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ARTICLE: LEGISLATIVE RETROACTIVITY

JAN G. LAITOS *

* John A. Carver, Jr. Professor of Law, University of Denver College of Law.

SUMMARY:
... Whenever a new law affects either past legal relationships or decisions made by private parties in reliance on prior law, the question of prospective or **retroactive** application of the new law becomes significant. ... Legislation that applies retroactively, even legislation that applies with secondary retroactivity, carries with it considerable costs. ... A statute has a truly **retroactive** effect sufficient to trigger the presumption when it satisfies both (1) the Landgraf definition of secondary retroactivity, and (2) the Wheeler definition of retroactivity. ... If the "nature" of the rezoning is to alter either a "vested right," or a contract protected by the Contracts Clause, the developer may be able to escape **retroactive** application of the 1997 rezoning. ... When viewed functionally, a successful assertion of a particular legal defense to retroactivity depends less on the choice of a specific defense and more on the existence of the following factual variables: (1) a protectable legal interest, often in the form of a property right; (2) an earlier promise by a governmental entity; (3) reasonable reliance on the promise resulting in a legitimate expectation by a private party; (4) some injury to that party; and (5) the absence of a suitable justification or explanation for the governmental decision to proceed retroactively. ...

TEXT:
[*81]

Whenever a new law affects either past legal relationships or decisions made by private parties in reliance on prior law, the question of prospective or **retroactive** application of the new law becomes significant. If the new law is to apply retroactively, it may affect previously-established rights or legal relationships. The new **retroactive** law may alter pre-existing legal arrangements beginning with the effective date of the new law, or it may relate back to the original date of creation of legal relationships arising under prior law. **Retroactive** application of a new law may also attach legal consequences to decisions made by private parties who did not anticipate these consequences at the time the decision was made. These new legal consequences may take effect on the date of the new law, or they may apply backwards to the time of the original decision. Such retroactivity can profoundly affect the plans and expectations of private parties.

The United States Supreme Court has been aware of, and sensitive to, the significance of retroactivity. Between 1988 and 1997, the Court has considered virtually all of the paradigmatic retroactivity issues involving legislatures, [1] courts, [2] and **[*82] [*83]**

administrative agencies. [3] These cases indicate that the Court has revised its thinking about the nature and legal effect of retroactivity, particularly legislative retroactivity. Lower court cases also seem to confirm that judicial review of **retroactive** lawmaking has undergone a change in recent years. [4] This developing body of law from the Supreme Court and lower courts has, in the past decade, basically reconstructed the jurisprudence of retroactivity.

Surprisingly, other than a few important (and frequently cited) articles written years ago, [5] **retroactive** legislation has not been the focus of much commentary. [6] Rather, current scholarship has tended **[*84]** to discuss retroactivity in a judicial, [7] criminal, [8] or administrative [9] context. This Article reconsiders, in light of recent judicial developments, the problem of retroactivity, and proposes a new way of thinking about nonpenal legislative retroactivity.

Part I suggests that legislation should be classified according to how it alters the temporal legal consequences of past and present private actions. Use of this proposed classification system reveals that the most common type of **retroactive** legislation operates with what will be termed "secondary retroactivity," which is where the legal consequences of past private actions are altered only in the future. Part II considers the traditional doctrinal justifications for laws that apply with secondary retroactivity. Part II concludes that, although secondary retroactivity permits legislatures to achieve certain political goals, it produces so many social and economic costs that its validity should be suspect. [10]

Parts III through V argue that the negative consequences of **retroactive** lawmaking should encourage, and in fact have caused, **[*85]** reviewing courts to empower private parties with three defenses to defeat retroactively-applying legislation.

Part III shows that while laws intended to apply with secondary retroactivity are usually valid, those that operate with what will be termed "primary retroactivity" - laws that alter the past legal consequences of past private actions - are usually invalid. [11] Part IV analyzes the 1994 Supreme Court decision in Landgraf v. USI Film Products. [12] The Landgraf case illustrates how the Court has become far more sympathetic to parties burdened by legislation that applies with secondary retroactivity. In Landgraf, the Court returns to an expansive definition of retroactivity, which is broad enough to encompass the idea of secondary retroactivity. [13] Landgraf holds that legislative changes that may be characterized as **retroactive** under the Landgraf definition, must be subject to a presumption of prospectivity. This presumption prevents the operation of legislation that might otherwise burden existing substantive rights with secondary retroactivity. The presumption is not rebutted unless the legislative body expresses its intent to apply the new law with secondary retroactivity. [14]

Part V advances a theory for invalidating secondarily **retroactive** laws that articulate a legislative intent which rebuts the Landgraf presumption of prospectivity. Part V argues that such intentional secondary retroactivity is forbidden when pre-enactment conduct has attained "protected legal status" with respect to the new, retroactively-applying rule. Pre-enactment private conduct has "protected legal status" when various constitutional provisions [15] and **[*86]** equitable principles, [16] which track a formula articulated in the Landgraf opinion, [17] operate to immunize the conduct from secondary retroactivity.

I. Classifying the Temporal Application of Legislation

A. How Does A New Law Apply? A Proposed Classification Scheme

Legislative rules may be adopted by federal, state, and local legislative and administrative bodies. When these entities enact or adopt legislation, the new rule may apply to private parties in one of three ways. If the legislation is purely prospective, then its provisions affect private behavior and events occurring only after the applicable effective dates of the legislation. Laws that are prospective alter the future (post-enactment) legal consequences of private action. Where legislation burdens substantive rights held by private parties prior to its

enactment, and is ambiguous or silent as to its effective date, it is presumed to be prospective. [18]

If the new law attaches new legal consequences to events completed before its enactment, it operates retroactively. Laws that apply retroactively may be classified as operating with either **[*87]** secondary or primary retroactivity. Secondary retroactivity occurs far more frequently than primary retroactivity. A law that operates with secondary retroactivity affects the legality of past private action in the future, after the applicable date of the law. [19] Primary retroactivity alters the legal consequences of past private action. [20] Action that was legally permissible at the time it occurred, is either made impermissible, or is burdened, in the past (i.e., prior to the applicable date of the new law). These three possibilities are diagrammed in Figure 1. **[*88]**

[SEE FIGURE IN ORIGINAL]

B. When Does Retroactivity Invalidate Legislation?

New legislation can apply prospectively, or with primary or secondary retroactivity. This classification scheme does not reveal whether, and when, the fact of retroactivity invalidates the law. Nor does it establish whether a legislative body may validate **retroactive** laws simply by expressing an intent that the new law apply with **[*89]** either primary or secondary retroactivity. The following list summarizes possible rules regarding the relationship between legislative intent and the ultimate validity of **retroactive** legislation:

(1) All **retroactive** laws, regardless of whether the law applies with primary or secondary retroactivity, are valid so long as the legislature intends for the law to be **retroactive.**

(2) All **retroactive** laws are invalid, regardless of legislative intent.

(3) Laws that operate with primary retroactivity are invalid, regardless of legislative intent. However, laws intended by the legislature to operate with secondary retroactivity are valid.

In two significant opinions involving primary and secondary retroactivity, the Supreme Court seems to have rejected all three of the above possibilities. The Court instead has adopted a more flexible rule.

In 1995, in Plaut v. Spendthrift Farm, Inc., the Court addressed the question of whether a federal statute could require federal courts to reopen federal judgments in private civil actions. [21] It concluded that such a law violates constitutional separation of power principles. [22] The Court also suggested that "**retroactive** legislation that requires its own application in a case already finally adjudicated" is invalidly **retroactive.** [23] The statute operated with primary retroactivity because it altered the legal consequences of past action. The Court in Plaut confirms the traditional view that primary retroactivity is usually invalid, regardless of legislative intent. [24] **[*90]**

In 1994, in Landgraf, the Court addressed the more frequently-occurring issue of secondarily **retroactive** legislation. [25] The Landgraf Court considered the question of whether a federal statute, the Civil Rights Act of 1991, could apply with secondary retroactivity. [26] Landgraf concluded that if legislation was secondarily **retroactive** (i.e., it attached new legal consequences to events completed before its enactment), then its **retroactive** nature would not, by itself, invalidate the new law. [27] The Court noted two important requirements for the validity of **retroactive** legislation. First, the legislative body must have unambiguously expressed its intent for the law to be secondarily **retroactive.** [28] Without clear legislative

intent, a law is presumed to apply prospectively only. [29] 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." [30] 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. The elements of protected legal status, discussed more fully in Part V, are as follows: (1) the new law must be intended to alter future legal consequences of past private action (i.e., it must be intentionally secondarily **retroactive)**; (2) the **[*91]** past private action must have some legal status - it must have resulted in the creation of a property interest, contract, or some other vested right; and (3) that legal status must also be protected by some antiretroactivity principle, found either in the Constitution [31] or in equity. [32]

The following guidelines thus determine whether legislation is impermissibly **retroactive:**

Laws which the legislature intends to apply with primary retroactivity are usually invalid.

Laws which the legislature intends to apply with secondary retroactivity are usually valid as long as the legislature rebuts the presumption of prospectivity with an unambiguous statement of legislative intent.

If the legislature does not rebut the presumption of prospectivity with language that requires secondary retroactivity, the **retroactive** application is valid unless it affects private actions that have protected legal status.

These general rules provide private parties with several defenses against **retroactive** legislation. Part II discusses the doctrinal justifications that support successful judicial attacks on retroactively-applying laws.

II. The Case Against **Retroactive** Legislation

A. Choice of Law Options for Legislative Bodies

In the most frequently-occurring and straightforward type of retroactivity, a legislative body adopts a substantive rule which alters the future legal consequences of private action taken pursuant to a previously valid legislative rule. This is secondary retroactivity. The **[*92]** new rule may have been adopted to override a previous legislatively-made rule [33] or to change both an old legislative rule and an agency rule adopted pursuant to the legislation. [34] In either situation, private behavior occurring pursuant to an old rule will be affected in the future by the operation of the new rule.

The typical sequence of events for changes in legislative rules and private action is as follows:

(1) The legislative body adopts a substantive rule (the "old law").

(2) After its adoption, private conduct occurs consistent with, or perhaps because of, this old law.

(3) The legislative body adopts a new substantive rule (the "new law").

(4) After its adoption, the new law in some way affects the legal consequences of the private conduct that occurred under the old law.

For example, assume that in 1960 a Board of County Commissioners imposed a zoning classification on six acres within its jurisdiction. This classification contained a one-half acre minimum lot size requirement. Under the 1960 zoning rule (the "old law"), a maximum of 12 homes could be built on the six acres. In 1997, the Board rezones the six acre parcel so that it is now subject to a two acre minimum lot size requirement. As a consequence of this change in the law (the "new law") only three homes can be built on the six acres.

The applicable legislative body, the Board, has a choice-of-law problem that it must resolve in one of the following ways: **[*93]**

(1) The Board can intend that the new law apply prospectively only. In that case, the new two-acre minimum lot size requirement will only apply to events occurring after its 1997 adoption date. A builder who had purchased six acres prior to the effective date of the 1997 law, and had applied for building permits for twelve homes would be subject to the 1960 zoning rule permitting one-half acre minimum lots. [35]

(2) The Board can fail to reveal its intent about whether the new law should be prospective or **retroactive.** In this case, the Landgraf presumption of prospectivity applies. The presumption will yield the same result as in option (1); the "old" 1960 zoning rule will apply to builders who purchased land and applied for building permits prior to 1997.

(3) The Board can expressly state in the ordinance that the new law operates with primary retroactivity. In that case, the new law applies in the past, supplanting the 1960 old law with the 1997 new law as the operative rule from 1960 to 1997. Events occurring between 1960 and 1997 are made subject to the more restrictive requirements of the new law. A builder who constructed twelve homes prior to 1997 is in violation of the new two acre minimum lot size rule. This builder will likely be able to successfully challenge the 1997 rule. [36]

(4) The Board can expressly state that the new law operates with secondary retroactivity. In that case, the unambiguous expression of legislative intent rebuts the Landgraf presumption of prospectivity. The new law only applies after its 1997 adoption date, but it may affect, after its adoption date, events that occurred prior to 1997. A builder can defeat **[*94]** the intentional secondarily **retroactive** rule only if events occurring prior to 1997 have achieved protected legal status. [37]

A central thesis of this Article is that when a legislative body, such as the Board of County Commissioners in the above example, contemplates changes in applicable law, the changes generally should operate prospectively. Another proposition this Article advances is that when a legislative body intends that a new law apply retroactively, the scope of protected legal status should be broad enough to provide private parties with meaningful defenses to the retroactivity. Both propositions are grounded in the argument that while retroactivity often serves benign and legitimate purposes, the **[*95]** negative aspects are sufficiently disruptive and harmful to justify more extensive judicial limitations of **retroactive** legislation that are currently employed.

B. The Limited Justifications for Retroactivity

1. Retroactivity for Non-Substantive Changes and for Changes in Judge-Made Law

Non-substantive laws that operate retroactively help to rectify or prevent injustices that may have been caused by the previous law. For example, so-called "curative legislation" will be upheld when the legislation: (1) ratifies prior official conduct of government officers who acted without the requisite authority, [38] or (2) retroactively cures defects in an administrative system. [39] **Retroactive** curative rules are acceptable because of the strong public interest in a fair government system, and because they merely produce the same result that would have occurred had the lawmaker (usually an agency) promulgated the original rule correctly. [40] An amendment which merely "clarifies" existing law may also be applied retroactively. [41] **[*96]**

When a statute is remedial in nature (i.e., they vary the penalties that may be imposed for violating a statute, or the methods by which, or the time in which, rights of action can be enforced)it may apply retroactively to existing rights of action. [42] Remedial statutes may be **retroactive** if a potential plaintiff's ability to enforce substantive rights is left substantially unimpaired. [43] Similarly, the Supreme Court has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the **[*97]** underlying conduct occurred or when the suit was filed." [44] The reasoning behind **retroactive** application of a new jurisdictional rule is that it usually does not alter any substantive right, but simply changes the forum that hears the case. [45]

While changes affecting substantive rights should usually be prospective, [46] a different rule exists when changes affect "procedural" rights. [47] A new procedural rule, such as one requiring notice and an opportunity for explanation, may be retroactively applied, [48] unless **retroactive** application of the procedural change would create a manifest injustice or affect substantive rights. [49] Unfortunately, the label "substantive" is conclusory, and neither the Supreme Court nor lower courts have been particularly helpful in defining when rights and liabilities affected by statutory changes are **[*98]** substantive. Attempts at defining the scope of the word "substantive" include the following: "vested or mature rights"; [50] "matured property-like interests"; [51] when persons are subjected to "greater liabilities"; [52] and changes which are neither "remedial" nor "procedural." [53]

Another instance where retroactivity is appropriate is when courts change judge-made law. When the federal judicial power is exercised to alter or overrule a previous judicial rule, retroactivity conforms to Article III, which confers on the federal courts the power "to say what the law is." [54] The common law understood a tradition of retroactivity for judicial decisions. [55] Blackstone thought retroactivity was an inherent characteristic of judicial power, [56] and Thomas Cooley believed that the ability to make decisions **retroactive** was a principal distinction between judicial and legislative power. [57] Prospective judicial decisionmaking may be criticized for encouraging unprincipled judicial activism, because it permits courts to disregard stare decisis. [58] By 1993, the Supreme Court had established a "firm rule" that new judge-made law **[*99]** announced in a judicial decision will be **retroactive.** [59] In addition to these somewhat technical justifications for secondary retroactivity, there are two more general, widely-accepted rationales.

