Metzenbaum’s words, of “hard-fought, difficult negotiations.” In particular, “[a] number of Senators felt quite strongly that a plaintiff who has won a jury verdict should not have the verdict taken away by intervening legislation — others employees in light of the limiting language in § 3(a), “acting in an official capacity”?

(b) Under what circumstances may the limitation be avoided by suing officials and employees in their individual capacity as well as their official capacity?

(c) Should the limitation apply in cases in which the official’s or employee’s action (1) was unlawful under state or local law, (2) constituted an *ultra vires* act, or (3) was taken in bad faith?

(d) Does the Act’s elimination of the damages remedy exclude the possibility of equitable restitution in an appropriate case?

(e) Does the Act’s elimination of damages and attorneys’ fees under the antitrust laws affect their availability under other federal laws, *e.g.*, 42 U.S.C. §§ 1983, 1988?

(f) What additional factors, other than those specifically listed in § 3(b) of the Act, may be considered by a court in deciding whether § 3(a) should be applied retrospectively in a given case?

(g) In deciding the issue of retrospective application, the court is directed by § 3(b) of the Act to consider the availability of alternative relief, principally injunctive relief. May a plaintiff with unclean hands, or a plaintiff who has sold his property or franchise, argue that injunctive relief is unavailable and defeat the governmental defendant’s claim that immunity should be applied retrospectively?

(h) What is the scope of the immunity for nongovernmental defendants provided for in § 4(a) of the Act?

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disagreed." As these comments and those of other congressmen indicate, the central concern of the conferees was the fairness of applying the immunity to cases already commenced. Indeed, section 3(b) requires the judge in such cases to determine that failure to give section 3(b) retrospective application "would be inequitable." Until the closing minutes of debate on the Act, however, Congress did not consider the constitutional limits on its authority to eliminate the damage remedy with respect to a case already commenced or to a cause of action that had accrued. Then Senator Symms introduced a memorandum, which was ordered printed in the Congressional Record but was never discussed, that argued there is a "very good likelihood" that the courts would find that "the proposed bill effects a taking of property without just compensation." If the courts found a taking, the memorandum argued, the Tucker Act would "provide Claims court jurisdiction for suits against the United States grounded upon the Fifth Amendment of the Constitution."  

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21 Id. See also id. at H12187 (retroactivity was a "key issue") (remarks of Rep. Fish).
23 Act, supra note 10, § 3(b) (emphasis added).
26 Symms memorandum, supra note 19, at S14366. The United States District Court for the Eastern District of Louisiana also concluded that the Tucker Act would provide jurisdiction for any claim against the United States in which an antitrust plaintiff alleged that the Act effected an unconstitutional taking of property. See Jefferson Disposal Co. v. Parish of Jefferson, 603 F. Supp. 1125 (E.D. La. 1985). The court rejected plaintiff's due process challenge to the Act, however, on the ground that retrospectivity was justified by the "great national concern" over municipal antitrust liability and the Act merely altered the remedy available to plaintiffs without changing their substantive rights. Id. at 1136. These issues
Senator Symms based his conclusion almost entirely upon the Ninth Circuit's 1982 decision, *In re Aircrash in Bali, Indonesia on April 22, 1974.* In that case, plaintiffs obtained a judgment in their wrongful death action in district court against an international air carrier and were awarded damages of $951,000. The Ninth Circuit held that the Warsaw Convention's limitation on liability pre-empted California state law and that plaintiffs' judgments should be reduced accordingly. The court of appeals rejected plaintiffs' arguments that preemption would constitute a deprivation of property without due process and an impermissible burden on their decedents' right to travel, principally because the impact of preemption would be ameliorated to the extent plaintiffs had a taking claim that could be pursued against the United States under the fifth amendment. The court held that the Tucker Act conferred the United States Claims Court with jurisdiction over such a claim.

Although the *Bali* court explicitly refrained from deciding whether the Warsaw Convention may effect a taking, are discussed infra notes 100-06 and accompanying text. The only other district court decision under the Act as this article is being written gave the Act retrospective effect by dismissing an antitrust claim filed on September 7, 1984, but the court did not discuss the constitutional issues raised by its action, see TCI Cablevision, Inc. v. City of Jefferson, 604 F. Supp. 845 (W.D. Mo. 1984), perhaps because an alternate ground existed for the dismissal, see id. at 846-47.

27 *684 F.2d 1301 (9th Cir. 1982).*
28 *In re Aircrash in Bali, Indonesia, 462 F. Supp. 1114, 1116 (C.D. Cal. 1978).*
31 *Bali, 684 F.2d at 1310.*
32 See supra note 25.
33 *Bali, 684 F.2d at 1310.*
34 *Id. at 1312.*
the Symms memorandum nonetheless characterized Bali as "[t]he most recent authority for the proposition that [the Act] would effect a taking of property, where a cause of action in antitrust law has already accrued."\(^3\) This assertion ignores not only the Ninth Circuit's own limitation on its holding, but also the apparent limitations on its reasoning. As the court recognized, Bali did not involve "a change in law, but the limitation of an independently existing right under state law,"\(^36\) an apparent reference to the principle that a sovereign has considerable, though not complete, freedom to modify rights that it has created by statute.\(^37\)

The Symms memorandum more nearly resembles a "hit and run" effort to raise without resolving the significant issue of the Act's constitutionality, but its message will not be lost on plaintiffs' counsel who are asked to demonstrate to a trial court why the Act should not be applied retrospectively to their claims for antitrust damages. The remainder of this article attempts to fashion a guide through the seemingly inconsistent and unnecessarily perplexing decisional law applicable to the constitutionality of the Act.

