# ESSAY

## NEW REGULATIONS AND PENDING CASES

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### INTRODUCTION

Do new regulations apply to pending cases? The question is simple, but the short answer is a lawyer's favorite: "*It depends.*" It depends on the organic statute, it depends on the regulation, and, unfortunately, it may even depend on the federal court of appeals that happens to decide the case. This Essay looks at this issue by examining the effect of the Department of Labor's 2013 amendments to regulations governing claims under the Black Lung Benefits Act.[1] This Essay explains why the new regulations are applicable to pending cases, even if the Department of Labor already issued its final decision on a claim and a party already petitioned a court to review that decision.

The analytical route to this result varies by circuit. This Essay explains why the factor-based retroactivity test used by most circuits better addresses fundamental due process concerns and is more administrable than the D.C. Circuit's approach, which turns on whether a circuit split predates the new regulations. This Essay both provides a clear answer about whether the 2013

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[1] Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners' and Survivors' Entitlement to Benefits, 78 Fed. Reg. 59,102 (Sept. 25, 2013) (codified at 20 C.F.R. pts. 718, 725 (2014)) [hereinafter Regulations Implementing the Byrd Amendments]. The Black Lung Benefits Act is codified at 30 U.S.C. §§ 901–44 (2012).

amendments to the black lung regulations apply to pending cases and suggests how courts should handle retroactivity questions for regulations more broadly.

## I. THE GENERAL PROBLEM: RETROACTIVITY OF ADMINISTRATIVE RULES

Aside from cases with choice-of-law or federalism issues, one would think that our legal system would be clear about the applicable law in a given case. When the law changes, however, issues arise as to whether the new law should apply to past activity. These issues are generalized under the term "retroactivity."[2]

Retroactivity encompasses a spectrum of situations. These situations range from vested activities being regulated for the first time (e.g., a new environmental law setting limits on carbon emissions from power plants built decades before)[3] to new laws revisiting otherwise final judicial orders (e.g., a legislature passing a more lenient criminal law and allowing courts to reduce the sentences of criminals who were sentenced under the previous harsher law).[4] This Essay examines a zone between these two poles of the retroactivity spectrum: pending cases where an action has already been filed but is awaiting a final judicial order.

In such a case, after a change in the law, should a judge apply the current law or the law that existed when the action commenced? The answer to this question highlights a conflict between two principles: (1) that a court must "apply the law in effect at the time it renders its decision,"[5] and (2) that "the legal effect of conduct should ordinarily be assessed under the law that

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[2] *See generally* William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 114-34 (discussing retroactivity in both statutory and regulatory contexts).

[3] *See, e.g.*, Carbon Pollution Standard for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,960 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

[4] *See, e.g.*, Freeman v. United States, 131 S. Ct. 2685, 2690 (2011) (plurality opinion) (holding that prisoners whose sentences were based on provisions of the United States Sentencing Guidelines that were subsequently and retroactively lowered could seek sentence reductions under 18 U.S.C. § 3582(c)(2) (2012)).

[5] Landgraf v. USI Film Prods., 511 U.S. 244, 264 (1994) (quoting Bradley v. Sch. Bd. of Richmond, 416 U.S. 696, 711 (1974)). This principle flows from the Blackstonian "declaratory theory" of the judicial role as "discovering" the law and declaring it as it exists. Luneburg, *supra* note 2, at 106 & n.1. The principle is most clearly represented in early Supreme Court doctrine by Chief Justice Marshall's opinion in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), which applied a (newly ratified) intervening treaty to reverse a trial court opinion.

existed when the conduct took place."[6] The Supreme Court has considered the tension between these two principles numerous times.[7] The leading case on the issue is *Landgraf v. USI Film Products*.[8] In the context of holding that some portions of the 1991 revisions to Title VII of the Civil Rights Act of 1964 applied to pending cases while other portions did not, *Landgraf* established a framework for assessing retroactivity issues that was based on a careful provision-by-provision analysis.[9]

But despite *Landgraf*, confusion still exists. Lower courts commonly apply different tests to determine whether application of new regulations to pending cases is improperly retroactive.

On the one hand, the D.C. Circuit in *National Mining Association v. Department of Labor* declared that retroactivity depends on whether the new rule "changes the legal landscape"[10]—which is determined by asking whether "a new regulation is substantively consistent with prior regulations or prior agency practices, and has been accepted by *all* Courts of Appeals to consider the issue."[11] By this test, if a single federal court of appeals's interpretation varied from the agency's new regulation, then the regulation should not apply retroactively.[12]

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[6] *Landgraf*, 511 U.S. at 265 (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). In the civil context—where the Ex Post Facto Clauses, U.S. CONST. art. 1, §§ 9, 10, are inapplicable—this principle flows from due process requirements. *See generally* Luneberg, *supra* note 2, at 114 ("[M]uch of the judicial and scholarly analysis of retroactivity in the statutory context focuses on due process problems. The due process analysis may [also] impose constraints on retroactive agency rules." (footnote omitted)).

[7] *See, e.g.*, Bennett v. New Jersey, 470 U.S. 632, 638-42 (1985) (discussing statutory retroactivity); *Bradley*, 416 U.S. at 710-21 (same); *see also* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-15 (1988) (discussing the retroactivity of an agency rule); Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 281-83 (1969) (same); Greene v. United States, 376 U.S. 149, 160 (1964) (same).

