THE NEW RETROACTIVITY CAUSATION STANDARD

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I. INTRODUCTION

How does the Constitution protect private property interests from government action? This topic was of great interest to Americans two centuries ago.[1] Between 1987 and 1994, in a series of decisions grounded mainly in the Takings and Due Process Clauses, the United States Supreme Court also revisited the issue.[2] In the 1998 case of *Eastern Enterprises v. Apfel*,[3] the Court concluded again that these two provisions of the Constitution indeed protect private property from certain types of onerous government action. Although *Eastern Enterprises* lacks the majority opinion one would normally look to for guidance on the question of *how* the Constitution provides its protection, a close examination of the various plurality, concurring and dissenting opinions reveals that five members of the Court may have embraced a new standard for certain property rights cases, the "retroactivity causation" standard. Under this standard, the government allocates burdens improperly if it retroactively singles out a property owner to bear the cost of a regulation, despite the fact that the owner's property use did not cause the problem that the regulation addresses. Such a disproportionate impact runs afoul of several constitutional prohibitions, embedded primarily in the Takings and Due Process Clauses.

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1. JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992); JENNIFER NEDLSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990); William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

2. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Landgraf v. USI Film Prods., 511 U.S. 244 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

3. 524 U.S. 498 (1998).

Part I of this Article shows how five Justices have seemingly adopted this standard in the *Eastern Enterprises* case. In Part II, this Article considers the standard's philosophical and legal underpinnings. Part III reviews how the standard had previously been suggested in dictum by earlier Supreme Court opinions, by a post-*Eastern Enterprises* Supreme Court opinion, and by lower courts. Part IV points out that recent cases have relied on the essential elements of "retroactivity causation" to decide property rights challenges to various government actions. While not a perfect predictor of when laws affecting property are unconstitutional, the retroactivity causation standard should provide a basis for courts wishing to void certain unjust and unfair government rules.

II. *EASTERN ENTERPRISES*

In 1998, the Supreme Court's multiple opinions in *Eastern Enterprises* suggest that a majority of the Court (albeit a narrow five-Justice majority) may now be willing to adopt a new standard for when government action imposes special, disproportionate burdens on private property interests. The standard, which may be cobbled together from a plurality and a concurring opinion, recognizes that new government burdens may run afoul the Constitution if they are (1) *retroactive* and (2) do not take into account whether the property owner saddled with the burden has in some way *caused* the social problem that the law is meant to redress.[4] As will be pointed out below in Parts II and III, this retroactive causation test is built upon sound philosophical values and a wealth of legal precedent.

The issue in *Eastern Enterprises* was the constitutional validity of a new federal statute, the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act" or the "Act").[5] The Coal Act required coal mining companies to contribute to a fund for lifetime health benefits to miners who had left the industry many years earlier.[6] The Coal Act was thought necessary in

4. *See Eastern Enters.*, 524 U.S. at 498.

5. *See id.* (referencing Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3036, 3037 (1992) (codified at 26 U.S.C. § 9701 (1994)).

6. *See id.*

order to address severe financial problems facing pre-1992 coal miners' benefit plans.[7] The company that brought the *Eastern Enterprises* case found itself subject to the contribution provisions of the Coal Act (where the company's cumulative payments under the Act would be on the order of $50 to $100 million).[8] However, since it had sold its coal producing business in 1965, it alleged that the Coal Act's retroactive imposition of liability had violated the Takings and Due Process Clauses.[9]

A four-Justice plurality (Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas) thought that the Coal Act as applied to *Eastern Enterprises* effected an unconstitutional taking, but the plurality expressly declined to decide the company's due process claim.[10] Justice Kennedy's concurrence in the judgment provided the fifth vote to hold the Coal Act unconstitutional, but he thought that the Act violated substantive due process, and he dissented from the plurality's takings analysis.[11] The four remaining dissenting Justices (Justice Breyer, joined by Justices Stevens, Souter and Ginsburg) agreed with Justice Kennedy's rejection of the plurality's takings analysis, but they concluded that the Coal Act as applied to the company satisfied substantive due process.[12]

There is no question that the Court's inability to agree on a theory for deciding the case is unusual and should make it difficult for lower courts to deal with cases involving similar facts. Nonetheless, one can read in the four-Justice plurality opinion, and in Justice Kennedy's concurring opinion, an acknowledgment and acceptance of two key principles: (1) retroactivity is disfavored in the law;[13] and (2) legislation might be unconstitutional if it imposes new, retroactive liability on a limited class of parties that is substantially disproportionate to the parties' experience.[14] A review of these two opinions reveals how each

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7. *Id.*
8. *Id.* at 528.
9. *Eastern Enters.*, 524 U.S. at 500.
10. *Id.* at 502-38.
11. *Id.* at 538-50 (Kennedy, J. concurring in the judgment and dissenting in part).
12. *Id.* at 551-66 (Breyer, J., dissenting).
13. *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).
14. Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986) (stating that the liability assessed against a property owner should not resemble a calcula-

principle is reflected in and reaffirmed by two separate property-protective clauses in the Constitution—Takings and Due Process.

A. The Four-Justice Plurality

1. Retroactivity.—The plurality concluded that the Coal Act had worked a taking, in large part because it had substantially interfered with Eastern Enterprises' "reasonable investment backed expectations."[15] The Act had interfered with these expectations because it had reached back thirty to fifty years to impose liability based on the company's activities between 1946 and 1965. The Act was therefore retroactive, even though it mandated only the payment of future health benefits, since it "attache[d] new legal consequences to [an employment relationship] . . . completed before its enactment."[16]

The plurality was troubled by the Act's retroactivity, both on philosophical and legal grounds. A statute should generally not have retroactive effect because to do so is inconsistent with "'fundamental notions of justice' that have been recognized throughout history."[17] This judicial dislike of retroactive laws is because they are, according to the plurality, "of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts. . . . "[18] The plurality noted that the Constitution expresses concern with retroactive laws through several of its provisions, most notably the Takings Clause. After citing to several cases which had either struck down or suggested retroactive statutes were takings,[19] the four Justices zeroed in on the Coal Act's retroactive nature. The plurality stated that it had "divest[ed] Eastern of property long after the company believed

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tion "made in a vacuum").

15. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); *Eastern Enters.*, 524 U.S. at 532.

16. Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994).

17. *Eastern Enters.*, 524 U.S. at 532 (citing Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

18. *Id.* at 533 (quoting H. BROOM, LEGAL MAXIMS 24 (8th ed. 1911)).

19. United States v. Security Indus. Bank, 459 U.S. 70, 78-79 (1982); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601-02 (1935).

its liabilities . . . to have been settled. And the extent of Eastern's retroactive liability is substantial and particularly far reaching."[20]

2. Causation and Proportionality.—The plurality opinion began by quoting from the touchstone Takings Clause case,[21] *Armstrong v. United States*:[22] "The aim of the Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[23] The determination of "fairness and justice" requires that "economic injuries caused by public action [must] be compensated by the government, rather than remain disproportionately concentrated on a few persons."[24] Here the plurality is suggesting that for laws that impose obligations to avoid takings challenges, they should not "disproportionately concentrate" burdens on property owners—such statutory liability should reflect some proportionality to the private party's experience with the activity giving rise to the liability.[25]

The central concern of the plurality was that, although the company in *Eastern Enterprises* had at one time employed the now-retired workers, the "correlation" between the company and its liability to pay the past employees was tenuous.[26] It was "not calibrated" either to the company's past actions or to any agreement—implicit or otherwise—by the company with the employees.[27] As a result, the plurality concluded that the Coal Act was an unconstitutional taking as applied to the company. The Act's contribution requirements did not take into account the issue of proportionate causation: Was the liability proportional to the social problem (the retiree's retirement needs)

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20. *Eastern Enters.*, 524 U.S. at 534.

21. *See id.* at 522.

22. 364 U.S. 40 (1960).

23. *Eastern Enters.*, 524 U.S. at 522 (quoting *Armstrong*, 364 U.S. at 49).

24. *Id.* at 523 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

25. "Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties . . . and the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 528-29.

26. *Id.* at 532.

27. *Id.* at 534.

caused by the company? The plurality phrased the causation test in this way:

> When, however, [a] . . . solution [to a societal problem] singles out certain [private property owners] . . . to bear a burden that is substantial in amount, based on the [property owners'] . . . conduct far in the past, and unrelated to any commitment that the [property owners] made *or to any injury they caused*, the government action implicates fundamental principles of fairness underlying the Takings Clause."[28]

B. The Kennedy Concurrence

Although Justice Kennedy was unable to join the plurality's opinion that the Coal Act was unconstitutional under the Takings Clause,[29] he did arrive at the same result (the statute is unconstitutional) for the same reason (it violates the retroactivity causation standard). However, Kennedy believed that the retroactivity causation standard was subsumed within the Due Process Clause.[30] The main thrust of his concurrence is that due process requires an inquiry into whether the Coal Act's retroactivity was an arbitrary and irrational way of accomplishing its goal.[31] His conclusion is that the retroactive remedy created by the statute "bears no legitimate relation to the interest which the Government asserts in support of [it]."[32] The interest asserted as grounds for the retroactive liability was the retirees' expectation of lifetime health benefits, made doubtful by the shaky financial condition of certain pre-Coal Act plans. Justice Kennedy assumed that the only way to justify retroactive application of the Coal Act to Eastern Enterprises would be if the company in some way *caused* these expectations to arise and if the company somehow *caused* the miners' expectation of secure health benefits to be put in jeopardy.

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28. *Eastern Enters.*, 524 U.S. at 537 (emphasis added).

