

DID *EASTERN ENTERPRISES* SEND ENTERPRISE RESPONSIBILITY SOUTH?

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I. INTRODUCTION

Since the end of the *Lochner*¹ era, constitutional tolerance of policy-based civil retroactivity has been the governing law. We may call this the constitutional tolerance of the "enterprise responsibility" principle, for the most important contemporary issues concern civil legislative imposition of retroactive responsibility for social burdens on business enterprises. *Eastern Enterprises*² invalidated a federal statute (the "Coal Act" or "Act") that imposed liability for coal miners' widows' health benefits upon business enterprises reaching back to miners employed thirty to fifty years earlier. That result raises the question: Did *Eastern Enterprises* send enterprise responsibility "south," that is, did it markedly diminish the constitutional tolerance of Congressional imposition of retroactive responsibility for social burdens on business enterprises?

To read *Eastern Enterprises* as a broad statement against the constitutionality of retroactive legislation is both easy³ and wrong. A five Justice majority of the Court expressly and firmly rejected making retroactive legislation a "taking" and left the legal standard where it had always been.⁴ The constitutional

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The author would like to thank Judge Eric Bruggink and Robert K. Huffman for invaluable practical assistance, Heather Akehurst-Krause for able research assistance, and the skilled staff of Emily R. Greenberg for its library/computer assistance.

1. *Lochner v. New York*, 198 U.S. 45 (1905).

2. *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998).

3. See *The Supreme Court Leading Cases*, 112 HARV. L. REV. 122, 213 (1998) (acknowledging in *Eastern Enterprises* a "sea of disputes" and "disagreement along several axes" but claiming to find "a bedrock principle with which all nine Justices seemingly concurred").

4. *Eastern Enters.*, 524 U.S. at 528 (plurality opinion).

challenge to retroactive legislation continues to be substantive due process, with all the strong limiting precedents and principles upon judicial invalidation built up in reaction to the *Lochner* era. Indeed, the Court will not repeat its ruling in *Eastern Enterprises* absent some implicit factors, consistent with its post-*Lochner* substantive due process rulings, signifying what this Article will call "highly aggravated retroactivity." Those factors of highly aggravated retroactivity, what the *Eastern Enterprises* plurality calls in its conclusion an "extremely retroactive burden,"⁵ continue the post-New Deal consensus that Congress, not the Supreme Court, must generally determine when such urgency or appropriateness attends the remediation of a social burden that it cannot be phased in prospectively but must be done faster, that is, retroactively.

What *Eastern Enterprises* tells us of highly aggravated retroactivity's tell-tale factors consists of the combination of: the Coal Act's most striking feature, its extraordinary thirty-to-fifty year reach back; the contract-based, not tort-based, enterprise responsibility principle in the Coal Act, which burdened employers, not (in tort-based fashion) for health problems they had some role in causing, but merely (in contract-based fashion) for having employed the widows' husbands; and Congressional overriding of key "disconnects," namely, retroactively changing the rules in a way that deprived the contracting party of legally formal protective events: (1) its freedom to exit, non-opportunistically, the relevant line of business without subsequent open-ended liability (*Eastern Enterprises*) or (2) its basis for originally consenting to enter a contract with the government, followed by its reliance expenditures from executing that contract (*Winstar*⁶).⁷ The classic phrase in the retroactivity context, "vested rights," captures some of this sense of legally formal protective events.

Distilling the key factors that make up highly aggravated

5. *Id.* at 538.

6. *United States v. Winstar Corp.*, 518 U.S. 839 (1996). For a superior analysis of *Winstar*, see Joshua I. Schwartz, *Assembling Winstar: Triumph of the Ideal of Congruence in Government Contracts Law?*, 26 PUB. CONT. L.J. 481 (1997); Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 GEO. WASH. L. REV. 633 (1996).

7. *Eastern Enters.*, 524 U.S. at 529-37.

retroactivity allows an examination of how *Eastern Enterprises* affected the major categories of retroactivity issues continuing to face us today.⁸ On the "tort" side of enterprise responsibility, the chief questions today concern the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")⁹ and nuclear cleanup, where Congress sometimes imposes heavy retroactive burdens on enterprises with a causation link, albeit not always a strong one, to the social problem. Congress dealt out heavy retroactivity in these contexts based fundamentally in tort for enterprise responsibility, rather than the contract basis seen in *Eastern Enterprises*.¹⁰ Nothing in the contractually-based case of *Eastern Enterprises* necessitates concluding that a majority of the Supreme Court has curtailed Congress' ability to legislate retroactively as in CERCLA regarding burdens linked causally, however weakly, to the enterprise.

On the "contract" side, the chief questions today concern government contracting such as changes made applicable to pre-legislation contracts in subsequent executive pay ceilings and to pre-regulation contracts in subsequent Cost Accounting Standards ("CAS") pension treatment. These matters display little of the factors that led five Justices in *Eastern Enterprises* to find highly aggravated retroactivity. This Article's conclusion is simply this: Congressional power to impose enterprise responsibility Retroactively has not gone south after *Eastern Enterprises*.

8. See generally *Accounting: Effect of Supreme Court Decision on Application of CAS 413, Pay Cap Discussed*, 71 Fed. Contr. Rep. (BNA) 618 (May 3, 1999) (reporting with particular interest on the contention that "[a]nyone who is looking to a 1998 Supreme Court decision to support the striking down of retroactive application of statutory and regulatory requirements as unconstitutional is likely to be disappointed. . . .") (referring to the initial presentation of this Article at the Symposium of the U.S. Court of Federal Claims, Apr. 29-30, 1999).

9. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 (1994).

10. *Eastern Enters.*, 524 U.S. at 531-32 (plurality opinion).