*Bowen* stated that "as a general matter" agencies may not promulgate rules with retroactive effect unless Congress explicitly conveyed that power. 488 U.S. at 208. *Bowen* appears to sweep broadly, but subsequent decisions such as *Smiley v. Citibank (S.D.), N. A.*, 517 U.S. 735, 739-44 (1996), have applied new regulations retroactively without express congressional authorization. Accordingly, *Bowen*'s statements about retroactivity must be considered in the context of *Bowen*'s unique facts, which involved the Department of Health and Human Services attempting to use a retroactive rule to recoup millions of Medicare dollars after a prior version of the rule was invalidated on procedural grounds. *See Bowen*, 488 U.S. at 206-08; *see also* RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 299 (6th ed. 2014) (explaining the practical problems *Bowen* created with its retroactivity holding).

[8] 511 U.S. 244 (1994).

[9] *Id.* at 280-86.

[10] 292 F.3d 849, 859 (D.C. Cir. 2002) (quoting Nat'l Mining Ass'n v. U.S. Dep't of the Interior, 177 F.3d 1, 8 (D.C. Cir. 1999)).

[11] *Id.* at 860 (emphasis added).

[12] *See id.* at 864-65 (holding that regulations taking sides in circuit splits should not be applied to pending cases).

On the other hand, the Sixth Circuit, sitting en banc in *Combs v. Commissioner of Social Security*, declined to consider the existence of a circuit split to be dispositive and instead looked to three factors articulated in *Landgraf*: fair notice, reasonable reliance, and settled expectations.[13] Most courts of appeals considering retroactivity issues align with the Sixth Circuit in *Combs* and use a multifactor test,[14] but two courts of appeals's decisions regarding black lung benefits claims have followed the D.C. Circuit's approach.[15]

In short, there is a circuit split over circuit splits. This sounds more like a statement from a self-referential logic problem than the clarity we desire from our legal system. A uniform approach would allow federal agencies and parties to better predict what law applies in cases during transition

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[13] 459 F.3d 640, 645-46 (6th Cir. 2006) (en banc) (citing *Landgraf*, 511 U.S. at 270).

[14] *See* Carranza-De Salinas v. Holder, 700 F.3d 768, 772-75 (5th Cir. 2012); Iles v. de Jongh, 638 F.3d 169, 177 (3d Cir. 2011); Gordon v. Pete's Auto Serv. of Denbigh, Inc., 637 F.3d 454, 459-61 (4th Cir. 2011); Durable Mfg. Co. v. U.S. Dep't of Labor, 578 F.3d 497, 503 (7th Cir. 2009); Martinez v. INS, 523 F.3d 365, 375-77 & n.4 (2d Cir. 2008); Saravia-Paguada v. Gonzales, 488 F.3d 1122, 1130-31 (9th Cir. 2007), *abrogated in part on other grounds by* Cardenas-Delgado v. Holder, 720 F.3d 1111, 1118-19 (9th Cir. 2013) (noting that, because of more recent Supreme Court precedent, "it is clear that someone seeking to show that a civil statute is impermissibly retroactive is not required to prove any type of reliance" and "the essential inquiry is whether the new statute attaches new legal consequences to events completed before the enactment of the statute"); Heim v. Cadogan (*In re* ADC Telecomms., Inc. Sec. Litig.), 409 F.3d 974, 977 (8th Cir. 2005); Lattab v. Ashcroft, 384 F.3d 8, 14-17 (1st Cir. 2004); Sarmiento Cisneros v. U.S. Att'y Gen., 381 F.3d 1277, 1283 (11th Cir. 2004).

[15] *See* Cent. Ohio Coal Co. v. Dir., OWCP, 762 F.3d 483, 489 (6th Cir. 2014); Antelope Coal Co./Rio Tinto Energy Am. v. Goodin, 743 F.3d 1331, 1342 (10th Cir. 2014).

*Central Ohio* and *Goodin* do not necessarily represent the current retroactivity approaches of the Sixth and Tenth Circuits. *Goodin* appears to follow the D.C. Circuit's approach, but the court cited both the D.C. Circuit's decision in *National Mining Association* as well as the Tenth Circuit's previous decision in *Farmers Telephone Co. v. FCC*, 184 F.3d 1241, 1250-51 (10th Cir. 1999), which used a five-factor test to assess a retroactivity challenge. *See Goodin*, 743 F.3d at 1342. Similarly, the Sixth Circuit in *Central Ohio* cited the D.C. Circuit's decision in *National Mining Association*, but did not acknowledge its own previous en banc decision in *Combs* or explain why it was no longer circuit law, so *Combs* should still control in the Sixth Circuit. *See Cent. Ohio Coal Co.*, 762 F.3d at 489-90. Despite these decisions' citations to *National Mining Association*, they should *not* be understood as holding that the Tenth and Sixth Circuits adopted the D.C. Circuit's methodology, particularly for the specific analysis in this Essay. As explained below, the difference in approaches is not outcome determinative for the 2013 amendments to the black lung benefits regulations. *See infra* Sections II.A, II.B. Thus, the Tenth and Sixth Circuits' methodological choices in cases concerning the 2013 amendments should be considered dicta, not holdings. *See generally* Pierre N. Leval, Madison Lecture, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1256-58 (2006) (explaining the distinction between dicta and holdings with the test that "[i]f the court's judgment and the reasoning which supports it would remain unchanged, regardless of the proposition in question, that proposition plays no role in explaining why the judgment goes for the winner[ . . . ,] is superfluous to the decision[,] and is dictum").

periods. Through the example of a new Department of Labor regulation under the Black Lung Benefits Act, this Essay illustrates that a multifactor approach more appropriately addresses due process concerns than the D.C. Circuit's approach.

