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Substantive Due Process Since Eastern Enterprises, with New Defenses Based on Lack of Causitive Nexus: The Superfund Example

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SUBSTANTIVE DUE PROCESS SINCE *EASTERN ENTERPRISES*, WITH NEW DEFENSES BASED ON LACK OF CAUSATIVE NEXUS: THE SUPERFUND EXAMPLE

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Abstract: *Eastern Enterprises v. Apfel* has renewed the relevance of one type of substantive due process reasoning by implicitly ruling that future statutory obligations to pay compensation are tempered by an analysis of the party's actions and the alleged harm. Though the legal commentary has focused on *Eastern Enterprises*'s implications for cases involving takings and retroactive liability, the causative nexus analysis adds another dimension to its importance. This analysis is relevant to Superfund actions, particularly when innocent landowners are involved. Courts should address the causative nexus issue when determining liability to ensure that Superfund does not place unconstitutional burdens on private citizens. After *Eastern Enterprises*, proper substantive due process analysis requires courts to ask why a Potentially Responsible Party is the appropriate party to pay for a cleanup and whether such a burden is in line with this nation's traditional notions of fairness.

INTRODUCTION

A family with small children buys a home in Minnesota. They are happily settled in a suburban neighborhood when their children begin developing strange illnesses.[1] They are dismayed to find that the other children on the street are similarly sick. When it becomes clear that the illnesses cannot be coincidental, the state begins environmental testing and finds elevated levels of dioxins, PCPs, and hydrocarbons, all of which are linked to elevated cancer risk as well as impaired functioning

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[1] This hypothetical is based on an actual Superfund site in Minnesota. *See generally* MINN. POLLUTION CONTROL AGENCY, JOSLYN MANUFACTURING SITE SUPERFUND AND VIC CLEANUPS (May 2001), http://www.pca.state.mn.us/publications/g-27-03.pdf.

of the heart, liver, and kidneys.[2] A further investigation discovers that a paper mill had disposed of its wastes on the lands underneath the homes for a period of thirty years.[3] Suppose that the paper mill is no longer in business and has no assets. State and federal Superfund laws have developed a complex retroactive joint and several liability scheme to address such situations, with limited carve-outs for innocent landowners.[4] The 1998 U.S. Supreme Court decision of *Eastern Enterprises v. Apfel* potentially protects these types of defendants from liability through its substantive due process protections.[5]

This Note is an exploration of the potentially renewed relevance of one form of substantive due process analysis, springing from a common line of argument within each of the opinions in the *Eastern Enterprises* decision.[6] This particular substantive due process inquiry focuses on whether a citizen can defend against a statutory obligation to pay compensation by showing that there was no causative nexus between the citizen's actions and the harm being compensated.[7] Specifically, this Note will examine the implications of *Eastern Enterprises*'s substantive due process analysis for innocent landowners held liable under state and federal Superfund laws.

I. The Federal Response: The Comprehensive Environmental Response, Cleanup, and Liability Act

The Ninety-Sixth Congress passed the Comprehensive Environmental Response, Cleanup, and Liability Act (CERCLA) in 1980 after several highly publicized toxic waste sites illustrated the need for a federal law to deal with the growing problem of hazardous waste contamination and its effect on public health.[8] By passing CERCLA, Congress created a complex scheme to clean toxic sites, administered by the Environmental Protection Agency (EPA).[9] The major CERCLA provisions assign liability to categories of actors that Congress deemed potentially

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[2] *Id.* at 2.

[3] *See id.* at 1.

[4] *See* Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601, 9607 (2000); Mass. Gen. Laws ch. 21E, § 5 (2004).

[5] 524 U.S. 498, 547 (1998) (Kennedy, J., concurring).

[6] *See id.* at 523–24 (O'Connor, J.); *id.* at 547 (Kennedy, J., concurring); *id.* at 566–67 (Brever, J., dissenting).

[7] *See* opinions cited *supra* note 6.

[8] 42 U.S.C. §§ 9601–9675; *see* Zygmunt J.B. Plater, et al., Environmental Law and Policy: Nature, Law, and Society 886 (3d ed. 2004).

[9] 42 U.S.C. §§ 9601–9675.

responsible,[10] create and maintain a "Superfund" through a general tax on polluting industries to clean the most polluted sites,[11] and authorize EPA to promulgate regulations and remediate toxic sites.[12]

CERCLA also grants administrative order authority to EPA, enabling it to bring administrative and enforcement actions to ensure remediation.[13] The administrative order authority is "perhaps [EPA's] most potent enforcement tool."[14] EPA may commence such an action whenever a site "may [present] an imminent and substantial endangerment to public health or . . . the environment" by issuing "such orders as may be necessary to the protect public health and welfare and the environment."[15] Though EPA prefers to administer voluntary remediation through settlement agreements, its stated policy indicates that it will take further action if necessary.[16] If the parties do not comply with the order, EPA may fund its own cleanup or may refer the case for judicial action to compel performance and recover penalties.[17] Additionally, under the Polluter Pays Principle,[18] CERCLA authorizes EPA to sue responsible parties for cleanup costs, in order to replenish the Superfund for subsequent cleanups.[19]

A. *Strict Liability*

Responsible parties are held strictly liable for remediation costs.[20] This means that parties are liable for cleanup costs even when they are not negligent. Furthermore, causation is not a factor for CERCLA litigation.[21] CERCLA imposes joint and several strict liability on four categories of parties, called Potentially Responsible Parties (PRPs): (1) generators of hazardous wastes; (2) transporters of waste to and

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[10] *Id.* § 9607(a) (2000).

[11] Hazardous Substance Superfund, 26 U.S.C. § 9507 (2000); 42 U.S.C. § 9611.

[12] 42 U.S.C. § 9606.

[13] *Id.* § 9606(a).

[14] PLATER, *supra* note 8, at 927.

[15] 42 U.S.C. § 9606(a).

[16] U.S. EPA, OSWER Directive No. 9833.0-1a, at 2 (Mar. 7, 1990), http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cerc106-uao-rpt.pdf. When viable private entities exist and are unwilling to reach a timely settlement to undertake remediation under a consent order or decree—or in some circumstances prior to any settlement discussions—the Agency will typically compel private party response through unilateral orders. *Id.*

[17] *Id.*

[18] *See* PLATER, *supra* note 8, at 887.

[19] 42 U.S.C. § 9607(a) (2000).

[20] New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985).

[21] *Id.*

from disposal sites; (3) current owners and operators of facilities with contamination; and (4) owners and operators of facilities at the time of disposal of the waste.[22] These parties are responsible for response costs expended by the federal government or a state or, via injunction, can be held responsible for cleaning the site themselves.[23]

B. *Retroactive Application to Pre-1980 Pollution*

The courts have uniformly upheld the liability provisions of CERCLA.[24] Most of the challenges to date have involved the retroactive application of CERCLA liability, based on the Ninth Amendment prohibition of ex post facto laws as well as the Fifth and Fourteenth Amendments' guarantees of substantive due process and prohibition of uncompensated takings.[25] Congress did not explicitly state its intent to apply CERCLA liability retroactively.[26] Two cases established retroactive liability by interpreting sections 106 and 107 of CERCLA to infer that polluters must pay for cleanup even if the actions were committed before the statute's passage.[27]

State of Ohio ex rel. William J. Brown v. Georgeoff first established the principle of retroactive application of CERCLA in 1983.[28] In that case, the State of Ohio attempted to impose CERCLA liability on polluters who dumped regulated chemicals five years before CERCLA's enactment.[29] In order to resolve retroactivity in the absence of plain statutory language, the district court relied on legislative history to determine that Congress intended the liability to apply to both prior and future actions.[30]

After these early decisions establishing retroactivity, a series of cases followed that attempted to attack the constitutionality of the ret-

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[22] 42 U.S.C. § 9607(a).