2. The Change-Is-Good Rationale

One rationale advanced to justify secondary retroactivity is that a system of laws which is purely prospective in nature would be too confining and limiting to a lawmaker wishing to improve the status quo. Secondary retroactivity might be needed if the old law has been found to be unworkable, [60] or if it has produced undesirable effects. [61] Also, if a party harmed by a legislative rule successfully lobbies for its change, secondary retroactivity permits the past interests of that party to be benefited by the change in the future. Retroactivity thus

encourages private individuals to press legislators to rethink old notions, and to improve the quality of existing rules. **Retroactive** lawmaking provides legislators with a potentially valuable tool to attain social and political goals. [62]

Unfortunately, the change-is-good rationale ignores the fact that **retroactive** change holds the potential of adversely affecting those who in good faith have reasonably relied on the then extant legal regime. Indeed, it has been said that the hallmark of an invalid **retroactive** law is a law which serves to defeat the reasonable **[*100]** expectations of the person it affects. [63] Even if the purpose of **retroactive** application is to rearrange or nullify the effect of an earlier law to correct inappropriate welfare distributions, the accomplishment of that otherwise benign purpose may harm those who have assumed that current rules will continue. It may be wrong to conclude that the benefits resulting from the new distribution will always outweigh the harm experienced by those who relied on a continuation of existing laws. [64] Moreover, those who lobby for the **retroactive** change may be far more interested in altering laws to aid a powerful minority, not the larger public interest. [65] A change-is-good theory cannot fully justify secondary retroactivity.

3. The Unreasonable Expectations Rationale

The other general rationale attacks the argument that retroactivity should be discouraged (or made illegal) because it defeats the "expectations" of private parties. This defense is premised on the notion that private expectations should not be protected from retroactivity when they are unreasonable. Expectations are said to be unreasonable if parties holding the expectation either had a duty to take future changes into account in their decisions, or somehow had notice of the likelihood that there would be a change in the applicable law. [66] Some commentators have argued "that private parties should anticipate and protect themselves against future changes in government policy, just as they protect themselves from **[*101]** changes in the private market." [67] When there is constructive notice of change, the expectation-holders are presumed to have assumed the risk that there would be no change. Having taken their chances and lost the bet, there should be no legal recourse when the law does change and applies retroactively in the future to affect an unreasonable expectation. [68] Moreover, nothing in the Constitution says that reliance on the continuation of existing civil laws is protected. [69]

The "unreasonable expectation" defense of retroactivity is grounded in the belief that when changes are foreseeable, one adversely affected by a change does not have sufficiently clean hands to challenge the validity of the **retroactive** law. The central problem with this justification for retroactivity is that there is no principled way to put borders on it. Given the constantly changing legal and political process, it is impossible to say that change is ever unanticipated. A logical extension of the unreasonable expectation theory would allow the government to argue that because all persons have actual or constructive knowledge that laws often change, no retroactively-applying law may ever be invalidated for its retroactivity. All persons affected by the retroactivity have always been on notice that the law might change. Therefore, no one should **[*102]** ever have held an expectation based on then-existing laws. Such expectations would be per se unreasonable.

Of course, such a result would wreak havoc with America's economic market system. The market functions because its actors can rely on a set of rules that permit them to make decisions. When this reliance is deemed so unreasonable as to not be worthy of judicial or constitutional protection, then decisions must be made in the absence of predictable rules. Without rules backed by law, there is no foreseeability or accountability. The market would largely cease to work. The unreasonable expectations defense fails to justify unchecked retroactivity. [70]

C. The Problem with Retroactivity

When the legislature intends a law to apply with primary retroactivity, the retroactivity itself

usually invalidates the law. [71] When legislation is intended to apply with secondary retroactivity, the Landgraf prospectivity rule does not apply and the legislation can safely operate on pre-enactment conduct, unless there is some constitutional or equitable impediment which forbids the **retroactive** application. What follows here is an examination of why these impediments should be judicially acknowledged.

Theoretically, secondary retroactivity should be largely immune from legal attack because, while it affects pre-enactment private behavior, it does so only in the post-enactment future. Courts have seized upon this future-applying aspect of secondary retroactivity to justify its general validity. [72] However, while such retroactivity is similar to prospectivity because it takes effect only after enactment, secondary retroactivity is unlike prospectivity because it draws upon **[*103]** antecedent facts for its implementation. As a result, secondary retroactivity produces negative consequences in three distinct time periods: (1) the pre-enactment period; (2) the date of enactment; and (3) the post-enactment period.

[SEE FIGURE IN ORIGINAL]

1. The Pre-enactment Period

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.

When individuals are unable to evade a **retroactive** decision in the pre-enactment period, there are two related consequences. The first **[*104]** consequence involves uncertainty. Decisionmaking 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, decisionmaking during the pre-enactment period may be chilled. [73] 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. [74] By contrast, laws announced in advance of private action allow individuals to predict how rules will be applied to their future behavior. Such predictability is critical to legal order. [75]

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. [76] Laws that **[*105]** operate with secondary retroactivity are inconsistent with this premise. [77] In the post-enactment period, such laws may defeat planned investments of labor, interfere with uses of property, conflict with personal autonomy, and impair contracts. [78] Such disruption in private patterns of conduct may be particularly severe if the old law had been in effect for a considerable time in the pre-enactment period. [79] As John Austin once observed, "Whenever expectations have been raised in accordance with the declared purpose and concession of the state, to disappoint those expectations by recall of the concession ... [is] pernicious." [80]

2. Enactment

[*106] 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. [81] As Justice 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." [82]

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, **[*107]** 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, the value changes in the future as a result of the operation of the new law. Such price instability prevents market actors from making rational decisions about long-term investments. [83]

Some commentators have argued that **retroactive** lawmaking encourages legislative self-dealing. [84] For instance, legislators could attempt to enact regulatory measures that would reward political contributors and pay back those who supported their campaigns. Retroactivity, particularly secondary retroactivity, may then be viewed not as a weapon to advance the public good, but as a tool to maximize the chances of legislators' re-election. [85]

3. The Post-enactment Period

Secondary retroactivity seems contrary to fundamental notions of justice and fairness. [86] Unless an individual's pre-enactment conduct is assessed in the post-enactment period under the law that at the time the individual engaged in that conduct, "[the law] can deprive **[*108]** citizens of legitimate expectations and upset settled transactions." [87] These post-enactment effects are harmful to persons who have reasonably relied to their detriment on a pre-enactment law. [88] A new law applied retroactively thwarts reliance by impairing the advantages of planned conduct. [89] 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. [90]

Lon Fuller maintained that the function of law was to provide a mechanism for eliminating "the blind play of chance" by clear and understandable rules previously declared and consistently applied. [91] Secondary retroactivity is entirely at odds with this view of law. Conversely, prospectivity reduces the role of chance by removing the specter of behavior being judged by norms not yet in existence. Prospectivity allows for possible changes in behavior to reduce the risk of sanctions under existing laws. In addition, prospectivity is consistent with elemental notions of fairness which demand that "a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." [92]

Secondary retroactivity prevents persons from changing their pre-enactment behavior to reduce the likelihood that they will incur a post-enactment sanction. [93] Prospectivity also fosters predictability. Increased predictability permits individuals to make accurate value **[*109]** assessments, which will increase the probability that they will devote resources to

maximize their utility. [94]

Legislation that applies retroactively, even legislation that applies with secondary retroactivity, carries with it considerable costs. Parts III through V argue that in response to these costs, three principles have been judicially adopted which allow private parties otherwise burdened by retroactivity to defeat **retroactive** legislation: (1) a general prohibition against primary retroactivity; (2) a presumption of nonretroactivity for legislation that otherwise could operate with secondary retroactivity; and (3) a willingness to invalidate even intentional secondary retroactivity when pre-enactment private action has protected legal status.

III. Changing Judicial Views of Primary and Secondary Retroactivity

The judiciary's traditional dislike of **retroactive** legislation can be traced back in time to an early, but highly influential Nineteenth Century case - Society for the Propagation of the Gospel v. Wheeler. [95] The Wheeler case recognized that statutes could be voided not just for applying with primary retroactivity, but also when they produced secondary retroactivity. As a result, for over a century much legislation affecting property and economic interests was voidable simply for operating with secondary retroactivity. In the Twentieth Century, although legislation intended to apply with primary retroactivity was usually invalidated, statutes that operated with secondary retroactivity were typically sustained. Parts IV and V demonstrate how a combination of Landgraf and the concept of protected legal status have lately permitted courts to strike secondarily **retroactive** legislation.

A. Original Recognition of Invalid Secondary Retroactivity

[*110] In the early years of American legal history, at the beginning of the Nineteenth Century, there was dispute involving a central issue of retroactivity: For a legislative action to be deemed improperly **retroactive,** must it take effect before its enactment (i.e., primary retroactivity), or was it enough that, following its enactment, the legislation altered a pre-existing legal interest (i.e., secondary retroactivity)? [96] If the former, then laws could survive retroactivity challenges simply by taking effect as of the date of their adoption. If the latter, existing private economic and property interests created under an earlier legal regime could resist new legislation affecting these interests in the future.

In Wheeler, Justice Story rejected the view that only laws with primary retroactivity were invalid. Instead, he adopted the position that even statutes that are secondarily **retroactive** ("statutes, which, ... operate only from their passage") may be invalid. [97] The Court stated that if a statute satisfied this definition, it would be invalid either if it (1)"takes away or impairs vested rights acquired under existing laws," or (2) "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." [98] Under this conception of secondary retroactivity, statutes intended to become effective only after their passage could still be invalidated, if they either interfered with vested rights or imposed new duties or liabilities on earlier events.

The Wheeler notion of retroactivity did not mean that lawmakers could not change rules affecting existing legal interests. The prohibition against **retroactive** laws was limited to only those legal interests that had been determined by pre-existing law to be "vested" against substantive legislative modification. [99] These included rights that had been either vested by "contract," [100] or otherwise protected **[*111]** by general prohibitions against deprivations of "property" except by due process. [101] **Retroactive** laws could still reach all interests that were not vested, thereby avoiding a freezing of existing property rules that might otherwise have occurred if non-vested interests had been immune from legislative change. [102]

The Wheeler rule meant that **retroactive** legislation could not be saved simply by an express

legislative desire to affect private interests post-enactment. More significantly, if the retroactivity was secondary, it could not be applied to existing private legal relationships if these had achieved protected legal status with respect to the new statute. Protected legal status existed whenever certain legal rights were deemed to be impaired, or if the statute operated to increase liability or impose a new duty on past conduct.

B. The Rise of the Police Power and Decline of Invalid Secondary Retroactivity

By the middle of the Twenthieth Century, the Supreme Court had largely abandoned the strict Wheeler rule. Its demise was caused by two difficulties associated with protecting "vested rights" from subsequent legislative change. First, because vested rights included many contract and property interests, courts had the power to review the wisdom of much secondarily **retroactive** legislation specifically intended to affect these interests, and to overturn this legislation if it "impaired" these interests. This seemed to be an excessive exercise of judicial power. Second, both commentators and courts believed that the term "vested right" was conclusory, and not helpful in predicting whether a law could be applied with secondary **[*112]** retroactivity to an existing interest. [103] The term was most often used to justify invalidating a **retroactive** law that was defective for reasons other than the law's impact on vested rights. [104]

For most of the Twentieth Century, **retroactive** legislation was not tested against the Wheeler rule. Instead, the Supreme Court simply determined whether the retroactivity was inconsistent with one of the property-protective clauses of the Constitution - the Due Process, Contracts, and Takings clauses. From the 1930s to the 1980s, the judicial standard of review for these clauses was deferential rational basis review, and **retroactive** legislation was typically sustained.

When courts used substantive due process to determine the validity of secondarily **retroactive** laws, the legislation tended to be validated. Under substantive due process analysis, the **retroactive** aspects of legislation were no more than a factor to consider in deciding whether secondarily **retroactive** legislation had unconstitutionally interfered with existing property or economic rights. [105] The pertinent question was not the effect of the **retroactive** law on a "vested right," or whether the law had created a "new obligation" burdening past transactions, or whether the law was unfair, but whether retroactivity was a useful means of carrying out the goal of the law. [106] The level of judicial review was extremely deferential, and if the **retroactive** aspects of the legislation were a "rational means" of furthering some legitimate legislative purpose, then the **retroactive** provisions of the law would meet the test of due process. [107] Moreover, if **retroactive** application of the new law was **[*113]** rational, it could safely "readjust existing rights" and "upset otherwise settled expectations." [108]

Litigants were equally unsuccessful when they attempted to raise retroactivity concerns in the context of non-due process constitutional protections. During the Wheeler era, contract rights were considered among the most sacrosanct vested rights protected against **retroactive** legislation. [109] By the latter part of the Twentieth Century, however, the Supreme Court had largely gutted the Contracts Clause as a weapon to use against retroactivity. Even when a statute was found to operate as a substantial impairment of an existing contractual relationship, the statute was usually acceptable if "the legislature's adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." [110] Unless a state was itself a contracting party, courts typically deferred to a legislature's decision to retroactively alter existing private contract interests. [111]

When property rights were not in contract form (and arguably protected by the Contracts Clause), litigants looked to the Takings Clause as the constitutional provision that might

protect existing property interests which had been adversely affected by a **retroactive** change in applicable law. This was particularly so after the Supreme Court stated in Penn Central Transportation Co.v. New York **[*114]** City [112] that one factor that should be taken into account when determining if a regulation was an unconstitutional taking was whether it had "interfered with distinct investment-backed expectations." [113] This protection of "investment-backed expectations" seemed to parallel the Wheeler admonition against **retroactive** laws which either impaired rights acquired under existing laws, or imposed new duties on past "transactions or considerations." The "investment-backed expectations" approach seemed to permit takings recoveries for owners who could demonstrate that they had purchased their property or made decisions about their property in reliance on an expectation that did not include the challenged new regulation.

However, the Court quickly narrowed the scope of the protection afforded property rights under the Penn Central takings test. A distinct investment-backed expectation had to be more than a unilateral expectation or an abstract need. [114] There could be no taking for retroactively-applying laws based on the Penn Central "expectation" theory if the private property owner (1) had long been subject to similar laws, [115] or (2) had somehow been put on notice that a change in the law was possible. [116] Notice could be constructive and was implied if those subject to the new law operated **[*115]** in a heavily regulated field. [117] A property owner who acted with constructive knowledge of a future restraint could be said either to have no reliance interest, or to have assumed the risk of any subsequent economic loss. [118]

Judicial abandonment of the Wheeler rule, coupled with the courts' reluctance to use of the Constitution's property-protective clauses to halt backwards-looking legislation, meant that secondary retroactivity was routinely upheld by courts. Throughout much of the Twentieth Century, the judiciary sustained legislation that imposed conditions on private parties which made it more difficult, more expensive, or impossible in the post-enactment period either to: (1) obtain a valuable legal interest despite taking steps to secure that interest in the pre-enactment period, [119] or (2) retain such an interest. [120] Legislation was also sustained that limited [121] or **[*116]** **[*117]** prohibited [122] the future use of existing property, imposed on the party a future duty or liability for actions that took place in the past, [123] changed in the future the legal classification of a private **[*118]** interest, [124] or applied a new requirement to pending claims and actions. [125] **[*119]**

C. Continued Invalidity of Primary Retroactivity

Although courts upheld most of the Twentieth Century legislation that applied with secondary retroactivity, courts generally invalidated laws that altered the past legal consequences of past action. Such primary retroactivity was thought to be especially harsh, and usually void, since the new rule did not merely affect past transactions; it also changed what the law was in the past when these transactions occurred. Unlike secondary retroactivity, which has an exclusively future effect on past transactions, primary retroactivity alters the past legal consequences of past private behavior. Consequently, legislation that operates with primary retroactivity violates two fundamental jurisprudential principles: (1) persons should not be penalized in the past for making decisions in good faith reliance on rules in effect at the time the decision was made, [126] and (2) the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place. [127]

Primary retroactivity usually occurs in two ways. First, the legislative body can adopt a new law that deprives a private party of a past valuable benefit by declaring as void the past legal basis for the benefit. [128] Second, the new law may impose a penalty or burden **[*120]** on past private action. [129] In both situations, the fact that the law operates with primary retroactivity is generally sufficient, by itself, to invalidate it.