## II. A SPECIFIC APPLICATION: REGULATIONS IMPLEMENTING THE BYRD AMENDMENTS TO THE BLACK LUNG BENEFITS ACT

The Black Lung Benefits Act is an appropriate place to examine retroactivity due to the nature of black lung disease and the large number of changes to the law. Black lung disease is a latent and progressive pulmonary disease, which causes those who regularly breathed coal mine dust to suffer respiratory impairments resulting in death or disability.[16] In 1969, Congress passed the Federal Coal Mine Health and Safety Act, which included provisions that created a benefits system for disabled coal miners and their families.[17]

In 2010, as a part of the Affordable Care Act, Congress modified the Black Lung Benefits Act with a set of amendments known as the "Byrd Amendments" in honor of West Virginia Senator Robert C. Byrd.[18] These amendments do two things: (1) revive the "fifteen-year presumption" so that a disabled coal miner who worked for fifteen years or more in or around an underground coal mine will be entitled to a rebuttable presumption that his disabling respiratory impairment was due to black lung disease caused by his coal mine employment, and (2) remove the requirement that a miner's dependent survivor (often a widow) revalidate the miner's claims to receive survivor's benefits.[19]

The Byrd Amendments explicitly apply to any pending case filed after January 1, 2005: the Affordable Care Act declares that the Byrd Amendments "shall apply with respect to claims filed . . . after January 1, 2005, that are

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16 *See generally* Edward L. Petsonk et al., *Coal Mine Dust Lung Disease: New Lessons from an Old Exposure*, 187 AM. J. RESPIRATORY & CRITICAL CARE MED. 1178, 1179-80 (2013) (providing a medical overview of the diseases commonly known as "black lung disease").

17 The relevant provisions of the Federal Coal Mine Health and Safety Act are codified as amended at 30 U.S.C. §§ 901–44 (2012). For an introduction to the black lung benefits system, see Stephen A. Sanders, *Black Lung Benefits for Disabled Coal Miners and Their Families*, 2013 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 476, 477-83.

18 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010) (codified at 30 U.S.C. §§ 921(c)(4), 932(l) (2012)), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf; *see also* 156 CONG. REC. S2083-84 (daily ed. Mar. 25, 2010) (statement of Sen. Robert C. Byrd) (discussing the amendments), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2010-03-25/pdf/CREC-2010-03-25-pt1-PgS2069-8.pdf.

19 *See generally* Sanders, *supra* note 17, at 477-78 & n.8.

pending on or after the date of enactment of this Act."[20] In a floor statement, Senator Byrd explained that the amendments should apply to cases on appeal from the Department of Labor's final decision as well as cases in which a claimant seeks to modify a "final" order.[21] No courts considering the Byrd Amendments have found them unconstitutional even as applied to pending cases.[22]

The specific focus of this Essay is on the Department of Labor's regulations implementing the Byrd Amendments. While most of the rule's revisions serve merely to clarify the regulations following the statutory change, one change is notable and affects the result of many cases: the regulation at 20 C.F.R. § 718.305(b) concerning the way surface mine conditions are compared to underground mine conditions.[23]

The rebuttable presumption (for disabled coal miners who worked for fifteen years or more) is primarily phrased in terms of years of employment in "underground coal mines."[24] Nevertheless, the statute states that a coal miner who worked on surface mines can be eligible if the Secretary of Labor determines that the conditions were "substantially similar to conditions in an underground mine."[25] The question of how to determine whether surface work is sufficiently "similar" to underground work has produced confusion,[26] especially in cases in which the miner has only surface mine experience.[27] How is the claimant supposed to prove that his working conditions were similar to something with which he has no experience? How is an administrative law judge—who cannot be expected to have experience in an

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[20] Patient Protection and Affordable Care Act § 1556(c).

[21] 156 CONG. REC. S2083-84 (daily ed. Mar. 25, 2010) (statement of Sen. Robert C. Byrd).

[22] *See* McCoy Elkhorn Coal Corp. v. Dotson, 714 F.3d 945, 946 (6th Cir. 2013); Vision Processing, LLC v. Groves, 705 F.3d 551, 556-58 (6th Cir. 2013); W. Va. CWP Fund v. Stacy, 671 F.3d 378, 382-86 (4th Cir. 2011); B&G Constr. Co. v. Dir., OWCP, 662 F.3d 233, 252 (3d Cir. 2011); Keene v. Consolidation Coal Co., 645 F.3d 844, 849 (7th Cir. 2011).

[23] Regulations Implementing the Byrd Amendments, *supra* note 1, at 59,114-15 (codified at 20 C.F.R. § 718.305(b) (2014)); *see also id.* at 59,104-05 (discussing the Department of Labor's interpretation of how and when miners must show that non-underground mines have "substantial similarity" to underground mines).

[24] 30 U.S.C. § 921(c)(4) (2012).

[25] *Id.*

[26] *See, e.g.*, Styka v. Jeddo-Highland Coal Co., No. 11-0150, 2012 WL 893953, at *4 (Ben. Rev. Bd. Feb. 27, 2012), *available at* http://www.dol.gov/brb/decisions/blklung/published/11-0150.pdf, at 6-7 (disagreeing with the administrative law judge's view of how specific the miner's evidence must be to establish "substantial similarity").