[23] *Id.* §§ 9606(a), 9607(a).

[24] *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 174 (4th Cir. 1988); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 733–34, 749 (8th Cir. 1986) [*NEPACCO*].

[25] *See Monsanto*, 858 F.2d at 174; *NEPACCO*, 810 F.2d at 733–34, 749; HRW Sys. Inc. v. Wash. Gas, 823 F. Supp. 318, 329 (D. Md. 1993).

[26] 42 U.S.C. § 9607 (2000); *see* United States v. Price, 577 F. Supp. 1103, 1109–10 (D.N.J. 1983); Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1302, 1309 (N.D. Ohio 1983). For an in-depth analysis of CERCLA's retroactivity, see David Milton Whalin, *Is There Still Pre-1980 CERCLA Liability After* Eastern Enterprises*?*, 5 Envtl. Law. 701 (1999).

[27] *See Price*, 577 F. Supp. at 1112; *Georgeoff*, 562 F. Supp. at 1302, 1309–14.

[28] *See* 562 F. Supp. at 1302.

[29] *Id.*

[30] *Id.* at 1308–09, 1314.

roactive application of CERCLA.[31] Perhaps the most important of these cases from a substantive due process standpoint is *United States v. South Carolina Recycling & Disposal, Inc.*[32] In that case, the district court found no constitutional violation because CERCLA was not in fact retroactive.[33] The court noted that CERCLA is a remedial "statute that attaches liability to present conditions stemming from past acts [and] does not necessarily have retroactive effects that are subject to [substantive] due process limitations."[34]

The *South Carolina Recycling* court relied heavily on *Usery v. Turner Elkhorn Mining Co.*, which was the leading case dealing with constitutional law and retroactive statutes.[35] The *Turner Elkhorn* Court held that economic statutes violate substantive due process if they are irrational and arbitrary.[36] The *South Carolina Recycling* court found that CERCLA, as applied retroactively, was in line with the reasoning of *Turner Elkhorn* because it was a rational means to accomplishing Congress's goal.[37] Further, the court noted that South Carolina Recycling could be held liable because there was a reasonable nexus between the actors and the alleged harm.[38] In determining whether this nexus existed, the court reasoned: "Congress intended through CERCLA to create a broad remedial statute which allocates to those persons responsible for creating dangerous conditions, and who profited from such activities, the true costs of their enterprise."[39] It is therefore evident that the court found it rational for Congress to spread the costs of liabilities from pollution among parties who caused or benefited from that pollution, and therefore that there was no due process violation.[40]

In *United States v. Northeastern Pharmaceutical & Chemical Co.* (*NEPACCO*), the defendant was found to have disposed of several fifty-five-gallon drums of hazardous wastes on the Denney Farm from 1970 to 1972.[41] Despite the fact that the acts were committed prior to the passage of CERCLA, the Court of Appeals for the Eighth Circuit held

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[31] United States v. Kramer, 757 F. Supp. 397, 429–30 (D.N.J. 1991); United States v. S.C. Recycling & Disposal, Inc., 653 F. Supp. 984, 995 (D.S.C. 1986).

[32] *See* 653 F. Supp. at 996–98.

[33] *Id.* at 996.

[34] *Id.*

[35] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); s*ee* Whalin, *supra* note 26, at 727.

[36] *Turner Elkhorn*, 428 U.S. at 18.

[37] *S.C. Recycling*, 653 F. Supp. at 997–98; *see Turner Elkhorn*, 428 U.S. at 18.

[38] *See Turner Elkhorn*, 428 U.S. at 18; *S.C. Recycling*, 653 F. Supp. at 997–98.

[39] *S.C. Recycling*, 653 F. Supp. at 998.

[40] *Id.*

[41] *NEPACCO*, 810 F.2d 726, 729–30 (8th Cir. 1986).

that "[c]leaning up inactive and abandoned hazardous waste disposal sites is a legitimate legislative purpose, and Congress acted in a rational manner in imposing liability . . . upon those parties who created and profited from the sites . . . ."[42] *NEPACCO* is important for three major reasons: (1) it reaffirmed that CERCLA was intended to apply retroactively; (2) it supported the reasoning in *South Carolina Recycling* that substantive due process is not violated in cases when an enterprise is assigned liability because it caused or benefited from an activity; and (3) it held that government cleanup of toxic sites is not a taking at all because no property interest is affected.[43]

These cases are interesting because retroactive statutes are typically met with disfavor.[44] Justice Story noted in his treatise on the Constitution that "[r]etrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation . . . ought not to change the character of past transactions carried on upon the faith of then existing law."[45] The specter of retroactivity has troubled even more recent Supreme Court Justices because such laws "can deprive citizens of legitimate expectations and upset settled transactions."[46]

The courts have looked to the Ex Post Facto Clause as well as the takings and substantive due process provisions of the Fifth and Fourteenth Amendments to demonstrate the constitutional concerns with retroactive laws.[47] Due to these concerns, the courts seem to hold retroactive statutes to a slightly higher level of scrutiny and validate them only when such statutes are "clearly just and reasonable, and conducive to the general welfare,"[48] yet appear to invalidate them only under the "most egregious of circumstances."[49]

C. *Defenses to CERCLA Litigation*

The initial version of CERCLA provided a defense if the release of toxic substances was due to: (1) an act of God; (2) an act of war; or

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[42] *Id.* at 734.

[43] *Id.* at 733–34.

[44] E. Enters. v. Apfel, 524 U.S. 498, 532–33 (1998); *see* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1996); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

[45] 2 J. Story, Commentaries on the Constitution § 1398 (1891).

[46] Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992).

[47] *See E. Enters.*, 524 U.S. at 533–34, 547–48 (Kennedy, J., concurring); Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16–17 (1976).

[48] 1 James Kent, Commentaries on American Law 455–56 (3d ed. 1983).

[49] *E. Enters.*, 524 U.S. at 550 (Kennedy, J., concurring).

(3) an act or omission of a third party.[50] The third-party defense is a difficult one because the statute requires that the party not be "an employee or agent of the defendant, or . . . one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . ."[51]

In terms of practical availability, the defense has not often been successful because purchase and sale agreements create a contractual relationship, and therefore many "innocent landowners" who purchased contaminated property—but who did not contribute to or have any knowledge of the contamination—would be held liable for massive cleanup costs.[52] This well-settled standard of liability through contractual relationship can cause serious problems for parties who did not contribute to or benefit from pollution on their property.[53]

Partially in response to unintended innocent landowner liability, Congress passed the Superfund Amendments and Reauthorization Act of 1986 (SARA).[54] SARA includes a provision that provides a defense for innocent landowners who had no reason to know that the property was polluted at the time of purchase.[55] The owner must have taken "all appropriate inquiries…into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices."[56] At a minimum, the statute requires that purchasers complete a title search to determine all prior uses of the property.[57] In addition, many courts now consider "all appropriate inquiry" to include costly environmental site assessments.[58] The result has been an explosion of due diligence and environmental site investigations; however, the innocent landowner de-

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[50] 42 U.S.C. § 9607(b) (2000).