29. Justice Kennedy's main concern with the Takings Clause was that the Coal Act did not operate upon or alter an identified property interest; instead, it simply imposed on the company an obligation to perform an act, the retroactive payment of benefits. *Id.* at 539-43.

30. *Id.* at 546.

31. *Id.* at 547-50.

32. *Id.* at 549.

When Justice Kennedy reviewed the chronology of events leading to the Coal Act, it became obvious to him that Eastern Enterprises "was not responsible for their [the miners'] expectations of lifetime health benefits or for the perilous financial condition of the [Benefit] Plans. . . . "[33] Any expectation held by the miners had been created by promises and arrangements made by others long after the company had left the coal business in 1965. As a result, Eastern Enterprises could "not [be held] responsible for the resulting chaos in the funding mechanism caused by [the actions of coal companies other than Eastern Enterprises]."[34] Consistent with the plurality opinion, but under a different clause in the Constitution, Justice Kennedy combined a disfavor of retroactive legislation with a requirement that new liability be imposed only on those who had some causative link to a societal need addressed by the legislation.[35]

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33. *Eastern Enters.*, 524 U.S. at 550.

34. *Id.*

35. Apart from its apparent adoption of the retroactivity causation standard, the *Eastern Enterprises* case is significant because there may now be five Justices that seem to agree on a number of issues that have arisen in the context of some of the Court's recent property rights cases:

1) Justice Kennedy interpreted the Takings Clause to apply only to the taking of specific property interests. Therefore, since a government demand for the payment of a fee may not "operate upon or alter an identified property interest," *id.* at 540, one can infer that he would conclude that an exaction requirement in the form of a fee would not be subject to a takings analysis. The four dissenting Justices agreed with this part of Justice Kennedy's opinion, *id.* at 540-47, so there may be a majority of the Court that will not consider fee conditions to be takings. The Supreme Court, in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), appeared to say as much when it concluded that a requirement—"rough proportionality" must exist between the law's burden on the property owner and the impact of the property's use—be limited to cases involving "the dedication of property. . . . " 526 U.S. at 698.

2) Justice Kennedy and the plurality opinion suggest that some retroactive rules will be struck down for violating either the Takings or Due Process Clauses. A so-called "ad hoc development exaction" on a development application (one whose existence becomes known only after the application has been filed) is retroactive. It also suffers from the same defect as the new liability imposed by the Coal Act—it could have an unforeseen effect on a property owner who reasonably relied on existing law, thereby interfering with that owner's investment-backed expectations. *Eastern Enters.*, 524 U.S. at 532-35 (plurality opinion); 541 (Kennedy concurrence). As a result, the truly unexpected retroactive ad hoc exaction might be successfully challenged pursuant to due process/takings theories. *See* Fred Bosselman, Dolan's *Mysteries Explained?*, 51 LAND USE LAW & ZONING DIGEST 3, 5 (1999).

3) The *Eastern Enterprises* result raises questions about the constitutional validity of CERCLA, 42 U.S.C. §§ 9601-9675 (1994). Five Justices have now struck

III. PHILOSOPHICAL ROOTS

The retroactivity causation standard is anchored in two deeply rooted philosophical traditions: (1) a presumption, grounded in notions of justice and fairness, against retroactive laws that affect pre-enactment private behavior in the post-enactment future, and (2) an anti-utilitarian belief that the government should not be permitted to achieve the public "goal" of maximizing human happiness by forcing some people to trade certain political liberties for an overall improved distribution of wealth.

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down a federal statute that substantially interfered with reasonable investment-backed expectations by attaching "new legal consequences" to acts completed well before its enactment. *Id.* at 532. It is not a stretch to argue that CERCLA's retroactive nature does the same; it imposes liability on property owners for "conduct far in the past." *Id.* at 536. The four dissenting Justices were certainly concerned about this possibility. *Id.* at 558-62; *see also* United States v. Vertac Chem. Corp., 33 F. Supp. 2d 769 (E.D. Ark. 1998); Bruce Howard & Jennifer Harr, *Environmental Law: CERCLA Retroactivity*, NAT'L L.J., Dec. 28, 1998-Jan. 4, 1999, at B7.

4) Five Justices may now agree that the Takings Clause does not encompass the takings test first announced in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980): A law constitutes a taking if it does not "substantially advance legitimate state interests." Justice Kennedy was troubled by this test because it is a substantive limit on the government's power to act, while the Takings Clause "presupposes what the Government intends to do is otherwise constitutional." *Eastern Enters.*, 524 U.S. at 545. The four dissenting Justices concur. *Id.* at 556 ("[The Takings Clause] 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."). I have made this same point elsewhere. *See* JAN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS 12-8 to 12-20 (1999) (hereinafter LAW OF PROPERTY RIGHTS PROTECTION); Jan G. Laitos, *The Public Use Paradox and the Takings Clause*, 13 J. OF ENERGY, NAT. RESOURCES, & ENVTL. L. 9 (1993). However, in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), the Court applied the *Agins* "substantially advance legitimate state interests" standard to find a taking, even though *Del Monte Dunes* involved a permit denial situation, and the result of the case was for the Takings Clause to act as a substantial limit on the government prohibition. *Del Monte Dunes*, 526 U.S. at 691.

5) Despite Justice Kennedy's use of due process to strike down the Coal Act, eight other Justices appear disinclined to resurrect substantive due process as a check on social and economic legislation. *See Eastern Enters.*, 524 U.S. at 536 (plurality opinion); *id.* at 558-66 (dissenting opinion).

A. Anti-retroactivity

The statute in *Eastern Enterprises* applied "secondary retroactivity," where the legal consequences of past private actions are altered only in the future. Laws which operate with secondary retroactivity are much more common than laws that operate with "primary" retroactivity—laws that alter the past legal consequences of past private actions. Most laws that operate with primary retroactivity are invalid.[36] Laws that operate with secondary retroactivity are subject to the 1994 Supreme Court decision in *Landgraf v. USI Film Products*,[37] which calls for a presumption of prospectivity which can only be rebutted by legislative intent to apply the new law with secondary retroactivity.[38] When the legislature makes its intent clear that it wishes the law to apply with secondary retroactivity, courts often seize upon the future-applying aspect of this kind of retroactivity (affecting pre-enactment private behavior in the post-enactment future) to justify its general validity.[39] However, while such retroactivity is similar to prospectivity because it takes effect only after enactment, secondary retroactivity is unlike prospectivity because it draws upon antecedent facts for its implementation. As a result, secondary retroactivity produces several negative effects.[40]

Legislative decisions that operate with secondary retroactivity act upon past circumstances and conduct. Those individuals whose behavior triggered these past events cannot do anything in the pre-enactment period to soften the blow of the new law. Therefore, with secondary retroactivity, the option of altering behavior to avoid the impact of the new law no longer exists.

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36. *See, e.g.*, Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 233-44 (1995).

37. 511 U.S. 244 (1994).

38. Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994; *see also* Lindh v. Murphy, 521 U.S. 320 (1997) (noting that if Congress does not speak to the issue of retroactivity, a court may employ normal rules of statutory construction to determine the statute's temporal scope).

39. *See, e.g.*, Association of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1253-58 (D.C. Cir. 1998); Madrid v. Gomez, 150 F.3d 1030, 1038-39 (9th Cir. 1998), *opinion withdrawn by* Madrid v. Gomez, 179 F.3d 1252 (9th Cir. 1999).

40. *See generally* LAITOS, LAW OF PROPERTY RIGHTS PROTECTION, *supra* note 35, § 16.03. *See also* Jan G. Laitos, *Legislative Retroactivity*, 52 WASH. UNIV. J. OF URBAN & CONT. LAW 81, 102-09 (1997) (Legislative Retroactivity).

When individuals are unable to evade a retroactive decision in the pre-enactment period, there are two related consequences. The first consequence involves uncertainty. Decision-making in the pre-enactment period becomes problematic because those making decisions are without knowledge concerning one critical variable—the probability that existing law will continue in the future. As a result of this uncertainty, decision-making during the pre-enactment period may be chilled.[41] Individuals will be reluctant to act if they are unable to predict the likely outcome of a decision. They may be deterred by the possibility of a change in the law with secondary retroactive effects. These behavior changes in anticipation of retroactivity generate social costs which take the form of deferred investments and reduced risk-taking.[42]

The second negative consequence of retroactivity during the pre-enactment period involves expectations. When individuals cannot take steps in the pre-enactment period to evade the post-enactment imposition of new rules, settled expectations arising in the pre-enactment period are undermined. This result is inconsistent with a central purpose of law in a civilized society, which is to preserve the expectations of individuals that are formed in light of existing laws, as well as actions taken in reliance on those laws. Laws that operate with secondary retroactivity are inconsistent with this premise.[43]

At the time of enactment, a law that applies with secondary retroactivity violates one prime tenet of the Rule of Law: Persons subject to laws should have their behavior governed by rules fixed in advance because such rules then provide fair notice and warning to those contemplating the action.[44] As Justice

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41. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 3 (1985) ("Uncertainty and insecurity make it difficult to plan, which prevents individuals from effectively utilizing their talents and external goals."); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 689-94 (1978) (describing the deterrent effect of uncertainty in a free speech context).

42. *See* FRANK H. KNIGHT, RISK, UNCERTAINTY & PROFIT 197-232, 313-75 (1921).

43. W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216, 219 (1960) ("(1) Individuals commonly act so as to achieve advantageous results. (2) Retroactive laws change the legal results of acts after these acts have been performed. (3) Therefore retroactive laws defeat reasonable expectations and are undesirable.").

44. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994); *see also* Phillips

Scalia observed: "The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."[45]

The enactment of secondarily retroactive legislation allows private behavior to be judged, post-enactment, by new, often unanticipated rules. If a number of laws are adopted which act with secondary retroactivity, individuals who find themselves surprised by new rules learn that they cannot plan conduct with reasonable certainty of the legal consequences. When market actors cannot plan because the relevant rules are uncertain, this may result either in a disinclination to act at all or hedged action, where the actor takes cautious compensatory measures to protect against future loss.

A law that operates with secondary retroactivity also has an impact on existing property interests at the time of enactment. Although such laws are effective only in the future because they apply to private property interests that existed prior to enactment, they alter the expected value of property at the moment of enactment. In other words, the change in expected future values will, at the time of enactment, change the present value of affected property. Therefore, property subject to laws that apply with secondary retroactivity sustain three value changes: (1) Prior to enactment of the new law, the value is determined by expectations based on the old law; (2) at the time of enactment, expected future value changes alter the present value; and (3) post-enactment, value changes in the future result from the operation of the new law. Such price instability prevents market actors from making rational decisions about long-term investments.

Finally, secondary retroactivity seems contrary to fundamental notions of justice and fairness.[46] Unless an individual's

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v. Curiale, 608 A.2d 895, 899 (N.J. 1992).

45. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring).

46. *See* LON L. FULLER, THE PROBLEMS OF JURISPRUDENCE 701-03 (1949) (discussing the ability to legislate based on acceptance of the legislator); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1398, at 260 (4th ed. 1873) ("Retrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of social compact."); *see also Landgraf*, 511 U.S. at 270, 280; Van Sickle v. Boyes, 797 P.2d 1267, 1271

pre-enactment conduct is assessed in the post-enactment period, under the law in effect at the time that the individual engaged in that conduct, "[the law] can deprive citizens of legitimate expectations and upset settled transactions."[47] These post-enactment effects are harmful to persons who have reasonably relied to their detriment on the pre-enactment law.[48] A new law applied retroactively thwarts reliance by impairing the advantages of planned conduct. In the post-enactment period, secondary retroactivity may also remove a benefit currently enjoyed, take away property currently held, or deprive a person of liberty to act in a manner earlier permitted.

B. John Rawls, Causation, and the Takings Clause

Constitutional protection of private property is grounded in a conflict between two legal principles—the government's power to regulate private property for the common good[49] and the Constitution's limit on this power in the Takings Clause, which provides that "private property [shall not] be taken for public use, without just compensation."[50] The first principle, the government's power to restrict private property rights for the public good, is consistent with utilitarianism, which condones redistribution of private wealth in order to maximize societal

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(Colo. 1990) (en banc); Peoples Natural Gas Div. of N. Natural Gas Co. v. Public Utilities Comm'n, 590 P.2d 960, 962 (Colo. 1979) (en banc).

The Constitution's Ex Post Facto Clause, U.S. CONST. art. I, § 9, cl. 3, was adopted to prevent the unfairness of punishing an act which was not punishable at the time that it was committed. *See* Weaver v. Graham, 450 U.S. 24, 28 (1981).

47. General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992).

48. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967) (stating that "demoralization costs" are the disabilities, in the form of impaired incentives or social unrest, to uncompensate losers and their sympathizers affected in part by retroactive laws).

49. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962) (noting that the state may interpose its authority on "'behalf of the public [if] . . . the interests of the public . . . require such interference'") (quoting Lawton v. Steele, 152 U.S. 133, 137 (1894)).

50. U.S. CONST. amend. V; *see* Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922) (stating that although "some values are enjoyed under an implied limitation and must yield to the police power . . . the implied limitation must have its limits").

happiness.[51] The second principle, reflected in the Takings Clause, prohibits certain regulations that are intended to achieve a public benefit.[52]

The Takings Clause's check on government power conforms to John Rawls' philosophy.[53] A Rawlsian approach to an organized society rejects the utilitarian beliefs that the government may act to achieve the "good" of maximizing human happiness and that the government can force people to trade certain political liberties for an improved distribution of wealth.[54] Under Rawls' theory, the principle of "justice as fairness" limits a government's ability to require some people to bear burdens in order to advance public goals, and the principle of "equal liberty" eventually leads to Pareto-optimality.[55]

For many years, the United States Supreme Court adopted a utilitarian perspective when it deferred to legislative judgments furthering general public goals. To the extent that utilitarianism urges decisionmakers to maximize society's happiness,[56] the Court embraced the theory when it rejected takings claims that arose from three types of governmental action: (1) "a public program that adjusts the benefits and burdens of economic life to promote the common good"[57]; (2) a restriction on private property that furthers "a legitimate state goal"[58] or a "substantial public purpose"[59]; or (3) a government decision "to protect the public interest in health, the environment, [safety],

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51. *See* Berman v. Parker, 348 U.S. 26, 32-33 (1954) ("[T]he legislature . . . is the main guardian of the public needs to be served by social legislation."); JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 3 (1988) ("An action then may be said to be comfortable to the principle of utility . . . when the tendency it has to augment the happiness of the community is greater than any it has to diminish it."). *See generally* JOHN STUART MILL, UTILITARIANISM (1957).

52. *See generally* U.S. CONST. amend. V.

53. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

54. *Id.* at 60-63.

55. *Id.* at 31, 150-52.

56. *See, e.g.*, BENTHAM, *supra* note 51, at 3; HENRY SIDGWICK, THE METHODS OF ETHICS 411, 415 (7th ed. 1907); J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 7 (1973).

57. Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 643 (1993) (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986)).

58. Texaco v. Short, 454 U.S. 516, 529 (1982).

59. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978) (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

and . . . fiscal integrity."[60]

Recently, however, the Supreme Court's takings jurisprudence has shifted markedly toward Rawlsian theory.[61] The change began in 1960, when the Court held in *United States v. Armstrong*[62] that the federal government had violated the Fifth Amendment by taking private property without compensating its owners. In *Armstrong*, the Court did not assume, consistent with utilitarian theory, that the federal government could take property from private parties to improve the public condition without paying just compensation.[63] Rather, the Court adopted a rationale for the Takings Clause that is consistent with Rawls' idea of "justice as fairness": "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all *fairness and justice*, should be borne by the public as a whole."[64]

Since 1960, the Court frequently has cited this statement as an articulation of "[t]he purpose"[65] or "one of the principal purposes"[66] of the Takings Clause. The Court's rationale in *Armstrong*, however, is not just an oft-repeated summary of why the Takings Clause prohibits the government from affecting private property without paying just compensation. This rationale also reflects and ratifies the two core tenets of Rawlsian theory: "equality" and "justice."

Rawls' first principle, which *Armstrong* refers to as "fairness," assumes that laws should conform to the idea of equality—that similarly situated people (and property owners) should be treated similarly under the law.[67] The equality principle has

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60. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987); Lawton v. Steele, 152 U.S. 133, 136-37 (1894).

61. *See generally* Leigh Raymond, *The Ethics of Compensation: Takings, Utility, and Justice*, 23 ECOLOGY L.Q. 577 (1996).

62. 364 U.S. 40 (1960).

63. The private property interests taken in *Armstrong* were valid materialmen's liens that the United States rendered unenforceable. *Armstrong*, 364 U.S. at 44-49.

64. *Id.* at 49 (emphasis added).

65. Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 227 (1986).

66. Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987).

67. RAWLS, *supra* note 53, at 60 ("[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.").

links to the Equal Protection Clause in that it protects horizontal equity by treating like people alike.[68] Rawls' notion of equality also provides a basis for Takings Clause jurisprudence. Rawls' equality principle suggests that a taking occurs if a regulation *singles out* certain property owners to bear special burdens in order to benefit a larger group or, in utilitarian terms, to maximize that group's happiness.[69]

Rawls and *Armstrong* explicitly endorse the view that a regulation should not violate the equality principle inherent in "fairness" by singling out certain property owners to bear the burden of achieving a greater good, instead of requiring that the public at large share the burden. Rawls argues that "[t]here is no more justification for using the state apparatus to compel some citizens to pay for unwanted benefits that others desire than there is to force them to reimburse others for their private expenses."[70] In *Armstrong*, the Supreme Court similarly presumes that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens."[71]

Rawls' second principle, which is embodied in the idea of "justice," stems from his fundamental disagreement with the utilitarian notion that through certain persons, the government may achieve a greater societal good.[72] Rawls does not believe that decisionmakers should "impose upon [some members of society] lower prospects of life for . . . . the higher expectations of others."[73] Instead, Rawls' theory of justice holds that one should not trade or negotiate basic liberties, such as ownership of private property, for changes in the overall economic distribu-

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68. *See* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 420 (1977); Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1387-92 (1993). In *Village of Willowbrook v. Olech*, 120 S. Ct. 1073 (2000), the Supreme Court acknowledged that a property owner could assert an equal protection claim if the regulation had created a class of one.

69. *See, e.g.*, Art Piculell Group v. Clackamas County, 922 P.2d 1227, 1236 (Or. Ct. App. 1996) (stating that the Takings Clause is concerned "with the extent to which particular property may be burdened because of impacts that are attributable to its development").