[27] *See, e.g.*, McGinnis v. Freeman United Coal Mining Co., 10 Black Lung Rep. (Matthew Bender & Co.) 1-4, 1-7 (Ben. Rev. Bd. 1987), 1987 WL 107313, at *2 (reversing the administrative law judge's decision to compare the surface miner's dust exposure to the *most* dusty area of an underground mine, rather than a typical area of an underground mine).

underground coal mine—supposed to assess the similarity?[28] Correspondingly, what is the archetypal underground mine? Is it a responsibly run mine that follows the federal dust standards, a scofflaw mine, or something in between? Finally, how does one compare a surface mine's dust, which contains higher levels of dangerous silica,[29] to the dust in an underground mine? Because there is no clear answer to these questions, the Tenth Circuit has acknowledged some merit in the argument that the "substantial similarity" standard is arbitrary and results in the absence of a meaningful legal standard.[30]

The regulations implementing the Byrd amendments avoid these difficult questions by simplifying the inquiry: one only needs to ask whether a miner "was regularly exposed to coal-mine dust while working."[31] Effectively, the 2013 amendments to the black lung benefits regulations forego a case-by-case comparison of surface mine conditions to underground mine conditions. Instead, they determine by rule that coal mine dust on most surface mines is sufficiently dangerous to warrant treating like underground miners those surface miners who are "regularly exposed" to dust.

The "regularly exposed" standard is a more claimant-friendly standard and can make a difference in the outcome of close cases.[32] For example, conditions in an underground coal mine often include constant exposure to dust because mining machinery produces dust during their operation. But a miner who drives a dump truck at a surface mine may be intermittently exposed to dust (e.g., when a load of coal or other material is dumped into his truck or when he drives by a portion of the mine where drilling or blasting has recently occurred). The dump-truck driver would nonetheless be "regularly exposed to coal mine dust" even if it is debatable whether the conditions were "substantially similar to an underground mine."

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[28] The Tenth Circuit has stated that it is error for an administrative law judge to base a "substantial similarity" inquiry on the judge's personal experience with the testimony of underground miners. *See* Antelope Coal Co./Rio Tinto Energy Am. v. Goodin, 743 F.3d 1331, 1343 n.16 (10th Cir. 2014).

[29] *See* A. Scott Laney et al., *Pneumoconiosis and Advanced Occupational Lung Disease Among Surface Coal Miners—16 States, 2010–2011*, 61 MORBIDITY & MORTALITY WKLY. REP. 431, 431 (2012) (reporting that a "high proportion" of surface miners' "radiographs suggested silicosis, a disease caused by inhalation of crystalline silica").

[30] *Goodin*, 743 F.3d at 1344.

[31] Regulations Implementing the Byrd Amendments, *supra* note 1, at 59,114 (codified at 20 C.F.R. § 718.305(b)(2) (2014)).

[32] *See, e.g.*, Templeton v. Debra Lynn Coals Inc., No. 13-0161, 2013 WL 6408519, at *2 (Ben. Rev. Bd. Nov. 22, 2013), *available at* http://www.dol.gov/brb/decisions/blklung/unpublished/Nov13/13-0161.pdf, at 3-4 (reversing the administrative law judge's decision and holding that even if a miner's testimony was not sufficient to meet the "substantially similar" standard, it was sufficient under the "regularly exposed" standard).

But which standard should a court use if the dump-truck driver has a pending claim that was filed before the effective date of the regulations, but came to the court following the effective date? For reasons that differ depending on the circuit in which the case arises, courts should use the new "regularly exposed" standard rather than the old "substantially similar" standard.

### A. *The Factor-Based Approach*

Most circuits use a multifactor test to decide whether to apply new laws to pending cases.[33] A representative decision is the Sixth Circuit's en banc decision in *Combs v. Commissioner of Social Security*.[34] In *Combs*, the court decided whether a social security claim should be governed by the regulations in effect at the time of the claim or at the time of the decision.[35] When Barbara Combs filed her claim in 1996, obese people were presumed to be disabled.[36] In 1999, however, new regulations eliminated this presumption.[37] Accordingly, the Sixth Circuit held that Combs was no longer entitled to the presumption.[38]

The Sixth Circuit reached the conclusion that the new regulations applied to Combs's pending case by focusing on three factors articulated in *Landgraf*—fair notice, reasonable reliance, and settled expectations.[39] The Sixth Circuit explained that no reliance concerns existed, because individuals do not become obese or decide to file claims based on the presumption.[40] Relatedly, the situation presented neither a need for fair notice regarding the law governing their claims nor settled expectations regarding how social security would assess a claim.[41]

Part of the court's reasoning involved the procedural nature of the rebuttable presumption. The activity that the regulation affected was the adjudicator's process for assessing the claim, not the ultimate question of whether Combs was disabled or should seek a job.[42] Because, prior to 1999, obesity had led only to a *rebuttable* presumption of disability, Combs could

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33 *See supra* notes 13-14 and accompanying text.
34 459 F.3d 640 (6th Cir. 2006).
35 *Id.* at 642.
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.* at 645-46; *see also supra* note 13 and accompanying text.
40 *Combs*, 459 F.3d at 646.
41 *Id.*
42 *Id.* at 647-49.

not expect that this presumption would stand unrebutted.[43] Because the regulation affected only the adjudicator's allocation of the burden of persuasion, the court found it to be a process-based rule that should apply to Combs's case.[44]

A similar analysis would apply to the 2013 amendments to the black lung benefits regulations. The party seeking to avoid the new regulations would be the coal company who last employed the miner seeking black lung benefits.[45] A coal company would have a very difficult time showing that it relied on the "substantially similar" standard when deciding whether and how to employ workers and an even harder time showing that it would have employed workers differently if the "regularly exposed" standard had been applied.