III.

Although the Constitution's sole explicit limitation on the ability of Congress to enact retrospective legislation, the ex post facto clause,\(^38\) has been judicially limited to criminal or penal statutes,\(^39\) the Supreme Court has con-

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\(^{35}\) Symms memorandum, supra note 19, at 14366.

\(^{36}\) Bali, 684 F.2d at 1312 n.10.


\(^{38}\) U.S. CONST. art. I, § 9, cl. 3. The Constitution, of course, also limits the states' ability to pass ex post facto law or laws "imparing the Obligation of Contract." Id. § 10, cl. 1.

strued the due process clause of the fifth amendment as imposing such a limitation implicitly. The limitation derives from the substantive due process doctrine; thus, decisions in this area have waxed and waned approximately as has the doctrine itself. In addition, Congress has sought to act retrospectively in a variety of settings, and the factual differences in the cases, not surprisingly, have had a significant bearing on the results.

In addition, if the just compensation clause were deemed applicable to retrospective legislation, as the *Bali* Court and the Symms memorandum suggest it should be, it could constitute yet another limitation on Congress’ legislative power in this area. It would attach a price tag measured in terms of treble damages to the Act every time its application to an accrued cause of action or judgment were deemed to constitute a taking of private property.

A cause of action is a species of “property” that is protected by the due process and just compensation clauses and so, *a fortiori*, is a claim that has ripened into a judgment. Both accrued causes of action and judgments.

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40 U.S. Const. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law”).

41 See e.g., J. Nowak, R. Rotunda & J. Young, Constitutional Law 471-76 (2d ed. 1983). In addition, the equal protection clause of the 14th amendment, made applicable to the federal government for some purposes by *Bolling v. Sharpe*, 347 U.S. 497 (1954), could be similarly construed as a limitation upon the legislature’s ability to single out a group with respect to whom the benefits and burdens of economic life are to be reallocated. It does not appear, however, that the Supreme Court has ever applied the 14th amendment in this way. Cf. *Slawson*, supra note 37, at 239-35.

42 U.S. Const. amend. V (“nor shall private property be taken for public use without just compensation”).

43 See, e.g., *Louisville & N.R.R. v. Mottley*, 219 U.S. 467 (1911); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948); *Slawson*, supra note 37, at 249 (“there seems little doubt at the present time that legislation can impair or remove accrued rights of action to the same extent that it can impair or destroy other property rights.”). Cf. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 311-15 (1945) (defense based on statute of limitations may be
however, may be impaired or destroyed by subsequent legislation as long as there is no denial of the protections provided by the Constitution. Judgments, particularly final ones, are undoubtedly entitled to a greater level of protection than mere causes of action, and the Act recognizes this by providing that the existence of a judgment awarding damages to an antitrust plaintiff constitutes "prima facie evidence" that section 3(a)'s prohibition should not be applied retrospectively. For purposes of the following analysis, accrued causes of action and judgments are assumed to be property interests entitled to the full measure of the Fifth Amendment's protection.

In practice, challenges to retrospective legislation are usually based upon a substantive due process argument. Accordingly, the following sections discuss the due process clause first and then the just compensation clause. In addition, the discussion does not distinguish for most purposes between the two provisions in the Act that can give rise to retrospective application of section 3(a)'s bar

abolished by subsequent legislation extending limitations period). But see Coombes v. Getz, 285 U.S. 494 (1932) (where right to enforce liability, based on contract authorized by state statute, was perfected before repeal of authorizing statute, repeal did not extinguish liability); Ettor v. City of Tacoma, 228 U.S. 148 (1913) (repeal of state statute granting compensation for damages could not destroy compensation rights that accrued while the statute was in effect); Steamship Co. v. Joliffe, 69 U.S. (2 Wall.) 450 (1864) (a perfected right that arises under a contract authorized by statute is not affected by repeal of the statute).


Cf. 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199 (judgment for employees in action for overtime pay affirmed May 5); S.C., 331 U.S. 795 (1947) (judgment modified, after the Portal-to Portal Act became law on May 14 to give the district court authority "to consider any matters presented to it under" that Act); S.C., S.D.N.Y. 1948, 79 F. Supp. 41[3] (defendant employer permitted to amend answer to make new defenses under new act).

But see Massingill v. Downes, 48 U.S. (7 How.) 760 (1849) (alternative holding).

47 See Hochman, supra note 37, at 718 ("[O]nce ... a right has been reduced to judgment, the interest in stability is present to a significantly greater extent than at any time before judgment. Moreover, there is likely to be substantial reliance on the judgment.")

48 Act, supra note 12, § 3(b).
to a damage recovery. Both the automatic thirty-day re-

trospectivity of section 648 and the equitable retrospectiv-

ity provided for in section 3(b) may preclude an award of damages with respect to claims that have accrued but have not been sued upon, cases that have been commenced but have not gone to judgment, and judgments that have not yet become final. Where the balancing of factors that is a condition of retrospectivity under section 3(b) might have a difference to the analysis in the following section, the difference between the two types of re-

trospectivity is noted.

A.