[51] *Id.* § 9607(b)(3).

[52] Debra L. Baker & Theodore G. Baroody, *What Price Innocence? A Realistic View of the Innocent Landowner Defense Under CERCLA*, 22 ST. MARY'S L.J. 115, 116 (1990); *see* New York v. Shore Realty Corp., 759 F.2d 1032, 1044, 1049 (2d Cir. 1985) (holding that Congress was unclear about what constitutes an appropriate inquiry, and it must be determined on a case-by-case basis); Jersey City Redevelopment Auth. v. PPG Indus., 655 F. Supp. 1257, 1261 (D.N.J. 1987).

[53] Baker & Baroody, *supra* note 52, at 116; *see Shore Realty*, 759 F.2d at 1044, 1049; *Jersey City Redevelopment*, 655 F. Supp. at 1261.

[54] Pub. L. No. 99-514, sec. 2, 100 Stat. 1628 (codified at 42 U.S.C. §§ 9601–9675).

[55] 42 U.S.C. § 9607(b)(3).

[56] 42 U.S.C. § 9601(35)(B) (2000).

[57] *Id.* § 9601(35)(B)(iii)(III).

[58] *Id.* § 9601(35)(B)(iii)(I); *see* United States v. Serafini, 706 F. Supp. 346, 353 (M.D. Pa. 1988).

fense is rarely successful when raised in court[59] because the courts hold parties to an extremely high standard.[60] If after reviewing the title history, there is any possibility that a landowner should have known that a commercial or industrial use had occurred on the property, costly site assessments must be conducted.[61] However, merely conducting a thorough environmental assessment does not shield an owner from liability should pollution later be found.[62]

Another potential pitfall for innocent landowners exists in the structure of CERCLA. In light of the retroactive nature of CERCLA, parties can be held responsible for discharges that were not known to be toxic at the time of disposal.[63] This makes it quite possible that even when a landowner conducts an appropriate inquiry, materials or substances on the property that are not currently tested for or known to be toxic could cause future liability for landowners.[64]

D. *State Superfund Laws*

Following the passage of CERCLA, many states enacted their own Superfund laws to deal with toxic sites that would not make the National Priorities List.[65] Massachusetts was one such state, enacting the Massachusetts Oil and Hazardous Material Release, Prevention, and Response Act in 1983 (Massachusetts Superfund Law).[66] The Massachusetts Superfund Law has been amended several times, most notably in 1986 by referendum,[67] and in 1992 to clarify the liability provisions and delegate authority for cleanups.[68] The law uses CERCLA's definition of "hazardous substances" and also applies a similar liability scheme.[69] However, the Massachusetts statute goes much further in three regards.[70] First, Massachusetts has a broader liability net by in-

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[59] *See Serafini*, 706 F. Supp. at 353; *see also* 135 Cong. Rec. H3514–15 (daily ed. June 28, 1989) (statement of Rep. Curt Weldon).

[60] *See generally Serafini*, 706 F. Supp. at 353 (holding that the standard should be determined based on a series of factors including the expertise of the purchaser and the extent of site assessment).

[61] *See* Baker & Baroody, *supra* note 52, at 125.

[62] *See id.* at 116–17.

[63] *See NEPACCO*, 810 F.2d 726, 732–33 (4th Cir. 1988).

[64] *See id.*

[65] *See, e.g.*, Massachusetts Oil and Hazardous Material Release, Prevention, and Response Act, Mass. Gen. Laws ch. 21E (2002).

[66] 1983 Mass. Acts 7, § 5.

[67] 1986 Mass. Acts 554, § 2.

[68] 1992 Mass. Acts 133, § 309.

[69] *Id.* § 2.

[70] *Id.* §§ 5, 13.

cluding—in addition to CERCLA's four categories of PRPs—"any person who otherwise caused or is legally responsible for a release or threat of release of oil or hazardous material from a vessel or a site . . . ."[71] This catchall provision has effectively captured more "middlemen" due to its open-ended nature.[72] Second, Massachusetts treats the cleanup costs associated with a contaminated site as a debt owed to the Commonwealth—due at twelve percent interest per year.[73] Because the cleanup costs constitute a debt, a "superlien" is placed on the property and the costs act as a lien on all property rights presently or subsequently owned, thereby holding the original and all subsequent landowners liable for cleanup costs.[74] Finally, the Massachusetts statute allows the government to collect treble damages, making the potential liability astronomical.[75]

Like the federal model, Massachusetts applies retroactive, strict, joint and several liability for cleanup costs.[76] This means that the parties mentioned are liable under the statute even without fault, a premise upheld by the Massachusetts courts:

> It is insufficient under section 5(c)(3) . . . to prove due care in transporting the hazardous wastes to the site only. Otherwise, [parties] would not be liable if they proved that they were not negligent. This reading of the third-party defense would undermine the strict liability provisions of c. 21E.[77]

The Massachusetts Superfund Law, like CERCLA, contains limitations to the liability of parties.[78] Like CERCLA, parties are not liable for releases caused by an act of God or war.[79] However, Massachusetts also provides exemptions for bona fide tenants, manv government agencies, lenders, and downgradient property owners.[80] In addition, under the Massachusetts Superfund Law, current owners/operators who did not own or operate at the time of release, or did not cause or contribute to the release or threat of release, are only liable up to the

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[71] *Id.* § 5(a)(5).

[72] John F. Shea, *Hazardous Waste Cleanup Law, in* Massachusetts Continuing Legal Education Handbook 22-1 (2002); *see* Mass. Gen. Laws ch. 21E, § 5 (2002).

[73] Mass. Gen. Laws ch. 21E, § 13.

[74] *Id.*

[75] *Id.* § 5(e).

[76] *See id.* § 5.

[77] Massachusetts v. Pace, 616 F. Supp. 815, 819–20 (D. Mass. 1985).

[78] Mass. Gen. Laws ch. 21E, §§ 5(c), 17 (2002).

[79] *Id.* § 5(c)(1), (2).

[80] *Id.* § 5D.

value of the property, essentially limiting the liability to the investment in the property.[81]

II. *Eastern Enterprises*

Eastern Enterprises has received a fair amount of attention from the legal community, but most of the focus has been on the issues of defining takings and retroactive statutes in general.[82] *Eastern Enterprises* implicates a third important proposition, however. The most innovative element of the *Eastern Enterprises* decision may well be its adoption of a causative nexus inquiry which, depending on how the votes are analyzed, is supported by at least a 5–4 vote, and arguably represents an implicit consensus.[83] It can be argued that under this third proposition from *Eastern Enterprises*—which has not received sufficient academic notice—that when the government compels actions by private parties or attaches liability for alleged harms, a causative nexus must exist between the actors and the harm.[84] Although the Justices split as to outcome of the case, on this point it appears that all nine justices followed a substantive due process causative nexus reasoning in their various opinions.[85] After analyzing this third theme in the *Eastern Enterprises* opinions, it appears that the lack-of-causative-nexus defense might apply in the setting of innocent property owners' liability for toxic cleanups.[86] *Eastern Enterprises* may be rightly or wrongly decided as to its particular outcome, but its substantive due process inquiry is clearly important and useful in framing possible limits for regulatory impositions of financial liability upon innocent third parties.[87]

A. Eastern Enterprises*: Substantive Due Process and Takings*

It is little wonder that there is marked confusion over when and how to undertake a substantive due process inquiry.[88] *Eastern Enter-*

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[81] *Id.* § 5(d).