Similarly, the need for fair notice and settled expectations is weak. The strongest fair notice and settled expectations argument would have applied when the Black Lung Benefits Act first held coal operators responsible for the cost of their former workers' black lung benefits. The law held operators responsible for the results of dust exposure from before a federal black lung benefit system existed.[46] That is, active operators had to pay miners for a disease that was previously not compensable in many states.[47] Yet, in *Usery v. Turner Elkhorn Mining Co.*, the Supreme Court rejected coal operators' due process arguments and held that the Black Lung Benefits Act's system of allocating responsibility was a rational means of spreading the costs of black lung disease within the coal industry.[48] Since the initial passage of the law in 1969, the Black Lung Benefits Act and its regulations have undergone repeated, substantial revisions, routinely upsetting existing expectations.[49]

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[43] *See id.* (noting that the rebuttable presumption was not necessarily outcome-determinative).

[44] *Id.*

[45] Coal companies have an incentive to contest claims because the last company who employed the miner and meets the Black Lung Benefits Act's "responsible operator" test is liable for the miner's (and his survivor's) benefits. *See* 20 C.F.R. § 725.495 (2014) ("[T]he operator responsible for the payment of benefits . . . shall be the potentially liable operator . . . that most recently employed the miner.").

[46] *See generally* Sanders, *supra* note 17, at 477 n.6 (explaining how, with the initial passage of the black lung benefits statutes, claims filed on or after July 1, 1973 were classified as "Part C" claims to be paid by private employers or by a fund to which the employers would contribute).

[47] One of Congress's explicit findings in the Black Lung Benefits Act was that "few States provide benefits for death or disability due to [pneumoconiosis] to coal miners or their surviving dependents." 30 U.S.C. § 901(a) (2012). For a historical account of efforts to make black lung compensable under state laws, see ALAN DERICKSON, BLACK LUNG: ANATOMY OF A PUBLIC HEALTH DISASTER 89-105 (1998).

[48] 428 U.S. 1, 15-20 (1976).

[49] The Black Lung Benefits Act has been amended seven times since 1969. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010) (codified at 30 U.S.C. §§ 921(c)(4), 932(*l*) (2012)); Black Lung Consolidation of Administrative Responsibility Act, Pub. L. No. 107-275, 116 Stat. 1925 (2002) (codified as amended at 30 U.S.C. §§ 921–24

As a result, neither coal operators nor claimants can claim that their expectations are truly settled.

Following the *Combs* analysis, the procedural nature of the fifteen-year presumption also supports its retroactive application. The regulations implementing the Byrd Amendments do not entitle a miner who can satisfy the "regularly exposed" standard to black lung benefits, but only to a rebuttable presumption that his disabling respiratory impairment is caused by black lung arising from his coal mine employment.[50] Accordingly, just as in *Combs*, the only effect of the new regulations is to allocate the burden of persuasion.

Thus, under an approach using the *Landgraf* factors to determine whether due process is violated, courts should apply the regulations implementing the Byrd Amendments to pending black lung cases.

### B. *The D.C. Circuit's Uniform Treatment Approach*

The D.C. Circuit takes a different approach to assessing retroactivity that focuses on existing precedent in each of the federal courts of appeals rather than on the *Landgraf* factors. In *National Mining Association v. Department of Labor*, an industry trade group challenged the large-scale changes that the Department of Labor made in December 2000 to the regulations governing black lung benefits claims.[51] The National Mining Association challenged many of the regulations' new provisions,[52] but two examples demonstrate the D.C. Circuit's approach.

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(2012)); Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 104-66, § 1102(b)(2), 109 Stat. 707, 723 (codified as amended at 30 U.S.C. § 936(b) (2012)); Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (codified as amended in scattered sections of 26 and 30 U.S.C. (2012)); Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) (codified as amended at 30 U.S.C. §§ 901–45 (2012)); Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978) (codified as amended in scattered sections of 26 and 30 U.S.C. (2012)); Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (codified as amended at 30 U.S.C. §§ 902–36 (2012)).

The regulations have also been regularly amended, with substantial changes occurring in 1979, 1983, 2000, and—as discussed in this Essay—2013. *See* Regulations Implementing the Byrd Amendments, *supra* note 1; Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 65 Fed. Reg. 79,920 (Dec. 20, 2000) (codified as amended at 20 C.F.R. pts. 718, 722, 725, 726, 727 (2014)) [hereinafter Regulations of Dec. 20, 2000]; Standards for Determining Coal Miner's Total Disability or Death Due to Pneumoconiosis; Claims for Benefits Under Part C of Title IV of the Federal Mine Safety and Health Act, as Amended, 48 Fed. Reg. 24,272 (May 31, 1983) (codified as amended at 20 C.F.R. pts. 718, 725 (2014)); Review of Denied and Pending Claims Under the Black Lung Benefits Reform Act of 1977, 44 Fed. Reg. 10,057 (Feb. 16, 1979) (codified as amended at 20 C.F.R. §§ 410.702, 410.704 (2014)).

[50] *See supra* notes 18-19 and accompanying text.