II. HOW THE SOLID OPPOSITION BY FIVE JUSTICES TO A "TAKINGS" ANALYSIS CONTINUES THE CONSTITUTIONAL TOLERANCE OF RETROACTIVITY THAT IS NOT HIGHLY AGGRAVATED

A. *The Opinions*

Eastern Enterprises came onto a comparatively settled scene of judicial tolerance of Congress's power to legislate with civil retroactivity. Since the end of the *Lochner* era, the courts have regarded the issues of civil retroactive legislation like other economic legislation, as one of the social and economic questions left to the legislature.¹¹ In the academic literature¹² and in some of the *Eastern Enterprises* opinions, various arguments against tolerance of Congress' ability to enact retroactive legislation are made, but these were familiar and have long been discounted. That the Constitution has an Ex Post Facto Clause,¹³ that venerated authorities criticize retroactivity,¹⁴ that continental jurisprudence abhors it,¹⁵ and that some consider it violative of "natural law," only serves to underline by contrast the acceptance of civil retroactivity by the judiciary. The arguments that retroactivity normatively imposes lack of notice and, consequently, lack of consciousness of any violation and that retroactively inefficiently defeats expectations have long been known¹⁶ and simply discounted.

Since *Lochner* ended, courts have upheld challenges to retroactive civil laws notwithstanding the most dubious basis in ei-

11. "Significantly, since the origination of the tax deference doctrine in 1938, the Supreme Court not only has never sustained a due process challenge to the retroactive application of a tax law, but, more remarkably, has not sustained a due process challenge to any retroactive economic law." Andrew C. Weiler, Note, *Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws*, 42 DUKE L.J. 1069, 1071-72 (1993) (footnotes omitted).

12. James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87 (1993).

13. U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1.

14. *Eastern Enters.*, 524 U.S. at 533 (plurality opinion) (quoting Justice Story).

15. *Id.* (quoting French Civil Code).

16. Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960).

ther normative or efficiency analysis. One example was seen in the Supreme Court case that upheld retroactive provisions for deporting persons who had legally resided in the United States, where such deportation could unfairly impose stark human tragedy for long-ceased, previously legal Communist party membership.¹⁷ Similarly, courts have upheld civil retroactive laws that reduced benefits from government contracts, and older case law holds "that the Government cannot repudiate its own obligations [which have] since been implicitly overruled. . . ." ¹⁸

What has long completely persuaded the Judiciary to leave discretion to Congress, besides the lack of textual or original-intent basis to cramp Congress in this regard, was the strong process-oriented reasoning for deferring to the democratically sovereign Congress since the New Deal. On the one hand, no persuasive analysis has been put forth, nor did any get articulated or accepted in the *Eastern Enterprises* opinions, why groups complaining about civil retroactive legislation affecting their economic expectations cannot make their voices heard in the legislature like any other groups adversely affected by civil economic legislation. Quite the opposite is true. On process grounds, retroactive criminal legislation is suspect, but retroactive civil legislation is not.¹⁹ As Professor Krent's impressive study concluded, "the Court has been comparatively lenient in permitting retroactivity when economic interests are at stake, whether in the tax, pension, or regulatory fields" because from process-based analysis, "interest group theory suggests powerful reasons why we should be more skeptical of retroactive lawmaking in the criminal context and more open to limited retroactivity in economic affairs."²⁰

On the other hand, throughout many of the varied retroactive statutes runs a consistent Congressional theme. Social problems may need legislative action with rapidly effectuated remediation. Retroactivity may be imposed without notice and may disturb expectations, but it phases in the solution to prob-

17. *Harisiades v. Shaughnessy*, 342 U.S. 580, 593 (1952).

18. W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216, 243 (1960) (footnote omitted).

19. Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143 (1996).

20. *Id.* at 2146.

lems rapidly, while prospectivity amounts to gradualism in accomplishing the goals, as well as distributing the burdens, of legislated reform. Like other processes of weighing competing economic interests, the legislature, not the courts, has the legitimacy in striking the balance. In the post-*Lochner* era, the courts yield to Congress on such questions.

It is as easy to read *Eastern Enterprises* as making a big change in this as it is wrong. While two theories for changing the constitutional law regarding retroactivity received extensive consideration, one received a firm rejection, and the other only had the support of a single Justice.²¹ Five Justices expressly rejected the notion of the four-Justice plurality that the challenged Coal Industry Retiree Health Benefit Act effected a taking, and a majority of the Court thus rejected a change in the standard for "takings" and retained the existing legal principles.²² Justice Breyer, speaking for four Justices, said "[a]s a preliminary matter, I agree with Justice Kennedy . . . that the plurality views this case through the wrong legal lens. The Constitution's Takings Clause does not apply."²³ Justice Kennedy provided the fifth vote confirming what Justice Breyer said for four Justices. In Justice Kennedy's concurring and dissenting opinion, he stated, "[t]o call this sort of governmental action a taking as a matter of constitutional interpretation is both imprecise and, with all due respect, unwise."²⁴

None of these five Justices rejecting the view of the statute at issue as an unconstitutional taking arrived at that view lightly or in any way suggested they would help make up a majority of the Court holding the contrary any time soon.²⁵ In a four-page section of his concurring and dissenting opinion, Justice Kennedy, perhaps the key swing Justice on the Court in takings jurisprudence,²⁶ heaped extra analytic scorn about why "the

21. *Eastern Enters.*, 524 U.S. at 539-47 (concurring and dissenting opinions).

22. *Id.* at 539, 554 (concurring and dissenting opinion).

23. *Id.* at 554 (Breyer, J., dissenting).

24. *Id.* at 540 (concurring and dissenting opinion).

25. *Id.* at 539, 556 (concurring and dissenting opinion).