70. RAWLS, *supra* note 53, at 283.

71. United States v. Armstrong, 364 U.S. 40, 49 (1960).

72. RAWLS, *supra* note 53, at 179-81.

73. *Id.* at 180.

tion.[74] Indeed, Rawls asserts that "injustice" is "simply inequalities that are not to the benefit of all."[75]

Rawls would consider an exercise of the police power unjust if it forced certain property owners to bear the cost of a public good that others primarily enjoy. Under *Armstrong*, such an economic redistribution would be an uncompensated taking. According to the Court, "the public as a whole," rather than a select class of property owners, should bear the cost of "public burdens."[76] *Armstrong* essentially holds that the Takings Clause has a "justice" component that tracks Rawls' theory of justice. The justice principle in the takings Clause prevents government wealth transfers that damage unwilling property owners who have not caused the societal problem that was the impetus for the wealth transfer scheme. In contrast to tax laws, which can redistribute resources from one class of persons to another for the public good, if the government uses its regulatory power, the Takings Clause provides that it must compensate property owners burdened for "the public as a whole."[77]

Both *Armstrong's* rule of fairness and justice and Rawls' principles of equality and justice are consistent with the causation element of the retroactivity causation standard. This causation element holds that regulated property owners merit compensation when: (1) the government singles out a property owner or owners to bear the cost of a regulation; and (2) the regulated property owners' use of their property has not caused or primarily contributed to a societal problem that the regulation seeks to redress.

A causation requirement, similar to the one articulated by the *Eastern Enterprises* plurality[78] and Kennedy's concurrence,[79] ensures that regulatory action violates neither the fairness (equality) nor the justice (redistribution) principle. Most uncompensated takings are inconsistent with fairness because takings target a class of non-culpable property owners to provide a public benefit; takings are also unjust when they force target-

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74. *Id.* at 61.
75. *Id.* at 62.
76. *Armstrong*, 364 U.S. at 49.
77. *Supra* note 41, at 197.
78. *Eastern Enters.*, 524 U.S. at 536.
79. *Id.* at 549.

ed property owners to bear the cost of a public good that others largely enjoy.[80] Both justice and fairness are also akin to the constitutional requirement that government-imposed liability on a property owner be *proportionate* to the owner's responsibility for the problem that the liability is designed to correct. When liability is disproportionate to responsibility, then the Takings Clause is implicated. In *City of Monterey v. Del Monte Dunes*,[81] the United States Supreme Court explicitly acknowledged that "in a general sense concerns for proportionality animate the Takings Clause."[82]

IV. SUPREME COURT PRECEDENT

The retroactivity causation standard was not first announced in *Eastern Enterprises*. Rather, its components—anti-retroactivity and causation—have been a partially hidden concern in many Supreme Court property rights cases, not just takings cases. Prior to *Eastern Enterprises*, the Supreme Court in the *Landgraf*[83] case reaffirmed that the Constitution expresses concern with secondary retroactivity through several of its provisions. The Court's reliance on a causation test can be seen in two pre-*Eastern Enterprises* takings cases—*Nollan v. California Coastal Commission*[84] and *Dolan v. City of Tigard*.[85]

A. Landgraf *and Anti-retroactivity*

In 1994, in the important *Landgraf* case, the Court recognized that two requirements must be met for retroactive legislation (specifically, laws that operate with secondary retroactivity) to be valid. First, the legislative body must have unambiguously expressed its intent for the law to be secondarily retroactive.[86]

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80. *See* LAITOS, LAW OF PROPERTY RIGHTS PROTECTION, *supra* note 35, § 10.09; Jan G. Laitos, *Takings and Causation*, 5 WM. & MARY BILL OF RTS. J. 359, 360-65 (1997) (Takings and Causation).

81. 526 U.S. 687 (1999).

82. *Del Monte Dunes*, 526 U.S. at 698.

83. Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

84. 483 U.S. 825 (1987).

85. 512 U.S. 374 (1994).

86. *See Landgraf*, 511 U.S. at 270 (citing United States v. Heth, 7 U.S. (3

Without clear legislative intent, a law is presumed to apply prospectively only.[87] Second, even if the legislature clearly expresses its intent that the law apply with secondary retroactivity, the law may still be invalidated if it violates one of the "antiretroactivity principle[s that] find expression in several provisions of our Constitution."[88]

These "antiretroactivity principles" may be used by private parties whose pre-enactment conduct provides them with *protected legal status* from application of the new law. When a private party's pre-enactment conduct has protected a legal status, even a law which is intended by the legislature to be secondarily retroactive may not operate to adversely affect these earlier private actions.[89] Whether private actions have a protected legal status with respect to laws intended to be secondarily retroactive depends on what the *Landgraf* Court calls a "process of judgment" that considers three factors: (1) the "nature of the change in the law," (2) the "extent of the change in the law," and (3) "the degree of connection between the operation of the new rule and a relevant past event."[90] While the primary function of these three factors is to determine whether a statute operates with "true retroactivity," they also control whether pre-enactment conduct has achieved protected legal status. If so, the conduct is immunized from retroactivity even when the legislature expressly intends for the legislation to be retroactive.

The first consideration—"the nature of the change in the law"—focuses on the nature of the legal interest affected by the change. Protected legal status tends to be conferred on an exist-

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Cranch) 399, 413 (1806)).

87. *See id.* at 280; Craig v. Eberly, 164 F.3d 490, 493-95 (10th Cir. 1998).

88. *See Landgraf*, 511 U.S. at 266; *accord Eastern Enters.*, 524 U.S. at 502 (plurality opinion).

89. *See* Maitland v. University of Minn., 43 F.3d 357 (8th Cir. 1994) (stating that if a statute reveals Congress' intent that the statue is to be retroactive, that intent governs unless such an application would violate the Constitution); Arledge v. Holnam, Inc., 957 F. Supp. 822, 828 (M.D. La. 1996) ("Even if the legislature made the law retroactive, such an effect must be constitutional."); State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 61 (Fla. 1995) ("Even when the legislature does expressly state that a statute is to have retroactive application, this Court has refused to apply the statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties."); *see also* LAITOS, LAW OF PROPERTY RIGHTS PROTECTION, *supra* note 35, § 16.05.

90. *Landgraf*, 511 U.S. at 270.

ing legal interest either determined to be a "vested right" that would otherwise be impaired by the new law[91] or a contract right specially protected against the change by the Contracts Clause.[92] The *Landgraf* Court concurs. *Landgraf* finds laws retroactive (often impermissibly so) if they "[impair] vested rights acquired under existing laws."[93] The Court's opinion also notes that "new provisions affecting contractual or property rights [are] matters in which predictability and stability are of prime importance"[94] and that the Contracts Clause "prohibits [s]tates from passing . . . retroactive . . . laws 'impairing the Obligation of Contracts.'"[95]

The second consideration—"the extent of the change in the law"—requires reviewing courts to take into account the degree and kind of impact that the changed law has on existing rights.[96] Protected legal status is most often afforded to property holders where the extent of change causes property either to be (1) unconstitutionally "taken" without just compensation[97] or (2) subject to certain kinds of new duties or liabilities with respect to past events.[98] The *Landgraf* Court specifically notes

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91. *See, e.g.*, Resolution Trust Corp. v. Fleischer, 892 P.2d 497, 500-01 (Kan. 1995); Steinfeld v. Nielsen, 139 P. 879, 896 (Ariz. 1913); Hansen Bros. Enters. v. Board of Supervisors of Nevada County, 907 P.2d 1324, 1344 (Cal. 1996) (remanding to determine the extent of the company's vested rights to mine and quarry its property).

92. *See, e.g.*, Educational Employees Credit Union v. Mutual Guar. Corp, 50 F.3d 1432, 1438-39 (8th Cir. 1995); *In re* Workers' Compensation Refund W. Nat'l Mut. Ins. Co., 46 F.3d 813, 821 (8th Cir. 1995); Holiday Inns Franchising Inc. v. Branstad, 29 F.3d 383, 385 (8th Cir. 1994). A contract is often seen as a vested right. *See* Spradling v. Colorado Dep't of Revenue, 870 P.2d 521, 523 (Colo. Ct. App. 1993).

93. *Landgraf*, 511 U.S. at 269. The Court characterizes the Takings Clause as a constitutional protection against legislative attempts to deprive private persons of "vested property rights." *See id.* at 266. In his concurring opinion, Justice Scalia criticizes the majority opinion's "vested right focus." *See id.* at 290-93.

94. *Id.* at 271.

95. *Id.* at 266.

96. The extent of the new liability imposed on pre-enactment conduct was a primary reason why the *Landgraf* Court refused to apply the 1991 Amendments to the Civil Rights Act retroactively. *See Landgraf*, 511 U.S. at 283-84.

97. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994); Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991).

98. *See, e.g.*, Rivers v. Roadway Express, Inc., 511 U.S. 298, 304 (1994) (holding that § 101 of the 1991 Civil Rights Act cannot be retroactive because it imposes

that the anti-retroactivity principle is particularly strong with respect to "new provisions affecting . . . property rights"[99] and that it is the "Takings Clause [which] prevents the Legislature (and other government actors) from depriving private persons of vested property rights."[100] With respect to the imposition of new duties or liabilities, both *Landgraf* and its companion case, *Rivers*,[101] failed to specify which particular provision in the Constitution would most likely be implicated. One suspects that both the Takings and Due Process Clauses could be advanced to resist such retroactive creation of duties or liabilities. Five Justices in *Eastern Enterprises* thought so.[102]

The third consideration—"the degree of connection between the operation of the new rule and a relevant past event"—is really an inquiry into the essential fairness of a secondarily retroactive law. Private property right-holders have protected legal status with respect to a new retroactive law if it would be fundamentally "unfair" to apply the law so as to affect their existing rights.[103] Such fundamental unfairness is present

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"important new legal obligations" on employers for past acts); Davon, Inc. v. Shalala, 75 F.3d 1114, 1122 (7th Cir. 1996) (stating that a statute is retroactive if it attaches new legal consequences, in the form of new mandatory payments to a fund, for the act of engaging in some pre-enactment conduct); Nickeo v. Virgin Islands Tel. Corp., 42 F.3d 804, 806-07 (3d Cir. 1994) (holding that the Civil Rights Act of 1991 cannot apply retroactively to cases pending at time of enactment of the Act, when to do so would increase liability); P-W Invs., Inc. v. City of Westminster, 655 P.2d 1365, 1371 (Colo. 1982) (stating that a new law cannot take away vested rights or create new obligations or attach a new disability with respect to past transactions); Saint Vincent Hosp. & Health Ctr., Inc. v. Blue Cross & Blue Shield of Mont., 862 P.2d 6, 9 (Mont. 1993) (invalidating a law if it impairs a vested right or creates a new obligation with respect to past transactions); OSI Indus., Inc. v. Utah State Tax Comm'n, 860 P.2d 381, 383 (Utah Ct. App. 1993) ("[A] later statute or amendment should not be applied retroactively so as to deprive a party of its rights or impose greater liability. . . . ").