Courts will uphold laws that are primary **retroactive** in rare instances. A new law may be given primary **retroactive** effect when doing so is necessary to protect private rights otherwise adversely affected by past inequitable behavior of other private parties. [130] Primary retroactivity is also generally acceptable when the new law does not impose new past liability on past action but merely changes the amount of damages available or taxes due. [131] Courts view imposing a new past liability on individuals as a substantive change and therefore impermissible, [132] **[*121]** but generally allow **retroactive** modification of damages or tax on the theory that they are remedial in nature. [133] For primary **retroactive** legislation to be impermissible, the legislation must change past legal consequences; it is not enough that the legislation has a marketplace effect that adversely affects the past decisions of private parties. [134]

IV. The Presumption Against **Retroactive** Substantive Legislation and the Modern Era Definition of Retroactivity

The precise holding of the Landgraf Court is that when a legislature has not made its intention known about whether a statute is to be applied retroactively, its substantive provisions will only be given prospective effect. [135] The resulting presumption against legislative retroactivity may be rebutted with "clear legislative intent." [136] Perhaps more importantly, Landgraf also adopts a **[*122]** definition of retroactivity that requires the presumption to apply only to statutes whose legal effect satisfies the Wheeler test. [137] The Wheeler test not only encompasses retroactivity which is secondary, [138] but also statutes which impair existing rights, increase liability for past conduct, or impose new duties with respect to completed transactions. [139] As a result, even when private parties cannot establish that their pre-enactment conduct has achieved protected legal status, a court may refuse to apply a statute retroactively if the legislature does not explicitly demand that effect.

A. Presumptive Legislative Prospectivity

1. Genesis of and Justifications for the Presumption

Prior to Landgraf, there was much uncertainty about whether courts should apply new legislation retroactively or prospectively when there was no guiding legislative intent. The confusion was caused by what the Supreme Court identified as an "apparent tension" between two lines of cases. [140] One line of Supreme Court cases - United States v. Schooner Peggy, [141] Thorpe v. Housing Authority of Durham, [142] and Bradley v. School Board of Richmond [143] - seemed to establish a general presumption in favor **[*123]** of legislative retroactivity. The Bradley Court articulated "the principle that a court is to apply the law in effect at the time of the decision." [144] The second line of cases culminated in the 1988 case Bowen v. Georgetown University Hospital, [145] where the Court flatly stated that "retroactivity is not favored in the law." [146] In 1990, some members of the Court described this conflict as an "irreconcilable contradiction." [147]

The confusion between the two seemingly contradictory presumptions led to judicial opinions by lower courts which tended to "rely upon [the] conflicting precedent to reach equally conflicting results." [148] The conflict was particularly evident in cases involving the Civil Rights Act of 1991. [149] The purposes of the 1991 Act were **[*124]** to strengthen the federal civil rights laws [150] and to provide additional remedies for claims alleging civil rights violations. [151] Congress enacted the 1991 Act in response to a 1989 Supreme Court decision which limited the remedies available for various civil rights violations. [152] The 1991 Act expanded the definition of an employment contract, [153] for which damages could be claimed if discrimination was proven, and provided for jury trials, [154] additional damage claims, [155] and witness fees. [156] Most of the Act's provisions were to be effective on the date the Act was passed, but the language was unclear as to whether they should apply retroactively or prospectively. [157]

Most lower courts tended to adopt the Bowen presumption of prospectivity that was

eventually adopted in Landgraf. The rationales offered by these courts included the following: (1) the traditional and historic rule of construction that legislation must be addressed to the future, and therefore, a statute should not be given retrospective operation interfering with antecedent rights; [158] (2)the fear that if **[*125]** the enormous power of the legislature can be applied to past (as well as future) conduct, it might "produce massive dislocations in ongoing litigation and defeat [reasonable] reliance interests"; [159] and (3)the common sense notion implicit in Bowen that persons should be able to "conform their present conduct to existing rules of law without the risk of retrospective liability." [160]

The Landgraf presumption of prospectivity for new legislation appears to be a correct resolution of the Bradley-Bowen conflict. [161] As a matter of history and tradition, prospective application for legislation has been the rule among courts. [162] Prospective **[*126]** application of legislation and is based on ancient Roman and English common law. [163] It is also in accord with over 150 years of American tradition through countless judicial rulings, [164] and state constitutional prohibitions against **retroactive** legislation. [165] By contrast, a presumption of legislative retroactivity runs completely contrary to this well-established history; indeed, Bradley's presumption of retroactivity has been judicially described as a "brief and inexplicable excursion from the long-standing norm." [166]

The Supreme Court cases that have been traditionally cited as justifying a presumption of retroactivity - Schooner Peggy, Thorpe, and Bradley - are in fact easily reconcilable with the presumption of prospectivity for substantive legislative changes. In Schooner Peggy, the Court applied a treaty to a case pending on appeal because the language of the treaty commanded such retroactivity. [167] In that case, the presumption of prospective application had been rebutted by clear legislative intent. [168] In Thorpe, retroactivity was justifiable because the change involved the imposition of a new notice and hearing requirement. [169] Prospective application was not warranted in Thorpe because the change fell within the exception for purely non-substantive, procedural alterations of existing law. [170] Bradley involved a statute that allowed a federal court to grant reasonable attorneys' fees to prevailing parties in certain cases. [171] Because applying the attorneys' fees provisions would not result in manifest injustice and there was no congressional intent to the contrary, the **[*127]** Bradley Court held that the new attorney's fee provision could be applied retroactively. [172]

Even if Schooner Peggy-Thorpe-Bradley were not such tenuous precedent, a presumption of prospectivity should still have commanded the Court's support simply because it is the "better rule." [173] Presumptive prospectivity provides persons otherwise affected by new legislation with fixed, predictable standards at the time persons contemplate conduct, [174] which allows market actors to make decisions with more complete information about applicable rules. Prospectivity is more fair because persons know before they act what the likely legal consequences of those actions will be, which allows them to avoid conduct that is unlawful. [175] A presumption against retroactivity better preserves the distinction between courts and legislatures: the former act retroactively, settling disputes between persons by application of pre-existing law; the latter act prospectively, setting the general rules of future conduct. [176]

2. The Landgraf Rule

After Landgraf, a presumption of prospectivity applies for legislation affecting conduct or legal interests arising prior to the effective date of the new statute. The temporal event which controls the prospective application of the new law is private party conduct, which may have (but need not have) created a pre-enactment legal interest. [177] Prospectivity is not rebutted when the private party's prior interests are subject to the filing of a lawsuit, or the pendency **[*128]** of an appeal, at the time of the new law's adoption. [178] This rule of presumed prospectivity is triggered when four conditions are present.

First, the legislature must not have revealed its intent about whether the new statute is to

apply retroactively or prospectively. When the legislature expresses a "clear intent" that the legislation is **retroactive,** the presumption is rebutted. [179] Although there is some confusion about whether this first step can be satisfied by evidence of legislative intent other than an express statutory command, [180] the better rule is that the legislature manifests a clear intent only when the face of the statute "requires retroactivity," [181] or when the statute **[*129]** contains an "express command" that it be **retroactive.** [182] If the statute is silent on the issue of retroactivity, and the legislative history is at all ambiguous, the presumption applies. [183] If the statute expressly requires prospectivity, the presumption is not necessary. [184]

Second, the presumption only applies to substantive changes. [185] Changes characterized as procedural, jurisdictional, remedial, clarifying, or curative may be **retroactive.** [186] If the legislature seeks to avoid the presumption simply by labeling the change as non-substantive, a court may look behind the label to see if the change, in **[*130]** effect, imposes new penalties or damages liability for past private behavior. In such a case, prospectivity controls despite the legislature's attempt to characterize the statute as non-substantive. [187] The impact of such new penalty provisions on parties' existing rights may be particularly harsh and pronounced, therefore justifying application of the presumption.

Third, the presumption has greatest applicability to statutes which would, but for the presumption, be secondarily **retroactive** - they would alter the future legal consequences of past private action, particularly where **retroactive** application would otherwise impose an unanticipated liability. [188] The presumption is typically not needed to overcome primary retroactivity, because legislation which alters the past legal consequences of past private action is usually impermissible regardless of legislative intent. [189]

Fourth, the presumption of prospectivity is not needed simply because the new statute draws upon antecedent facts for its operation, [190] is applied in a case arising from pre-enactment conduct, [191] or upsets expectations based in prior law. [192] These kinds of changes do not operate with what will be termed "true retroactivity." [193] Indeed, when the precipitating event for a statute's **[*131]** application occurs after the effective date of the statute, the statute is often deemed to apply prospectively, even though the precipitating event had its origin in a factual context existing prior to the statute's enactment. [194]

A statute has a truly **retroactive** effect sufficient to trigger the presumption when it satisfies both (1) the Landgraf definition of secondary retroactivity, and (2) the Wheeler definition of retroactivity. The Landgraf definition of secondary retroactivity is met and a law exhibits "true retroactivity," only when legislation attaches a new legal consequence to a pre-enactment event. Removal of discretionary power to relieve a person from a burden imposed by pre-enactment conduct is not a new legal consequence. [195] Under the Wheeler definition, readopted in Landgraf, a new statute is truly **retroactive** if it takes away or impairs vested rights acquired under existing laws, creates a new obligation or imposes a new duty, or attaches liability for past conduct. [196] (The substantive content of **[*132]** these definitional conditions to true retroactivity will be fully explored in Part V). Secondarily **retroactive** statutes which have these consequences operate with true retroactivity, and therefore, they are subject to the presumption of prospectivity, unless a contrary legislative intent is evident.

These four conditions to a successful invocation of the presumption of prospectivity are summarized below in Figure 3. **[*133]**

[SEE FIGURE IN ORIGINAL]

B. The Modern Era Definition of Retroactivity

1. Conflicting Roles of a Finding of Retroactivity

For many years there has been dispute over the function of the term "**retroactive.**" On the

one hand, most commentators and some courts believed that a finding that a law was **retroactive** to was **[*134]** merely descriptive of the operation of the law, [197] and only the beginning point of analysis. If a law was deemed **retroactive,** this finding was not dispositive of the law's validity; there were other issues that still needed to be addressed (e.g., the nature of the **retroactive** impact on the private party) before one could decide whether the retroactivity was sufficient to void the law. [198] Under this view, it was important to define whether a law was **retroactive,** because satisfaction of that definition then sets in motion a series of subsequent inquiries about the law's ultimate validity. If the law was not found to be **retroactive,** then additional steps are not necessary.

On the other hand, many courts assumed that finding a law to be "**retroactive**" was not the beginning, but rather the end of a process of analysis. For these courts, a finding that a law was **retroactive** was tantamount to a finding that the law was unconstitutional or otherwise impermissible. [199] If these courts believed the challenged law should not be declared void, they had to conclude that the law was not **retroactive.** Courts defined the term "retroactivity" narrowly so that it would not encompass the law under attack. **[*135]**

Courts commonly relied on three definitions of retroactivity. First, legislation was not "**retroactive**" merely because it applied to conduct antedating the legislation's enactment. [200] Second, legislation was not **retroactive** just because it imposed a new duty or liability on past acts. [201] Third, regulation of future action based upon rights previously acquired by the person regulated was not **retroactive.** [202]

This approach to retroactivity has several faults. First, it is conclusory. Simply terming the future operation of backwards-looking law "non-**retroactive**" has allowed courts to validate laws without having to explain why it was not somehow unfair for the law's operation to rely on pre-enactment facts. also, the three definitions of retroactivity have not been routinely adopted by all courts. While some jurisdictions have refused to call legislation **retroactive** if the new statute either imposed new duties on past acts or regulated future actions based on legal rights previously acquired, [203] other jurisdictions have deemed laws to be impermissibly **retroactive** if the new statute imposed a new duty with **[*136]** respect to past transactions, [204] impaired legal rights vested under existing laws, [205] or applied a penalty to a prior completed act. [206]

2. A New Model of Retroactivity

A better approach is one that makes a finding of retroactivity neither the beginning nor the end of the analysis. Rather, there may be as many as four decision points in an analytical process which call for differing inquiries about the retroactivity issue. At each point a slightly different definition of retroactivity is employed.

The first inquiry is whether the new statute has prospective or **retroactive** effect. If the statute alters the legal consequences of past (pre-enactment) private action, it has **retroactive** effect. If it affects private interests and private conduct arising only post-enactment, it has only prospective effect. [207]

If it does have **retroactive** effect, the second step is to ask whether the statute alters the legal consequences of private action in the past (pre-enactment), or in the future (post-enactment). If the former, then the law is an example of primary retroactivity. The Supreme Court refers to statutes that operate with primary retroactivity as "statutes ... enacted to take effect from a time anterior to their passage," [208] and "legislation that prescribes what the law was at an earlier time, when the act whose effect is controlled by the legislation **[*137]** occurred." [209] As noted in Part III, if the retroactivity is primary, the analysis usually ends here because the primary retroactivity itself invalidates the statute. [210]

If the statute alters only the future legal consequences of past private action, then it is an example of secondary retroactivity. The Wheeler court referred to secondary retroactivity

when it permitted the invalidation of statutes which, "though operating only from [their] passage, affect [past] rights and transactions." [211] One-hundred-and-eighty years after Wheeler, Landgraf readopted this definition when it stated that courts "must ask whether the new provision attaches new legal consequences to events completed before its enactment." [212] Lower courts concur. While a statute is not **retroactive** merely because it draws upon antecedent facts, it is **retroactive** if it affects pre-existing rights and legal duties of individuals subject to the statute. [213]

If a statute operates in a secondarily **retroactive** fashion, the next (and third) inquiry is whether "clear" legislative intent requires this result. [214] When legislative intent is ambiguous, the presumption of prospectivity becomes relevant. The presumption is applicable only when the statute is truly **retroactive.** A statute manifests true retroactivity when it satisfies the Wheeler-Landgraf definition of secondary retroactivity - the statute impairs existing vested rights, creates or imposes a new duty, or attaches or increases liability for past conduct. [215] A statute is not considered "truly **retroactive"** if the **[*138]** its only **retroactive** effect is to upset the expectations of private parties. True retroactivity is present, and the presumption is triggered, only when (1) legislative intent to proceed retroactively is unclear, and (2) the statute satisfies the Wheeler-Landgraf definition of secondary retroactivity.

When the presumption of prospectivity is inapplicable because the legislature intends for the statute to be secondarily **retroactive,** the fourth and final relevant inquiry is not whether the statue applies retroactively (it does), but whether the retroactivity is permissible. This inquiry requires a determination of whether the pre-enactment private conduct or private interest has protected legal status with respect to the new statute. If it does not, and if the legislature calls for retroactivity, then the statute may alter the future, post-enactment legal consequences of the past private action. If the conduct or interest does have protected legal status, then secondary retroactivity is forbidden, regardless of legislative wishes. [216]

This sequence of analysis, which requires up to four definitional decision points, is illustrated in Figure 4.