26. The previous key takings case, *Lucas v. South Carolina Coast Council*, 505 U.S. 1003 (1992), had a five Justice majority opinion, including Justice White; the Court now has Justice Breyer, whose views differ from Justice White's. In *Lucas*, Justice Kennedy wrote a separate opinion concurring in the judgment on his own grounds. 505 U.S. at 1032-36. If Justice White had not been on the Court in *Lucas*

plurality is adopting its novel and expansive concept of a taking. . . .²⁷ "[T]he plurality opinion," Justice Kennedy charged, would apply to an "amorphous class of cases," for which the takings analysis is "incongruous," and subject governments "to the potential of new and unforeseen claims in vast amounts."²⁸ The imposition of miners' widows' health care obligations in *Eastern Enterprises* "does not operate upon or alter an identified property interest."²⁹ Just because the Act retroactively burdened employers, however excessively or unfairly, did not make it a taking, Justice Kennedy insisted, because the Takings Clause only prohibits the taking of a specific "property" interest for public use.³⁰

It is particularly significant that Justice Kennedy styled his opinion "concurring and dissenting." That means that five Justices dissented on what he dissented on, namely, the issue of takings. Therefore, according to a majority of the Court, it remains the law after *Eastern Enterprises* that when civil retroactive legislation, such as the Act in that case, does not operate upon a specific "identified property interest," the legislation is not a taking.³¹

However, if the theory for invalidating civil retroactive statutes as takings lacked a majority on the Court, the other theory

and Justice Breyer had been, *Lucas* might well have presented the same opinion configuration as *Eastern Enterprises*, namely, four Justices in the plurality saying a taking occurred, four Justices in dissent, and Justice Kennedy's separate concurrence as the defining fifth vote for the judgment.

For background on *Lucas* and recent prior takings jurisprudence, see, e.g., Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892 (1992). For a more historical perspective, see, e.g., Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1 (1986); William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985). For Congressional consideration of takings legislation, see Charles Tiefer, *Controlling Federal Agencies by Claims on Their Appropriations? The Takings Bill and the Power of the Purse*, 13 YALE J. ON REG. 501 (1996).

27. *Eastern Enters.*, 524 U.S. at 544 (concurring and dissenting opinion).

28. *Id.* at 542 (concurring and dissenting opinion).

29. *Id.* at 540 (concurring and dissenting opinion).

30. *Id.* at 541.

31. *Id.* at 540, 554.

under consideration hardly commanded much support either. Justice Kennedy took the lonely position that the Coal Act's retroactivity, given its particular extreme characteristics, violated substantive due process.³² Four of the other Justices flatly opposed him,³³ and the other four did not support him.³⁴ Justice Breyer, speaking for four dissenting Justices, willingly analyzed the statute under the rubric of substantive due process, but he found that the complainant had not met its "burden of showing that the statute, because of its retroactive effect, is fundamentally unfair or unjust."³⁵ Justice O'Connor, speaking for her four Justice plurality, reminded the Court that it "has expressed concerns about using the Due Process Clause to invalidate economic legislation,"³⁶ citing with approval the post-*Lochner* precedents in this regard, and she led the four Justices in the plurality in declining to address Justice Kennedy's substantive due process argument.³⁷ In other words, eight Justices rejected, or with criticism on their lips declined to reach, the substantive due process challenge to this civil retroactive legislation.

Why would it be easy, but wrong, to read *Eastern Enterprises* broadly as a condemnation of civil retroactivity? It is easy because, by ignoring the doctrinal positions just described, an eager commentator or, for that matter, a judge opining in a future case, can construct artificially a position that adds together Justices of differing positions, overlooks their pointed rejections of each other's minority-of-the-Court viewpoints, and produces a seemingly broad anti-retroactivity position.³⁸ Gloss over the rejection by five Justices of the "takings" position or the lack of support among eight Justices for the substantive due process position, and it is easy to attribute to the Court just such a fabricated broad anti-retroactivity position.

Not only is this wrong as a matter of basic principles of

32. *Eastern Enters.*, 542 U.S. at 549 (concurring and dissenting opinion).

33. *Id.* at 567 (Breyer, J., dissenting).

34. *Id.* at 538 (plurality opinion).

35. *Id.* at 567.

36. *Id.* at 537 (plurality opinion).

37. *Eastern Enters.*, 524 U.S. at 537-38 (plurality opinion).

38. For a description of eagerness to devise broad takings principles, see Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509 (1998).

reading a split Supreme Court decision like *Eastern Enterprise*, but it also ignores the powerful and long-standing doctrinal limitations in the retroactivity context. It is not just that in *Eastern Enterprises* five Justices refused to extend "takings" to include retroactive legislation that lack, as most burden-charges against business enterprises lack, any focus upon a specifically identified property.³⁹ Rather, for two centuries, the critique of retroactivity has been presented to the courts but ultimately not accepted.⁴⁰ Broadening "takings" has never won out for sound doctrinal reasons that even now command a majority of the Court.

It is noteworthy that neither Justice O'Connor's plurality opinion nor Justice Kennedy's concurring and dissenting opinion in any way purports to overrule, narrow or disrespect established precedents regarding Congress' broad power to legislate retroactively without it being a taking. Quite the opposite, those opinions, just like Justice Breyer's dissent and, for that matter, virtually all of the briefing in the case, work within the narrow area of comparing this statute to previously upheld retroactive employee benefit legislation. Justices O'Connor and Kennedy reviewed, with every indicia of agreement, the Court's opinions upholding multi-employer pension benefit legislation reaching back five years to burden employers,⁴¹ as well as imposing unexpectedly increased withdrawal liability linked to employer decisions, on a retroactive basis, to joining plans years before.⁴² Similarly, it is not just in *Eastern Enterprises* that only one Justice spoke to broaden substantive due process to invalidate this Act. Not academic critics, but the Supreme Court itself, time and again has noted and disparaged the *Lochner* era when refusing to go that way.⁴³

Accordingly, it is error to jump into *Eastern Enterprises*' plurality opinion, with its application of the three-pronged test

39. *Eastern Enters.*, 524 U.S. at 539, 554 (concurring and dissenting opinion).

40. *Id.* at 533 (plurality opinion).

41. *Id.* at 524-25 (plurality opinion).

42. *Id.* at 525-28 (plurality opinion).