99. *Landgraf*, 511 U.S. at 271.

100. *Id.* at 266; *see also* Plaut v. Spendthrift Farms, 514 U.S. 211, 237-38 (1995) (stating that the Takings Clause invalidates laws that abrogate vested property interests) (citing Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)).

101. 511 U.S. 298 (1994) (considering whether § 101 of the 1991 Civil Rights Act should apply retroactively to pre-enactment conduct).

102. *Eastern Enters.*, 524 U.S. at 537-38 (plurality opinion relying on Takings Clause); *id.* at 539 (Kennedy, J., relying on the Due Process Clause).

103. *Landgraf*, 511 U.S. at 265 & n.18 ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence. . . . Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. . . . ").

when secondary retroactivity would be inconsistent with due process.[104] *Landgraf* notes that the "Due Process Clause . . . protects the interests . . . that may be compromised by retroactive legislation."[105]

B. The Causation Test

In the first Supreme Court case in which the Court applied a causation test, *Nollan v. California Coastal Commission*,[106] the Court found that an uncompensated taking occurred when a state agency granted a building permit to property owners subject to the owners' cession of a lateral easement across their beachfront property. The Court invalidated the conditional permit because the easement would not eliminate the problems that the new construction would cause.[107] Justice Scalia, writing for the majority, focused on causation in his takings analysis, noting that it was "impossible to understand how [the permit condition] . . . helps to remedy any additional congestion on [the public beaches] *caused* by construction of the Nollans' new house."[108]

In *Nollan*, the Court tied its causation standard to *Armstrong*'s "fairness" justification.[109] The fairness requirement presumes that a regulation may not impose on property owners a responsibility for correcting societal problems that they did not create.[110] That responsibility would be inconsistent with the notions of equality subsumed within *Armstrong*'s fairness justification:

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104. *See, e.g.*, Walz v. Town of Smithtown, 46 F.3d 162, 169 (2d Cir. 1995); National Union Fire Ins. Co. of Pittsburgh v. City Sav. F.S.B., 28 F.3d 376, 394 (3d Cir. 1994); Adamson Cos. v. City of Malibu, 854 F. Supp. 1476, 1490-91 (C.D. Cal. 1994).

105. *Landgraf*, 511 U.S. at 266. *Landgraf* also states that "a justification sufficient to validate a statute's prospective application under the [Due Process] Clause 'may not suffice' to warrant its retroactive application." *Id.*

106. 483 U.S. 825 (1987).

107. *Nollan*, 483 U.S. at 838-39 ("It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house.").

108. *Id.* (emphasis added).

109. *Id.* at 835-36 n.4.

110. *See Armstrong*, 364 U.S. at 49.

> If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems [of congestion on public beaches], *although they had not contributed to it more than other coastal landowners,* the state's action . . . might violate either the incorporated Takings Clause or the Equal Protection Clause. . . . [111]

The Court's decision in *Nollan* does not conform to utilitarian principles. The permit exaction that the state agency demanded is a utilitarian attempt to redistribute resources from a relatively wealthy landowner to less wealthy users of public beaches, resulting in a net societal benefit.[112] In *Nollan*, the Court rejected the utilitarian argument that because society benefits from expanded public lateral easements across beaches, no compensable taking occurred.[113] Instead, consistent with Rawlsian theory, Justice Scalia suggested that the method of delivering that benefit should be a simultaneous easement against all coastal property owners, rather than singling out those who requested building permits.[114]

In *Dolan v. City of Tigard*,[115] the Supreme Court applied *Nollan's* causation test to declare unconstitutional a regulation that required a landowner to dedicate a portion of her property to the city for a storm drainage system and a pathway prior to receiving a permit to expand her commercial property.[116] The Court held that the condition was a taking, in large part because of the absence of causation: "[The city] has not identified any 'special quantifiable burdens' *created by* her [proposed expansion] that would justify the particular dedications required from her. . . . "[117] The Court concluded that the pathway was a public good and was largely unrelated to the proposed property

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111. *Nollan*, 483 U.S. at 835-36 n.4 (quoting *Armstrong*, 364 U.S. at 49) (emphasis added); *see* Note, *The Principle of Equality in Takings Clause Jurisprudence*, 109 HARV. L. REV. 1030, 1036 (1996) [hereinafter *Harvard Note*].

112. Raymond, *supra* note 61, at 612.

113. *Nollan*, 483 U.S. at 841.

114. *Id.* at 835-36 n.4.

115. 512 U.S. 374 (1994).

116. *Dolan*, 512 U.S. at 386.

117. *Id.* at 386 (emphasis added); *see also* Douglas Kmiec, *At Last, The Supreme Court Solves the Takings Puzzle, in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 112-13 (David L. Callies ed., 1996).

expansion.[118] Thus, those who wanted the pathway should fund it.

The *Dolan* rule requires that the government show that an owner's property use would cause a societal evil and that the government's use restriction would address that evil.[119] *Dolan* requires that when a government conditions issuance of a permit, a "rough proportionality" must exist between what the property owner gives up and "the impact of the proposed development."[120]

Crucial to *Dolan's* test is "impact"—the Court must expect to find that the planned property use will cause a societal problem (have an impact) that the government action intends to alleviate.[121] Absent causation, as in *Dolan*, a regulation violates *Armstrong's* notion of fairness and Rawlsian requirements of equality. Without a causal link, some "people alone" bear public burdens.[122] Indeed, *Dolan* cites *Armstrong* for the proposition that without a causative nexus between impact and condition, the government effectively selected the burdened owner to cede property to the state for public use.[123] Such action facially violates the Takings Clause.

A land-use regulation that does not meet the causation test is "an out-and-out plan of extortion"[124] that forces certain property owners to bear the cost of a general community benefit.[125] *Dolan* also marks the Court's adoption of Rawls' theory of justice. Rawls believed that persons should pay their fair share of the additional costs that their actions created, but not the full

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118. *Id.* at 395-96.

119. *See generally id.*

120. *Id.* at 391.

121. *See generally Dolan*, 512 U.S. at 395-96.

122. *Id.* at 384 (citing United States v. Armstrong, 364 U.S. 40, 49 (1960)).

123. *Id. Dolan* overruled several lower court cases that upheld dedication requirements even when the dedications were not intended to address a societal evil attributable to the property use. *See, e.g.*, Association of Home Builders v. City of Walnut Creek, 484 P.2d 606, 610, 618 (Cal. 1971).

124. Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987) (citing J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)); *see also* Lambert v. City and County of San Francisco, 950 P.2d 59 (Cal. 1998), *cert. denied*, 120 S. Ct. 1549 (2000), where in a dissenting opinion from the denial of certorari, three justices noted that a taking could occur when a government extortionate demand from a property owner was either a condition precedent or subsequent.

125. *Armstrong*, 364 U.S. at 49.

price of a public good.[126] In *Dolan*, the Court reflected this view by holding that it would be a taking to exact from a landowner a concession that was disproportionate to the problems the landowner created.[127]

Although, prior to *Eastern Enterprises*, the Court had not decided whether causation was a relevant inquiry in a takings challenge to a law that burdened or restricted an owner's property use, Justice Scalia stated the case for a causation test in a pure regulation-of-property setting in his strongly worded partial dissent in *Pennell v. City of San Jose*.[128] In *Pennell*, apartment owners challenged a rent control ordinance that required hearing officers to determine the reasonableness of proposed rent increases in relation to several factors.[129] One of these factors was "the economic and financial hardship imposed on the present tenant or tenants . . . to which such increases apply."[130] Justice Scalia's partial dissent, in which Justice O'Connor joined, confronted the merits of this takings claim.[131]

Scalia began by citing *Armstrong's* justification for the Takings Clause.[132] He then explained why traditional land-use regulation does not violate this rationale:

> [T]here is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly.[133]

If a cause-and-effect relationship does not exist, however, then the regulation violates the equality/fairness justification undergirding the Takings Clause.

Scalia argued, consistent with Rawlsian theory and the *Armstrong* rationale, that the Takings Clause prevents "the unfairness of making one citizen pay, in some fashion other than

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126. RAWLS, *supra* note 53, at 28, 61-63, 112; Raymond, *supra* note 61, at 615.

127. *See generally Dolan*, 512 U.S. at 386.

128. 485 U.S. 1 (1988) (holding that the takings claim was premature).

129. *Pennell*, 485 U.S. at 4.

130. *Id.* at 5.

131. *Id.* at 15-24 (Scalia, J., concurring in part and dissenting in part).

132. *Id.* at 19 (Scalia, J., concurring in part and dissenting in part) (citing *Armstrong*, 364 U.S. at 49).