[82] *See generally* Karen S. Danahy, *CERCLA Retroactive Liability in the Aftermath of* Eastern Enterprises v. Apfel, 48 Buff. L. Rev. 509 (2000) (discussing *Eastern Enterprises*'s implications for retroactive statutes); Whalin, *supra* note 26.

[83] *See* E. Enters. v. Apfel, 524 U.S. 498, 531 (1998); *id.* at 550 (Kennedy, J., concurring); *id.* at 560 (Breyer, J., dissenting).

[84] *See* opinions cited *supra* note 83.

[85] *See* opinions cited *supra* note 83.

[86] *See* 42 U.S.C. §§ 9601(35)(B) (2000), 9607(B); Mass. Gen. Laws ch. 21E, § 5(d) (2004).

[87] *See* 42 U.S.C. §§ 9601(35)(B), 9607(B); Mass. Gen. Laws ch. 21E, § 5(d).

[88] *See generally* John Decker Bristow, Note, Eastern Enterprises v. Apfel*: Is the Court One Step Closer to Unraveling the Takings and Due Process Clauses?*, 77 N.C. L. Rev. 1525, 1525–26

prises comes at the end of a long period of inconsistent handling of substantive due process and takings cases.[89] This series of divergent decisions over the last seventy years makes the clarification by the *Eastern Enterprises* Court that much more significant.[90]

The protection of due process of law is rooted in the Fifth Amendment's guarantee that "[n]o person shall be . . . deprived of . . . property, without due process of law."[91] This text was copied exactly into the Fourteenth Amendment to apply due process to state government actions as well.[92] Courts have found that the Due Process Clauses, in addition to providing procedural rights, also include substantive protections.[93] The clause has been interpreted to protect citizens from "arbitrary and irrational"[94] laws and to prevent government actions which shock the conscience, ensuring "fair application of law."[95] Stated plainly, though legislation comes to the courts with a presumption of constitutionality, the Due Process Clauses protect citizens by ensuring principles of fundamental fairness in the way legislatures enact laws that impose burdens on private actors.[96] Such actions must be rationally related to a government purpose, and the analysis "turn[s] on the legitimacy of Congress' judgment."[97] Cases must be seen "in light of a basic purpose: the *fair application of law*, which purpose hearkens back to the Magna Carta."[98]

The Supreme Court has been hesitant to invalidate economic legislation on due process grounds, due to a fear of judges substituting their own judgment for the will of legislatures.[99] The Court, however, has ruled that it may invalidate legislation "under the most egre-

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(1999) (discussing Justice Kennedy's *Eastern Enterprises* concurrence and Justice Breyer's dissent as clarifying the differences between takings and substantive due process).

[89] *See id.*

[90] *See id.*

[91] U.S. CONST. amend. V.

[92] *Id.* at amend. XIV.

[93] *See, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 126 (1992); United States v. Salerno, 481 U.S. 739, 746 (1987); Hurtado v. California, 110 U.S. 516, 532 (1884); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 841–42 (2003).

[94] E. Enters. v. Apfel, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring).

[95] *See Collins*, 503 U.S. at 126; *Salerno*, 481 U.S. at 746; *Hurtado*, 110 U.S. at 532; Rubin, *supra* note 93, at 841–42.

[96] *E. Enters.*, 524 U.S. at 558 (1998) (Breyer, J., dissenting).

[97] *Id.* at 545 (Kennedy, J., concurring).

[98] *Id.* at 558 (Breyer, J., dissenting).

[99] *See id.* at 547 (Kennedy, J., concurring).

gious of circumstances."[100] Those circumstances arise when legislatures enact laws that are "fundamentally unfair" because such laws are "basically arbitrary."[101]

1. The *Lochner*-Era's Broad Interpretation of Substantive Due Process

In the nineteenth century and early twentieth century, the Court regularly used substantive due process to invalidate legislation.[102] This period of time is known as the *Lochner* Era, named after *Lochner v. New York*.[103] *Lochner* was the first case to hold that government actions were void for lack of substantive due process if they were arbitrary or irrational.[104] Similarly, in *Truax v. Corrigan*, the Supreme Court held that fundamental property rights exist and must be respected by states.[105] Despite the fact that the Court has overruled most of *Lochner*,[106] many appellate courts over the last twenty-five years have slowly returned to invalidating economic legislation on substantive due process grounds.[107]

Lochner v. New York was the apex of substantive due process litigation.[108] In *Lochner*, a bakery owner was charged with requiring and permitting an employee to work over sixty hours per week, in violation of the labor laws of the State of New York.[109] The Court was careful to note that the employee was not forced to work over sixty hours, and that the New York statute was an

> absolute prohibition upon the employer permitting, under any circumstances, more than ten hours' work to be done in his establishment. The employee may desire to earn the extra money which would arise from his working more than

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[100] *Id.* at 550 (Kennedy, J., concurring); *see* Planned Parenthood v. Casey, 505 U.S. 833, 953 (1992) (Rehnquist, C.J., dissenting in part).

[101] *E. Enters.*, 524 U.S. at 557 (Breyer, J., dissenting).

[102] *See* Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 Syracuse L. Rev. 917, 918 (1999).

[103] *See* 198 U.S. 45 (1905).

[104] *Id.* at 56, 63.

[105] 257 U.S. 314, 328 (1921).

[106] Phillips, *supra* note 102, at 924.

[107] *Id.* at 924–26; *see* Dolan v. City of Tigard, 512 U.S. 374, 405 (1994) (Stevens, J., dissenting) (explaining that the majority decision resurrects economic substantive due process); Littlefield v. City of Afton, 785 F.2d 596, 604, 607–08 (8th Cir. 1986); Epstein v. Township of Whitehall, 696 F. Supp. 309, 312–14 (E.D. Pa. 1988) (holding that economic laws cannot be arbitrary or irrational).

[108] 198 U.S. 45; *see* Phillips, *supra* note 102, at 920–21.

[109] *Lochner*, 198 U.S. at 52.