43. The most strenuous academic advocates of a constitutional rule against retroactivity have acknowledged fully that their chief problem lies in exactly the lack of support, grounded in the post-*Lochner* respect for Congress' role in dealing with social and economic problems, for broadening substantive due process to apply to retroactive economic legislation.

for "takings," and treat this as the new law about the validity of civil retroactive legislation. Five Justices rejected the above approach. It is also error to pluck individual words and concepts from Justice Kennedy's substantive due process concurrence and conclude that he, too, disliked "retroactive laws of great severity,"⁴⁴ despite the fact that such an approach highlights the factors explaining the holding. Eight Justices did not follow Justice Kennedy. When no majority of the Court subscribes to either theory, but rather, a majority of the Court has kept each area of the law as it was before *Eastern Enterprises*, the case has not broadly changed constitutional doctrine. Instead, the Court has invalidated one statute and provided the basis to analyze retroactive statutes, such as the one in *Eastern Enterprises*, that are unique due to their unacceptability, thereby uniting a majority of the Court.

B. *Highly Aggravated Retroactivity*

Of the various factors that *Eastern Enterprises* indicates made up the highly aggravated retroactivity in that case, the thirty-to-fifty year reach-back is the most striking. Successive collective bargaining agreements (i.e., contracts) in the coal industry beginning in the 1940s created benefit plans; however, until 1974, the agreements failed to expressly reference health benefits for retirees, let alone extend benefits to miners' widows.⁴⁵ The Court did not invalidate the statute under review insofar as it imposed retroactive liability upon companies which had employed miners since that 1974 agreement. Rather, it did so as it applied in the thirty to fifty years before the Act because "[b]efore 1974 . . . Eastern could not have contemplated liability for the provision of lifetime benefits to the widows of deceased miners. . . ."⁴⁶ The plurality found that stretch of time striking, noting that "[t]he company's obligations under the Act depend solely on its roster of employees some thirty to fifty years before the statute's enactment. . . ."⁴⁷ Again, the Court noted that

44. *Eastern Enters.*, 524 U.S. at 548 (concurring and dissenting opinion).

45. *Id.* at 508-09 (plurality opinion).

46. *Id.* at 530-31 (plurality opinion).

47. *Id.*

"[t]he Act's beneficiary allocation scheme reaches back thirty to fifty years to impose liability against Eastern based on the company's activities between 1946 and 1965."⁴⁸ The plurality observed that liability related to "the employers' conduct far in the past . . . decades before. . . ."⁴⁹

Justice Kennedy's concurring and dissenting opinion emphasize this even more in noting that "in creating liability for events which occurred thirty-five years ago the Coal Act has a retroactive effect of unprecedented scope."⁵⁰ Immediately before and after reciting this, Justice Kennedy refers to this Act as "one of the rare instances where the Legislature has exceeded the limits imposed by due process" and "one of the rare instances in which even [the] permissive standard has been violated" whereby "[s]tatutes may be invalidated on due process grounds only under the most egregious of circumstances."⁵¹

The opinions themselves argue the nature of that thirty-to-fifty year reach-back aspect in some depth and subtlety. However, the precise nature will not recur in other challenged statutes. Instead, what matters for future cases is whether sheer length of retroactivity was an important factor in highly aggravated retroactivity. In three respects, it was. First, as Justice Kennedy seized upon by twice emphasizing that he still considered it "rare" and for only "the most egregious of circumstances" to invalidate legislation by his analysis, factors must be isolated that would only result rarely in invalidation.⁵² The extreme thirty-to-fifty year length of the reach-back provision constitutes just such a rarity. Second, the principle vice cited against retroactive legislation lies in its undermining of the sense of security pertaining to respect for long-settled expectations, and the longer the retroactivity, the longer the settled expectations. As Justice Kennedy said, "[i]f retroactive laws change the legal consequences of transactions *long closed*, the change can destroy the reasonable certainty and security which are the very objects of property ownership."⁵³ The extreme duration of retroactive

48. *Id.* at 531 (plurality opinion).

49. *Eastern Enters.*, 524 U.S. at 537 (plurality opinion).

50. *Id.* at 549 (concurring and dissenting opinion).

51. *Id.* at 550 (concurring and dissenting opinion).

52. *Id.*

53. *Id.* (emphasis added).

reach-back measure disturbs transactions which have been "long closed" and expectations which have been "settled."⁵⁴

Third, the process-oriented justification of Congress' ability to legislate retroactively depends on the ability of threatened groups to make their voices heard, as is true with regard to other economic legislation. In other words, in process-oriented terms, the Court treats civil retroactive legislation like other economically burdensome legislation because the legislature provides the legitimate forum for weighing the needs for immediate phasing-in of remediation of a social burden against the lack of notice and disturbance of expectations. Arguably, as the period of retroactivity is extended, the degree of disorganization of the retroactively burdened group and its ability to organize and be heard in the legislature presumably diminishes.⁵⁵

Another factor highlighted by *Eastern Enterprises* concerns the distinction between tort- and contract-based enterprise responsibility. The plurality neatly captured that distinction in asking whether the employers' conduct for which the legislation imposed a burden related (1) to "any commitment that the employers made," i.e., a contract-based responsibility, or (2) "to any injury they caused," i.e., a tort-based responsibility.⁵⁶ Obviously, the distinction can involve overlap, as contracts and torts overlap in some matters- like warranties and product liability law or managed care contracting and medical malpractice.⁵⁷ Moreover, whole other categories of retroactivity exist indepen-

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

55. I would hesitate to assert that *Eastern Enterprises* itself, and its fellow affected coal employers, suffered greatly from disorganized inability to lobby Congress. A "public choice theory" analyst might say that the transaction costs for organizing an interest group to legislatively resist retroactive change increase as the unifying characteristics of the group increase, e.g., that they were part of the same business long ago recedes into the distant past. In contrast, in the judicial forum, any individual member of the group can litigate the issue effectively, even without group support, by presenting that individual's own complaint about lack of notice and disturbed expectations. Hence, by this process-based argument, the normal deference owed by the judiciary to the democratic process in the legislature for civil retroactive legislation diminishes as the period of retroactivity becomes extended to the duration of 30 to 50 years, owing to the degradation of the affected groups' organizing ability over that long time.