[51] 292 F.3d 849, 854-55 (D.C. Cir. 2002) (discussing Regulations of Dec. 20, 2000, *supra* note 49).

[52] *Id.* at 855.

First, the court approved of applying to pending cases the newly codified "treating physician rule," which allows an adjudicator to give weight to the well-reasoned opinion of a treating physician over other well-reasoned medical opinions.[53] Second, the court disapproved[54] of application in pending cases of a standard known as the "*Doris Coal* presumption," named after the Fourth Circuit case that created the presumption: *Doris Coal Co. v. Director, OWCP*.[55] The *Doris Coal* presumption is a rebuttable presumption that, when a miner receiving black lung benefits seeks medical care for a pulmonary disorder, the disorder was caused or aggravated by the miner's black lung disease rather than another cause (such as smoking).[56] The D.C. Circuit held that the newly codified *Doris Coal* presumption could be applied to pending cases in circuits that approved of the presumption; however, in circuits such as the Sixth, which had previously rejected the *Doris Coal* presumption,[57] this provision of the regulations could not apply to pending cases.[58]

The differing treatment in pending cases of these two provisions is a result of the D.C. Circuit's uniform treatment approach. In *National Mining Association*, the D.C. Circuit held that if "all Courts of Appeals to consider the issue" agree,[59] then the regulations can be applied to pending cases because these regulations do not "change[] the legal landscape."[60] If courts disagree, however, then the Department of Labor's decision to choose sides can only affect new cases—not currently pending cases.[61]

The result of the D.C. Circuit's approach appears to mean that new regulations never affect pending cases, which would continue to be governed by the preexisting precedent of the circuit in which they were filed.[62] If the new regulations are consistent with circuit precedent, then effectively the same standard as before would be applied—regardless of whether the court

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53 *Id.* at 861-62; *see also* 20 C.F.R. § 718.104(d) (2014).

54 *Nat'l Mining Ass'n*, 292 F.3d at 865.

55 938 F.2d 492 (4th Cir. 1991).

56 *Nat'l Mining Ass'n*, 292 F.3d at 865; *Doris Coal Co.*, 938 F.2d at 496-97; *see also* 20 C.F.R. § 725.701(e) (2014). *See generally* Eric R. Olsen, Note, *Reducing the Overburden: The* Doris Coal *Presumption and Administrative Efficiency Under the Black Lung Benefits Act*, 99 MICH. L. REV. 696, 699 (2000).

57 *See, e.g.*, Glen Coal Co. v. Seals, 147 F.3d 502, 513-14 (6th Cir. 1998) (holding that the *Doris Coal* presumption was inconsistent with Sixth Circuit law).

58 *Nat'l Mining Ass'n*, 292 F.3d at 865.

59 *Id.* at 860.

60 *Id.* at 859 (quoting Nat'l Mining Ass'n v. U.S. Dep't of the Interior, 177 F.3d 1, 8 (D.C. Cir. 1999)).

61 *Id.* at 860.

62 *Id.* (disallowing retroactive application of new rules that "reflect a substantive change from the position taken by any of the Courts of Appeals and is likely to increase liability").

applies the standard via new regulations or via its preexisting precedent. If the new regulations are not consistent with circuit precedent, then the regulations do not apply. In either case, the effect is that the standard from prior precedent is applied to pending cases.

However, there are situations in which the regulations *would* have an effect on pending cases under the D.C. Circuit's test. The D.C. Circuit looks to the decisions of "all Courts of Appeals to consider the issue."[63] But situations can arise in which either (1) no court has previously considered the issue, or (2) a circuit has yet to consider the issue but would not reach the same result as those circuits which already have. In other words, whether a new regulation affects a pending case depends largely on its timing.

The pivotal role of timing can be shown by modifying the timeline related to the *Doris Coal* presumption. First, recall the actual timeline regarding the *Doris Coal* presumption:

1. In 1991, the Fourth Circuit created it;[64]
2. In 1998, the Sixth Circuit rejected it;[65] and
3. In 2000, the Department of Labor adopted it.[66]

Now, imagine a world in which the Sixth Circuit had not considered whether to adopt the *Doris Coal* presumption in 1998, but where the Department of Labor still promulgated regulations adopting the *Doris Coal* presumption. Under the D.C. Circuit's approach, if the Sixth Circuit were to consider whether to apply the newly codified *Doris Coal* presumption in a case pending on or after the regulation's effective date, then the Sixth Circuit would be required to apply the presumption to the pending case—even if Sixth Circuit precedent did not otherwise support the *Doris Coal* presumption and even if it considered the *Doris Coal* presumption to be less than the best interpretation of the Black Lung Benefits Act.[67]

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[63] *Id.*

[64] *See* Doris Coal Co. v. Dir., OWCP, 938 F.2d 492, 496-97 (4th Cir. 1991).

[65] *See* Glen Coal Co. v. Seals, 147 F.3d 502, 513-14 (6th Cir. 1998).

[66] *See* Regulations of Dec. 20, 2000, *supra* note 49, at 80,096 (codified at 20 C.F.R. § 725.701(e) (2014)).

[67] The phrase "less than the best interpretation" is meant to indicate that once deference doctrines such as the *Chevron* doctrine are taken into account, the court could find the regulations to be reasonable, even if the court considers the agency's interpretation to differ from what the court would consider to be the best interpretation. *See generally* Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-43 (1984) (explaining that, when reviewing agency statutory interpretations where Congress has not directly spoken on the issue, "the court does not simply impose its own construction of the statute" but instead must determine "whether the agency's answer is based on a permissible construction of the statute").