After years of unpredictable decisions and the labored analysis of commentators, the United States Supreme Court attempted in 1976, in *Usery v. Turner Elkhorn Mining Co.*, to rationalize the substantive due process doctrine as it applies to retrospective federal civil legislation. In *Turner Elkhorn*, Congress had amended Title IV of the

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48 See supra note 15.
49 See supra notes 15-16 and accompanying text.
50 Compare, e.g., Forbes Pioneer Boat Line v. Board of Comm'rs, 258 U.S. 338 (1922) (state statute purporting to extinguish claim for refund of tolls unlawfully demanded violated due process clause of 14th amendment), and Ettor v. City of Tacoma, 228 U.S. 148 (1913) (repeal of statute that allowed certain landowners to collect consequential damages from changes in street grade violated due process clause), with, e.g. Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945) (state's extension of statute of limitations, which had the effect of resurrecting plaintiff's otherwise time-barred claim under Minnesota's Blue Sky Law, held not to violate due process clause), and Addison v. Huron Stevedoring Co., 204 F.2d 88 (2d Cir.) cert. denied, 346 U.S. 877 (1953) (federal "Overtime-on-Overtime" Act, which redefined "regular rate" for purposes of overtime computation under Fair Labor Standards Act and made the change retroactive as to some employers, held not to violate due process clause of fifth amendment).
Federal Coal Mine Health and Safety Act of 1969\textsuperscript{58} by enacting the Black Lung Benefits Act of 1972.\textsuperscript{54} The 1972 legislation provided benefits to miners suffering from the disease, \textsuperscript{55} including in both cases miners who left employment in the coal industry prior to the effective date of the 1972 act.\textsuperscript{56} Coal mine operators claimed that this aspect of legislation deprived them of property without due process on the theory "that to impose liability upon them for former employees' disabilities is impermissibly to charge them with an unexpected liability for past, completed acts that were legally proper and, at least in part, unknown to be dangerous at the time."\textsuperscript{57}

The Court rejected the constitutional challenge. First, the Court eliminated any blanket principle of invalidity for retroactive civil legislation: "legislation readjusting rights and burdens is not lawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts."\textsuperscript{58}

The constitutional test of retrospective legislation is that of due process, and the Court indicated that the prospective and retrospective aspects of a statute are to be tested separately.\textsuperscript{59} Thus, retrospectivity must itself be rationally related to a legitimate governmental objective. In Turner Elkhorn, the Court discerned a legitimate objective — spreading the costs of the employees' disability — and concluded that the retrospective imposition of liability was a "rational measure"\textsuperscript{60} to accomplish that goal.

It is unclear whether the Court's due process test is


\textsuperscript{55} Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 8 (1976).

\textsuperscript{56} Id. at 8-12.

\textsuperscript{57} Id. at 15.

\textsuperscript{58} Id. at 16 (citations omitted).

\textsuperscript{59} Id. at 17.

\textsuperscript{60} Id. at 18. \textit{See also id.} at 19 ("The Act approaches the problem of cost-spreading rationally").
more subtle or elaborate than the two preceding paragraphs indicate. As a part of its due process analysis, for instance, the Court stated that "the justification for [retrospectivity] must take into account"\(^1\) the mine operators' past knowledge of the dangerousness of their activity and the possibility that the owners would have acted differently in the past if the law had imposed liability on them at the time.\(^2\) Ordinarily, these factors have been weighed to assess the fairness of retrospective changes in the law,\(^3\) and the Court may someday refer to them for that purpose. The Court's purpose in acknowledging these factors in *Turner Elkorn*, however, was first to raise, and then reject, the possibility that these factors might support two alternative justifications for retrospectivity: deterrence\(^4\) and punishment of blameworthy conduct.\(^5\)

Despite the Court's best efforts to keep the due process test for retrospective federal legislation simple and straight-forward, the confusion was continued last term in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*\(^6\) In that case, Congress had enacted the Multi-employer Pension Plan Amendments Act ("Amendments Act"),\(^7\) which provided in part that an employer withdrawing from a multi-employer pension plan would be required to pay the

\(^{61}\) Id. at 17. Cf. Slawson, *supra* note 37, at 221-33 (analyzing due process in terms of a choice and reliance).

\(^{62}\) 428 U.S. at 17.

\(^{63}\) Logically, if a plaintiff lacked the knowledge to act differently, or did not act a particular way in reliance upon the former state of the law, "there is no reason why a retroactive [change] is any less desirable than a prospective one," Slawson, *supra* note 37, at 225. Nonetheless, the Court seems to say that knowledge of the dangers (i.e., a basis for acting differently) would tend to justify retrospectivity, rather than cut against it, 428 U.S. at 17 ("While the Operators have clearly been aware of the danger of pneumoconiosis for at least 20 years, . . . . we would nevertheless hesitate to approve the retrospective imposition of liability. . . .").

\(^{64}\) Deterrence is a poor theory to justify retrospectivity in any case, since deterrence, like the normative function of law generally, seems unqualifiedly prospective in nature. See Raz, *On the Functions of Law*, in *OXFORD ESSAYS IN JURISPRUDENCE* 278, 281 (A. Simpson 2d series 1973). Cf. O. Holmes, *The Common Law* 42 (M. Howe ed. 1963) ("For the most part, the purpose of the criminal law is only to induce external conformity to rule.").

\(^{65}\) *Turner Elkorn*, 428 U.S. at 17-18.