> the prescribed time, but this statute forbids the employer from permitting the employee to earn it.[110]

The Court continued by establishing that the right to contract for work is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.[111] Though the Court recognized that the state had within its police powers the right to prevent certain types of contracts when specific factors—such as general health and safety—were present, it laid a foundation for balancing the power of the state against the rights of individuals.[112] In *Lochner*, the Court therefore found that it must determine whether there was a reasonable ground for New York to limit the ability of bakers to enter into contracts for more than sixty hours per week.[113]

After setting the stage for the balancing test, the Court quickly found that there was no "reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."[114] Because New York did not have a legitimate reason for limiting the right of the employee, the statute was found to be an unconstitutional violation of the Due Process Clause.[115]

2. Beyond *Lochner*: The Current State of Due Process

Today, much of *Lochner* has been overruled, and the *Lochner*-era substantive due process cases have been maligned and repudiated by the legal community.[116] The major reason for the disapproval met by the *Lochner* era is the enormous power claimed by the courts to invalidate legislation.[117] This sweeping power has been seen by many as the ultimate anathema to democratic legislative power.[118] Much of this

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[110] *Id.* at 52–53.
[111] *Id.* at 53.
[112] *Id.* at 53–54.
[113] *Id.* at 57.
[114] *Id.*
[115] *Lochner*, 198 U.S. at 57–58. The Court stated:

> The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

Id.
[116] Phillips, *supra* note 102, at 921–23.
[117] *Id.* at 921–22.
[118] *Id.* at 922.

criticism is based on the presumption that the *Lochner* Court readily imposed its own ideas of economic and policy goals into its decisions.[119] It is claimed that the Court often substituted its own wisdom and desires—by judging for itself which prohibitions and requirements were legitimate and rational—for the judgment of legislatures.[120]

In 1937, the Supreme Court ended the *Lochner* era with *West Coast Hotel Co. v. Parrish*.[121] Following *West Coast Hotel*, the Court entered a period of levying a very lenient standard for the government to rebut substantive due process challenges. Such legislation seemingly always survived substantive due process inquiries.[122] However, certain important parts of the *Lochner* substantive due process analysis have been retained, and economic substantive due process seems to be making a resurgence.[123] Courts are increasingly deciding economic cases on the basis of substantive due process by determining whether or not the government action is rationally related to a specific purpose.[124] Though these cases are still in the minority when contrasted with the large number of cases in which substantive due process claims are rejected, the courts now recognize that economic legislation must at least be analyzed under the rational basis test and, at a minimum, a challenged law must: (1) aim at achieving a legitimate public purpose; (2) use means reasonably necessary to achieve that purpose; and (3) not be unduly oppressive.[125] Though most of the cases deal with state or municipal government actions against private parties—and therefore are analyzed under the Fourteenth Amendment's Due Process Clause—there are several cases involving the federal government that show that the Fifth Amendment's Due Process Clause protects the same interests and requires the same rational basis test.[126]

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[119] *See id.* at 923.

[120] *See id.* at 922–23.

[121] 300 U.S. 379 (1937).

[122] Phillips, *supra* note 102, at 923–24.

[123] *See id.* at 924–25.

[124] *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1, 15–16 (1974); Littlefield v. City of Afton, 785 F.2d 596, 607–08 (8th Cir. 1986) (holding that an arbitrary or capricious denial of a building permit is a violation of substantive due process).

[125] *E.g.*, Guimont v. Clarke, 854 P.2d 1, 14 (Wash. 1993) (holding that substantive due process inquiries are governed by a three-part test).

[126] *See* Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 636–37, 639 (1993).

B. Eastern Enterprises v. Apfel*: The Case*

1. Background

Eastern Enterprises, a Massachusetts coal company, opposed provisions in the Coal Act of 1974, which required compensation for harms to coal miners' health by establishing an employee health and retirement benefit fund.[127] The Coal Act was drafted to determine liability for particular employers based on the Commissioner of Social Security's (Commissioner) assessment of the premium payments according to the following formula:

> [T]he Commissioner of Social Security shall . . . assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:
>
> (1) First, to the signatory operator which—
>
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
>
> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.
>
> (2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—
>
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
>
> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.
>
> (3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.[128]

This legislation assessed liability to any successor interests of a coal operator, even if these entities no longer produced coal.[129]

With regards to Eastern Enterprises, the Coal Act therefore imposed liability to pay premiums based on the number of the company's employees.[130] Eastern Enterprises argued that congressional

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[127] E. Enters. v. Apfel, 524 U.S. 498, 515 (1998).
[128] 26 U.S.C. § 9706 (2000).
[129] *See id.* § 9701(c)(2).
[130] *See id.* § 9704(b)(2).

legislation assessing retroactive liability for retiree benefits was unconstitutional under the Fifth Amendment, and cast its attack on the statute in terms of both regulatory takings[131] and substantive due process.[132] The plurality opinion, authored by Justice O'Connor, held that the legislation constituted a takings violation,[133] while Justice Kennedy's concurring opinion denied that it was a taking, concluding instead that the legislation was void because it violated substantive due process.[134] The dissent adopted and applied a substantive due process analysis, but reached a contrary conclusion, finding no violation.[135]

Eastern Enterprises was established in 1929 as a Massachusetts Business Trust involved in coal mining operations in West Virginia and Pennsylvania.[136] There is no question that Eastern Enterprises employed a number of miners who subsequently would be granted benefits by the Coal Act in 1992.[137] In 1950, Eastern Enterprises entered into the National Bituminous Coal Wage Agreement (NBCWA), creating the United Mine Workers of America Welfare and Retirement Fund ("1950 W&R Fund").[138] The 1950 W&R Fund provided retirement and health care benefits through premium payments by coal mining companies.[139] Under the terms of this agreement, the benefits could be revised at any time by the board of trustees, and in the period between 1950 and 1974, the trustees made frequent revisions to ensure the fiscal stability of the fund.[140] Eastern Enterprises ceased its coal mining operations in 1965,[141] however, and at that time had no long-term agreement with its workers to provide health benefits.[142]

In 1974, the political landscape had changed in the coal mining industry generally, and as a result of amendments to the law, a new agreement was forged to provide permanent lifetime benefits to employees and their widows.[143] This was the first agreement to explicitly include health benefits for retirees.[144] The new provisions did not,

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[131] *E. Enters.*, 524 U.S. at 529.
[132] *Id.* at 547 (Kennedy, J., concurring).
[133] *Id.* at 529.
[134] *Id.* at 550 (Kennedy, J., concurring).
[135] *See id.* at 567–68 (Breyer, J., dissenting).
[136] *Id.* at 516.
[137] *See E. Enters.*, 524 U.S. at 504, 514.
[138] *See id.* at 506.
[139] *Id.*
[140] *Id.* at 508.
[141] *Id.* at 516.
[142] *Id.* at 507–08.
[143] *See E. Enters.*, 524 U.S. at 509.
[144] *See id.*

however, change the fixed-cost allocation or include liability beyond the life of the agreement.[145] Quickly after its creation, it became evident that the funding of the plans was inadequate due to increases in eligibility and health care costs,[146] resulting in congressional action to change the laws again in 1992 with the enactment of the Coal Act.[147]

The Coal Act merged the 1974 and 1950 funds, and assigned premium payments according to a formula.[148] The new formula designated the amounts to any operator that had been bound by previous NBCWA agreements based on the length of service to a particular company.[149] Congress's purpose was "to identify persons most responsible for [1950 and 1974 Benefit Plan] liabilities in order to stabilize plan funding and allow for the provision of health care benefits to . . . retirees."[150] Because Eastern Enterprises had ceased coal mining operations by 1965, it challenged its liability under the Coal Act.[151]

2. *Eastern Enterprises* and Takings: The Plurality

Writing for the initial plurality of four, Justice O'Connor based her opinion on the theory that the Coal Act violated the Takings Clause.[152] Justice O'Connor detailed the three factors of "economic" takings cases—that is, those cases in which the government has not actually seized property, but rather assigned a public burden to a private party: (1) the economic impact of the regulation; (2) its interference with investment-backed expectations; and (3) the character of the governmental action.[153] Implicitly, however, the initial plurality reflected substantive due process reasoning in what it called a "takings" analysis.[154] The core of Justice O'Connor's takings analysis is that the act applied liability to Eastern Enterprises for actions it took decades before any promises were made, and with no active causation

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[145] *Id.*

[146] *Id.* at 509–10.

