

riod when the statute guaranteed confidentiality and thus “formed the basis of a distinct investment-backed expectation,” would have destroyed the property value of the trade secret and constituted a taking.⁷⁰³ Following 1978 amendments setting forth conditions of data disclosure, however, applicants voluntarily submitting data in exchange for the economic benefits of registration had no reasonable expectation of additional protections of confidentiality.⁷⁰⁴ Relying less heavily on the concept but rejecting an assertion that reasonable investment backed-expectations had been upset, the Court in *Connolly v. Pension Benefit Guaranty Corp.*⁷⁰⁵ upheld retroactive imposition of liability for pension plan withdrawal on the basis that employers had at least constructive notice that Congress might buttress the legislative scheme to accomplish its legislative aim that employees receive promised benefits. However, where a statute imposes severe and “substantially disproportionate” retroactive liability based on conduct several decades earlier, on parties that could not have anticipated the liability, a taking (or violation of due process) may occur. On this rationale, the Court in *Eastern Enterprises v. Apfel*⁷⁰⁶ struck down the Coal Miner Retiree Health Benefit Act’s requirement that companies formerly engaged in mining pay miner retiree health benefits, as applied to a company that spun off its mining operation in 1965 before collective bargaining agreements included an express promise of lifetime benefits.

On the other hand, a federal ban on the sale of artifacts made from eagle feathers was sustained as applied to the existing inventory of a commercial dealer in such artifacts, the Court not directly addressing the ban’s obvious interference with investment-backed expectations.⁷⁰⁷ The Court merely noted that the ban served a substantial public purpose in protecting the eagle from extinction, that

⁷⁰³ 467 U.S. at 1011.

⁷⁰⁴ 467 U.S. at 1006–07. Similarly, disclosure of data submitted before the confidentiality guarantee was placed in the law did not frustrate reasonable expectations, the Trade Secrets Act merely protecting against “unauthorized” disclosure. *Id.* at 1008–10.

⁷⁰⁵ 475 U.S. 211 (1986). *Accord*, *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 645–46 (1993). In addition, *see Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) (involving frustration of “expectancies” developed through improvements to private land and governmental approval of permits), and *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980) (characterizing and distinguishing *Kaiser Aetna* as involving interference with “reasonable investment backed expectations”).

⁷⁰⁶ 524 U.S. 498 (1998). The split doctrinal basis of *Eastern Enterprises* undercuts its precedent value, and that of *Connolly* and *Concrete Pipe*, for takings law. A majority of the justices (one supporting the judgment and four dissenters) found substantive due process, not takings law, to provide the analytical framework where, as in *Eastern Enterprises*, the gravamen of the complaint is the unfairness and irrationality of the statute, rather than its economic impact.

⁷⁰⁷ *Andrus v. Allard*, 444 U.S. 51 (1979).