\(^{67}\) Public L. No. 96-364, 94 Stat. 1208 (1980).
share of the fund’s unvested liabilities attributable to that employer’s participation in the plan.\textsuperscript{68} The amendments were intended to alleviate the federal Pension Benefit Guaranty Corporation’s massive unfunded liability, which threatened to exceed the corporation’s ability to pay, to protect retirement plans from the adverse effects of employer withdrawal, and to provide a disincentive to such withdrawals.\textsuperscript{69}

The amendment provisions that imposed liability on employers who voluntarily withdraw from multi-employer pension plans were made effective five months before enactment.\textsuperscript{70} This retrospective imposition of liability was challenged by an employer who withdrew from its multi-employer pension plan during the five-month period of retrospectivity, incurring a withdrawal liability of over $200,000 in the process. After the district court granted summary judgment to the Pension Benefit Guaranty Corporation on the employer’s due process claim,\textsuperscript{71} the Ninth Circuit reversed,\textsuperscript{72} relying principally upon Nachman Corp. v. Pension Benefit Guaranty Corp.\textsuperscript{73} In Nachman, the Seventh Circuit identified four factors to be considered in determining whether retrospective civil legislation satisfies the test in Turner Elkhorn: “[1] the reliance interests of the parties affected, [2] whether the impairment of the private interest is effected in an area previously subjected to regulatory control, [3] the equities of imposing the legislative burdens, and [4] the inclusion or statutory provisions designed to limit and moderate the impact of the

\textsuperscript{68} R.A. Gray, 104 S. Ct. at 2712.

\textsuperscript{69} Id. at 2711-12.

\textsuperscript{70} Id. at 2712.

\textsuperscript{71} R.A. Gray & Co. v. Oregon Washington Carpenters-Employers Pension Trust, 549 F. Supp. 531 (D. Or. 1982). The employer also challenged the constitutionality of the retrospective imposition of liability on equal protection and procedural due process grounds, under the ex post facto clause, and as a denial of its right to trial by jury. See 104 S. Ct. at 2716 n.5. Only the substantive due process issue was presented to the Supreme Court.

\textsuperscript{72} Shelter Framing Corp. v. Pension Benefit Guar. Corp., 705 F.2d 1502 (9th Cir. 1983). For ease of reference, this decision will be referred to in text as R.A. Gray, from the style of the Supreme Court’s opinion.

\textsuperscript{73} 592 F.2d 947 (7th Cir. 1979), aff’d, 446 U.S. 359 (1980).
burdens." The Ninth Circuit concluded, on the basis of factors [1] and [3] in particular, that the retrospectivity of the Amendments Act violated due process.

The Supreme Court reversed and reiterated the message in *Turner Elkhorn* that the Seventh and Ninth Circuits had failed to heed: the burden of demonstrating that the retrospective provision of a federal civil statute satisfies the test of due process "is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." The Court emphasized that "the strong deference accorded legislation in the field of national economic policy is no less applicable when the legislation is applied retroactively." The test is simply whether "the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means." In this case, the Court easily concluded that the retrospective imposition of withdrawal liability on employers was a rational means to reduce the number of voluntary withdrawals; creation of a liability that was only prospective could have produced a rash of voluntary withdrawals and partially, if not substantially, defeated the purpose of the amendment.

If the Court's insistence that its due process test is a "simple" one is accepted at face value, the retrospectivity of the Local Government Antitrust Act of 1984 easily passes muster. Indeed, the automatic thirty-day retrospectivity of section 6 is justifiable on the same ground as that to which the Supreme Court adverted in *R.A. Gray*. Retrospectivity was necessary to avoid the exacerbation due to eleventh-hour activity (the filing of antitrust suits) of the evil (numerous claims for damages against local governments) against which the new legislation was directed. The limited retrospectivity of section 3(b) is not

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74 Id. at 960 (citations omitted).
75 705 F.2d at 1511-14.
76 104 S. Ct. at 2718.
77 Id.
78 Id.
79 Id. at 2718-19.
much more difficult to justify. Congress decided that local governments need to be relieved of the burdens imposed by the treble damages provision of the federal antitrust laws. The burdens are, principally, trebled money judgments in those few cases that will go to judgment and, perhaps more significantly, the cost of defending against antitrust claims and the chilling effect on local decision makers that all antitrust suits can be expected to produce. If pending treble damage claims are allowed to go forward, Congress’ objective to minimize or eliminate the first two of these burdens will be seriously undercut. Some cases will produce money judgments for plaintiffs, and all cases will impose defense costs on local governments. (The threat of future treble damage claims, rather than the impact of a pending claim, is the principal source of any chilling effect on decisionmakers. Retrospectivity bears no particular relationship to the elimination of that burden.) Thus, Congress could rationally conclude that its objectives would be furthered significantly by retrospective application of the prohibition against money damages.

The problem with the Supreme Court’s opinion in R.A. Gray is that, despite the Court’s intention that it do so, the opinion may not have established a simple rational-basis due process test. If doctrinal simplicity were desired, the Court could have rejected the four-part inquiry proposed by the Nachman court and relied on by the Ninth Circuit, but it did not do so. Instead, the Court claimed it had “no occasion to consider whether the factors mentioned by [the Nachman] court might in some circumstances be relevant in determining whether retroactive legislation is rational.” This is an inexplicable statement, in light of the Ninth Circuit’s opinion, which considered the four factors precisely because it deemed them relevant to the question

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81 104 S. Ct. at 2717 n.6.
of rationality under Turner Elkhorn. Nevertheless, the Court explicitly rejected only "the constitutional underpinnings" of the Nachman test and left open the question of their relevancy to future analyses under Turner Elkhorn.

The Court also equated the well-established rule "that retrospective civil legislation may offend due process if it is 'particularly "harsh and oppressive"' with the prohibition against arbitrary and irrational legislation that [the Court] clearly enunciated in Turner Elkhorn." Curiously, it was precisely for guidance on the issue of the harshness and oppressiveness of the pension law amendments that the Ninth Circuit turned to the four Nachman factors. Indeed, a court would be hard pressed to evaluate a claim of harsh and oppressive retrospective impact without reference to the degree to which a party relied on earlier law, the justifiability of that reliance (i.e., whether the area of activity was subject to federal regulation), the relative burden on affected parties weighed against the benefits sought to be achieved by retrospectivity, and the efficacy of moderating provisions (if any) in ameliorating an otherwise harsh and oppressive impact.