[147] Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, sec. 19,141–19,143, 106 Stat. 3037 (codified as amended at 26 U.S.C. §§ 9701–9722 (2000)); *E. Enters.*, 524 U.S. at 514.

[148] Pub. L. No. 102-486, sec. 19,143(a), 106 Stat. 3040, 3042 (codified as amended at 26 U.S.C. §§ 9702, 9706).

[149] *Id.*

[150] Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, § 19,142(a)(2), 106 Stat. 3037 (1992) (published as part of "Findings and Declaration of policy" following 26 U.S.C. § 9701).

[151] *E. Enters.*, 524 U.S. at 515.

[152] *Id.* at 523, 529.

[153] *Id.* at 523–24.

[154] *See id.*

of harm.[155] Interestingly, three of the four cases used by the plurality in support of its analysis were actually challenges based on substantive due process, as pointed out by Justice Kennedy in his concurrence.[156]

The plurality applied the three takings factors and found that the Coal Act was unconstitutional as applied to Eastern Enterprises because it implicated fundamental principles of fairness by imposing "a burden that is substantial in amount, based on the employers' *conduct far in the past*, and [*conduct*] *unrelated to . . . any injury they caused.*"[157] This demonstrates all three prongs of *Eastern Enterprises*'s importance: (1) takings burdens; (2) retroactivity; and (3) the need for a causal nexus to exist between the injury which Congress is addressing in the legislation and the party being held liable.[158] The due process inquiry was not undertaken and analyzed by the plurality of four because Justice O'Connor framed her decision as a finding that the Coal Act was an unconstitutional taking.[159]

3. The Kennedy Concurrence and Substantive Due Process

Justice Kennedy's opinion forces the analysis of *Eastern Enterprises* into the realm of substantive due process.[160] Justice Kennedy agreed with the plurality that severe retroactivity can invalidate a law, but insisted that the question be viewed through a substantive due process lens.[161] Justice Kennedy took issue with several aspects of the plurality's reasoning in his concurrence.[162] First and foremost, Justice Kennedy posited that the Takings Clause of the Fifth Amendment involves actual seizure of property by the government or regulatory restrictions that in essence limit the use or value of the property.[163] Put simply, the Takings Clause only operates on a real or regulatory "take."[164] Justice Kennedy underlined this point by showing that the Coal Act, while creating financial liability for Eastern Enterprises, does not "op-

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[155] *See id.* at 537.

[156] *Id.* at 528, 548 (Kennedy, J., concurring). In fact, in a similar case, *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986), the Court—upon finding no due process violation—stated that "it would be surprising indeed to discover" that the statute effected a taking.

[157] *E. Enters.*, 524 U.S. at 537 (emphasis added).

[158] *See id.*

[159] *Id.* at 538.

[160] *See id.* at 547–50 (Kennedy, J., concurring).

[161] *See id.* (Kennedy, J., concurring).

[162] *Id.* at 539–40 (Kennedy, J., concurring).

[163] *E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring).

[164] *Id.* (Kennedy, J., concurring).

erate upon or alter an identified property interest, and is not applicable to or measured by a property interest. . . . The law simply imposes an obligation to perform an act, the payment of benefits."[165] Because Congress has substantial leeway in how it assigns burdens, a takings analysis requires the Court to apply a complicated and fact-intensive inquiry in order to assess whether or not a taking has occurred.[166] Further, Justice Kennedy noted that the Takings Clause does not typically invalidate legislation; it gives government the option either to cease its action or to provide compensation for the property taken.[167] Justice Kennedy supported this view with precedent:

> "As its language indicates, and as the Court has frequently noted, [the Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking."[168]

In *Eastern Enterprises*, Justice Kennedy deemed it impossible to devise a monetary remedy, but rather he stated that the issue "appears to turn on the legitimacy of Congress' judgment."[169] According to Justice Kennedy, the appropriate vehicle for invalidating legislation and addressing notions of fairness, as mentioned above, is the Due Process Clause.[170]

Justice Kennedy continued his opinion with a thorough due process analysis.[171] Most importantly, Justice Kennedy noted that severely retroactive legislation violates due process because such laws "change the legal consequences of transactions long closed . . . [and] destroy the reasonable certainty and security which are the very objects of property ownership."[172] A significant further aspect of the Kennedy concurrence is its inquiry into the presence or absence of a causative

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[165] *Id.* (Kennedy, J., concurring).

[166] *See id.* at 542 (Kennedy, J., concurring).

[167] *Id.* at 545 (Kennedy, J., concurring).

[168] *Id.* (Kennedy, J., concurring) (quoting First English Evangelical Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314–15 (1987)) (alterations and omitted citations in original).

[169] *E. Enters.*, 524 U.S. at 545 (Kennedy, J., concurring).

[170] *Id.* (Kennedy, J., concurring).

[171] *Id.* at 547–50 (Kennedy, J., concurring).

[172] *Id.* at 548 (Kennedy, J., concurring).

nexus.[173] In part, this was a follow-up on the retroactivity discussion.[174] Because Eastern Enterprises left the business of coal operation long before the statute imposed liability upon it, and because it never agreed to any type of long-term benefits, the company was not within the causal nexus of harm necessary in due process jurisprudence.[175] Justice Kennedy explained this point by stating that Eastern Enterprises "was not responsible for their expectation of lifetime health benefits"[176] and therefore, "the Coal Act bears no legitimate relation to the interest which the Government asserts in support of the statute."[177]

But further, Justice Kennedy's opinion incorporated the logic of Justice O'Connor's plurality—that Eastern Enterprises had not caused the injuries—and argued that the issue was more properly considered as a substantive due process analysis.[178] As Justice Kennedy noted, this was the very precept used by the plurality, though they inappropriately labeled it a takings analysis.[179]

4. Support for the Substantive Due Process Approach from the Dissent

Irrespective of the vote count as to outcome, the dissent is notable for its agreement with Justice Kennedy that the issue must be framed in terms of substantive due process.[180] The dissent, authored by Justice Breyer, applied a due process analysis, and agreed with Justice Kennedy that the Takings Clause did not apply.[181] Justice Breyer detailed a brief history of the Court's use of the Takings Clause in his analysis.[182] First, he noted that the purpose of the Takings Clause was not "preventing arbitrary or unfair government action, but [rather] providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good."[183] The dissent, therefore, also focused on whether or not a taking occurred in *Eastern Enterprises*, noting that "[t]he 'private property' upon which the Clause tradi-

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[173] *See id.* at 549–50 (Kennedy, J., concurring).
[174] *See id.* at 547–50 (Kennedy, J., concurring).
[175] *See E. Enters.*, 524 U.S. at 550 (Kennedy, J., concurring).
[176] *Id.* (Kennedy, J., concurring).
[177] *Id.* at 549 (Kennedy, J., concurring).
[178] *Id.* at 549–50 (Kennedy, J., concurring).
[179] *Id.* (Kennedy, J., concurring).
[180] *Id.* at 554 (Breyer, J., dissenting).
[181] *E. Enters.*, 524 U.S. at 554 (Breyer, J., dissenting).
[182] *Id.* at 554–58 (Breyer, J., dissenting).
[183] *Id.* at 554 (Breyer, J., dissenting).