[SEE FIGURE IN ORIGINAL]
[*139] [*140]

V. Defeating Intentional Secondary Retroactivity: The Conditions to Protected Legal Status

A. The Elements of Protected Legal Status

1. Landgraf Considerations

When a private party's pre-enactment conduct has protected 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. [217] Whether private actions have 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." [218] While the primary function of these three factors is to determine (in conjunction with the Wheeler definition of retroactivity) 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 existing legal interest either determined to be a "vested right" that would otherwise be

impaired by the new law, [219] or a contract right specially **[*141]** protected against the change by the Contracts Clause. [220] The Landgraf Court concurs. Landgraf adopts that portion of the Wheeler test that finds laws **retroactive** (often impermissibly so) if they "impair vested rights acquired under existing laws." [221] The opinion also notes that "new provisions affecting contractual or property rights [are] matters in which predictability and stability are of prime importance," [222] and that the Contracts Clause "prohibits states from passing... **retroactive**... laws "impairing the Obligation of Contracts.'" [223]

The second consideration - "the extent of the change in the law" - requires reviewing courts to take into account the degree and kind of impact the changed law has on existing rights. [224] 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, [225] or (2) subject to certain kinds of new duties or liabilities with respect to past events. [226] The **[*142]** Landgraf Court specifically notes that the antiretroactivity principle is particularly strong with respect to "new provisions affecting... property rights," [227] and that it is the "Takings Clause [which] prevents the Legislature (and other government actors) from depriving private persons of vested property rights." [228] With respect to the imposition of new duties or liabilities, both Landgraf and its companion case, Rivers, [229] concluded that the provisions of the 1991 Civil Rights Act under review should be prospective, in large part because these new provisions substantially increase a party's liability in the civil context. [230]

The third consideration - "the degree of connection between the operation of the new rule and a relevant past event" - is really an inquiry about 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. [231] Such fundamental unfairness is present when secondary retroactivity would be either inconsistent with due process, [232] or barred by an **[*143]** assertion of equitable estoppel. [233] Landgraf notes that the "Due Process Clause... protects the interests... that may be compromised by **retroactive** legislation." [234] The Landgraf opinion also recognizes that it may be unfair for new laws to thwart legitimate expectations, arising from a reasonable reliance on prior law. [235] These are elements traditionally associated with the doctrine of equitable estoppel. [236]

2. The Factual Components of Protected Legal Status

The presence or absence of protected legal status is highly fact-specific. The example set out earlier in Part II [237] helps to demonstrate the fact-driven nature of protected legal status, and to explain when the above defenses to secondary retroactivity become applicable. It was assumed that a legislative body, the Board of County Commissioners, had initially zoned a parcel of land with a one-half acre minimum lot size requirement in 1960. In 1997, the Board rezoned the parcel, so there is now a two-acre minimum lot size requirement. Between 1960 and 1997, a land developer may have taken action that causes it to have protected legal status with respect to the 1997 rezoning.

If the "nature" of the rezoning is to alter either a "vested right," or a contract protected by the Contracts Clause, the developer may be able to escape **retroactive** application of the 1997 rezoning. For example, if the developer had purchased the six-acre parcel before 1997, and if the county had officially platted the parcel for twelve lots prior to 1997, the developer may have a vested right in post-1997 continuation of the one-half acre minimum lot size rule. [238] On **[*144]** the other hand, if the developer had only signed sales contracts with twelve private purchasers prior to 1997, the rezoning (permitting only three homes on the six acres) would probably be able to interfere with these private contracts. [239] The government action in platting might confer upon the developer a right that vests in the developer, and thus an ability to resist **retroactive** changes imposed by that government.

Assume instead that prior to 1997, the county had signed an agreement with the developer permitting the construction of twelve homes on the six acres once the developer paid $

1million to the county in impact fees. If the developer had paid the $ 1million to the county, the 1997 rezoning could then be viewed as the county reneging on its own contract with the developer. The developer might then have protected legal status under the Contracts Clause with respect to the 1997 zoning change. [240] **[*145]**

If the "extent" of the rezoning is either to "take" an existing property right without compensation, or impose a particular new duty or liability on past transactions, the developer may similarly have protected legal status with respect to the 1997 rezoning. If, prior to 1997, the county had approved the developer's plan to build twelve homes on the six acres, and if the developer had then expended a great deal of money to begin the project, application of the 1997 rezoning change to the six acres might be a taking of the developer's property. [241] The likelihood that the developer would have protected legal status because of the Takings Clause would be even greater if the developer could prove that application of the 1997 change would deny the developer economically viable use of the six acres, [242] or interfere with the developer's reasonable investment-backed expectations. [243]

The developer might also have protected legal status if the developer had built twelve homes prior to 1997 and the 1997 change required the developer to pay the county $ 1million in impact fees. These fees might be charged so that the county could buy open space elsewhere in the county to compensate for the open space lost when the developer built twelve homes, instead of the three that would have been permitted after 1997. The exaction of the impact fees might trigger the Takings Clause. [244] Such a requirement would **[*146]** "create new obligations" based on past transactions and possibly make the "extent" of the developer's **retroactive** liability sufficient to deserve protected legal status. [245]

Finally, the developer has protected legal status when there is an inadequate "degree of connection between operation of the new [1997] rule and a relevant past event." [246] If so, it could be unfair to apply the 1997 change to pre-enactment conduct by the developer. Such unfairness is present when secondary retroactivity would either violate the Due Process Clause, or permit the developer to raise equitable estoppel against the county. The developer might be able to raise a successful due process challenge if it can be shown that the new two-acre minimum lot size rule either is completely irrational, and accomplishes no legitimate goal, [247] or deprives the developer of a vested right. [248] The developer could raise equitable estoppel if the county had earlier made assurances that twelve homes could be built on the six acres, and if the developer had detrimentally relied on these assurances prior to 1997. [249] **[*147]**

B. Functional Preconditions to Protected Legal Status

There are six constitutional and equitable defenses to intentional secondary retroactivity: (1) the Contracts Clause, (2) the vested rights doctrine, (3) the Takings Clause, (4) restrictions on new duties or liabilities imposed on past transactions, (5) the Due Process Clause, and (6) the equitable estoppel doctrine. Although these six defenses to retroactivity are usually raised separately by litigants, they are interrelated. For example, similar elements of proof are needed to establish vested rights and to invoke equitable estoppel. Courts often ask identical questions in determining whether there is a vested right or a due process violation. A Contracts Clause challenge often entails an allegation that the new law has retroactively imposed a new duty; a Takings Clause challenge may arise when a new law imposes a new liability on an existing property interest. A takings lawsuit is more likely to be successful if the property affected by the new law constitutes a vested right. A takings claim and a due process challenge sometimes use the same test - whether the purpose of the **retroactive** law is justifiable and whether the law will in some way bring about that purpose. Due process and estoppel are linked because each addresses the underlying fairness of the new law.

The interrelated nature of the six traditional legal defenses to secondarily **retroactive** laws

suggests that there may be little difference between them. When viewed functionally, a successful assertion of a particular legal defense to retroactivity depends less on the choice of a specific defense and more on the existence of the following factual variables: (1) a protectable legal interest, often in the form of a property right; (2) an earlier promise by a governmental entity; (3) reasonable reliance on the promise resulting in a legitimate expectation by a private party; (4) some injury to that **[*148]** party; and (5) the absence of a suitable justification or explanation for the governmental decision to proceed retroactively. These factual variables, in effect, have become the functional pre-conditions to protected legal status. A critical inquiry for secondarily **retroactive** legislation is how many of these conditions are present in a given factual context. [250]

1. Protectable Legal Interest

The initial inquiry for a legal defense to retroactivity is usually whether the private party affected by the retroactivity has some legal interest that existed and was legally protected prior to the new legislation. If such an interest is present, then (1) the Takings and Due Process clauses become applicable if the interest is "private property," [251] (2) the Contracts Clause is relevant if the interest is contractual, [252] and (3) the vested rights doctrine may be advanced if **[*149]** the right has vested. [253] Successful assertion of these defenses protects legal interests from retroactively-applying changes. [254] **[*150]**

Private parties should be cautioned that not all legal interests are property, [255] nor are all property rights (including contract rights) protectable. [256] To have a protectable legal interest, especially if such an interest is claimed to be a property interest, the private party **[*151]** must have either a legitimate claim of entitlement to it, or ownership of it. [257] To resist a **retroactive** change in applicable statutory law, a private party will typically claim a pre-enactment property entitlement to a right that was sought (e.g., an approval by a government body of an application) [258] or already existed (e.g., a previously granted building permit) [259] prior to the legislative change. **[*152]**

2. Government Promises

A government guarantee or assurance may create a legal interest that is protected against secondary **retroactive** application of a new law. A promise by some government actor about the continued applicability of existing law may prevent the later application of **retroactive** law. The promise is critical to the success of a vested rights, [260] estoppel, [261] or Contracts Clause claim. [262] The Takings **[*153]** Clause is also more likely to be implicated if what has been unconstitutionally affected by a new law is a legal interest arising as a result of some government assurance. [263]

3. Reliance

[*154] Reasonable reliance on existing law is important for the successful assertion of a (1) takings claim (which may turn on whether the **retroactive** law interferes with an investment-backed expectation), [264] (2) due process claim (which considers the fairness of changing the rules on someone who has relied on a previous set of rules), [265] or (3) Contracts Clause claim (which assumes that parties to a contract rely on the fact that the terms of the contract will not change). [266] Detrimental reliance often is influential in determining whether an expectation thwarted by a **retroactive** law rises to the level of a protected vested right. [267] If a party did not assume the risk **[*155]** of a future change of law, and if the possibility of change was unforeseeable, it may be impermissible for a new duty or an unexpected liability to affect reliance interests. [268] Also, one of the traditional elements of equitable estoppel is reliance. [269] **[*156]**

4. Harm

An estoppel action requires reliance that produces some detriment or injury. [270] Protected legal status usually requires a party affected by secondary retroactivity to demonstrate some harm or injury resulting from the new law. Both vested rights and contracts are presumptively protected if they are "impaired." [271] There may be an unconstitutional taking if a property right has been physically invaded, [272] singled out for restrictive regulation, [273] or subject to **[*157]** the loss of economically viable use. [274] A successful due process challenge often entails an allegation that the effect of the new law is "oppressive." [275] **[*158]**

5. Rationality

Finally, a **retroactive** law is constitutionally suspect if it fails to meet the test of essential rationality. This test is simply a requirement that the new law have a valid purpose, and that the choice to apply its terms retroactively be consistent with this purpose. A **retroactive** law that impairs a contract may be void under the Contracts Clause if it is not justified by a legitimate state interest. [276] If a **retroactive** law does not substantially advance a legitimate state interest it may constitute a taking. [277] A **retroactive** law may also violate due process if it is arbitrary, [278] or if it cannot accomplish the government's goal. [279] **[*159]**

Conclusion

Courts, legislatures, administrative agencies, and other lawmakers must change applicable law from time to time. A change may be thought necessary because of differing social and economic contexts, a rethinking of the continued usefulness or fairness of the old law, or a realization that the old law had caused unanticipated negative consequences. Whatever the reason for the change, one central issue inevitably associated with the change is whether it should apply to or otherwise affect persons whose pre-change conduct has been influenced by the old law, or whether it should apply only to conduct arising after the change. This is the problem of retroactivity.

Analysis of the problem begins with an understanding of the important difference between primary and secondary retroactivity. When a legislature enacts a substantive statute which is an example of true secondary retroactivity, three questions follow:

(1) Has the legislature intended the statute to apply retroactively? (2) If not, should the statute be presumed to apply retroactively? (3) Regardless of legislative wishes, may the statute apply retroactively?

[*160] The third issue is often resolved by determining whether the private actions subject to the new statute have achieved protected legal status.

The study of retroactivity has been neglected too long. The Supreme Court has focused considerable attention on the topic, [280] and in so doing has raised the possibility that private property owners adversely affected by new law may raise defenses of impermissible retroactivity to prevent application of the new law. Retroactivity is an alternative way of thinking about how laws may harm private expectations and individual action taken in good

faith reliance on a continuation of previous law. For parties accustomed to losing takings or due process challenges to government action, an argument concentrating on the essential unfairness of the action's retroactivity may be more effective in protecting private interests otherwise injured by changes in law.

FOOTNOTES:

n1. In 1994, the Court decided that statutes should have presumptively prospective effect in the absence of legislative guidance to the contrary. See Landgraf v. USI Film Prods., 511 U.S. 244, 265-73 (1994); Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994). Landgraf concluded that this presumption against statutory retroactivity exists even when the conduct preceding the new statute has resulted in a judicial case "pending" on appeal on the effective date of the new statute. See Landgraf, 511 U.S. at 263-65.The Landgraf presumption is limited to statutes altering substantive rights. See id. at 271-73. It does not apply to changes characterized as procedural, see id. at 275, jurisdictional, see id. at 274, or remedial. See id. at 285 n.37. In Hughes Aircraft Co. v. United States ex rel. Schumer, 117 S. Ct. 1871, 1878 (1997), the Court clarified that jurisdictional statutes address which courts shall have jurisdiction to hear a **cause of action,** while non-jurisdictional statutes determine whether a suit may be brought at all.Other Supreme Court decisions have considered the extent to which Congress may retroactively alter the results reached in a litigation context. In Plaut v. Spendthrift Farm, Inc., the Court found a separation of powers impediment to congressional attempts to reopen final court judgments. 115 S. Ct. 1447 (1995). Plaut addressed a different kind of retroactivity than that at issue in Landgraf. Landgraf presumed prospectivity to avoid construing a new law that otherwise might have attached new [post-enactment] legal consequences "to events completed" before the law's enactment. Landgraf, 511 U.S. at 258-59. This means that the statute in Landgraf altered the legal consequences of past private actions only in the future. Plaut considered a statute which altered the past legal consequences of past private actions. The Court in Plaut erected a barrier to **retroactive** legislation that "prescribes what the law was at an earlier time." Plaut, 115 S. Ct. at 1456. In the context of tax legislation, however, Congress may prescribe what the law was at an earlier time if it so intends. In United States v. Carlton, the Court decided that due process was not violated by an amendment to a federal tax statute that imposed a **retroactive** tax liability on pre-amendment transactions. 512 U.S. 26 (1994).The Supreme Court recently resolved important issues about the relationship between new legislation and rules announced previous judicial decisions. Both Plaut and Rivers permit Congress to alter rules of law established by judicial decision (i.e., to "legislatively overrule" a case), even decisions by the Supreme Court. See Plaut, 115 S. Ct. at 1457; Rivers, 511 U.S. at 304-05 & n.5. Plaut also established that Congress may decide to announce a new law that operates retroactively to govern the rights of parties whose rights would otherwise be subject to a rule announced in an appealable judicial decision. See Plaut, 115 S. Ct. at 1457 (acknowledging "the distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being apealed)"). If Congress wishes to change the law for pending cases that are not yet final, it must make clear its intent. See Landgraf, 511 U.S. at 270-73. Once Congress has signaled its intent, it may change the result of a pending case by changing the law underlying the legal basis of the pending suits. See Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992).In 1993 the Court was presented with the question of whether a legislative body may change the statutory language underlying a governmental contract, thereby retroactively changing the contract itself. See Cisneros v. Alpine Ridge Group, 508 U.S. 10 (1993). The Court left unresolved this significant retroactivity issue when it interpreted the contract as not prohibiting the changes contemplated by the subsequent statute. See id. at 17-21. However, in 1996 the Court concluded that the government may be liable for damages resulting from **retroactive** contract breaches where the contract allocates the risk of regulatory change to the government. See United States v. Winstar Corp., 116 S. Ct. 2432 (1996).