Notwithstanding the Court's protestations to the contrary, it appears that plaintiffs challenging the retrospective application of section 3(a) of the Act may rely upon the four Nachman factors or their equivalent. Predicting what a court will do with those factors is an inherently risky undertaking, in light of the lack of clear, or even consistent, guidance from the Supreme Court, but the general lines of analysis seem fairly straightforward.

1. Reliance. As David W. Slawson has observed, "nothing seems more basic to the existence of a legal order than the ability to rely upon the actions of others, in-

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82 See 705 F.2d at 1510.
83 104 S. Ct. at 2717 n.6.
84 Id. at 2720 (quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n.13 (1977) (quoting Welch v. Henry, 305 U.S. 134, 147 (1938))).
85 Id.
86 See 705 F.2d at 1510, 1514.
cluding the government, with some assurance." There is, however, an inherent conflict between this need for stability and the requirement that "the legal order must constantly change to fit new factual conditions or new conceptions of the common good." Thus, reliance *simpliciter* does not provide a useful principle for limiting the legislature's ability to change legal rules retrospectively, "since it would rule out all but the most inconsequential legislative change." Nonetheless, whether giving a statute retrospective application is fair, or whether retrospectivity offends due process because it is, in the Supreme Court's words, "particularly harsh and oppressive," depends in part upon the degree to which the affected party either acted or refrained from acting in light of then existing rules of law and suffered a material loss as a result.

In this respect antitrust plaintiffs are not in the same position as either a party to a contract that has been rendered unenforceable by subsequent legislation or the employer in *R.A. Gray* who withdrew from its multi-employer pension plan before the Amendments Act became law. In both instances, the parties arguably altered their positions, *e.g.*, paid insurance premiums, purchased gov-

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87 Slawson, *supra* note 37, at 225. *See also*, *e.g.*, K. Llewellyn, Bramble Bush 59-60 (1960); *The Federalist No. 44*, at 282 (Rossiter ed. 1961) (Madison); Fuller, *Human Interaction and the Law*, in *The Rule of Law* 171, 201 (Wolff ed. 1971). Benjamin Cardozo, on the other hand, doubted that most people relied significantly on the content of particular judge-made rules, *see* B. Cardozo, *The Nature of the Judicial Process* 146 (1949) ("[I]n the vast majority of cases the retrospective effect of judge-made law is felt either to involve no hardship or only such hardship as is inevitable where no rule has been declared."), and the point seems equally valid as to many legislative rules.

88 Slawson, *supra* note 37, at 226.

89 *Id.*

90 *See supra* notes 84-85 and accompanying text.

91 In addition to the explicit protection that the Constitution accords contract rights under state law, *see* U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."). decisions under the due process clause seem to recognize that "[m]ore than other kinds of legally significant action, . . . contracting is likely to be done with knowledge of, and specific reliance on, the law," Slawson, *supra* note 37, at 233.


ernment bonds,\textsuperscript{94} or withdrew from a pension plan when no withdrawal penalty existed,\textsuperscript{95} only to suffer a material loss when subsequent federal legislation upset their settled expectations. Antitrust plaintiffs, on the other hand, have neither suffered a loss of the primary benefit of their pre-enactment activity nor had imposed upon them liability for some past conduct.\textsuperscript{96}

Antitrust plaintiffs may have acted in reliance upon the availability of treble damages, however, to the extent they conducted depositions and other expensive pretrial discovery, engaged expert consultants, and incurred other litigation-related liabilities that would not have incurred had money damages not been available. Regardless of whether the constitution requires cognizance of such litigation-related reliance,\textsuperscript{97} and apart from the difficulties of proof such a claim raises, the Act itself appears to take this type of reliance into account. Section 3(b) explicitly makes "the state of litigation" one of the factors the court must consider in determining whether "it would be inequitable not to apply [section 3(a)] to a pending case."

\textsuperscript{94} See Perry v. United States, 294 U.S. 330 (1935).
\textsuperscript{95} See R.A. Gray, 104 S. Ct. at 2716 (1984).
\textsuperscript{96} Moreover, antitrust immunity bills for local governments had been pending and extensively discussed in Congress for two years before passage of the Act, and most of the bills contained no limitation on retrospectivity. Thus, plaintiffs had some notice of the possibility that any diminution or prohibition of the damage remedy would be applied to pending as well as future cases.
\textsuperscript{97} At least one commentator has discerned an attitude "that the expense and other changes of position involved in litigation are not sufficient to affect the constitutionality of a retroactive statute which would otherwise be valid." Hochman, supra note 37, at 718.
\textsuperscript{98} See Act, supra note 12, § 3(b). The automatic 30-day retrospectivity provided by § 6 will seldom, if ever, do violence to plaintiff's litigation-related reliance interest, because of the near possibility of incurring substantial discovery expenses during the first 30 days following the commencement of the action. Fed. R. Civ. P. 27(a), for instance, permits a precommencement deposition only with the court's permission and upon a showing that it is needed "to prevent a failure or delay of justice." Similarly, a plaintiff will not ordinarily be permitted to take a deposition until more than 30 days after commencement of the suit, Fed. R. Civ. P. 30(a), except by leave of court or unless the defendant notices a deposition within the first 30 days, id., or under special, narrowly defined circumstances, see Fed. R. Civ. P. 30(b)(2). Of course, expert consultants may have been retained and paid prior to commencement of the suit, but the expenditures will seldom be
The further a suit has proceeded and the more extensive and expensive the preparation, the more difficult it will be for the defendant to establish the unfairness of not applying section 3(a) retrospectively. On balance, however, the reliance test is not one that favors the antitrust plaintiff. The only significant reliance is likely to occur in the conduct of litigation, which is of doubtful constitutional import, and the Act appears to give that reliance interest substantial protection in any event.