tionally has focused is a specific interest in physical or intellectual property."[184]

The dissent noted that in one of the cases cited by the plurality, *Connolly v. Pension Benefit Guaranty Co.*,[185] the Court found that in fact no taking had occurred because "the Government does not physicallv invade or permanently appropriate any . . . assets for its own use."[186] Like Justice Kennedy, the dissent believed that "there is no need to torture the Takings Clause to fit this case."[187]

Justice Breyer disagreed that there was a due process violation, in part because he believed that a causal nexus existed between Eastern Enterprises and the coal miners.[188] "The substantive question before us," he wrote, "is whether or not it is fundamentally unfair to require Eastern to make *future* payments for health care costs of retired miners and their families, on the basis of Eastern's *past* association with these miners."[189] Justice Breyer emphasized that there was a relationship between Eastern Enterprises and the miners it had employed, as well as a series of "promises" made by Eastern Enterprises to those miners.[190] Clearly, the dissent focused on the nexus that existed between the miners and Eastern Enterprises, and found that under a due process analysis, the nexus was sufficient to render Congress's actions constitutional.[191] Therefore, it appears that the dissent was willing to say that common law enterprise liability can create a sufficient nexus to pass constitutional muster.[192]

Due to the split in analyses, lower courts have not read *Eastern Enterprises* to hold any specific rule of law.[193] The takings analysis adopted by the plurality, expanding the takings doctrine to include liabilities, was supported by a minority of Justices.[194] If one counts the votes, however, a majority opinion—composed of Justice Breyer's dis-

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[184] *Id.* (Breyer, J., dissenting).

[185] 475 U.S. 211 (1986).

[186] *Id.* at 225.

[187] *E. Enters.*, 524 U.S. at 556 (Breyer, J., dissenting).

[188] *See id.* at 559–60 (Breyer, J., dissenting).

[189] *Id.* at 558–59 (Breyer, J., dissenting).

[190] *Id.* at 559–60 (Breyer, J., dissenting).

[191] *See id.* (Breyer, J., dissenting).

[192] *See id.* at 566–67 (Breyer, J., dissenting).

[193] *See, e.g.*, Unity Real Estate Co. v. Hudson, 178 F.3d 649, 658–59 (3d Cir. 1999); Ass'n of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1254–55 (D.C. Cir. 1998); Asarco Inc. v. Dep't of Ecology, 43 P.3d 471, 475 (Wash. 2002); Verizon W. Va., Inc. v. W. Va. Bureau of Employment Programs, Workers' Comp. Div., 586 S.E.2d 170, 189–90 (W. Va. 2003).

[194] *See E. Enters.*, 524 U.S. at 538.

sent and Justice Kennedy's concurrence—held that substantive due process, and not takings, is the appropriate analysis for government actions against a private party.[195]

In terms of property rights, the Court placed particular emphasis on "reasonably settled expectations"[196] and the "reasonable certainty and security which are the very objects of property ownership."[197] In addition, due process principles require legislators to establish a rationale for why they have chosen to place burdens on private citizens, in order to prevent "the legislative 'tempt[ation] to use . . . legislation as a means of retribution against unpopular groups or individuals.'"[198] In essence, courts must invalidate laws that deprive citizens of property unless a rational, causal nexus exists between the party's injury and the government's action.[199]

Interestingly, the Justices who chose a takings analysis rather than a due process analysis have tended to disfavor invalidating legislation based on due process challenges in the past.[200] Frequently, however, these same Justices have been strong protectors of individual property rights.[201] Thus, the Justices of the plurality created a paradox—one that could only be resolved by "tortur[ing] the takings clause" to achieve the desired result.[202]

Eastern Enterprises does not provide an explicit test for substantive due process inquiries; rather, it uses the same ambiguous language that permeates substantive due process jurisprudence such as "arbitrary and irrational."[203] However, the *Eastern Enterprises* Court did ask the same questions that have been asked in prior substantive due process cases: did the party cause the harm, and if not, did it enjoy a sufficiently direct benefit from the harm? These questions appropriately frame a substantive due process argument, and without affirmative answers, parties are not within a causative nexus of harm.

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[195] *See id.* at 539 (Kennedy, J., concurring); *id.* at 554 (Breyer, J., dissenting).

[196] *Id.* at 559 (Breyer, J., dissenting).

[197] *Id.* at 548 (Kennedy, J., concurring).

[198] *Id.* (Kennedy, J., concurring) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994) (first alteration in original)).

[199] *See id.* at 559 (Breyer, J., dissenting).

[200] *See* Nancie G. Marzulla, *The Textualism of Clarence Thomas: Anchoring the Supreme Court's Property Rights Jurisprudence to the Constitution*, 10 Am. U. J. Gender Soc. Pol'y & L. 351, 351–52, 363–69. (2002).

[201] *See id.*

[202] *E. Enters.*, 524 U.S. at 556 (Breyer, J., dissenting).

[203] *Id.* at 547 (Kennedy, J., concurring).

III. How Might an *Eastern Enterprises* Causative Nexus Substantive Due Process Defense Arise in the Toxic Cleanup Field?

Distilling the element of causative nexus from *Eastern Enterprises*'s substantive due process inquiry invites several interesting further inquiries in environmental regulatory settings. One prime area for testing the proposition is the field of toxic cleanup liability.

There are three seemingly unfair situations in which innocent landowners can be held liable under CERCLA and state Superfund laws.[204] *Eastern Enterprises* does not answer whether these cases are valid under the Constitution. The value of *Eastern Enterprises*, however, lies in the way in which these cases should be analyzed. According to the Court's reasoning, the appropriate inquiry is whether the party has caused or sufficiently benefited from the pollution.[205]

One problematic example of innocent landowner liability is when a landlord leases property to a tenant who "midnight dumps"[206] chemicals onto the property. Even if the landlord diligently oversees the property, there can be situations in which the landlord will not be able to prevent the tenant from polluting the land and will still be held liable for the cleanup costs.[207] Several cases illustrate this point. In *United States v. A & N Cleaners & Launderers, Inc.*, the court found a landowner strictly liable for any hazardous releases by a tenant or subtenant.[208] The *A & N Cleaners* court did not allow the landlord to use the innocent landowner defense because there was no inquiry into the disposal practices of the tenant.[209] Similarly, in *United States v. Monsanto Co.*, the Court of Appeals for the Fourth Circuit held that the innocent landowner defense is not applicable when there is "willful or negligent blindness on the part of absentee owners."[210] Both courts were careful to note that their decisions did not require land-

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[204] *See* Baker & Baroody, *supra* note 52, at 119–21.

[205] *See E. Enters.*, 524 U.S. at 531; *id.* at 550 (Kennedy, J., concurring); *id.* at 560 (Breyer, J., dissenting).

[206] Midnight dumping refers to tenants who, unbeknownst to the landlord, discharge pollutants in a manner that is difficult to discover. This might include releasing barrels of oil late at night into effluent streams or tampering with monitoring equipment to hide illegal polluting. Since a contractual relationship exists, the landlord can still be held liable for cleanup under CERCLA.