56. *Eastern Enters.*, 524 U.S. at 537.

57. William M. Sage, *Enterprise Liability and the Emerging Managed Health Care System*, 60 L. & CONTEMP. PROBS. 159 (1997).

dent of these, such as tax retroactivity or regulatory retroactivity, which necessitate neither commitments of a contractual nature nor causation and injury of a tortious nature.

Still, the distinction helps organize the diverse array of enterprise responsibility situations for the same reason it helps organize the diverse array of legal issues learned in first-year law school. The Supreme Court has left legislatures a broad scope in the post-*Lochner* era by respecting the wide discretion needed to respond to economic and social conditions, including retroactive legislation. Above all, the legislature must allocate responsibility to enterprises for the burdens society which sees as its own. If the scope is a bit less in the contract-based context rather than in the tort-based arena, the variance can be seen as rooted in the differences, going back to medieval times, in the view of enterprise responsibility in the tort-based as compared with the contract-based context.

III. ENTERPRISE RESPONSIBILITY FOR ENTERPRISE-CAUSED PROBLEMS: CERCLA AND NUCLEAR CLEANUP

CERCLA presents the single biggest issue today regarding Congressionally-imposed retroactive liability.⁵⁸ The 1980 CERCLA statute directs cleanups of hazardous waste sites, imposing joint and several liability for cleanup costs on the owners, operators, transporters and others involved prior to (as well as after) 1980 in the handling of the hazardous wastes. Liability can easily be very large, disproportionate to individual responsibility because of the "joint and several" character, and applicable to actions preceding the statute. For example, a classic case involving cleaning up a contaminated arsenal site outside Denver involved recovery from companies for behavior in the 1940s.⁵⁹ Businesses have challenged CERCLA as unconstitutional due to the retroactivity provision, but these efforts have been unsuccessful.⁶⁰

58. For a statutory analysis of CERCLA reflecting its importance, see John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405 (1997).

59. *United States v. Shell Oil Co.*, 605 F. Supp. 1064 (D. Colo. 1985).

60. *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir.

Another important issue today consists of liability for disposal of spent nuclear fuel. A 1982 statute directs companies to pay a one-time fee into a Nuclear Waste Fund, with that assessment measured retroactively based on the amount of electricity generated in a nuclear power reactor prior to the effective date of the act.⁶¹ Congress intended that the fund be used to dispose of nuclear fuel, but this has not happened. As a result, a utility company has filed suit contending that the assessment constitutes an unconstitutional taking.⁶² In 1995, the Court of Federal Claims ruled for the utility,⁶³ but then the Federal Circuit reversed.⁶⁴ Significantly, the Federal Circuit analogized the statute to CERCLA, as an enterprise responsibility statute: "To the extent that the Energy Policy Act is designed to spread the costs of a societal problem, it is not unlike other instances where Congress has enacted legislation to spread societal costs."⁶⁵ In 1998, the utility filed a new suit contending, inter alia, that the Department of Energy's failure to begin disposal services amounted to a taking.⁶⁶

As discussed earlier, it is easy, although wrong, to take a broad view of what *Eastern Enterprises* does to enterprise responsibility legislation. To uphold a retroactive statute of this kind, courts have had to apply the rational-relation test, a highly deferential test: "Congress acted in a rational manner in imposing liability for the cost of cleaning up such sites upon those parties who created and profited from the sites. . . ."⁶⁷ In other words, CERCLA pushes the principle of enterprise liability.⁶⁸ What *Eastern Enterprises* adds is a significant discussion that distinguishes enterprise liability along tort lines, where the responsible enterprise has some causal link to the problem or injury, from non-tort situations. The plurality drew this distinction:

1986).

61. 42 U.S.C. § 10,222 (1994).

62. *Yankee Atomic Elec. Co. v. United States*, 33 Fed. Cl. 580 (1995).

63. *Yankee Atomic Elec. Co.*, 33 Fed. Cl. at 580.

64. *United States v. Yankee Atomic Elec. Co.*, 112 F.3d 1569 (Fed. Cir. 1997).

65. *Yankee Atomic Elec. Co.*, 112 F.3d at 1576 n.6.

66. *Yankee Atomic Elec. Co. v. United States*, 42 Fed. Cl. 223 (1998).

67. *Northeastern Pharm. & Chem.*, 810 F.2d at 734.

68. Cindy A. Schipani, *Infiltration of Enterprise Theory into Environmental Jurisprudence*, 22 J. CORP. L. 599 (1997).

Eastern's liability also differs from coal operators' responsibility for benefits under the Black Lung Benefits Act of 1972. That legislation merely imposed "liability for the effects of disabilities bred in the past [that] is justified as a rational measure to spread the costs of the employees' disabilities. . . . Likewise, Eastern might be responsible for *employment related* health problems of all former employees whether or not the cost was foreseen at the time of employment. . . ."⁶⁹

In many ways, the concept of enterprise liability has dominated tort law in recent decades.⁷⁰ It has had a particular effect on the law of product liability, engendering debates between an early generation of scholars and judges who emphasized the goals of victim compensation and loss spreading⁷¹ and a modern group of theorists that defend the concept of enterprise liability as a means of fair⁷² risk distribution.⁷³ New issues continue to test the concept's limits.⁷⁴

The large role of enterprise liability in recent legal thinking about tort liability underlies the strong contrast in the *Eastern Enterprises* plurality between, on the one hand, its acceptance of imposition of liability for any health costs causally linked to the employers and, on the other hand, its rejection of imposition of liability for miners' widows' health costs. *Eastern Enterprises* simply accepts tort-based retroactive legislation, however far back in time the legislation reaches, however severe its impact, and however disproportionate its measurements of liability, so long as the burdened enterprise is causally linked to the problem or injury being solved. The Justices in *Eastern Enterprises* reconfirmed, without hesitation, black lung disease liability

69. *Eastern Enters.*, 524 U.S. at 536 (plurality opinion) (emphasis added) (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1975)).