133. *Id.* at 20 (Scalia, J., concurring in part and dissenting in part).

taxes, to remedy a social problem that is none of his creation."[134] Because the apartment owners were not responsible for the fact that some renters were too poor to afford reasonably priced housing, the city's rent control law merely provided an opportunity "to establish a welfare program privately funded by those landlords who happen to have 'hardship' tenants."[135]

A regulation without compensation cannot be a proper exercise of legislative power because it requires landlords to correct a societal problem that they did not cause. This disproportionate burden violates Rawls' equality principle. As Justise Scalia noted, that burden is inconsistent with "our traditional constitutional notions of fairness."[136] Justice Scalia's partial dissent in *Pennell*, his opinion in *Nollan*, and the majority's reasoning in *Dolan* all laid the groundwork for a majority of the Court to adopt a test in *Eastern Enterprises* that is concerned with proportionality and causation.[137] In *Del Monte Dunes*, the Court's 1999 takings case, the Court confirmed that "concerns for proportionality animate the Takings Clause."[138]

V. THE RETROACTIVITY CAUSATION STANDARD APPLIED

When the four-Justice plurality and Justice Kennedy relied on the retroactivity causation standard to strike down the Coal Act, they were simply re-affirming what lower federal and state courts had been doing pre-*Eastern Enterprises* when confronted with laws that subject property owners with new burdens or obligations.[139] Now that five Justices have coalesced around a

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134. *Pennell*, 485 U.S. at 23 (Scalia, J., concurring in part and dissenting in part).

135. *Id.* at 21-22 (Scalia, J., concurring in part and dissenting in part).

136. *Id.* at 22 (Scalia, J., concurring in part and dissenting in part); *see* Kmiec, *supra* note 117, at 1652-54.

137. The causation test was earlier suggested in LAITOS, *supra* note 35, at 10.09[A]; Laitos, *Takings and Causation*, *supra* note 80; Edward H. Ziegler, *Partial Takings Claims and Horizontal Equity: Making Sense of Fundamental Fairness and Development Restrictions*, 19 ZONING & PLAN. L. REP. 53 (1996).

138. 526 U.S. at 698. In *Del Monte Dunes*, the Supreme Court affirmed the Ninth Circuit's decision that a taking had occurred when a city's dedication requirement was *disproportional* to the impact *caused* by the property development. Del Monte Dunes at Monterey v. City of Monterey, 95 F.3d 1422, 1432 (9th Cir. 1996).

139. *See, e.g.*, American President Lines, Ltd. v. United States, 291 F.2d 931,

theory, many post-*Eastern Enterprises* cases are relying on retroactivity and causation to determine whether new rules imposing burdens on property owners should be declared unconstitutional. For example, in two post-*Eastern Enterprises* cases, *Association of Bituminous Contractors, Inc. v. Apfel*,[140] and *Unity Real Estate Co. v. Hudson*,[141] the federal circuits there explicitly used the new retroactivity causation to determine if the Coal Act could apply to coal companies whose factual connection to the coal industry was different than that posed by the plaintiff in *Eastern Enterprises*.

In *Association of Bituminous Contractors, Inc. v. Apfel*,[142] the D.C. Circuit Court of Appeals agreed that the test emerging from the scattered opinions in the *Eastern Enterprises* case was whether there was "proportionality" between a new law's imposition of retroactive liability and the amount of "participation" by the burdened party in the events leading to the imposition of liability.[143] In a fact situation similar to the one facing Eastern Enterprises, the members of a Coal Association who had been made retroactively liable by the Coal Act argued that the Act was unconstitutional on due process grounds.[144] One primary ground for this argument was that they had not been "the dominant cause" of underfunding of the retiree's trust fund.[145]

The D.C. Circuit rejected this argument and upheld the retroactive liability because the Coal Association members, unlike Eastern Enterprises, had signed agreements while still active in the coal industry. These agreements had "created an expectation of lifetime benefits that the employers (i.e., the Coal Association members) who participated in the agreements *were responsible for creating*."[146] These past agreements not only

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935-36 (Cl. Ct. 1961) (finding that the Maritime Commission's modified definition of "capital" within a statute requiring operators to give the government one-half of the profits above 10% of capital was invalid because it was (1) unreasonably retroactive and (2) discriminatory because there was no rational basis for singling out a particular class of ship operators to comply with the new definition).

140. 156 F.3d 1246 (D.C. Cir. 1998).

141. 178 F.3d 649 (3d Cir. 1999).

142. *Apfel*, 156 F.3d at 1246.

143. *Id.* at 1256.

144. *Id.* at 1247.

145. *Id.*

146. *Id.* (emphasis added).

satisfied the causation prong of the retroactivity causation standard, but they also constituted sufficient evidence of foreseeability to avoid problems of retroactivity.[147] The Coal Act could therefore single out the plaintiffs to bear the cost of the new law, because the plaintiffs were partially responsible for the societal problem sought to be addressed by the law and because the normal concerns about retroactivity had been obviated by their own behavior.

Similarly, in *Unity Real Estate Co. v. Hudson*,[148] the Third Circuit revisited the constitutionality of the Coal Act in a case brought by companies in a different factual situation than the *Eastern Enterprises* plaintiff. Unlike *Eastern Enterprises*, the plaintiffs in *Unity Real Estate* had promised, explicitly and implicitly, to fund the benefit plan for which they were now retroactively liable as a result of the Coal Act. Moreover, the *Unity Real Estate* plaintiffs had a much longer history in the coal industry—their participation ended over thirty years after *Eastern Enterprises* left the industry. These facts led the Third Circuit to conclude that the "retroactivity causation" standard had been satisfied, which meant defeat for the plaintiffs' due process challenge to the Coal Act.

The *retroactivity* prong of the test was satisfied because the plaintiffs had voluntarily negotiated for and adhered to agreements that had initially established participation in the benefit funds which Congress later made mandatory.[149] Also, the length of retroactivity for the *Unity Real Estate* plaintiffs was more reasonable than that experienced by *Eastern Enterprises*. For *example*, Unity Real Estate's contractual obligations to pay for the miners' benefits had expired eleven years prior to the Coal Act's imposition of liability. Furthermore, B&T, the other plaintiff in the *Unity Real Estate* case, had fulfilled its contractual obligations to pay for miners' benefits only four years before the Coal Acts imposed retroactive liability. For *Eastern Enter-*

147. *Apfel*, 156 F.3d at 1256-57.

148. 178 F.3d 649 (3d Cir. 1999).

149. *Unity Real Estate*, 178 F.3d at 661. Significantly, the court relied on an "implicit promise (that is, one not clearly found in the contract)" to find the existence of a benefit plan, thereby eliminating the requirement that a property owner make an express promise in a contract to justify retroactive imposition of liability. *Id.* at 665.

prises on the other hand, there was a thirty-year gap between the company's exit from the coal business and the enactment of the Coal Act.[150]

Causation was met in *Unity Real Estate* because the companies' departure from the coal business "helped to create the financial crisis . . . that ultimately led to the Coal Act."[151] Given the *Unity Real Estate* plaintiffs' lengthy tenure in the coal business (unlike Eastern Enterprises), "it was surely foreseeable that departures would lead to [financial] instability."[152] Although the companies argued that they were not the dominant cause of the underfunding that ultimately led to the passage of the Coal Act, the Third Circuit responded with the following bootstrap response: "[T]hough . . . [a coal company's] individual contribution to the problem was small, the aggregate effects of its actions and parallel actions by other companies contributed to the problem."[153] If adopted elsewhere, this "aggregate effects" argument could swallow the causation test, since the cumulative aggregate effects of insignificant individual contributors to a problem inevitably become a significant cause of the problem. An "aggregate effects" rationale is also at odds with the notion that there be some proportionality between any harm attributable to the property owner's action and the government's imposition of regulatory burdens on that owner.

Other cases have tended to rely separately on either the anti-retroactivity or causation components of the standard in deciding whether to strike laws imposing new burdens on property owners.

A. Anti-retroactivity Concerns

A private property owner is immunized from new laws that operate with secondary retroactivity if that party's pre-enactment conduct has a "protected legal status." As noted earlier,[154] both the *Landgraf* case and five Justices in the *Eastern*

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150. *Id.* at 670.
151. *Id.* at 661.
152. *Id.* at 662.
153. *Unity Real Estate*, 178 F.3d at 663.
154. *See supra* notes 88-104 and accompanying text.

Enterprises case suggest that private parties may, in certain situations, acquire a protected legal status that prevents the operation of a newly-enacted law to apply to their pre-existing property interests. This protected legal status attaches if their pre-enactment legal interest otherwise affected by the retroactive law is subject to the proscriptions of (1) the Takings Clause,[155] (2) the Due Process Clause,[156] (3) the Contracts Clause,[157] or (4) the vested rights doctrine.[158] The four-Justice plurality in *Eastern Enterprises* found protected legal status in the Takings Clause, while Justice Kennedy's concurrence found it in the Due Process Clause.

Recent lower court decisions have reaffirmed that the validity of laws applying with secondary retroactivity should often be resolved according to whether the property owner has a pre-enactment protected legal status under one of the four above-listed property rights doctrines. As in the *Eastern Enterprises* case, the issue is not simply whether the new law is, for example, a taking or a due process violation, but it is whether the new law is inconsistent with the anti-retroactivity component of the particular property rights doctrine being asserted as conferring the protected legal status.

Takings.—One theme that pervades recent takings cases is the issue of whether the property owner subject to the new and retroactive law had "reasonable investment-backed expectations" subsequently interfered with by the law.[159] If the plaintiff-owner's expectations are reasonable and if they have arisen as a result of prior government action (the same government that is now interfering with them), then the owner might have a protected pre-enactment status, immunizing that expectation from retroactive change under the Takings Clause. An investment-

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155. *See supra* notes 96-99.

156. *See supra* notes 102-04.

157. *See supra* notes 91-94.