2. Prior Regulation. The reasonableness of a party's reliance on current law and the harshness of a change in that law depends in part on the extent to which the party's actions were previously subject to regulation. If the conduct was not covered by statute until enactment of the law that retroactively changed the rules of the game, courts may place greater weight on a party's reliance interest in assessing the constitutionality of the law. Conversely, parties engaged in conduct that is heavily regulated by Congress are deemed to be on notice that rules could be changed at any time, possibly to their detriment, and should plan accordingly. Undoubtedly it is a mistake to read these sentiments as principles of constitutional law or rules of decision, despite the Supreme Court's past tendency to do so.\(^9\) Rather, they should simply guide and inform a court in deciding whether a particular retrospective law is "unduly harsh and oppressive."

The field of antitrust law is primarily a matter of federal concern and regulation, at least as to conduct involving

\(^9\) See Federal Hous. Admin. v. The Darlington, Inc., 358 U.S. 84, 91 (1958) (Douglas J.) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."). See generally Fleming v. Rhodes, 331 U.S. 100 (1947) (Douglas, J.) (landlord properly enjoined from enforcing eviction judgments obtained during 25-day gap between expiration of Emergency Price Control Act of 1942 and Price Control Extension Act of 1946). The distinction, however, lacks force. As one commentator has observed, "Whether the realignment of economic and social relationships is sought to be effected by an original statute or a repealer, valuable interests may be adversely affected; and due process limitations would seem necessary to assure fairness." Greenblatt, supra note 37, at 560.
interstate commerce. In view of the relatively slight reliance interest that an antitrust plaintiff can claim in existing statutory remedies, and Congress's strong interest in adjusting the scope and effects of its regulation of the federal economy through the antitrust laws, the prior-regulation factor favors the Act rather than antitrust plaintiffs.

Concern with prior federal regulation suggests the relevance of another well-established but abused rule of thumb: Whatever may be the limits on Congress's authority to create, abolish, or modify substantive rights retrospectively, Congress may amend the procedures or remedies associated with that right virtually without limitation as long as the change does not destroy a potential plaintiff's ability to enforce the underlying substantive right. Although the right/remedy dichotomy collapses in certain cases and may produce endless mischief in the wrong hands, it embodies the intuitively valid distinction, described by Professors Hart and Sacks, between a primary claim to a performance and a remedial capacity to invoke a sanction for nonperformance. The procedures and remedies that define the "remedial capacity to invoke a sanction" are generally subject to the control of the legislature. Thus, the usual rule of statutory construction, that in the absence of a contrary intention a statute

100 To the extent an antitrust plaintiff also has a state antitrust clause of action against a local government, the impact of retroactive elimination of damages for the federal claim is lessened considerably.


102 See, e.g. Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 311-12 (1945); Hallowell v. Commons, 239 U.S. 506 (1916); United States v. Vanella, 619 F.2d 384 (5th Cir. 1980); Turner v. United States, 410 F.2d 837, 842 (5th Cir. 1969); J. Nowak, R. Rotunda & J. Young, supra note 41, at 475; Slawson, supra note 37, at 242.

103 H. Hart & A. Sacks, supra note 45, at 152.
will be deemed to operate prospectively only,¹⁰⁴ is reversed when a statute affects procedure or remedy, and the statute is deemed to apply retroactively.¹⁰⁵

The Act affects only the damage remedy formerly available against local governments under the Clayton Act, leaving intact a plaintiff’s antitrust cause of action and other non-damage remedies. Moreover, it is doubtful that any court would see the retrospective elimination of the damage remedy as a practical elimination of the right to be free of unduly restrictive, anticompetitive conduct. This is particularly true in light of section 3(b)’s explicit requirement that the court consider “the availability of alternative relief under the Clayton Act” in deciding whether “it would be inequitable not to apply [section 3(a)] to a pending case.”¹⁰⁶ In the extraordinary case in which the elimination of the damage remedy virtually extinguishes the underlying substantive right, the Act permits the court to deny retrospectivity. Thus, on its face, the Act seems to be drafted specifically to avoid unconstitutionality on this ground.

3. Balance of Equities. The third factor considered by the Ninth Circuit in R.A. Gray weighed the benefits that Congress sought to achieve through the Amendments Act against the burdens on withdrawing employers.¹⁰⁷ This inquiry draws on a long line of federal cases in which Congress acted in response to a national emergency¹⁰⁸ or en-


¹⁰⁵ See, e.g., United States v. Vanella, 619 F.2d 384 (5th Cir. 1980); Koger v. Ball, 397 F.2d 702 (4th Cir. 1974); Bowles v. Strickland, 151 F.2d 419 (5th Cir. 1945); Sutherland Statutory Construction, supra note 104, § 41.09, at 280-81; W. Wade, supra note 104, § 58.


¹⁰⁸ This classification appears to have originated with Hochman, supra note 37, at 698, and was adopted by J. Nowak, R. Rotunda & J. Young, supra note 41 at 472. See generally Lichter v. United States, 334 U.S. 742 (1948); Veix v. Sixth Ward Bldg. & Loan Ass’n, 310 U.S. 32 (1940); Home Bldg. & Loan Ass’n v. Blaisdell,
acted "curative" legislation and the courts upheld the retroactivity, largely because the strong federal interest promoted by the change in law outweighed the individual's interests under the former law.