n2. In 1993 the Court considered whether there should be a different rule for retroactivity

when a court case is changed not by the legislature, but by a subsequent court case. See Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993). The Court concluded that when a court in a civil context reverses judicial precedent and applies a new rule of federal law to the parties before it, that new rule is to be retroactively applied to private conduct arising before the new rule, and to all cases pending that are not yet final. See id. at 97. Accordingly, prospectivity is assumed with respect to new legislation, while retroactivity is acceptable for new judicial rules.When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. See Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932). A state is also free to provide an exclusively predeprivation remedy for when a statute is alleged to be unconstitutional. See McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 38 & n.21 (1990) (assessing challenges to taxes). However, if a state holds out a "clear and certain" postdeprivation remedy, it cannot later declare that no such remedy exists after the statute to which the remedy applies is declared unconstitutional. See Reich v. Collins, 115 S. Ct. 547, 550 (1994). In 1995 the Court concluded that the Harper retroactivity rule for new judge-made rules does not give state courts sufficient legal leeway to create exceptions from the application of the new rule based on reasonable reliance interests in the former state law. See Reynoldsville Casket Co. v. Hyde, 115 S. Ct. 1745 (1995).

n3. In 1988 the Court presaged the Landgraf prospectivity rule when it decided a case that concerned the retroactivity of rules from administrative agencies. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988). Bowen established that (1) federal administrative rules may have legal consequences only for the future, and (2) a statutory grant of legislative rulemaking authority will not encompass the power to promulgate **retroactive** rules unless the legislature expressly conveys that power. See id. at 208-09.

n4. See infra Part V.

n5. See, e.g., Michael J. Graetz, Retroactivity Revisited, 98 Harv. L. Rev. 1820 (1985); Charles B. Hochman, The Supreme Court and the Constitutionality of **Retroactive** Legislation, 73 Harv. L. Rev. 692 (1960); Stephen R. Munzer, A Theory of **Retroactive** Legislation, 61 Tex. L. Rev. 425 (1982); W. David Slawson, Constitutional and Legislative Considerations in **Retroactive** Lawmaking, 48 Cal. L. Rev. 216 (1960); Elmer E. Smead, The Rule Against **Retroactive** Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775 (1936); Bryant Smith, **Retroactive** Laws and Vested Rights, 6 Tex. L. Rev. 409 (1928); Edward S. Stimson, **Retroactive** Application of Law - A Problem in Constitutional Law, 38 Mich. L. Rev. 30 (1939).

n6. A text that is still required reading on the general subject of retroactivity is Lon L. Fuller, The Morality of Law (1964). An excellent historical account of the Court's approach to **retroactive** legislation can be found in James L. Kainen, The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights, 79 Cornell L. Rev. 87 (1993); see also Jill E. Fisch, Retroactivity and Legal Change: An Equilibrium Approach, 110 Harv. L. Rev. 1055 (1997) (attempting to harmonize concerns of efficiency and fairness regarding retroactivity analysis).

n7. See, e.g., Ronald A. Cass, Judging: Norms and Incentives of Retrospective Decision-Making, 75 B.U. L. Rev. 941 (1995); Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1733 (1991); Paul E. McGreal, Back to the Future: The Supreme Court's Retroactivity Jurisprudence, 15 Harv. J.L. & Pub. Pol'y 595 (1992); William M. Treanor & Gene B. Sperling, Prospective Overruling and the Revival of "Unconstitutional" Statutes, 93 Colum. L. Rev. 1902 (1993).

n8. See, e.g., Harold J. Krent, The Puzzling Boundary Between Criminal and Civil **Retroactive** Lawmaking, 84 Geo. L.J. 2143 (1996); L. Anita Richardson & Leonard B. Mandell, Fairness Over Fortuity: Retroactivity Revisited and Revised, 1989 Utah L. Rev. 11.

n9. See, e.g., Abner S. Greene, Adjudicative Retroactivity in Administrative Law, 1991 Sup. Ct. Rev. 261 (1992); William V. Luneburg, Retroactivity and Administrative Rulemaking, 1991 Duke L.J. 106.

n10. See Fuller, supra note 6, at 53 ("Taken by itself, and in abstraction from its possible function in a system of laws that are largely prospective, a **retroactive** law is truly a monstrosity."); Andrew C. Weiler, Note, Has Due Process Struck Out? The Judicial Rubberstamping of **Retroactive** Economic Laws, 42 Duke L.J. 1069, 1071-75 (1993) (stating that **retroactive** legislation should be subject to more meaningful judicial review because of "the inherent injustice of **retroactive** laws").

n11. See Plaut, 115 S. Ct. at 1456 (stating that legislation which alters what the law was at an earlier, pre-enactment time, is invalid).

n12. 511 U.S. 244 (1994). See also supra note 1.

n13. The Landgraf opinion expands the definition of retroactivity to include changes in the law which attach "new legal consequences to events completed before its enactment." Id. at 269-70. A more narrow definition would have limited the Landgraf rule only to statutes that take effect from a time anterior to their passage. After Landgraf, a law which in the future disrupts certain settled expectations, imposes new obligations, or increases liability for past actions, is **retroactive** because the law attaches new legal consequences to prior acts. See id.

n14. See id. at 270.

n15. Landgraf recognizes "that the antiretroactivity principle finds expression in several provisions of our Constitution." Id. at 266. The most prominent of these provisions are the Takings and Due Process clauses, U.S. Const. amends. V & XIV (protecting private property), and the Contracts Clause, U.S. Const. art. I, 10, ch. 1 (protecting contract rights). See, e.g., United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (holding that the Contracts Clause prevents **retroactive** alteration of contract with state bondholders); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 584-90 (1935) (holding that the Takings Clause invalidates a bankruptcy law that retroactively abrogates a vested property interest).

n16. Landgraf acknowledges that arguments against retroactivity may also be based upon "elementary consideration of fairness" found outside the Constitution. 511 U.S. at 265. For example, Landgraf seems to resurrect the vested rights doctrine as a bar to secondary retroactivity. See id. at 290-93 (Scalia, J., concurring) (criticizing the majority's "vested rights" approach to retroactivity). In addition, the equitable estoppel doctrine protects private property owners from **retroactive** changes in the law if the owner has relied, in good faith, upon some act or omission of government, and if there has been a substantial change in position by the owner as a result of this reliance. See Charles L. Siemon et al., Vested Rights: Balancing Public and Private Development Expectations 13 (1982).

n17. The Landgraf opinion suggests that the validity of **retroactive** legislation may depend on the "nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." Landgraf, 511 U.S. at 270.

n18. See id. at 269-73.

n19. See generally Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 219-20 (1988) (Scalia, J., concurring); John K. McNulty, Corporations and the Intertemporal Conflict of Laws, 55 Cal. L. Rev. 12, 58-60 (1967).

n20. See supra note 19.

n21. See Plaut, 115 S. Ct. 1447 (1995). In Plaut, a Securities Exchange Act section provided for reinstatement of actions that had been dismissed as time barred after the court established a uniform limitations period if they would have been timely under the previously existing laws.

n22. See id. at 1463.

n23. Id. at 1456, 1460 (stating that statutes are impermissibly **retroactive** which subject "a judgment ... to a reopening requirement which did not exist when the judgment was pronounced"). See also supra note 1.

n24. See infra Part III.C.

n25. See supra note 1.

n26. The Civil Rights Act of 1991 creates a right to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964. See Pub. L. 102-166, 102, 105 Stat. 1071 (codified as amended at 42 U.S.C. 1981a(a).In 1989 the plaintiff in Landgraf brought suit against her employer for allegedly violating Title VII of the Civil Rights Act of 1964. See Landgraf, 511 U.S. at 248. Her complaint was dismissed because she was not entitled to the equitable relief permitted by Title VII, which at that time did not authorize the recovery of damages. See id. at 249. While her appeal was pending, the 1991 Act permitting the recovery of damages was signed into law. See id. The question before the Supreme Court in Landgraf was whether the compensatory and punitive damage provision of 102 of the 1991 Act should apply, post-enactment, to conduct that occurred before the effective date of the 1991 Act. See id. at 250.

n27. See id. at 267-70.

n28. See Landgraf, 511 U.S. at 270 (citing United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806)).

n29. See id. at 280.

n30. See id. at 266.

n31. See id. See also note 15.

n32. See, e.g., General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) ("**Retroactive** legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.").

n33. See Landgraf, 511 U.S. at 250-57 (Civil Rights Act of 1991 changes Title VII of Civil Rights Act of 1964); Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990) (Federal Court Improvement Act of 1982 amends the federal statute previously in effect governing awards of post-judgment interest); Bradley v. School Bd. of Richmond, 416 U.S. 696, 708-10 (1974) (Education Amendments of 1972 change the Civil Rights Act of 1871).

n34. See Bennett v. New Jersey, 470 U.S. 632 (1985) (Education Amendments of 1978 alter the Elementary and Secondary Education Act of 1965 and administrative regulations in effect in 1972).

n35. In some jurisdictions, the filing of an application for a building permit prevents **retroactive** application of any subsequent law. See, e.g., Friends of the Law v. King County, 869 P.2d 1056 (Wash. 1994) (en banc) (stating that land developer's rights vest at the time of application and the application must be evaluated under the laws in effect at that time);

South Fork Coalition v. Board of Comm'rs of Bonneville County, 792 P.2d 882, 886 (Idaho 1990) (stating that an applicant's rights are determined by the law in existence at the time of filing an application for a building permit).

n36. See infra notes 128-29.

n37. See infra Part V.A.2.If the builder purchased the six acres between 1960 and 1997 but took no steps toward subdividing or selling the lots, it is unlikely that his past actions in purchasing the land have any protected legal status. Although the application of the new 1997 rule will adversely affect the builder's investment plans if the purpose of the initial purchase was to develop twelve homes, merely burdening the future profitability of the property does not confer protected legal status. See Agins v. City of Tiburon, 447 U.S. 255 (1980) (holding that developers who purchased land with intent to subdivide were subject to a subsequent zoning change limiting development); Anchorage v. Sandberg, 861 P.2d 554, 560 (Alaska 1993) (stating that the mere purchase of five lots does not grant purchaser protected legal status immunizing purchaser from the police power); Mansfield Apartment Owners Ass'n v. City of Mansfield, 988 F.2d 1469, 1476-78 (6th Cir. 1993) (stating that although a landlord's property has legal status, that status is not protected, in that it does not prevent a locality from retroactively (1) imposing on the landlord the duty in the future to pay the tenant's unpaid water bills, and (2) refusing to provide water service until the delinquent accounts of former tenants are paid).However, if in addition to purchasing the land, the developer also received some commitment from the relevant government body authorizing the construction of twelve homes, the developer's past actions may have protected legal status. For differing treatments of plat applications, compare Friends of the Law v. King County, 869 P.2d 1056, 1060 (Wash. 1994) (en banc) (stating that mere application for approval of plat - even without approval - confers protected legal status), and Robinson v. Lintz, 420 P.2d 923, 927 (Ariz. 1966) (lots become legally established and protectable when County properly records plat), with R. A. Vachon & Son, Inc. v. City of Concord, 289 A.2d 646, 649 (N.H. 1972) (stating that even final approval of plat does not place lots beyond authority of zoning changes), and Stucker v. Summit County, 870 P.2d 283, 288 (Utah Ct. App. 1994) (stating that platting does not confer protected legal status).For the treatment of building permits, compare Hy Kom Development Co. v. Manatee County, 837 F. Supp. 1182, 1187 (M.D. Fla. 1993) (stating that a vested right may be created in a building permit), with L.M. Everhart Construction, Inc. v. Jefferson County Planning Commission, 2 F.3d 48, 52 (4th Cir. 1993) (stating that the issuance of building permit does not vest rights against future changes in zoning regulations), and Littlefield v. Inhabitants of Lyman, 447 A.2d 1231, 1233 (Me. 1982) (same).

n38. This situation usually arises when government officials assert that some duty must be performed - e.g., payment of a duty or tariff - and their authority is later found invalid. See Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937); United States v. Heinszen & Co., 206 U.S. 370 (1907).

n39. See Paramino Lumber Co. v. Marshall, 309 U.S. 370 (1940) (upholding Act of Congress enacted to cure a defect in the administration of a claim under the Longshoremen's & Harbor Workers' Compensation Act).

n40. See Delmay v. Paine Webber, 872 F.2d 356, 358 (11th Cir. 1989) ("Courts have been especially careful to give retrospective application to curative measures."); Cromwell v. MacLean, 25 N.E. 932, 935 (N.Y. 1890) (stating that a statute may be cured if the irregularity or omission could have been corrected by a prior statute); see also Hochman, supra note 5, at 703-706; Munzer, supra note 5, at 468-470. But see Washington Nat'l Arena Ltd. Partnership v. Treasurer, 410 A.2d 1060, 1069 (Md. 1980) ("The presence of curative language ... cannot render a statute immune from constitutional challenge on retroactivity grounds. If it did, any **retroactive** legislation could be shielded from a successful constitutional attack merely by the insertion of such language.").

n41. See GTE Sprint Communications Corp. v. State Bd. of Equalization, 2 Cal. Rptr. 2d 441, 444-45 (Cal. Ct. App. 1991) ("Where a statute or amendment clarifies existing law, such action is not considered a change because it merely restates the law as it was at the time, and retroactivity is not involved."); Tomlinson v. Clarke, 825 P.2d 706, 713 (Wash. 1992) (en banc) ("When an amendment clarifies existing law and where that amendment does not contravene previous constructions of the law, the amendment may be deemed curative, remedial, and **retroactive.**").

n42. Landgraf left open the question of whether there are constitutional limitations on the **retroactive** application of punitive damage statutes; the Court instead focused its analysis on the powers of the legislature to upset settled expectations as to what the law requires. See Landgraf, 511 U.S. at 265. The Court has indicated that punitive damage awards must comply with due process. See TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) (finding punitive damage award not so "grossly excessive" as to violate due process). Lower courts have concluded that due process permits **retroactive** imposition of punitive damages if a party has notice that its conduct might be sufficiently "egregious" to support an award of punitive damages under prior law. See Patton v. TIC United Corp., 77 F.3d 1235, 1243-45 (10th Cir. 1996); see also In re Pacific Far E. Lines, Inc., 889 F.2d 242, 246-47 (9th Cir. 1989) (holding that applying a new statute in a pending case which limits fees paid to the Referees' Salary and Expense Fund in bankruptcy required refunding the amounts paid in excess of the limit). But see Louisiana-Pacific Corp. v. Asarco, Inc., 24 F.3d 1565, 1578 (9th Cir. 1994) (declining to extend the reasoning for allowing **retroactive** application of a public remedial scheme for recovery to an amendment creating a private remedial scheme).With respect to enforcement, see Bradley, 416 U.S. at 710-24 (permitting **retroactive** application of a statute authorizing an award of attorneys' fees); Campbell v. Holt, 115 U.S. 620, 628-29 (1885) (stating that **retroactive** repeal of a limitations period does not violate due process); FDIC v. New Hampshire Ins. Co., 953 F.2d 478, 486-87 (9th Cir. 1991) (permitting **retroactive** application of a statute of limitations); Sibley v. United States Dep't of Educ., 913 F. Supp. 1181, 1188 (N.D. Ill. 1995) (holding that **retroactive** appeal of statute of limitations applicable to monetary debts does not violate due process); Slawson, supra note 5, at 242 ("Time periods [for statutes of limitations] generally can be lengthened or shortened as the legislature desires, even to the extent of reviving claims previously barred.").