70. "American tort law has been shaped during the past three decades by the theory of enterprise liability." Virginia E. Nolan & Edmund Ursin, *Enterprise Liability and the Economic Analysis of Tort Law*, 57 OHIO ST. L.J. 835, 835 (1996).

71. Virginia E. Nolan & Edmund Ursin, *Back to Basics: A Comment on the "Revived Case" for Enterprise Liability*, 26 HOFSTRA L. REV. 161, 162 (1997).

72. Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997).

73. Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 6683 (1993).

74. Note, *Absolute Liability for Ammunition Manufacturers*, 108 HARV. L. REV. 1679 (1995).

imposition⁷⁵, however far the reach-back, severity, and disproportion, and if reaffirmed the distinctions that could be drawn between that and the liability in CERCLA or the charge for spent nuclear fuel are without a difference. Where there is any causation link between the responsible enterprise and the burden addressed by the legislation, *Eastern Enterprises* continues the traditional constitutional tolerance for civil retroactive legislation.

IV. VALID ENTERPRISE RESPONSIBILITY IN GOVERNMENT CONTRACTS: PAY CEILINGS AND CAS

By contrast, contract-based retroactive legislation requires consideration of whether the case is one of "highly aggravated" retroactivity. *Eastern Enterprises* concerned legislation that built enterprise liability onto the contractual relationship between the employer (mining companies) and employees (miners). Accordingly, other enterprises faced with retroactive legislation that expands or changes their contract-based obligations to employees, customers or the government, where the government is the contracting partner, will seek to generalize from *Eastern Enterprises* to a judicial striking-down of the statute in their case.

Two particular current government contract issues present this concretely.

A. Pay Ceilings

In 1997, Congress strengthened a cap on executive compensation that can be charged to government contracts, effectively capping such pay at \$340,000.⁷⁶ The executive compensation cap raised an issue of retroactivity because it applied, by its terms, to "compensation . . . incurred after January 1, 1999, under covered contracts . . . entered into before, on, or after the date of the enactment of this Act."⁷⁷ A defense contractor has challenged the statute as unconstitutional.⁷⁸

75. *Eastern Enters.*, 524 U.S. at 524-25 (plurality opinion).

76. National Defense Authorization Act, Pub. L. 105-85, § 808, 111 Stat. 1629 (1997).

77. *Id.* § 808, 111 Stat. at 1837.

78. *Executive Compensation: General Dynamics Claims Retroactive Cap is Breach*

This executive compensation cap has an interesting history. Congress enacted prior versions three years in a row.⁷⁹ Each year it received considerable debate.⁸⁰ Its proponents argued the "serious misjudgment, appalling insensitivity, and skewed priorities" in uncapped pay to defense industry executives at a time when defense restructuring involved 2.2 million Americans losing their defense-related jobs.⁸¹ Colloquially, this period was known as the "payoffs for layoffs" era, when defense contractors could markedly improve their financial position by restructurings involving large cuts in employees. Those prior versions did not apply to pre-enactment contracts and for various reasons appear to have had little actual effect on executive compensation.

Then, the Fiscal Year ("FY") 1998 version, a stronger one, did apply to existing contracts. It received a considerable debate on the Senate floor, when successfully offered by Senators Boxer and Grassley as an amendment to defense authorization (not, as in prior years, defense appropriation).⁸² The House passed no companion provision. As a compromise, the conference committee modified the provision to apply only to costs incurred after

of Contract Under Winstar, 70 Fed. Cont. Rep. (BNA) 505 (Nov. 16, 1998).

79. These received codification in § 306(e)(1) of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. § 256 and 10 U.S.C. § 2324(e)(1) (1994). The enactments occurred in the Department of Defense Appropriation Acts for FY 1995, 1996 and 1997, respectively. Pub. L. No. 103-335, 108 Stat. 2599; Pub. L. No. 104-61, § 8086, 109 Stat. 636; Pub. L. No. 104-208, § 809, 110 Stat. 3009.

80. See *DOD: Congress Clears Defense Funding Measure, Caps Executive Compensation Reimbursement*, 62 Fed. Cont. Rep. (BNA) 12, at d3 (Oct. 3, 1994); *Executive Compensation: \$200K Cap on Defense Contractor Executive Compensation To Go Into Effect; OFPP Opts Not to Issue Regs Altering Statutory Cost Allowability Limitation*, 65 Fed. Cont. Rep. (BNA) 23, at d6 (June 10, 1996).

The debate occurred against the background of Congress' enactment of the Federal Acquisition Reform Act ("FARA") of 1996, which tempered a Congressional thrust toward relaxing regulatory requirements for commercial products with the continuation of Congressional concerns supporting the maintenance and occasional enhancement of requirements, especially for noncommercial products. See generally Charles Tiefer & Ron Stroman, *Congressional Intent and Commercial Products*, THE PROCUREMENT LAW., Spring 1997, at 22.

81. The quotes are from a letter by Representatives Bernard Sanders, Peter DeFazio and Carolyn Maloney, quoted in *Executive Compensation: Lawmakers Seek to Make Cap Permanent; OFPP Said Close to Issuing Guidance*, 65 Fed. Cont. Rep. (BNA) 19, at d3 (May 13, 1996).

82. 143 CONG. REC. S7169-79 (daily ed. July 10, 1997).