[207] *See* 42 U.S.C. § 9601(35)(A) (2000); United States v. A & N Cleaners & Launderers, Inc., 854 F. Supp. 229, 238–39 (S.D.N.Y. 1994).

[208] 854 F. Supp. at 244.

[209] *Id.*

[210] 858 F.2d 160, 169 (4th Cir. 1988).

lords to practice specific investigatory methods; however, neither court defined what constitutes non-negligent investigation sufficient to maintain an innocent landowner defense.[211]

A substantive due process claim would require a different approach to determine whether or not the landlord is within the causative nexus necessary for liability.[212] In the example above, a court would need to address whether or not the landlord caused the pollution, and if not, whether the landlord directly benefited from the harm.[213] It appears that in a midnight dumping case, the tenant is the sole polluter; thus, assessment of the landowner's liability would require an inquiry into any possible benefits that he or she received from allowing the pollution to occur.[214] Certainly, the landlord profited from leasing the property, but was the profit enhanced due to the pollution? Was the landlord paid extra money to look the other way, or was there some other benefit granted to allow for the pollution? These questions could guide a court in determining whether or not a sufficient nexus exists between the landlord and the liability.[215]

Another troubling scenario occurs when purchasers do not meet the "all appropriate inquiry" standard needed for the innocent landowner defense.[216] Suppose, for example, that Mom and Pop Retiree purchase their dream home for $200,000 and begin renovations with what is left of their retirement savings. Prior to purchasing the home, the Retirees conducted a sixty-year title search and saw no indication of any commercial or industrial activity.[217] Because there did not seem to be a need, they did not conduct an environmental site assessment. However, when they break ground to renovate the house, toxins are found. Mom and Pop call EPA and remediation ensues. EPA is unable to find the responsible parties, however, and thus, it holds the Retirees liable for the entire cleanup cost. While it is likely that EPA would enter into settlement negotiations and greatly reduce this burden, the

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[211] *See id.*; *A & N Cleaners*, 854 F. Supp. at 241, 243.

[212] *See* E. Enters. v. Apfel, 524 U.S. 498, 531 (1998); *id.* at 550 (Kennedy, J., concurring): *id.* at 560 (Breyer, J., dissenting).

[213] *See* opinions cited *supra* note 212.

[214] *See* opinions cited *supra* note 212.

[215] *See* opinions cited *supra* note 212.

[216] *See* 42 U.S.C. § 9601(35)(B)(i) (2000).

[217] Under CERCLA's innocent landowner provisions, all-appropriate inquiry requires heightened diligence when indications of commercial or industrial activity are evident in a title search. *Id.* § 9601(35)(B)(iii).

statute, as currently interpreted, would hold the Retirees responsible for all costs associated with remediation.[218]

Since the property was already polluted when the Retirees took ownership, the court would need to examine whether the Retirees benefited from purchasing contaminated property. Several factors could shape this inquiry, such as whether the Retirees paid a discounted price for the property.[219] If they did not, it would seem that the Retirees were sufficiently outside the causal nexus, and holding them liable for cleanup would be irrational and would shock the conscience.

The third scenario occurs in states such as Massachusetts, which cap rather than excuse liability for innocent landowners up to the value of the land.[220] Because the innocent landowner defense caps liability only at the value of the land, even when an illegal trespass and dumping occurs on the property, the landowner can be held liable for the entire value of the property.[221] For Example, John and Jane Landowner reside on twenty-five acres in Norfolk, Massachusetts.[222] Midnight Dumper, who runs a "recycling" business next door, regularly backs his trailers full of fluorescent bulbs into the pond on the Landowners' property late at night.[223] After several years of doing this, Dumper dissolves his business and disappears. When the Landowners see the bulbs in the pond, they call the Department of Environmental Protection, which informs them that, because they are innocent, they will only have to pay the state $650,000, the value of their land.[224] Even if the Department of Environmental Protection uses its discretion to demand only half of the cleanup costs, the Landowners will be responsible for paying over $300,000 to remediate property that they never polluted.

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[218] *See* 42 U.S.C. § 9607(a)(1); New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985); Baker & Baroody, *supra* note 52, at 115–16.

[219] *See* AL Tech Specialty. Steel Corp. v. Allegheny Int'l Credit Corp., 104 F.3d 601, 607 n.8 (3d Cir. 1997) (holding that a discounted price could be seen as a benefit created by the pollution and should be a factor in a CERCLA analysis).

[220] MASS. GEN. LAWS ch. 21E, § 5(d) (2002).

[221] *See id.*

[222] Norfolk, Massachusetts was chosen for this example because it is a community that has industrial and commercial properties in reasonable proximity to large agricultural areas. Norfolk also has many lakes and ponds.

[223] Fluorescent light bulbs contain high amounts of mercury, a toxic substance. *See* Hazardous Waste Management System; Modification of the Hazardous Waste Program; Hazardous Waste Lamps, 64 Fed. Reg. 36,466, 36,467 (July 6, 1999) (codified at 40 C.F.R. pts. 260, 261, 264, 265, 268, 271, 273) (discussing fluorescent lamps' toxicity and adding them to the Resource Conservation and Recovery Act list of universal wastes).

[224] *See* MASS. GEN. LAWS ch. 21E, § 5(d).

Eastern Enterprises provides insight into how to address a substantive due process claim in such a scenario.[225] Since the Landowners did not pollute the land themselves, a court should inquire whether they benefited from the pollution in any way.[226] In this example, short of some sort of collusion between the neighbors, it is very difficult to envision a scenario in which the Landowners could possibly have benefited from this pollution.

Conclusion

To determine whether an *Eastern Enterprises* causative nexus exists between a Superfund defendant and the harm courts first must determine whether the defendant caused the pollution. Beyond actual causation, there may still be a sufficient nexus, particularly in cases where the party held responsible directly benefited from the harm. Each of the *Eastern Enterprises* opinions focused on whether the causal nexus—the benefit from the harm—was strong enough so as to not "shock the conscience" by attaching liability.

Though the legal commentary has focused extensively on *Eastern Enterprises*'s importance for cases involving takings and retroactive liability, the causative nexus analysis adds another dimension to its importance. By analyzing the Justices' opinions, it is clear that when the government assigns liability or compels a private party to act, the courts should undertake a substantive due process analysis. This inquiry would appropriately determine whether the private party is within a sufficiently causal nexus, and therefore can constitutionally be held responsible for the alleged harms.

This line of reasoning is important for state and federal Superfund actions, particularly when innocent landowners are involved. Courts will need to address the causative nexus issue when determining liability in order to ensure that Superfund legislation does not place unconstitutional burdens on private citizens. Just as the Court asked "why Eastern [Enterprises]?"[227] when addressing the constitutionality of the Coal Act, substantive due process requires courts to ask why a Potentially Responsible Party is the appropriate party to pay for a cleanup and whether such a burden is in line with this nation's traditional notions of fairness.

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[225] *See* E. Enters. v. Apfel, 524 U.S. 498, 531 (1998); *id.* at 550 (Kennedy, J., concurring); *id.* at 560 (Breyer, J., dissenting).

[226] *See* opinions cited *supra* note 225.

[227] *E. Enters.*, 524 U.S. at 559 (Breyer, J., dissenting).