n43. See Gersman v. Group Health Ass'n, 975 F.2d 886, 898-99 (D.C. Cir. 1992); Johnson v. Uncle Ben's, Inc., 965 F.2d 1363, 1374 (5th Cir. 1992) (stating that the Bradley presumption of applicability of law as of the time of decision pertains to "remedial provisions - not substantive obligations or rights under a statute"); United States v. Peppertree Apartments, 942 F.2d 1555, 1561 (11th Cir. 1991) (stating that an intervening statutory amendment authorizing double damages was "remedial" in nature and thus properly applied retroactively).

n44. Landgraf, 511 U.S. at 274.

n45. See Hallowell v. Commons, 239 U.S. 506, 508 (1916); United States ex rel. Newsham v. Lockheed Missiles & Space Co., 907 F. Supp. 1349, 1357 (N.D. Cal. 1995). However, if a statute "does not merely allocate jurisdiction among fora[, but rather] creates jurisdiction where none previously existed ... it ... speaks ... to the substantive rights of the parties" and is subject to the presumption against retroactivity. Hughes Aircraft Co. v. United States ex rel. Schumer, 117 S. Ct. 1871, 1878 (1997) (emphasis in original).

n46. See, e.g., United States v. TRW, Inc., 4 F.3d 417, 422 (6th Cir. 1993) (quoting Boddie v. American Broad. Co., 881 F.2d 267, 270 (6th Cir. 1989)); Wright v. Director, Fed. Emergency Management Agency, 913 F.2d 1566, 1574 (11th Cir. 1990) (stating that an intervening regulatory amendment of insurance policy exclusion clause affects unconditional contractual relationship and therefore may not apply retroactively in the absence of legislative intent).

n47. Landgraf, 511 U.S. at 275 ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity."); Thorpe v. Housing Auth. of Durham, 393 U.S. 268 (1969) (stating that a procedural requirement that local housing authorities provide tenants with reasons for eviction which was adopted while case was pending applies to litigants because, among other reasons, it does not infringe on any rights); Resolution Trust Corp. v. Bayside Developers, 43 F.3d 1230, 1235-36 (9th Cir. 1995); Baynes v. AT&T Technologies, Inc., 976 F.2d 1370, 1374 (11th Cir. 1992) (stating that the fact that statutory changes are procedural in nature as opposed to substantive weighs in favor of **retroactive** application).

n48. See Thorpe, 393 U.S. 268 (new hearing requirement).

n49. See Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 937 (7th Cir. 1992) (stating that because "the **retroactive** application of a procedural provision [to a case on appeal] could require a new trial and could, therefore, require double expenses [it] would rise to the level of manifest injustice" and apply retroactively); Raya v. Maryatt Indus., 829 F. Supp. 1169, 1174 (N.D. Cal. 1993) (stating that **retroactive** application of the ADA would result in manifest injustice because it imposes new obligations and affects substantive rights).

n50. See Boyce v. Fleet Fin., Inc., 802 F. Supp. 1404, 1408 (E.D. Va. 1992).

n51. See Mozee, 963 F.2d at 936.

n52. See Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 229 (7th Cir. 1992).

n53. See Gersman, 975 F.2d at 899.

n54. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

n55. See Linkletter v. Walker, 381 U.S. 618, 622-23 (1965) ("At common law there was no authority for the proposition that judicial decisions made law only for the future."); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("Judicial decisions have had retrospective operation for near a thousand years.").

n56. See William Blackstone, Commentaries on the Laws of England 69 (1765) ("[The judicial power is] not delegated to pronounce a new law, but to maintain and expound the old one.")

n57. See Thomas M. Cooley, Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 91 (1868) ("It is said that that which distinguishes a judicial from a legislative act is, that the one [judicial] is a determination of what the existing law is in relation to some existing thing already done or happened, while the other [legislative] is a predetermination of what the law shall be for the regulation of all future cases ....").

n58. See Mackey v. United States, 401 U.S. 667, 680 (1971) (Harlan, J., concurring) (stating that refusal to apply new judicial rules to all cases on direct appeal "mitigates the practical force of stare decisis"); Cass, supra note 7, at 971-973; Robert Von Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harv. L. Rev. 409, 427-28 (1924).

n59. See Landgraf v. USI Film Prods., 511 U.S. 244, 278-79 n. 32 (1994); Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 94-99 (1993). But see Abbott v. City of Los Angeles, 326 P.2d 484, 494-495 (Cal. 1958) (stating that where judicial decisions have been relied upon in investing money or purchasing property they should be adhered to based on stare decisis).

n60. See Landgraf, 511 U.S. at 267-68 ("Retroactivity provisions often serve ... to correct mistakes ... or simply to give comprehensive effect to a new law Congress considers salutary.").

n61. See, e.g., Certified Color Indus. Comm. v. Secretary of Health, Education, and Welfare, 283 F.2d 622, 626 (2d Cir. 1960) (stating that the FDA may retroactively revoke its previous certification of certain food additives based on public concerns about the original certification); see also Munzer, supra note 5, at 471 (discussing the curative aspects of **retroactive** statutes).

n62. See Krent, supra note 8, at 2156 (stating that retroactivity helps legislatures reach policy objectives).

n63. See Stimson, supra note 5, at 37-38.

n64. See Krent, supra note 8, at 2160-67 (discussing the interests implicated by retroactivity in civil and criminal contexts).

n65. See Einer R. Elhauge, Does Interest Group Theory Justify More Intensive Judicial Review?, 101 Yale L.J. 31 (1991).

n66. See Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 646 (1993) ("[The private party] could have had no reasonable expectation that it would not be faced with [future] liability ...."); see also Landgraf, 511 U.S. at 269-70 & n.24 (stating that a statute is not **retroactive** merely because it upsets expectations based in prior law); Omnia Commercial Co. v. United States, 261 U.S. 502 (1923) (finding no taking when expectations under a contract are frustrated, but not appropriated, by lawful government action).

n67. Krent, supra note 8, at 2164. See generally Louis Kaplow, An Economic Analysis of Legal Transitions, 99 Harv. L. Rev. 509, 598-602 (1986) (discussing factoring in potential changes in law that increase liability into initial risk assessments).

n68. See Concrete Pipe, 508 U.S. at 644-45 (stating that there is no reasonable basis for employer to expect that the legislative ceiling of liability on its federally regulated pension plan would never be lifted); General Motors Corp. v. Romein, 503 U.S. 181, 192 (1992) ("Petitioners knew they were taking a risk [in relying on the old law], but they took their chances .... Having now lost the battle in the [state legislature], petitioners wished to continue the war in court."); EEOC v. Puget Sound Log Scaling & Grading Bureau, 752 F.2d 1389 (9th Cir. 1985) (stating that reliance was unreasonable because prior administrative interpretations had signaled the agency's future position); Nicholson v. Brown, 599 F.2d 639, 648-49 (5th Cir. 1979) (stating that a change of criteria used by agency "are not such a new departure [from previous criteria] that they could not reasonably have been foreseen").

n69. The Ex Post Facto Clause of the Constitution does protect individuals who rely on non-**retroactive** criminal law. See U.S. Const. art. I, 9, cl. 3; see also United States v. Halper, 490 U.S. 435 (1989) (determining when a civil sanction constitutes "criminal" punishment); Bae v. Shalala, 44 F.3d 489, 492-93 (7th Cir. 1995) (stating that when a civil sanction can be characterized as punishment it implicates ex post facto concerns).

n70. See Giles v. Adobe Royalty, Inc., 684 P.2d 406, 412-13 (Kan. 1984) (declining to give a law **retroactive** effect is proper when there has been reliance on the settled nature of the prior law and application would result in substantial hardship).

n71. See Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1456 (1995).

n72. Many courts characterize statutes that apply to pre-enactment acts in the future as non-retrospective or non-**retroactive.** See, e.g., Cox v. Hart, 260 U.S. 427, 435 (1922); Lohf v. Casey, 466 F.2d 618, 620 (10th Cir. 1972); Liberty Mut. Ins. Co. v. Whitehouse, 868 F. Supp. 425, 435 (D.R.I. 1994).

n73. 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).

n74. See Frank H. Knight, Risk, Uncertainty and Profit 197-232, 313-75 (1921).

n75. See Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 460-61 (1897); see also Landgraf, 511 U.S. at 271 ("The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.").

n76. See Munzer, supra note 5, at 427-28, 429, 430, 432.<Indent Quote2><PARA'0 pt'14.4 pt'14.4 pt'>An expectation is a disposition to predict that certain event will occur together with (characteristically) an attitude of being able to count on its occurrence.<Indent Quote2><PARA'0 pt'14.4 pt'14.4 pt'>.... <Indent Quote2><PARA'0 pt'14.4 pt'14.4 pt'>... The law should shelter legal expectations that are rational, or that are legitimate within the legal system.<Indent Quote2><PARA'0 pt'14.4 pt'14.4 pt'>.... <Indent Quote2><PARA'0 pt'14.4 pt'14.4 pt'>... An expectation is rational if the probability assigned to the predicted event corresponds suitably to the actual likelihood that it will occur.... <Indent Quote2><PARA'0 pt'14.4 pt'14.4 pt'>.... <Indent Quote2><PARA'0 pt'14.4 pt'14.4 pt'>The legitimacy of an expectation within a legal system depends on whether the expectation is supported ... by the underlying justifications of the laws inducing it.... Id. See also Landgraf, 511 U.S. at 265 ("Settled expectations should not be lightly disrupted"); Bott v. Commission of Natural Resources, 327 N.W.2d 838, 849 (Mich. 1982) (stating that rules which induce "extensive reliance" should not be retroactively changed); Krent, supra note 8, at 2160 ("Individuals should be able to rely on existing law when ordering their affairs").

n77. See Slawson, supra note 5, at 219 ("(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.").

n78. See McDonald v. Watt, 653 F.2d 1035, 1045-46 (5th Cir. Unit A Aug. 1981) (stating that **retroactive** application would cloud title to hundreds of leases); NLRB v. E & B Brewing Co., 276 F.2d 594, 600-01 (6th Cir. 1960) (finding no public interest justification for applying rule retroactively to private contract); see also Slawson, supra note 5, at 233 ("More than other kinds of legally significant action ... contracting is likely to be done with knowledge of, and specific reliance on, the law.").

n79. See NLRB v. Majestic Weaving Co., 355 F.2d 854, 860-61 (2d Cir. 1966).

n80. 2 John Austin, Lectures On Jurisprudence 1138, at 256-57 (Robert Campbell ed., 1875). See also Jeremy Bentham, The Theory Of Legislation 111-12 (C. K. Ogden ed., 1931) (stating that security is the principal object of law, and "as regards property, security consists in receiving no check, no derangement to the expectation founded on the laws").

n81. See Landgraf, 511 U.S. at 265, 270; see also Phillips v. Curiale, 608 A.2d 895, 899 (N.J. 1992) (noting the tension recognized by the court in Kaiser between applying the law in effect at the time of decision and antiretroactivity principles); Fuller, supra note 6, at 209-10

("Surely the very essence of the Rule of Law is that in acting upon the citizen ... a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties."); Krent, supra note 8, at 2143 ("**Retroactive** lawmaking conflicts with rule-of-law aspirations ...."). When a law has already put a party on notice of its effects, secondary retroactivity is permissible. See DeBlasio v. Zoning Bd. of Adjustment, 820 F. Supp. 876, 885 (D.N.J. 1993) (finding no taking resulted from zoning ordinance because plaintiff had notice). Reliance on the continuation of a law is unreasonable when the lawmaker has warned against such reliance, thus putting the private party on notice that reliance may be inappropriate. See American Mach. Corp. v. NLRB, 424 F.2d 1321, 1328-30 (5th Cir. 1970).

n82. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring).

n83. See Graetz, supra note 5, at 1822-23; Kaplow, supra note 67, at 520-50.

n84. See Krent, supra note 8, at 2159.

n85. See generally Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction (1991).

n86. See Lon L. Fuller, The Problems Of Jurisprudence 701-703 (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 (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 it was committed. See Weaver v. Graham, 450 U.S. 24, 28 (1981).

n87. General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992).

n88. See Smith, supra note 5, at 418-19 (1928); Stimson, supra note 5, at 37-38; see also 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 uncompensated losers and their sympathizers affected in part by **retroactive** laws).

n89. See Smead, supra note 5, at 776-78.

n90. See infra Part V (examining when persons have pre-enactment legal status that protects them from such secondarily **retroactive** effects).

n91. See Fuller, supra note 6, at 9, 39.

n92. BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1598 (1996). See also Patton v. TIC United Corp., 77 F.3d 1235, 1243-44 (10th Cir. 1996).

n93. See Cass, supra note 7, at 952-53.

n94. See id. at 960-61.

n95. Wheeler, 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156).

n96. See William P. Wade, A Treatise on the Operation and Construction of **Retroactive**

Laws, As Affected by Constitutional Limitations and Judicial Interpretations 1, at 2 (1880).

n97. 22 F. Cas. at 767.

n98. Id.

n99. See Kainen, supra note 6, at 105.

n100. See Barron v. Mayor of Baltimore, 32 U.S. (7Pet.) 243 (1833); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

n101. See Watson v. Mercer, 33 U.S. (8 Pet.) 88 (1834). See generally Cooley, supra note 57, at 353.

n102. See Morton J. Horwitz, The Transformation of American Law 1870-1960: The Crisis of Legal Othodoxy 149-151 (1992); Eric F. Freyfogel, The Owning and Taking of Sensitive Lands, 43 UCLA L. Rev. 77, 106-108 (1995); James L. Kainen, Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State, 31 Buff. L. Rev. 381, 437 (1982).

n103. See John Scurlock, **Retroactive** Legislation Affecting Interests in Land 6 (1953); Smith, supra note 5, at 233.

n104. See Kainen, supra note 6, at 112-14.

n105. See id. at 111.

n106. See Concrete Pipe, 508 U.S. at 637 (finding no due process violations "even though the effect of the legislation is to impose a new duty ... based on past acts"); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-18 (1976); Barrick Gold Exploration, Inc. v. Hudson, 47 F.3d 832, 836 (6th Cir. 1995).

n107. See General Motors Corp. v. Romein, 503 U.S. 181, 192 (1992); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986); Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 729-30 (1984); Eastern Enters. v. Chater, 110 F.3d 150, 156-57 (1st Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3085 (July 3, 1997) (No. 97-42); Deck v. Peter Romein's Sons, Inc., 109 F.3d 383, 387-88 (7th Cir. 1997); Carbon Fuel Co. v. USX Corp., 100 F.3d 1124, 1137-38 (4th Cir. 1996); 20th Century Ins. Co. v. Garamendi, 878 P.2d 566, 607 (Cal. 1994).

n108. Usery, 428 U.S. at 16. See also R. A. Gray & Co., 467 U.S. at 729-30; Fleming v. Rhodes, 331 U.S. 100, 107 (1947); In re Chateaugay Corp., 53 F.3d 478 (2d Cir. 1995) (upholding the Coal Act even though it upsets settled expectations and imposes new duties or liabilities based on past acts); Barrick Gold Exploration, 47 F.3d at 837-38; Lisbon Square v. United States, 856 F. Supp. 482, 490 (E.D. Wis. 1994). See generally James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 139-40 (1992).

n109. See supra note 101.

n110. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 505 (1987) (internal quotations omitted). See also Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410-13 (1983); Holiday Inns Franchising, Inc. v. Branstad, 29 F.3d 383, 385 (8th Cir. 1994).