In this regard, the Court has gone out of its way, first in *Turner Elkhorn* and more recently in *R.A. Gray*, to state that a presumption of constitutionality attaches to "legislative acts adjusting the benefits and burdens of economic life," and that the Court accords such legislation, even if it applies retrospectively, "strong deference." Thus, the public need for the Act as perceived by Congress, while not rising to the level of emergency present in certain Depression-era cases, is certainly a strong, possibly compelling, justification for retrospectivity.

Weighed against this strong public-interest objective, the Act's impact on plaintiffs whose claims accrued before the Act became law is not particularly significant. That substantial monetary loss alone is not decisive in establishing the harshness or oppressiveness of retrospectivity was made clear in *R.A. Gray*, in which the withdrawal liability of the employer exceeded $200,000. Rather, plaintiffs must show that the burden on them is not outweighed by the legislative interest promoted by the Act. While plaintiffs can be expected to claim that their financial burden is their actual economic injury trebled, the


*Turner Elkhorn*, 428 U.S. at 15; *R.A. Gray*, 104 S.Ct. at 2717 (quoting *Turner Elkhorn*).

*See supra* note 108.

*See R.A. Gray*, 104 S. Ct. at 2716.
value of the damage award prohibited by the Act, it is just as accurate to say that the impact is equal to the amount of their actual damages before trebling: their uncompensated injury. If the latter is accepted as the measure of the Act’s retrospective impact on plaintiffs, the benefit/burden ratio significantly favors the Act, because local government defendants will be protected from treble-damage awards while the direct cost to plaintiffs is their uncompensated, untrebled antitrust injury.

Even if the impact on plaintiffs is equal to the trebled damage award they are denied, plaintiffs will have great difficulty demonstrating the Act’s unconstitutionality under the balance-of-equities test. Since Congress’ power to alter the remedies available under the antitrust laws prospectively, i.e., as to causes of action that accrue after the enactment date of the legislation, is not even fairly debatable, plaintiffs challenging the retrospective application of such a change must show that they are significantly different from plaintiffs who are affected only by the prospective change. Except for litigation expenses, which the Constitution does not value but the Act nonetheless protects, it is difficult to imagine how such a difference can arise. Thus, the balancing of equities does not favor the challengers of retrospectivity.

4. Moderating Provisions. The Act attempts to avoid an unconstitutional level of harshness or oppressiveness due to retrospectivity by requiring local-government defendants to establish that it would be inequitable not to apply section 3(a) in cases commenced before the effective date. If properly applied, therefore, the Act guards against unfairness that might result from its retrospective application and render it unconstitutional.

On balance, the retrospective provisions of the Act satisfy both the explicit and the unstated due process requirements of Turner Elkhorn and R.A. Gray. Retrospectivity is rationally related to a proper legislative purpose

116 See supra notes 97-98 and accompanying text.
117 See Act, supra note 12, § 3(b).
and should not be unduly harsh and oppressive in any particular instance. There remains, however, the question raised directly by the Symms memorandum: Will the retrospective abolition of the Clayton Act’s damage remedy effect an uncompensated taking of property?  

B.

The Symms memorandum raised and purported to answer the issue of whether Congress’ retrospective application of section 3(a) of the Act to wipe out accrued claims for money damages under the federal antitrust laws constitutes a taking of property for which just compensation must be paid. In working toward an answer to this issue, it has been necessary to take an extended detour through the case law that has considered the traditional due process based limitations on retrospective federal civil legislation. The answer proposed in the preceding section is that the Act satisfies the requirements of substantive due process.

The Act’s retrospectivity also does not amount to a taking, and, although this is not intuitively obvious, the reasons why the Act does not effect a taking are virtually the same reasons that explain the Act’s validity under the due process clause. In the context of a challenge to retrospective civil legislation, the fifth amendment’s just compensation clause and the common law of takings add nothing to the due process clause protections against harsh and oppressive retrospective legislation.

This result at first seems at least peculiar and certainly counter to the spirit of recent Supreme Court decisions. In Dames & Moore v. Regan, for example, the Court care-

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118 See Symms memorandum, supra note 19.

119 The Constitution contains no express grant of eminent domain power to the federal government. See J. Nowak, R. Rotunda & J. Young, supra note 41, at 481 (citing Comment, State and Federal Power of Eminent Domain, 4 Geo. Wash. L. Rev. 130, 131 (1935)). Rather, it assumes the existence of the power and states that the exercise of that power requires the payment of just compensation for property taken. U.S. Const. amend. V. See supra note 42.

fully distinguished between the issue of the President's power to settle the claims of United States citizens against Iran and the question whether that settlement might constitute a taking of property.121 Again, in Kaiser Aetna v. United States,122 the Court stated that while the federal government’s authority under the commerce clause to provide a free right of access to a private marina was unquestionable, "[w]hether a statute or regulation that went so far amounted to a ‘taking,’ however, is an entirely separate question."123 The dichotomy between the government’s power to take action and the necessity that the action be paid for goes back at least as far as Justice Holmes’s opinion in Pennsylvania Coal Co. v. Mahon.124 In that case, the Court entertained no doubt about the state’s power to control mining operations under residences threatened by subsidence. Rather, "the question at bottom is upon whom the loss of the changes desired [by the state] should fall."125 Stated in terms of the Act, the principle in these cases is this: Even if retrospectivity rationally advances a legitimate governmental objective, does it nonetheless constitute a taking of property?