January 1, 1998.⁸³ The administration implemented it by a new Federal Acquisition Regulations ("FAR") provision.⁸⁴ In its retroactivity challenge, the defense contractor argued that this cap amounted to an unconstitutional unilateral reduction by the government of the sum agreed to in a submarine contract entered into in 1996.⁸⁵ In 1998, Congress enacted a minor clarification to the provision.⁸⁶

B. CAS

According to a government estimate, more than \$22.5 billion existed in 1994 in overfunded pension plans of the top twenty-five government contractors,⁸⁷ a figure probably much higher today as rising stock market prices has increased the valuation of pension plan holdings. As industry and government have wrestled over who receives such overfunding in the event that it does not simply go to benefit employees, industry has raised the contention that the government's efforts amount to retroactive action, unconstitutional pursuant to *Eastern Enterprises*.⁸⁸

Under cost-reimbursement contracts, the government pays contractors the costs of employee compensation, including the cost of pension plans. To trace the issue's evolution, the Cost Accounting Standards Board ("CASB" or "CAS Board")⁸⁹ original-

83. H.R. REP. NO. 340, 105-340, at 773 (1997).
84. FAR Contract Cost Principles & Procedures, 48 C.F.R. § 31.205-6 (1998) (promulgated in 63 Fed. Reg. 9066) (proposed Feb. 23, 1998).
85. *Executive Compensation: General Dynamics Claims Retroactive Cap is Breach of Contract Under Winstar*, 70 Fed. Cont. Rep. (BNA) 505 (Nov. 16, 1998).
86. The clarification concerned the five executives in each company subject to the cap. H.R. REP. NO. 105-736 (1998).
87. Wilkie H. Adams, Jr., Kevin C. Dwyer & Jeffrey P. Hildbrant, *Gould and the Adjustment of Pension Costs After the Sale of a Segment: Where Do We Go From Here?*, 70 Fed. Cont. Rep. (BNA) 477 (Nov. 9, 1998) (citing Memorandum from Richard Loeb, CASB Executive Secretary, through Steven Kelman, CASB Chairman, to John Koskinen, Office of Management and Budget (Dec. 25, 1994)).
88. *Id.*; *supra* note 29 and accompanying text.
89. For further background on CAS and pension plans, see generally CHARLES TEFER & WILLIAM A. SHOOK, *GOVERNMENT CONTRACT LAW: CASES AND MATERIALS* 159 (1999). CASB has faced recent consideration of legislative changes which have elicited public interest group confirmations of its value, including confirmations as to the pension plan issue. For two recent discussions, see Charles Tefer & Danielle Brian, *First, We Kill All the Auditors*, LEGAL TIMES, Apr. 6, 1999, at S34; Charles Tefer & Danielle Brian, *Grabbing for the Purse Strings: Defense Contractors Take*

ly promulgated provisions, CAS 412 and 413, dealing with government contract pension issues under ERISA in 1976-78, when overfunding was not being thought about much.⁹⁰ As pension plan assets ballooned in the 1990s, contractors wished to pocket the overfunding by having it "revert" to them, while the government wanted the overfunding, assuming it was not simply going to employees, to be repaid to the Treasury. In 1995, CASB promulgated revisions of CAS 412 and 413, which, in effect, declared a cease-fire with contractors so long as they did not grab for the overfunding:

[T]he Board has deferred the Government's recovery of excess assets in overfunded plans. This delay is appropriate for on-going pension plans when no assets have reverted or inured to the contractor.⁹¹

However, the CAS changes provided that the cease-fire ended if contractors engaged in certain kinds of restructuring:

The effect of this delay has been mitigated by clarifying and strengthening the Government's rights or obligations for a cost adjustment when there is a segment closing, plan termination, or freezing of benefits.⁹²

For example, given the extensive reshuffling in defense contractors, the question arose whether selling a contractor's division amounted to a "segment closing" that would trigger the government's claim to obtain the overfunding by a pricing adjustment on the contractor's contracts. In a 1997 ruling, the Armed Services Board of Contract Appeals ("ASVCA") held that a sale by a contractor of several of its divisions in 1987-88 would, in fact, amount to a segment closing.⁹³ However, the ASBCA applied the 1976-78 version, not the 1995 version, of the CAS standards, putting off the eventual showdown.⁹⁴

Aim at a Critical Accounting Watchdog, LEGAL TIMES, Aug. 10, 1998, at S19.

90. Office of Federal Procurement Policy, 60 Fed. Reg. 16,534 (1995) (tracing the promulgation of the previous CAS standards 412 and 413 to "the early years of the applicability of the Employee Retirement Income Security Act (ERISA).")

91. Office of Federal Procurement Policy, 60 Fed. Reg. 16,534, 16,535 (1995).

92. *Id.*

93. Appeal of Gould, Inc., 97-2 BCA 29,254 (1997), available in WL, ASBCA No. 46,759, at 6-8.

94. Appeal of Gould, 97-2 BCA 29,254 available in WL, ASBCA No. 46,759, at 6-8.

In an intriguing article, the contractor counsel in the 1997 ASBCA case argued that *Eastern Enterprises* rendered unconstitutional what the CASB sought to do:

[A]ny right asserted by the government to unilaterally abrogate its contractual responsibilities through intervening legislation or regulation is subject to challenge as a breach of contract or as being contrary to Fifth Amendment due process principles and the right against uncompensated takings by the government.

Given the numerous potential problems discussed above, the retroactive price adjustment provision in the new rule is likely to be challenged by contractors facing costly price reductions after closing a segment or terminating a plan.⁹⁵

Current cases continue to pose this issue of CAS treatment of pensions as a retroactive taking.⁹⁶

C. Analysis

The issues of executive compensation and pension cost reductions pose concretely the meaning of *Eastern Enterprises*. They are "contract-based" in the sense that *Eastern Enterprises* held that the legislation or regulation acts on the contractor because of its pre-existing contractual relations: in *Eastern Enterprises*, its employment of the miners; in these cases, its contracts with the government. A contractor might argue that a broad reading of *Eastern Enterprises* applies to these issues. Namely, *Eastern Enterprises* invalidated the retroactive burden of the Coal Act because of the classic problems of retroactivity, lack of notice and disturbed expectations, impairing rights previously established by binding legal arrangements, to wit, contracts.