n111. See United States Trust Co. v. New Jersey, 431 U.S. 1, 21-28 (1977).

n112. 438 U.S. 104 (1978).

n113. Id. at 124.

n114. See United States v. Locke, 471 U.S. 84, 106-07 n.15 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Golden Pac. Bancorp v. United States, 15 F.3d 1066, 1074-75 (Fed. Cir. 1994) (concluding that bank holding company had no reasonable expectation that the FDIC would not take over insolvent bank).

n115. See Concrete Pipe, 508 U.S. at 645-46; R. A. Gray & Co., 467 U.S. at 731-733; Farmers Home Admin. v. The Darlington, Inc., 358 U.S. 84, 91 (1958).

n116. See Concrete Pipe, 508 U.S. at 645-46 (finding no reasonable expectation in light of Congress' legislation in the pension field); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 226-27 (1986) (same); Avenal v. United States, 100 F.3d 933, 937 (Fed. Cir. 1996) (finding owner on notice that government actions were being planned); 767 Third Ave. Assocs. v. United States, 48 F.3d 1575, 1581 (Fed. Cir. 1995) (stating that lessor, as a member of the public, was on notice that the federal government could close an office leased to a foreign government); Ciampitti v. United States, 22 Cl. Ct. 310, 321-22 (Cl. Ct. 1991) (determining that landowner who purchased wetlands with knowledge of the regulatory structure and the difficulty of developing wetlands had no reasonable investment-backed expectation).

n117. See Darlington, Inc., 358 U.S. at 91; Resolution Trust Corp. v. Ford Motor Credit Corp., 30 F.3d 1384, 1389 (11th Cir. 1994).

n118. See Yee v. City of Escondido, 503 U.S. 519, 528-530 (1992) (concluding that owner of mobile home park knew rents could be regulated and invited tenants). Even if a private party has a reasonable expectation that applicable law will not change, there is still no taking under the Penn Central formulation if that party's "expectations can continue to be realized as long as he complies with reasonable regulatory restrictions ...." Locke, 471 U.S. at 107.

n119. Examples of acceptable conditions that impose a barrier to the receipt of a legal interest include the imposition of fees, see Blanche Road Corp. v. Bensalem Township, 57 F.3d 253 (3d Cir. 1995); Commercial Builders of N. California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991); Student Loan Mktg. Ass'n v. Riley, 907 F. Supp. 464 (D.D.C. 1995); Russ Bldg. Partnership v. City of San Francisco, 750 P.2d 324 (Cal. 1988); Blue Jeans Equities W. v. City of San Francisco, 4 Cal. Rptr. 2d 114 (Cal. Ct. App. 1992), a land dedication requirement as a condition to a building permit, see Pengilly v. Multnomah County, 810 F. Supp. 1111 (D. Or. 1992), or compliance with a low-income housing law as a condition to prepayment of a loan, see Parkridge Investors Ltd. Partnership v. Farmers Home Admin., 13 F.3d 1192 (8th Cir. 1994).

n120. Examples of acceptable conditions subsequent (usually imposed as a requirement to retain an interest) include: a new obligation to obtain a permit, see American Mining Congress v. EPA, 965 F.2d 759, 769-70 (9th Cir. 1992) (EPA rule requiring storm water discharge permits for inactive mining operations), charges for the privilege of construction granted under prior federal contracts, see East Columbia Basin Irrigation Dist. v. Federal Energy Regulatory Comm., 946 F.2d 1550 (D.C. Cir. 1991), or annual filing, see Locke, 471 U.S. at 104-07 (holders of preexisting unpatented mining claims must comply with law requiring annual filing of affidavit of assessment work, or forfeit the claim); see also Texaco, Inc. v. Short, 454 U.S. 516 (1982). Other acceptable conditions subsequent include future compliance with environmental requirements, see Zerbetz v. Municipality of Anchorage, 856 P.2d 777 (Alaska 1993) (holding that municipality's designation of private property as "conservation wetlands" is not a compensable taking); Public Resources Protection Ass'n of California v. Department of Forestry & Fire Protection, 5 Cal. Rptr. 2d 475 (Cal. Ct. App. 1992) (holding that timber harvest plan approved before enactment can be conditioned on consistency with the Endangered Species Act); Adams v. Thurston County, 855 P.2d 284, 291

(Wash. Ct. App. 1993) (stating that the vesting of development rights does not defeat a county's discretionary ability to condition or deny a plat based on environmental impacts), future compliance with new social and welfare requirements, see Pinnock v. International House of Pancakes Franchisee, 844 F. Supp. 574 (S.D. Cal. 1993) (application of the Americans with Disabilities Act to existing places of accommodation), disclosure of data, see Norfolk Energy, Inc. v. Hodel, 898 F.2d 1435 (9th Cir. 1990) (utility required to supply schematic drawings of facilities on non-federal, non-Indian lands), conformance with the conditions of a new rent control law, see Levald, Inc. v. City of Palm Desert, 998 F.2d 680 (9th Cir. 1993) (rent control and vacancy control law for mobile homes); Rent Stabilization Ass'n of New York City, Inc. v. Dinkins, 805 F. Supp. 159 (S.D.N.Y. 1992) (establishment of mandatory annual rent increase guidelines); Cope v. City of Cannon Beach, 855 P.2d 1083 (Or. 1993) (ordinance prohibiting transient occupancy); Margola Assocs. v. City of Seattle, 854 P.2d 23 (Wash. 1993) (en banc) (requirement that rental units be registered and fees paid), and a requirement that an additional bond be posted, see Universal Equip. Co. v. State Dep't of Envtl. Quality, 839 P.2d 967 (Wyo. 1992) (additional bond to insure reclamation of mine site). Sometimes a condition subsequent can be imposed on a private party's ability to withdraw from a relevant market. See Concrete Pipe, 508 U.S. at 644-46 (increased liability if employer withdraws from pension plan); In re "Plan for Orderly Withdrawal from New Jersey" of Twin City Fire Ins. Co., 609 A.2d 1248 (N.J. 1992) (stating that insurer must comply with automobile insurance reform act during its five-year withdrawal from the state market).

n121. See Licari v. Ferruzzi, 22 F.3d 344 (1st Cir. 1994) (revocation of building permits reducing size of project); South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974) (clean air plan requiring a 25 percent reduction in the number of available employee parking spaces); Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993) (Army Corps cease and desist order stops planned development); McKinley v. United States, 828 F. Supp. 888 (D.N.M. 1993) (reduction in number of cattle permitted to graze on allotment located in national forest); Brown v. City of Twin Falls, 855 P.2d 876 (Idaho 1993) (placement of road median barriers by city and state restrained business traffic flow to landowner s property). But see County of Anoka v. Esmailzadeh, 498 N.W.2d 58, 60-61 (Minn. Ct. App. 1993) (owner's loss of access to highway resulting from installation of median could be compensable taking of property).The most drastic limit placed on an existing property interest is a law imposing a moratorium on the property's future use or development. A moratorium is usually valid. See Pro-Eco, Inc. v. Board of Comm'rs of Jay County, 57 F.3d 505 (7th Cir. 1995) (moratorium on landfills); Kawaoka v. City of Arroyo Grande, 17 F.3d 1227 (9th Cir. 1994) (temporary water moratorium); Corn v. City of Lauderdale Lakes, 997 F.2d 1369 (11th Cir. 1993) (temporary moratorium on construction in an area pending completion of a study); 767 Third Ave. Assocs., 48 F.3d at 1577 (lessor lost rent upon federal closure of offices of foreign government); Herrington v. City of Pearl, 908 F. Supp. 418, 424-26 (S.D. Miss. 1995) (moratorium on new mobile home sales establishments); Carpenter v. Tahoe Reg'l Planning Agency, 804 F. Supp. 1316 (D. Nev. 1992) (temporary moratorium on issuance of building permits); Williams v. City of Central, 907 P.2d 701 (Colo. Ct. App. 1995) (moratorium on special use permits); Sun Ridge Dev., Inc. v. City of Cheyenne, 787 P.2d 583 (Wyo. 1990) (temporary moratorium on construction in residential subdivision); see also Burlington N. R.R. v. United Transp. Union, 822 F. Supp. 797, 802-03 (D.D.C. 1991) (stating that Congress can regulate pre-existing moratoria agreements). But see Adamson Companies v. City of Malibu, 854 F. Supp. 1476, 1491 (C.D. Cal. 1994) (three year moratorium imposed by rent control law violative of due process). A law can also produce future changes in the relevant method of calculating the following values: pre-enactment salaries, see Baltimore Teachers Union v. Mayor of Baltimore, 6 F.3d 1012 (4th Cir. 1993) (salary reductions), lease reimbursements, see Anco, Inc. v. State Health & Human Servs. Fin. Comm'n, 388 S.E.2d 780, 786-87 (S.C. 1989) (new reimbursement policy for nursing homes under Medicaid state plan), utility rates, see Town of Norwood v. Federal Energy Regulatory Comm., 53 F.3d 377, 381 (D.C. Cir. 1995) (future rates can reflect past costs when it was always planned to charge future ratepayers for these costs); Marshall County Bd. of Educ. v. Marshall County Gas Dist., 992 F.2d 1171, 1176 (11th Cir. 1993) (increased rates in proportion to the cost of debt service bonds), royalties, see Western Energy Co. v. United States Dep't of Interior, 932

F.2d 807 (9th Cir. 1991); Mesa Operating Ltd. Partnership v. United States Dep't of Interior, 931 F.2d 318 (5th Cir. 1991) (method of calculating royalty payment); Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), and taxes, see Mostowy v. United States, 966 F.2d 668, 670-71 (Fed. Cir. 1992) (income subject to varying tax treatment when tax laws change).

n122. A law may prohibit the future use of existing property by: forbidding one use of a private party's property, see National Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1129-30 (7th Cir. 1995) (holding that ordinance forbidding sale of spray paint within city limits does not violate store owner's substantive due process rights); Marrero Garcia v. Irizarry, 829 F. Supp. 523 (D.P.R. 1993) (utility may disconnect service to condominium residents who are not subscribers); Naegele Outdoor Adver., Inc. v. City of Durham, 803 F. Supp. 1068, 1079 (M.D.N.C. 1992) (ordinance prohibiting all commercial off-premises advertising signs); Boulder City v. Cinnamon Hills Assocs., 871 P.2d 320 (Nev. 1994) (denial of building permit to construct senior housing project); Unit Petroleum Co. v. Oklahoma Water Resources Bd., 898 P.2d 1275 (Okla. 1995) (same); Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 633-34 (Tex. 1996) (law forbidding depletion of underground aquifer), all uses of private property that produce a harmful effect, see Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (state law may prohibit coal mining that causes subsidence damage), M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995) (federal law can forbid coal mining causing subsidence), or virtually all uses of the property by denial of a permit, see Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992) (denying land use permit on ground that development would impair deer habitat); 1902 Atl. Ltd. v. United States, 26 Cl. Ct. 575 (Cl. Ct. 1992) (denying Clean Water Act permit to discharge dredged or fill material due to presence of wetlands). But see Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994).

n123. CERCLA strict liability may be applied retroactively. See United States v. Monsanto Co., 858 F.2d 160, 173-74 (4th Cir. 1988); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 732-34 (8th Cir. 1986); Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651 (N.D. Ind. 1996); Nova Chems., Inc. v. GAF Corp., 945 F. Supp. 1098 (E.D. Tenn. 1996); Nevada Dep't of Transp. v. United States, 925 F. Supp. 691, 692-704 (D. Nev. 1996); American Color & Chem. Corp. v. Tenneco Polymers, Inc., 918 F. Supp. 945, 960 (D.S.C. 1995); Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 790-1 (D.N.J. 1989); United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546, 556 (W.D.N.Y. 1988); United States v. Rohm & Haas Co., 669 F. Supp. 672, 676-77 (D.N.J. 1987) (applying the CERCLA amendments retroactively); see also Murphy v. Amoco Prod. Co., 729 F.2d 552 (8th Cir. 1984) (stating that state law may change the applicable duty of care owed under a lease from a negligence standard to a strict liability standard); Petropoulos v. Columbia Gas of Ohio, Inc., 840 F. Supp. 511, 515 (S.D. Ohio 1993) (holding that the Solid Waste Disposal Act may apply retroactively); The Pantry, Inc. v. Stop-N-Go Foods, Inc., 777 F. Supp. 713 (S.D. Ind. 1991) (applying state underground storage tank laws retroactively); Mesiti v. Microdot, Inc., 739 F. Supp. 57, 64-65 (D.N.H. 1990) (holding state environmental cleanup discharge before enactment of law); United States v. Price, 523 F. Supp. 1055, 1067, 1071-72 (D.N.J. 1981) (holding that the Resource Conservation and Recovery Act may be applied retroactively); New Jersey Dep't of Envtl. Protection v. Ventron Corp., 468 A.2d 150, 163 (N.J. 1983) (applying New Jersey Spill Act to hazardous waste spills occurring before passage of the Act).In Concrete Pipe, the Supreme Court found a federal statute that increased an employer's liability from 30% to 46% of its net worth upon withdrawal from a benefit plan an acceptable form of secondary retroactivity. See 508 U.S. 602 (1993); see also Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (upholding **retroactive** effect of federal law imposing liability on coal mine employers for employee disabilities caused by black lung disease); Holland v. Keenan Trucking Co., 102 F.3d 736, 740 (4th Cir. 1996) (stating that Coal Act may impose a new obligation based on past acts); Carbon Fuel Co. v. USX Corp., 100 F.3d 1124, 1137 (4th Cir. 1996) (upholding imposition of new duties on existing contract); In re Chateaugay Corp., 53 F.3d 478 (2d Cir. 1995) (upholding

retroactive provisions of the Coal Industry Retiree Health Benefit Act requiring coal operators to pay health benefits to retirees); Barrick Gold Exploration, Inc. v. Hudson, 47 F.3d 832 (6th Cir. 1995) (concluding that Coal Industry Retiree Health Benefit Act of 1992 may apply retroactively). A legislature may also impose an additional duty on a licensee. See Mitchell v. Clayton, 995 F.2d 772 (7th Cir. 1993) (stating that the legislature can impose additional educational requirements on acupuncturists who have already obtained licenses).

n124. Marusic Liquors, Inc. v. Daley, 55 F.3d 258, 262 (7th Cir. 1995) (changing the terms of an existing liquor license); Park Ave. Tower Assocs. v. City of New York, 746 F.2d 135 (2d Cir. 1984) (reducing the maximum allowed floor area ratio); Elias v. Town of Brookhaven, 783 F. Supp. 758 (E.D.N.Y. 1992) (changing zoning restrictions from commercial to residential).

n125. See Swanson v. Babbitt, 3 F.3d 1348 (9th Cir. 1993) (holding that enactment of Sawtooth National Recreation Area Act precludes issuance of patents after the Act's effective date even though applications were pending on effective date); United States v. Rohm & Haas Co., 669 F. Supp. 672, 676 (D.N.J. 1987) (amendments to CERCLA may apply to litigation pending at the time of the amendments' enactment); Citizens For Equity v. New Jersey Dep't of Envtl. Protection, 599 A.2d 516 (N.J. Super. Ct. App. Div. 1990) (imposing a sale requirement to prove value diminution on pending claims created only future effects and was therefore permissible secondary retroactivity).

n126. See generally Fuller, supra note 6, at 53.

n127. See Kaiser Aluminum & Chem. Corp., 494 U.S. at 855 (Scalia, J., concurring).