Until the Pennsylvania Coal Co. case, such a question was almost unimaginable. Justice Holmes’s famous dictum that "if regulation goes too far it will be recognized as a taking"126 represented an extension of the concept of "taking," which had before then been limited to the actual appropriation or physical invasion of property.127 Despite the Court’s opening in Pennsylvania Coal Co., however, challenges to retrospective federal civil legislation have been based on the due process clause, not the just com-

121 Id. at 688-89 n.14.
123 Id. at 174.
124 260 U.S. 393 (1922).
125 Id. at 416.
126 Id. at 415.
pensation clause. The most prominent exception to this pattern is *Louisville Joint Stock Land Bank v. Radford*,¹²⁸ in which Bankruptcy Act amendments that deprived mortgagees of their right to foreclose were held to effect a taking of property without compensation. As one commentator has pointed out, however, the choice between the due process and just compensation clauses in *Radford* seems largely one of semantics, since the majority opinion cites no takings cases and the key precedents were contract clause and due process clause cases.¹²⁹ Since the *Radford* case, the Court has treated the issue presented by legislative retroactivity as one of due process. In *Turner Elkhorn* and *R.A. Gray*, the two most recent such cases, neither the parties nor the Court considered the just compensation clause arguments against the statutes in question, although takings arguments were advanced by two *amici* in *R.A. Gray*.¹³⁰

It is striking how congruent a traditional takings analysis is with the due process analysis of retrospective legisla-

¹²⁹ Rogers, *The Impairment of Secured Creditors' Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause*, 96 HARV. L. REV. 973, 1023 (1983). Although it is largely unimportant under which clause a retrospective statute is upheld, it may be significant whether a statute is invalidated under the due process or the just compensation clause. If it is the latter, the property owner may be entitled to damages for the “interim taking” of its property interest. See *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 653-60 (1981) (Brennan, Stewart, Marshall & Powell, JJ. dissenting). This approach raises a number of problems. If the Supreme Court held that retrospective application of a statute that purported to bar a cause of action was unconstitutional and that dismissal of plaintiff’s claim by the district court constituted an interim taking, would damages be awarded for the erroneous dismissal? If the court of appeals affirmed the dismissal the period of time during which plaintiff’s claim had been “taken” would presumably start with the dismissal and end either with the Supreme Court’s reversal or recommencement of the proceedings on remand. But what if the court of appeals reversed the district court’s judgment and the defendant sought review in the Supreme Court? From the plaintiff’s point of view, the delay is the same in either case. If the same level of damages is awarded in both cases, it suggests that just compensation is required any time a claim is wrongfully dismissed, even if the ground for dismissal is not an unconstitutional statute.

tion. Both clauses require a determination whether equity and justice permit a private party to bear the loss or destruction of value of his or her property due to government action. Similarly, the various factors the Supreme Court relied on in its takings cases all find a counterpart in the substantive due process analysis described in Part III. A. of this article. These factors include: the degree of interference with the reasonable expectations of the individual; the character of the governmental action; the relationship between the regulation and the substantial public purpose sought to be furthered; the oppressiveness of the means chosen; and the balance of equities, i.e., harm to the individual and benefit to the public. The factors in both instances seek to tell the Court whether the settled expectations of private parties are such (reasonable and investment backed? vested? traditionally subject to "adjustment" by the legislature?) that governments should not be able freely to interfere with them.

The difference between the two clauses is largely in the direction they take after the Court has concluded that the legislature has "gone too far" by impermissibly altering expectations retrospectively. The due process clause simply limits the legislation to prospective effect, while

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133 E.g., Kaiser Aetna, 444 U.S. at 175-76; Penn Central, 438 U.S. at 127-28.

134 Penn Central, 438 U.S. at 127.


136 See generally Michelman, supra note 127, at 1193-96. The congruence of the two property clauses was illustrated recently in United States v. Locke, 105 S. Ct. 1785 (1985), in which the Supreme Court upheld a federal statute that divested owners of their title to "stale mining claims." Although the challenge was grounded in the just compensation clause, the Court's opinion on that issue was liberally interspersed with references to due process cases. See id. at 1797-1801.

137 See Rogers, supra note 129, at 1022.
the just compensation clause permits the retrospectivity but requires that the private party be compensated for its losses. Limiting the Act to prospective operation, however, is the economic equivalent of ordering the federal government to pay just compensation because, in either event, the antitrust plaintiff is left with its claim for damages or the money equivalent.\textsuperscript{138} Thus, even this "difference" between the two clauses can be viewed, at a certain level of generality, as similar means to an identical end: the amelioration of unduly harsh and oppressive retrospective legislation.\textsuperscript{139}

When viewed in this manner, the constitutional analysis of the Act's retrospectivity is the same under both the due process and just compensation clauses. The reasons why the Act is not unconstitutional on due process grounds explain its validity under the just compensation clause as well. Contrary to the suggestion of the Symms memorandum, an affected antitrust plaintiff should have no takings claim against the United States for the loss of its damage claim, any more than the Act should be limited to a prospective application to claims for damages that accrued after the statute became law.

\textsuperscript{138} This statement, while generally true, glosses over two differences in the outcome under the two clauses. As already noted, the just compensation clause may require the payment of compensation for the "interim taking" of the antitrust plaintiff's claim for damages as well as for the claim itself. See supra note 129. In addition, where the retrospective abolition of a cause of action is legislated by one sovereign (the federal government in the case of the Act), and the underlying claim is against a different entity (e.g., a local government), the economic burden will fall on different parties depending upon which clause is used to invalidate the legislation. Thus, the choice between the due process and just compensation clauses requires a policy choice as to which entity should pay to make the plaintiff whole: the local government defendants (and their taxpayers) or the federal government (and its taxpayers).

\textsuperscript{139} See Rogers, supra note 129, at 1022-23.