For instances like this, how to read *Eastern Enterprises*

95. Adams, Dwyer & Hildbrant, *supra* note 87, at 27 (footnotes omitted).

96. Robert M. Cowen, *Cost Accounting Standards: Teledyne Challenges \$130M in Government Pension Cost Claims; Judge to Consider CASB's Right to Retroactively Amend CAS 413 Regulation*, 71 Fed. Cont. Rep. (BNA) 727 (May 24, 1999) (quoting formal questions posed by the Court of Federal Claims to parties in current litigation, including: "(4) . . . [as for] the 1995 amendments to CAS 413. . . . To the extent the amendments effectuated a change [to pre-1995 CAS 413], can that change be lawfully applied to pre-1995 segment closings?").

becomes vitally important. The holding in *Eastern Enterprises* depended upon the factors that amounted to "highly aggravated" retroactivity: the long reach-back period and the government's scaling of "disconnects," namely, sharp and formal delineations of final settlement of contractors' obligations. As noted, *Eastern Enterprises* did not disturb, and, indeed, reaffirmed the previous Supreme Court opinions that pension legislation could impose retroactive liability. Only the aggravating factors in the case distinguished it from those previous cases.

In *Eastern Enterprises*, one such factor consisted of the striking thirty-to-fifty year reach-back period. Obviously, the executive compensation cap involves no such period. Whether the CAS pension provisions could involve a lengthy reach-back is a debatable question. In *Gould*, the contractor's current contracts were firm fixed-price, and the contractor could contend, in effect, that the government was really reaching back to prior contracts (which could have been long prior, although the opinion does not discuss the duration).⁹⁷ The government contended that it sought to adjust current contracts in effect by repricing them, not repricing prior ones.⁹⁸ In any event, the government, by working hard to keep "cost adjustments" tied to current contracts, appears committed to dealing with the argument that it is engaged in a lengthy reach-back. In *Eastern Enterprises*, there was nothing debatable about the duration and nature of the reach-back; the dispute only concerned whether there had been some expectations, or none, thirty to fifty years prior that health benefits might be provided. For the pension issue, in contrast, the government has kept the duration and nature of any reach-back quite debatable.

A second factor concerns the existence of "disconnects," what used to be captured in the phrase "vested rights" and more generically concerns legally formal protective events that appropriately distance a party from retroactive shifts. In *Eastern Enterprises*, the complaining company had left the coal mining business, which bothered both the plurality⁹⁹ and Justice Kenne-

97. *Appeal of Gould*, 97-2 BCA 29,254, available in WL, ASBCA No. 46,759, at 20.

98. *Id.*

99. *Eastern Enterprises* "ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the

dy in his concurring and dissenting opinion.¹⁰⁰ In *Winstar*, the acquiring savings and loans argued that its reason for consensually entering the contract to acquire an ailing enterprise was defeated by the later denial of "goodwill" accounting. The complaining enterprises in both cases thus argued the cases involved defeating, not merely ordinary expectations in contracting, but expectations protected by legally formal events: leaving the line of business non-opportunistically (*Eastern Enterprises*), and entering into the contract with the principal as confirming the expectation of being the particular asserted guarantee (goodwill accounting treatment) at issue (*Winstar*).

Neither of these current government contract controversies involves such overriding disconnects. The executive compensation cap, while it applies to contracts predating the legislation, concerns only the allowability of one particular cost (executive compensation), not the main reason for entering the contract. Although more debatable, the pension funding dispute does not involve companies that have already left the line of business; rather, it concerns what obligations are triggered by their trying to leave the line of business. This is much like the distinction drawn in *Eastern Enterprises* between coal companies like Eastern that had long ago left the business and deserved the benefits of formal legal protection, and companies that sought, opportunistically, to avoid legislated burdens by leaving the business, regarding were the Supreme Court had upheld legislation imposing on them their share of the social burden. How the government attempts to reach out to the pension funds of companies that had decades before ceased contracting with the government and retroactively adjust their obligations would present a closer question.

An alternative way of looking at the issue of changing the law regarding government contractors concerns the extent to which their zone is inherently one of legal change. As Professor Fisch's analysis suggests:

If an area of the law is settled, a stable equilibrium, reliance

Benefit Plans under the 1974, 1978, or subsequent NBCWA's." *Eastern Enters.*, 524 U.S. at 530 (plurality opinion).

100. "[T]he expectation was created . . . long after Eastern left the coal business." *Id.* at 550 (concurring and dissenting opinion).

interests are at their peak. Retroactivity thus presents serious fairness and efficiency concerns and should be disfavored. If the regulatory context is in flux, an unstable equilibrium exists, and retroactivity may be more appropriate.¹⁰¹

For *Eastern Enterprises*, the health benefits arrangements with retirees appear to have been stable, at least in the plurality's view, until long after the period caught by the thirty-to-fifty year reach-back. The "government contract" in the narrow sense, namely, the contract to supply the government with goods and services,¹⁰² exists in contemplation of the omnipresent changes in statutes, regulations and other positively-established law. Particularly for cost-reimbursement contracting, such as the CAS pension rule addresses, the contractor simply does not have the basis for a stable expectation about cost accounting. Quite the opposite, the contractor takes on a low-risk situation in a willing surrender of autonomy to the government, in contrast to the fixed-price contractor who earns the autonomy and investiture of rights by undertaking a much larger risk.

V. CONCLUSION

Eastern Enterprises revisited the classic debate about civil retroactive legislation. However, it continued the post-*Lochner* tolerance by the judiciary of Congressional action, absent highly aggravated retroactivity. Courts will have to throw out a lot of retroactivity challenges before they find another comparable to the one that assembled the shakiest of minority-viewpoint Supreme Court majorities in *Eastern Enterprises*.

101. Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1055 (1997).

102. These are what the Supreme Court calls "humdrum supply contracts." *United States v. Winstar Corp.*, 518 U.S. 839, 880 (1996).