158. *See supra* notes 90, 99.

159. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980). This "investment-backed expectation" test was initially developed in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). One important corollary issue that must be resolved alongside the investment-backed expectations question is whether the plaintiff has a *property* interest protected under the Takings Clause. *See, e.g.*, Phillips v. Washington Legal Found., 524 U.S. 156 (1998); Greater Dallas Home Care Alliance v. United States, 10 F. Supp. 2d 638, 646 (N.D. Tex. 1998).

backed expectation conferring protected legal status can exist as a result of pre-enactment statutory and common law protection,[160] contractual obligations with the government entity now wishing to renege on its earlier promises,[161] or a lack of notice regarding the likelihood of new restrictive regulations, coupled with affirmative indications by the regulatory body that development without the new regulations was permissible.[162]

Due Process.—Justice Kennedy's concurrence in *Eastern Enterprises* acknowledges that when a legislature decides to proceed retroactively, this decision must meet the guarantees of due process.[163] This is because, even if a legislative body expressly commands that a law apply retroactively, that law may do so only if it does not affect property interests that have some protected legal status. Due process considerations afford protected legal status when retroactivity would be either grossly *unfair* to the private party affected by the new law[164] or *inconsistent* with the goals of the new law.[165] In both situations, due process is the constitutional proscription ensuring that the retroactive law will not be permitted to apply to the party who has been able to successfully assert protected legal status.[166]

Contracts Clause.—Another source of protected legal status may be found in the Contracts Clause.[167] The United States Supreme Court has announced that the Contracts Clause may protect contracting parties from the consequences of retroactive

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160. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (trade secret protection); Philip Morris, Inc. v. Harshbarger, 159 F.3d 670 (1st Cir. 1998) (trade secret protection).

161. Bailey v. North Carolina, 500 S.E.2d 54 (N.C. 1998) (finding successful takings challenge to legislation placing a cap on tax exemption for state and local government employees' retirement benefits).

162. Golf Club of Plantation, Inc. v. City of Plantation, 717 So. 2d 166 (Fla. Dis. Ct. App. 1998).

163. *Eastern Enters.*, 524 U.S. at 547.

164. *See, e.g.*, Rivers v. South Carolina, 490 S.E.2d 261 (S.C. 1997) (retroactive tax legislation violates due process, as it contradicts the taxpayers' legitimate interest in finality regarding tax liabilities).

165. *Eastern Enters*, 524 U.S. at 549 ("[T]he [retroactive] remedy created by the Coal Act bears no legitimate relation to the interest which the Government asserts in support of the statute.") (Kennedy, J., concurring).

166. Mathews v. Kidder, Peabody & Co., 161 F.3d 156, 160 n.4 (3d Cir. 1998); Adams v. Hinchman, 154 F.3d 420, 424-25 (D.C. Cir. 1998); *see also* General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992).

167. U.S. CONST. art. I, § 10, cl. 1.

impairments to contracts with public[168] and private entities.[169] Although retroactive statutes that are necessary for the public good are usually constitutional if they only incidentally affect existing contracts between private parties,[170] if the retroactivity would substantially alter or void existing contractual obligations, the private parties affected by the retroactivity have protected legal status through the Contracts Clause.[171] Where a state is a party to the contract, the plaintiff has an even greater likelihood of being able to assert a protected legal status in the contract, thereby preventing its terms from being impaired by retroactive legislation.[172]

Vested Rights.—A private party who has a vested right *in* an existing property interest or *to* some future government benefit usually cannot have that vested right taken away or denied by some retroactively-applying law.[173] A unilateral expectation, linked simply to an application, is not a vested right when the government body that passes on it has discretion to deny it.[174] However, when an interest or expectation becomes vested prior to the enactment of a law that would retroactively impair or reject it, the holder of the interest/expectation has a protected legal status in the vested right.[175] Binding contract rights pro-

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168. United States Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977).

169. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978).

170. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411 (1983).

171. Empire Sanitary Landfill, Inc. v. Pennsylvania, 684 A.2d 1047, 1059 (Pa. 1996); First Nat'l Bank of Pennsylvania v. Flanagan, 528 A.2d 134, 137 (Pa. 1987).

172. Mascio v. Public Employees Retirement Sys. of Ohio, 160 F.3d 310, 314-15 (6th Cir. 1998). *But see* Liberty State Bank v. Minnesota Life & Health Ins. Guarantee Ass'n, 149 F.3d 832, 835 (8th Cir. 1998) (deferring to a legislature's judgment about a statutory "curative" remedy that retroactively impaired existing public contracts).

173. *See, e.g.*, Link v. Venture Stores, Inc., 677 N.E.2d 486, 488-89 (Ill. App. Ct. 1997) (finding that a vested right existed *in* a cause of action of negligence that accrued before a later statute attempted to invalidate it); State *ex rel.* Cunat v. Trustees of Cleveland Police Relief & Pension Fund, 79 N.E.2d 316 (Ohio 1948) (holding thata pensioner has a vested right *to* his future pension which cannot retroactively be impaired or revoked); *see also* Ficarra v. Department of Regulatory Agencies, 849 P.2d 6 (Colo. 1993) (finding that a vested right confers a title, legal or equitable, to the present or future enjoyment of property).

174. Town Pump, Inc. v. Board of Adjustment, 971 P.2d 349, 353 (Mont. 1998).

175. The existence of a vested right is not enough, alone, to confer protected legal status. That protection comes from some specific constitutional provision, such as the Takings, Due Process or Contracts Clauses, that is triggered by a threat to

vide a paradigmatic example of vested rights,[176] although many jurisdictions recognize that a landowner may acquire a vested right by making substantial expenditures in good faith reliance on some form of government permission.[177]

B. Causation and Proportionality

As noted above,[178] both the four-Justice plurality and Justice Kennedy seem to adopt the causation/proportionality test first articulated in the *Armstrong* case.[179] This test, grounded in fairness and justice,[180] has two components. The first component is that it is fundamentally *unfair* to single out certain private property owners to bear the burden of achieving a larger public good, instead of requiring the public at large to share the burden. Five Justices in *Eastern Enterprises* agreed that it would be unfair to force the plaintiff there to bear a public burden that should have been borne by the public as a whole.[181] The second component is that it is *unjust* to target an owner or a group of property owners to bear the new regulation's costs if their use of property has not caused the social problem that the regulation seeks to redress. The crucial fact upon which the *Eastern Enterprises* plurality and Justice Kennedy relied was that the Coal Act's liability was disproportionate to the plaintiff's past conduct. Disproportionality was present because Eastern Enterprises had not caused the retirees' underfunded

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the vested right. *See, e.g.*, Villa at Greeley, Inc. v. Hopper, 917 P.2d 350 (Colo. Ct. App. 1996) (impairment of a vested right gives rise to a claim for compensation under the Takings Clause).

176. United States v. Illinois Pollution Control Bd., 17 F. Supp. 2d 800, 808-09 (N.D. Ill. 1998).

177. Avco Community Developers, Inc. v. South Coast Regional Comm'n, 553 P.2d 546, 551 (Cal. 1976).

178. *See supra* notes 22-28, 33-35 and accompanying text.

179. *See supra* notes 61-65 and accompanying text.

180. *See supra* notes 66-76 and accompanying text.

181. *See Eastern Enters.*, 524 U.S. at 522 ("noting that [w]hen . . . [a] solution [to complex societal problems] singles out certain . . . [private parties] to bear a burden that is substantial in amount, . . . the government action implicates fundamental principles . . . underlying the Takings Clause.") (four-Justice plurality); *id.* at 501 ("Groups targeted by retroactive laws, were they to be denied all protection [by due process], would have a justified fear that a government once formed to protect expectations now can destroy them.") (Kennedy, J., concurring).

pension plan.[182]

"Fairness."—the courts are increasingly striking down laws involving regulatory burdens imposed on an owner's use of property, where:

> (1) the owner's property is burdened (or "sacrificed"),
> (2) in order to provide a distinct benefit to a group of legislatively-designed beneficiaries,
> (3) so that some perceived larger social problem is remedied.[183]

When the law in question is designed to aid a favored class, because to do so will in theory advance larger societal goals, that law cannot single out another group to bear the brunt of the regulatory burden, especially if the burdened group did not cause the need for the law in the first place. The law will likely be invalidated, usually under the Takings Clause, because it brings about an unfair wealth transfer.[184]

For example, in *Thomas v. Anchorage Equal Rights Commission*,[185] the Ninth Circuit found that a colorable takings claim had been asserted by landlords challenging an anti-discrimination statute that required them to rent their properties to unmarried couples. While the Court concluded that the statute had worked a taking since it authorized a physical invasion of the landlord's property,[186] it grounded this holding in the fairness doctrine: "[A] landlord's inability to choose his tenants 'may be relevant to a regulatory taking . . . [when the law] . . .

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182. *Id.* at 528 ("[The Takings Clause is implicated because] certain employers [must] bear a burden that is . . . unrelated to any commitment that the employers made or to any injury they caused. . . .") (four-Justice plurality); *id.* at 501 ("*Eastern* was not responsible for the resulting chaos in the funding mechanism caused by other coal companies. . . . ") (Kennedy, J., concurring). *Accord* Association of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1256-57 (D.C. Cir. 1998).

183. *See* Edward H. Ziegler, *Partial Takings Claims and Horizontal Equity: Making Sense of Fundamental Fairness and Development Restrictions*, 19 ZONING & PLANNING L. REP. 7 (1996).

184. *See, e.g.*, Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 484-85 (N.Y. 1994) ("A proffered State interest, which by definition should serve and protect the general populace on a fairly and uniformly applied basis, should not be countenanced when . . . the statute instead benefits one special class for an essentially unrelated economic redistribution. . . . ").

