

Daily Journal

Letter to the Editor (Focus & Forum)

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Court Majority Rejected Justice O'Connor's 'Takings' Analysis in Eastern Enterprises

LETTERS TO THE EDITOR COLUMN

'Using Loss-Shifting to Reduce Foreclosures: CONSTITUTIONAL RIGHTS' by Issac Gradman (Oct. 7) is fatally flawed by reliance on property rights "takings" analysis in a non-existent "majority opinion, written by Justice Sandra Day O'Connor," in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

In fact, as the Supreme Court report states: "Justice O'Connor announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Scalia, and Justice Thomas join."

Both O'Connor's analysis and finding of a taking were rejected by a majority of the Court: the four Justices who disagreed with the result in the case and Justice Kennedy, who was the only Justice to find a due process violation.

Since then, courts have ruled against Eastern Enterprises takings/ due process challenges to a wide range of laws.

On Oct. 5, the Supreme Court refused to review the 11th Circuit's rejection of an Eastern Enterprises claim that the Fair and Equitable Tobacco Reform Act of 2004, which imposes monetary assessments on current tobacco manufacturers and tobacco product importers to finance the phase-out of federal tobacco quota and price-support programs, violates the Due Process Clause or the Just Compensation Clause of the Fifth Amendment. *Swisher Int'l., Inc. v. Vilsack, Sec. Of Agriculture*, 08-1361.

As the United States Brief in Opposition explained, the only split in the circuits is not helpful to such claims: four "circuits have held that, because no single rationale commanded the assent of a majority of the Court, Eastern Enterprises does not provide a controlling rule that applies beyond the specific facts of that case," while "three circuits have held that Justice Kennedy's concurrence in Eastern Enterprises, combined with Justice Breyer's dissenting opinion for four Justices, provides binding authority for the proposition that general monetary assessments are not cognizable under the Just Compensation Clause."

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JUDGING THE ENVIRONMENT, DEFENDERS OF WILDLIFE