However, in the world we live in, the Sixth Circuit rejected the *Doris Coal* presumption *before* the Department of Labor adopted it in the 2000 amendments to the black lung regulations. Thus, applying the D.C. Circuit's approach, the applicable law is a question of timing: whether the new regulation comes before or after a federal court of appeal issued its interpretation.

In summary, the D.C. Circuit's approach means that new regulations *will* have an effect on pending cases when a court considering the issue for the first time would not consider the regulations to be the best interpretation of the law, but when prior precedent (1) does not exist or (2) aligns with the regulations.

If the D.C. Circuit applied its test to the 2013 amendments to the black lung regulations, the court would likely determine that the "regularly exposed" standard can be applied to pending cases. The "regularly exposed" standard is associated with the Seventh Circuit's decision in *Director, OWCP v. Midland Coal Co.*, which held that the "substantially similar" standard is satisfied by a miner who shows he was "exposed to sufficient coal dust in his surface mine employment."[68] *Midland*'s use of the word "sufficient" is circular and begs the question of what level of coal mine dust is sufficient. Functionally, the *Midland* standard roughly equated with a "regularly exposed" standard.[69] No circuit has disagreed with *Midland* or held that more than "regular exposure" is required, so under the D.C. Circuit's approach, the "regularly exposed" standard does not "change[] the legal landscape" and should therefore be applied to pending cases.[70] The Sixth and Tenth Circuits have agreed with this analysis and, applying the D.C. Circuit's retroactivity test from *National Mining Association*, have held that

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[68] 855 F.2d 509, 512 (7th Cir. 1988).

[69] *See, e.g.*, Antelope Coal Co./Rio Tinto Energy Am. v. Goodin, 743 F.3d 1331, 1342 (10th Cir. 2014) (stating that *Midland* validates "the Department's longstanding position that consistently dusty working conditions are sufficiently similar to underground mining conditions"); Sterling v. Cent. Ohio Coal Co., No. 12-0285, 2013 WL 878708, at *2-3 (Ben. Rev. Bd. Feb. 28, 2013), *available at* http://www.dol.gov/brb/decisions/blklung/unpublished/Feb13/12-0285.pdf, at 3-4 (holding that the miner's testimony that his work was "very dusty" and that at the end of the shift his clothes were "very dirty" was sufficient to establish that his surface mine working conditions were comparable to underground mine working conditions); Prater v. Bevins Branch Res., Inc., No. 10-0667, 2011 WL 4454952, at *3-4 (Ben. Rev. Bd. Aug. 26, 2011), *available at* http://www.dol.gov/brb/decisions/blklung/unpublished/Aug11/10-0667.pdf, at 5-6 (holding that the miner's testimony that he was "always exposed to dust" and his widow's testimony that he would come home from work "covered in dust" were sufficient to establish comparable surface mine working conditions).

[70] Nat'l Mining Ass'n v. Dep't of Labor, 292 F.3d 849, 859 (D.C. Cir. 2002) (quoting Nat'l Mining Ass'n v. U.S. Dep't of the Interior, 177 F.3d 1, 8 (D.C. Cir. 1999)).

the 2013 amendments to the black lung benefits regulations are substantively consistent with prior regulations and practices.[71]

The previous paragraph masks the burden of the D.C. Circuit's approach. To determine whether a regulation "changes the legal landscape,"[72] one must survey the legal landscape. This involves looking at how vague standards are actually applied as well as looking at the range of conclusions produced by "all Courts of Appeals to consider the issue."[73] This Essay has relegated this research to footnotes below the line, but under the D.C. Circuit's approach, whenever regulations affect a pending case, an adjudicator must conduct a full circuit survey. The burden of this research cuts in the opposite direction as the purpose of many regulations, which is to simplify the rule of decision for an adjudicator.

The burden of the D.C. Circuit's approach could be justified if it addressed due process concerns in a more thorough way than an approach based on the *Landgraf* factors. However, the D.C. Circuit's approach distracts from fundamental due process concerns by elevating the temporal nature of the question. The arbitrariness of the emphasis on timing can be exemplified by comparing two hypotheticals. In both situations, at least one circuit court disagrees with other circuits about the best interpretation of a vague standard—for example, as the Sixth Circuit disagreed with the Fourth Circuit regarding the *Doris Coal* presumption.[74] Under the D.C. Circuit's approach, if the hypothetical disagreeing court issues an opinion before the agency's regulations are final, then the regulations will have no effect on pending cases before that court. On the other hand, if the regulations are finalized before the hypothetical disagreeing circuit issues its decision, then the court should apply the regulations to pending cases.

The problem is not that the test turns on timing—legal issues often turn on timing. The problem is that for the parties whose cases are pending as case law and regulations develop, a focus on timing addresses due process concerns in a way inferior to the *Landgraf* factors, which would instead focus courts on the fundamental due process concerns of fair notice, reasonable reliance, and settled expectations. These factors encompass the concerns that likely led the D.C. Circuit to focus on existing circuit law: if a circuit has an established practice, then it is more likely that parties have reasonably

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[71] *See* Cent. Ohio Coal Co. v. Dir., OWCP, 762 F.3d 483, 489-90 (6th Cir. 2014); *Goodin*, 743 F.3d at 1342.

[72] *Nat'l Mining Ass'n*, 292 F.3d at 859 (quoting Nat'l Mining Ass'n v. U.S. Dep't of the Interior, 177 F.3d at 8).