185. 165 F.3d 692 (9th Cir. 1999), *rehearing granted, opinion withdrawn by* Thomas v. Anchorage Equal Rights Comm'n, 192 F.3d 1208 (9th Cir. 1999).

186. *Thomas*, 165 F.3d at 709.

unjustly imposes a burden on [a] petitioner that should be compensated by the government, rather than remain[ing] disproportionately concentrated on a few persons.'"[187]

In *Thomas*, as in *Eastern Enterprises*, a favored group (unmarried couples in *Thomas*; retired miners in *Eastern Enterprises*) benefitted at the expense of a property owner (landlords in *Thomas*; the coal company in *Eastern Enterprises*) in order to bring about a larger social goal (antidiscrimination in *Thomas*; post-retirement financial security in *Eastern Enterprises*).[188] The fairness doctrine limits these kinds of economic redistributions.[189]

One recent state case, *Bormann v. Kossuth County*,[190] reflects the same sentiment as *Thomas*. *Bormann* involved an Iowa statute that gave immunity from nuisance claims to farm operations.[191] After a county designated 960 acres as an "agricultural area," neighboring property owners alleged that the

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187. *Id.* at 708 (quoting in part from Yee v. City of Escondido, 503 U.S. 519, 531 (1992) (quoting Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978))).

188. *Id.*

189. Another recent rental housing case was decided on the same fairness grounds as *Thomas*. In *Bernard v. Scharf*, 675 N.Y.S.2d 64 (App. Div. N.Y. 1998), the court considered a New York City law that compelled the rebuilding of fire-damaged rental buildings. The law had been passed to ensure that a larger public good would be achieved—sufficient rental housing for tenants in the city. When the law was applied to an underinsured, fire-damaged building, the court found that it had worked a taking, especially when the cost of restoration would be $4.5 million, while the value of the restored building would be just $1 million. The takings holding was grounded in the assumption that to compel the owners to spend more than $4 million to create $1 million in value would improperly force the owners to pay for benefits to a favored class (tenants) that should instead be a public burden. *Scharf*, 675 N.Y.S.2d at 65-67. The California state courts take a somewhat contrary view with respect to ordinary rent control laws (those that establish maximum allowable rents). Such laws in California do not constitute regulatory takings because they advance the goals of rent control—providing affordable housing for the poor, the elderly and young families. Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993, 1002-07 (Cal. 1999). Moreover, even a rent control ordinance that does not allow a constitutionally minimum return is not a compensable regulatory taking when (1) the ordinance does not deny all beneficial use of the property, and (2) compensation for lost profits may be obtained via future rent levels. Yee v. Mobilehome Park Rental Review Bd., 73 Cal. Rptr. 2d 227, 234-37 (Cal. App. 1998). In the California courts, it seems that the retroactivity causation standard is not yet in place, and therefore landlords may be saddled with public burdens in order to benefit a target group.

190. 584 N.W.2d 309 (Iowa 1998).

191. *Bormann*, 584 N.W.2d at 311.

immunity law had taken their common law right to bring a nuisance action against farmers who were generating smells, noise, pollution and other negative externalities within the 960 acres.[192] The Iowa Supreme Court agreed, holding that the statute was a per se taking: "When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and *sacrificing those rights for the economic advantage of a few.*"[193] As in *Eastern Enterprises* and *Thomas*, the Court in *Bormann* had decided it would be unfair, and therefore unconstitutional, to impose a regulatory burden on one class of property owners (the neighbors) in order to favor a special class (the farmers).[194]

"*Justice.*"—John Rawls, the *Armstrong* case, and commonsense notions of justice presume that wealth transfers and regulatory burdens may be justified if the social problem sought to be corrected by the transfer and burden has been caused by the party or parties subject to the regulation.[195] There must be some proportionality between any harm caused by the property owner's action and the government's response to the harm (usually in the form of a regulatory burden). Even if an owner's property interest is limited or qualified by a regulation in order to benefit some other group or class, that reallocation of property may nonetheless be just if the owner is in some way responsible for the problem or need addressed by the regulation.[196] Conversely, if property owners subject to regulation did not cause the problem and if there is not proportionality between the property owner's action and the resulting government action, then regulating that class of owners is not only unjust,[197] but it is

192. *Id.* at 312.

193. *Id.* at 322 (emphasis added).

194. *Id.*

195. *See supra* notes 71-76 and accompanying text.

196. *See, e.g.*, Pennell v. City of San Jose, 485 U.S. 1, 19-20 (1988) (Scalia, J. dissenting); Splude v. Apfel, 165 F.3d 85, 91-92 (1st Cir. 1999) (government regulatory burdens acceptable when there is a causative link between the burdened owner and reason for the regulation and when reciprocal benefits inure to the burdened owner).

197. *See* RAWLS, *supra* note 53, at 283 ("There is no more justification for using the state apparatus to compel some citizens to pay for unwanted benefits that others desire, than there is to force them to reimburse others for their private expenses.");

also a likely uncompensated taking or violation of due process.[198]

The United States Supreme Court's *Nollan*[199] and *Dolan*[200] cases are perfect reflections of the causation test in the context of regulatory burdens that take the form of conditions imposed on government permission. In both cases, the applicable condition was found to be a taking because it imposed on property owners a responsibility for correcting societal problems that they did not create. Lower courts have also found that various development "exactions" were takings when there was no causative nexus between the condition and the owner's proposed land use.[201] These cases underscore the principle that justice requires some cause-and-effect nexus between the burdened owner's property and the social need addressed by the condition; they also are consistent with notions of "fairness" in that they reject the notion that owners wishing to develop land may be singled out to bear the cost of addressing community problems for which they are not responsible.

More similar to *Eastern Enterprises* are the cases that address attempts by cities to purchase and redevelop blighted areas, where the cities choose not to invoke their condemnation powers, but instead elect to engage in a course of conduct (e.g., denials of building permits, denial of some city services, publication of redevelopment plans) designed to force the sale of private property at greatly reduced prices. Courts have found that such actions by the government can become takings because they render the property unsaleable in a private market while severely limiting the property's intended use.[202] In these cases, the social need motivating the government action that imposes a

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see also Unity Real Estate Co. v. Hudson, 178 F.3d 649 (3d Cir. 1999).

198. *Eastern Enters.*, 524 U.S. at 499 (plurality opinion); *id.* at 550 (Kennedy, J., concurring); Garneau v. City of Seattle, 147 F.3d 802, 814 (9th Cir. 1998) (O'Scannlain concurring and dissenting); Curtis v. Town of South Thomaston, 708 A.2d 657 (Me. 1998).

199. *See supra* notes 105-12 and accompanying text.

200. *See supra* notes 114-25 and accompanying text.

201. *See, e.g.*, Cupp v. Board of Supervisors, 318 S.E.2d 407 (Va. 1984); St. Onge v. Donovan, 522 N.E.2d 1019 (N.Y. 1988); Andreas v. Village of Flossmoor, 304 N.E.2d 700 (Ill. App. 1973).

202. *See, e.g.*, Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency, 561 F.2d 1327, 1330 (9th Cir. 1977).

private burden is urban blight. But the plaintiffs' property, admittedly depressed, rundown and vacant, has not necessarily caused that condition. Rather, these judicial decisions point out that the sorry state of the plaintiffs' property had been caused by the city itself, not the property owner.[203] As in *Eastern Enterprises*, a regulatory solution had "single[d] out certain [property owners] to bear a burden that is substantial in amount . . . and unrelated to . . . any injury they caused. . . . "[204] The notion of justice argues that this type of legal remedy be invalidated.

VI. CONCLUSION

The *Eastern Enterprises* case has confirmed what some of us have suspected all along: Retroactive laws may be successfully challenged under the Constitution if they impose burdens on property owners to correct a social problem that these owners have not caused.:[205] Such laws are especially vulnerable under the Takings and Due Process Clauses, the two provisions relied upon by the five Justices in *Eastern Enterprises*. This retroactivity causation standard is grounded in sound tradition and policy. Both the four-Justice plurality and Justice Kennedy acknowledge a strong anti-retroactivity concern that is found in the U.S. Constitution.[206] These same Justices acknowledge that heightened scrutiny is called for when the party targeted by the retroactive law has not *caused* the need for the law.[207] Past Supreme Court cases, ranging from *Armstrong*[208] to *Dolan*,[209] concur. Lower court cases have similarly embraced a causation

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203. Amen v. City of Dearborn, 718 F.2d 789, 797-98 (6th Cir. 1983); Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968).

204. *Eastern Enters.*, 524 U.S. at 501-02 (plurality opinion).

205. *See, e.g.*, LAITOS, LAW OF PROPERTY RIGHTS PROTECTION, *supra* note 35, § 10.09, §§ 16.04-16.05; Ziegler, *supra* note 183; Kmiec, *supra* note 117; *Harvard Note*, *supra* note 111.

206. *Eastern Enters.*, 524 U.S. at 533-34 (plurality opinion); *id.* at 547-49 (Kennedy, J., concurring).

207. *Id.* at 2149, 2153 (plurality opinion); *id.* at 2159 (Kennedy, J., concurring).

208. *See supra* note 62.

209. *See supra* note 110.

standard,[210] which conforms to the teachings of John Rawls.[211] Perhaps now the American judiciary is beginning to accept what Justice Holmes pointed out many years ago: "In general it is not plain that a man's misfortunes or necessities will justify shifting the damages to his neighbor's shoulders."[212]

210. *See supra* notes 177-203 and accompanying text.
211. *See supra* notes 52-76 and accompanying text.
212. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).