[73] *Id.* at 860.

[74] *See supra* note 57 and accompanying text.

relied on the law of the circuit and such expectations should not be disturbed without fair notice. If a circuit decision predates the regulations by a short period of time and settled expectations do not exist, however, there is no reason to predicate the due process analysis on the relative timing of the court decision and the regulations.

In addition, the D.C. Circuit's approach means that a circuit court's opinions have an unwarranted and potentially determinative effect beyond the circuit's geographical boundaries. Consider the following timeline:

1. Circuit A interprets a statute in a given way.[75]
2. Circuit B rejects Circuit A's interpretation because it is inconsistent with Circuit B precedent.[76]
3. The Department of Labor promulgates regulations embracing Circuit A's interpretation.[77]
4. Circuit C must decide whether applying the Department's new regulations to a pending case violates due process.

Under the D.C. Circuit's approach, the regulations' embrace of Circuit A's approach cannot provide the rule of decision for Circuit C because "*all* Courts of Appeals to consider the issue"[78] do not agree. Instead, Circuit C has to proceed as if the regulations do not exist—and thus forego deference doctrines, such as *Chevron*, which relax judicial scrutiny[79]—because of a Circuit B decision. This result is odd. Of course, circuits do (and should) consider the varying approaches of other circuits.[80] But in the situation described above, there is no reason why a Circuit B decision should dictate a due process analysis in Circuit C. Allowing Circuit B's decision to have such an effect gives it unwarranted precedential weight without protecting due process.

The D.C. Circuit's approach for determining whether to retroactively apply new regulations to pending cases gives unwarranted influence to

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75 *See, e.g.*, Doris Coal Co. v. Dir., OWCP, 938 F.2d 492, 497-98 (4th Cir. 1991) (creating the *Doris Coal* presumption that a miner's pulmonary disorder is caused or aggravated by the miner's black lung disease).

76 *See, e.g.*, Glen Coal Co. v. Seals, 147 F.3d 502, 513-14 (6th Cir. 1998) (rejecting the *Doris Coal* presumption).

77 *See, e.g.*, Regulations of Dec. 20, 2000, *supra* note 49, at 80,096 (codified at 20 C.F.R. § 725.701(e) (2014)) (codifying the *Doris Coal* presumption).

78 *Nat'l Mining Ass'n*, 292 F.3d at 860 (emphasis added).

79 *See supra* note 67 and accompanying text.

80 Such considerations are appropriate, for example, in contexts such as determining whether a right is "clearly established" for purposes of qualified immunity under 42 U.S.C. § 1983 (2012). *See* Pearson v. Callahan, 555 U.S. 233, 244-45 (2009) (holding that government officers were entitled to rely on precedents outside their governing circuit as a shield to personal liability under § 1983).

timing and out-of-circuit precedent and is unnecessarily time consuming for adjudicators. A multifactor test based on *Landgraf* better accounts for due process concerns.

This is not to say a multifactor test is perfect. There are two main problems. First and most concerning, the three factors from *Landgraf*—fair notice, reasonable reliance, and settled expectations—all describe much the same thing. The inquiry essentially boils down to whether it would be unfair to apply current law to a party that made decisions based on prior law. If the decisions were not really based on the prior law, then it is not unfair. Likewise if the party should have known that the law was about the change, then it is not unfair. Second and more generally, the *Landgraf* factors do not lay out a clear rule and consequently, inherent indeterminacy exists about just how a given adjudicator will assess whether notice is fair or whether a party's reliance on the status quo was reasonable.

Ultimately, however, no due process test will provide a universal, clear-cut rule.[81] As the Supreme Court stated in *Morrissey v. Brewer*, "due process is flexible and calls for such procedural protections as the particular situation demands."[82] In the retroactivity context, the Court recognized in *Landgraf* that "[a]ny test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity."[83] Determining how much process is due in a given case requires interest balancing[84] and taking into account individual circumstances.[85] The plethora of regulations, regulated activity, and varied adjudicatory contexts mean that courts should use a broad contextual approach rather than make due process turn on coincidences like the timing of an out-of-circuit decision.

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[81] *See generally* Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1360-65 (2012) (discussing the flexible nature of the due process inquiry in multiple settings).

[82] 408 U.S. 471, 481 (1972).

[83] *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994).

[84] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) ("[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: . . . the private interest . . . [,] the risk of an erroneous deprivation of such interest . . . [,] and finally, the Government's interest . . . .").

[85] *See, e.g.*, Greene v. Lindsey, 456 U.S. 444, 453-56 (1982) (holding that posting notice on apartment doors at a specific housing project did not satisfy due process because children in the housing project were known to tear down such notices).

## CONCLUSION

The contextual nature of a due process analysis requires a multifactor test. For some regulations, such as the 2013 amendments to the regulations governing federal black lung benefits claims, the outcome is clear, no matter which of the retroactivity tests is used: there is no due process problem with applying the amended regulations to pending claims.

The D.C. Circuit differs from most circuits in how it analyzes retroactivity issues for pending cases affected by new regulations. The majority approach, which uses a multifactor test, does a better job of taking due process concerns into account, is more administrable, and does not give undue weight to considerations such as the existence of a circuit split or the timing of a court decision. When considering challenges to the application of new regulations to pending cases, courts should focus on fairness to the regulated entities while being willing to apply new regulations freely where reliance is lacking or expectations are not settled.

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