n128. Examples of this kind of invalid primary retroactivity include enactment of a statute which deprives a company of distributions of money already made under a pre-enactment contract, see In re Workers' Compensation Refund W. Nat'l Ins. Co., 46 F.3d 813, 818-19 (8th Cir. 1995), reinterpretation of an ordinance to reflect an earlier termination date of an approved development plan than was previously represented, see Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536 (11th Cir. 1994), cancellation of a previously valid permit, see NRG Co. v. United States, 24 Cl. Ct. 51 (Cl. Ct. 1991) (holding that cancellation of mineral prospecting permit was an unconstitutional taking); but see Achtien v. City of Deadwood, 814 F. Supp. 808, 815-16 (D.S.D. 1993) (city can rescind previously-issued building permit if the city believes it was illegal at the time of issuance), recission of a previously acceptable buy-out rule, see State ex rel. Reider's, Inc. v. Industrial Comm'n of Ohio, 549 N.E.2d 532 (Ohio Ct. App. 1988), denial of an award of benefits to which the recipient was otherwise entitled, see O'Reilly v. Town of Glocester, 621 A.2d 697, 705 (R.I. 1993); Guerrero v. Adult & Family Servs. Div., 676 P.2d 928 (Or. Ct. App. 1984) (under former rule agency had discretion to reimburse), and nullification of an otherwise valid judgment, see Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1460 (1995) (holding that Congress may not subject an earlier judgment to a reopening requirement that did not exist when the judgment was announced); Arbour v. Jenkins, 903 F.2d 416, 420 (6th Cir. 1990) (upholding Westfall Act because it only applies to cases not yet final); Burch v. Monroe, 834 P.2d 33, 35-36 (Wash. Ct. App. 1992).

n129. For example, a new law may seek to make past conduct subject to (1) disciplinary action, see Jordan v. Department of Prof'l Regulation, 522 So. 2d 450 (Fla. Dist. Ct. App. 1988), (2) higher taxes, see Blodgett v. Holden, 275 U.S. 142 (1927) (holding that gift tax may not apply to gifts made prior to enactment), (3) third party approval, see United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990), or (4) less favorable rates, See South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n, 594 So. 2d 357 (La. 1992). However, if rates are increased in the future to recover costs incurred in the past, the rate change is not primarily, but secondarily, **retroactive** and therefore valid. See Marshall County Bd. of Educ. v. Marshall County Gas Dist., 992 F.2d 1171 (11th Cir. 1993). But see City of Piqua v. Federal Energy Regulatory Comm., 610 F.2d 950, 954-55 (D.C. Cir. 1979) (stating that if a

utility includes an estimate of costs in its rates which is subsequently found to be too low, it cannot adjust future rates to recoup past losses).

n130. See, e.g., Cowling v. Board of Oil, Gas & Mining, 830 P.2d 220, 228-29 (Utah 1991) ("If ... an operator of a well engages in inequitable conduct by wrongfully delaying an application for a [well] spacing order, thereby prejudicing another's correlative right, the Board may make appropriate adjustments as to the date the pooling order is effective. That is, a pooling order may be made effective prior to the entry of a spacing order ....").

n131. See, e.g., United States v. Stocker, 798 F. Supp. 531, 534-35 (E.D. Wis. 1992) (concluding that **retroactive** application of damages provision merely affects the amount of damages not any substantive law).

n132. See Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 228-29 (7th Cir. 1992); see also Stocker, 798 F. Supp. at 535.

n133. See United States v. Carlton, 512 U.S. 26 (1994) (characterizing **retroactive** tax legislation as curative); Littlefield v. McGuffey, 954 F.2d 1337, 1345 (7th Cir. 1992) (holding that removal of a punitive damages cap is applicable retroactively). But see Plaut, 115 S. Ct. at 1462 ("Reliance on the vaguely remedial purpose of a statute to defeat the presumption against retroactivity [has been] rejected ....") (internal citations omitted).

n134. In Armour & Co. v. Inver Grove Heights, a property owner unsuccessfully claimed that past planning activities of the city had "taken" his property by making it less attractive to potential buyers. 2 F.3d 276 (8th Cir. 1993). See also Marietta Realty, Inc. v. Springfield Redevelopment Auth., 902 F. Supp. 310 (D. Mass. 1995) (stating that authority's failure to fulfill its public announcement of its intent to acquire private property is not a taking of that property).

n135. See Landgraf v. USI Film Prods., 511 U.S. 244, 267-73 (1994). See, e.g., United States ex rel. Anderson v. Northern Telecom, Inc., 52 F.3d 810, 814 (9th Cir. 1995) (stating that absent legislative intent to the contrary, statutes do not operate retroactively); James Cable Partners, L.P. v. City of Jamestown, 43 F.3d 277, 279-80 (6th Cir. 1995) (holding that the 1992 Cable Act applies prospectively only because the statute lacks strong and imperative language requiring **retroactive** application); United States v. AM Gen. Corp., 34 F.3d 472, 474-75 (7th Cir. 1994) (holding that the EPA cannot collaterally attack a permit by bringing a civil penalty action many years after the permit had been granted, when no indication that Congress meant to authorize such **retroactive** application of the Clean Air Act); Powell v. New York, 869 F. Supp. 106, 112-13 (N.D.N.Y. 1994) (holding that the Americans with Disabilities Act of 1990 does not apply retroactively to claims **accruing** before its effective date); Roark v. Crabtree, 893 P.2d 1058, 1061-62 (Utah 1995) (holding that legislative extension of a civil statute of limitations cannot be applied retroactively in the absence of legislative intent).

n136. "Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of **retroactive** application and determined that it is an acceptable price to pay for the countervailing benefits." Landgraf, 511 U.S. at 272-73. Compare United States v. $ 814,254.76 in U.S. Currency, 51 F.3d 207, 212 (9th Cir. 1995) (stating that lack of clear congressional intent requires application of default rule against retroactivity), with Stattin v. Resolution Trust Corp., 883 F. Supp. 678, 683-84 (M.D. Fla. 1995) (finding legislative intent rebutted presumption against retroactivity).

n137. See supra notes 97-102 and accompanying text. In Hughes Aircraft Co. v. United States ex rel. Schumer, the Court noted that the Wheeler-Landgraf definition of retroactivity was a "sufficient," but not a "necessary" condition, to the presumption against retroactivity. 117 S. Ct. 1871, 1876 (1997). After Hughes Aircraft, more functional conceptions of retroactivity can trigger the presumption.

n138. See Landgraf, 511 U.S. at 267-70 ("The court must ask whether the new provision attaches new legal consequences to events completed before its enactment"); Mills v. Amoco Performance Prods., Inc., 872 F. Supp. 975, 985 (S.D. Ga. 1994) (concluding that in a claim comprising both pre-enactment and post-enactment conduct, the Landgraf presumption applies to prevent **retroactive** application of new damages provision to any pre-enactment conduct).

n139. See Landgraf, 511 U.S. at 280.

n140. See Kaiser Aluminum & Chem. Corp., 494 U.S. at 837.

n141. 5 U.S. (1 Cranch) 103 (1801).

n142. 393 U.S. 268 (1969).

n143. 416 U.S. 696 (1974).

n144. Id. at 711.

n145. 488 U.S. 204, 208 (1988).

n146. Id. at 208. The Court had articulated a similar view in United States v. Security Industrial Bank, 459 U.S. 70, 79-80 (1982).

n147. Kaiser Aluminum & Chem. Corp., 494 U.S. at 841 (Scalia, J., concurring).

n148. James v. American Int'l Recovery, Inc., 799 F. Supp. 1156, 1162 (N.D. Ga. 1992). See Wright v. Director, Federal Emergency Management Agency, 913 F.2d 1566, 1573 (11th Cir. 1990) (stating that Bradley's presumption in favor of retroactivity created a dramatic shift in the law of retroactivity). Compare, e.g., United States v. Stocker, 798 F. Supp. 531 (E.D. Wis. 1992) (allowing **retroactive** application of the 1986 amendments to the False Claims Act), with United States v. Murphy, 937 F.2d 1032 (6th Cir. 1991) (holding that district court erred in applying False Claims Act amendments retroactively), and Thomas v. Frank, 791 F. Supp. 470, 476 (D.N.J. 1992) (stating that legislation which imposes unforeseen obligations on pre-legislation conduct should not be applied retroactively).

n149. For example, the Ninth Circuit found that the 1991 Act applies retroactively. See Estate of Reynolds v. Martin, 985 F.2d 470 (9th Cir. 1993); Davis v. City of San Francisco, 976 F.2d 1536 (9th Cir. 1992). Accord Bridges v. Eastman Kodak Co., 800 F. Supp. 1172 (S.D.N.Y. 1992); Coulter v. Newmont Gold Co., 799 F. Supp. 1071 (D. Nev. 1992); Jaekel v. Equifax Mktg. Decision Sys., Inc., 797 F. Supp. 486 (E.D. Va. 1992); Tyler v. Pennsylvania Dep't of Revenue, 793 F. Supp. 98 (M.D. Pa. 1992); Robinson v. Davis Memorial Goodwill Indus., 790 F. Supp. 325 (D.D.C. 1992); Sample v. Keystone Carbon Co., 786 F. Supp. 527 (W.D. Pa. 1992); United States v. Department of Mental Health, 785 F. Supp. 846 (E.D. Cal. 1992); Joyner v. Monier Roof Tile, Inc., 784 F. Supp. 872 (S.D. Fla. 1992); Sanders v. Culinary Workers Union Local No. 226, 783 F. Supp. 531 (D. Nev. 1992); Stender v. Lucky Stores, Inc., 780 F. Supp. 1302 (N.D. Cal. 1992).Other jurisdictions and courts, however, concluded that the 1991 Act should only apply prospectively. See Gersman v. Group Health Ass'n, 975 F.2d 886 (D.C. Cir. 1992); Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592 (5th Cir. 1992); Wilson v. UT Health Ctr., 973 F.2d 1263, 1267 (5th Cir. 1992); Wilson v. Belmont Homes, Inc., 970 F.2d 53 (5th Cir. 1992); Rowe v. Sullivan, 967 F.2d 186 (5th Cir. 1992); Johnson v. Uncles Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992); Holt v. Michigan Dep't of Corrections, 974 F.2d 771 (6th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992); Banas v. American Airlines, 969 F.2d 477 (7th Cir. 1992); Luddington v. Indiana Bell Tel. Co., 966 F.2d 225 (7th Cir. 1992); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir. 1992); Davis v. Tri-State Mack Distribs., Inc., 981 F.2d 340

(8th Cir. 1992); Huey v. Sullivan, 971 F.2d 1362 (8th Cir. 1992); Parton v. GTE North, Inc., 971 F.2d 150 (8th Cir. 1992); Hicks v. Brown Group, Inc., 982 F.2d 295 (8th Cir. 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); Vance v. Southern Bell Tel. & Tel. Co., 983 F.2d 1573 (11th Cir. 1993); Baynes v. AT&T Technologies, Inc., 976 F.2d 1370 (11th Cir. 1992).

n150. See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, 3, 105 Stat. 1071 (purposes of the amendments).

n151. See Symposium, The Civil Rights Act of 1991, 54 La. L. Rev. 1459 (1994); Douglas W. Kmiec, The 1991 Civil Rights Act: A Constitutional, Statutory, and Philosophical Enigma, 68 Notre Dame L. Rev. 911 (1993); see also Ronald D. Rotunda, The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation, 68 Notre Dame L. Rev. 923 (1993); Thamer E. Temple III, Retroactivity of the 1991 Civil Rights Act in Title VII Cases, 43 Labor L.J. 299 (1992).

n152. See Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

n153. See 42 U.S.C. 1981(b) (1994).

n154. See 42 U.S.C. 1981a(c).

n155. See 42 U.S.C. 1981a(b).

n156. See 42 U.S.C. 1988.

n157. See Temple, supra note 151.

n158. See Greene v. United States, 376 U.S. 149, 160 (1964); United States v. Magnolia Petroleum Co., 276 U.S. 160, 162-64 (1928); Baynes v. AT&T Technologies, Inc., 976 F.2d 1370, 1374 (11th Cir. 1992); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 935 (7th Cir. 1992); Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, 963-64 n.6 (D.C. Cir. 1990); DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1390 (10th Cir. 1990); Sargisson v. United States, 913 F.2d 918, 923 (Fed. Cir. 1990); Tyger Constr. Co. v. United States, 28 Fed. Cl. 35, 49-50 (Fed. Cl. 1993); cf. Ficarra v. Department of Regulatory Agencies, 849 P.2d 6 (Colo. 1993).

n159. Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 228-29 (7th Cir. 1992), quoted in Hicks v. Brown Group, Inc., 982 F.2d 295, 298 (8th Cir. 1992) (stating that when Congress "overrules" a Supreme Court decision it is not necessarily "restoring" the prior law, and therefore is not interfering with reliance interests; rather, it is laying down a new rule of conduct for the future).

n160. Baynes, 976 F.2d at 1373. See also Simmons v. Lockhart, 931 F.2d 1226, 1230 (8th Cir. 1991) (stating that the role of legislatures is to set rules to govern future conduct); Kemp v. Flygt Corp., 791 F. Supp. 48, 50-51 (D. Conn. 1992); Khandelwal v. Compuadd Corp., 780 F. Supp. 1077, 1080-81 (E.D. Va. 1992). Some lower courts adopted Bowen partly because it was the more recent Supreme Court case. See Tyree v. Riley, 783 F. Supp. 877, 892 (D.N.J. 1992).

n161. When legislative intent on the issue of retroactivity is missing, post-Landgraf cases have had no difficulty in interpreting new substantive statutes so prospectively. See, e.g., United States v. $ 814,254.76 in U.S. Currency, 51 F.3d 207, 212 (9th Cir. 1995); Carter v. Sedgwick County, 36 F.3d 952, 955 (10th Cir. 1994); Simons v. Southwest Petro-Chem, Inc., 28 F.3d 1029, 1031-33 (10th Cir. 1994); Hook v. Ernst & Young, 28 F.3d 366, 368 (3d Cir. 1994). However, courts will apply non-substantive changes to pre-enactment conduct. See Resolution Trust Corp. v. Ford Motor Credit Corp., 30 F.3d 1384, 1388 (11th Cir. 1994)

(stating that because the Act did not impose substantive changes, its application was not considered **retroactive)**; cf. Rodriguez v. General Motors Corp., 27 F.3d 396 (9th Cir. 1994) (stating that the presumption of prospectivity only applies to substantive changes); Mills v. Amoco Performance Prods., Inc., 872 F. Supp. 975, 985 (S.D. Ga. 1994).

n162. See Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 935-36 (7th Cir. 1992); DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1390 (10th Cir. 1990); Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, 964 n.6 (D.C. Cir. 1990); Sargisson v. United States, 913 F.2d 918, 922-23 (Fed. Cir. 1990); Kemp Indus., Inc. v. Safety Light Corp., 857 F. Supp. 373, 396 (D.N.J. 1994); Raya v. Maryatt Indus., 829 F. Supp. 1169, 1172-73 (N.D. Cal. 1993); Stout v. IBM Corp., 798 F. Supp. 998, 1007 (S.D.N.Y. 1992).

n163. Fray v. Omaha World Herald Co., 960 F.2d 1370, 1374 (8th Cir. 1992).

n164. See, e.g., Gersman v. Group Health Ass'n, 975 F.2d 886, 896-97 (D.C. Cir. 1992); Alpo Petfoods, 913 F.2d at 964 n.6; Tyree, 783 F. Supp. at 881; Ficarra, 849 P.2d at 12.

n165. See, e.g., Colo. Const. art. II, 11; Ga. Const. art. I, 1, P X; Idaho Const. art. XI, 12; Mo. Const. art. I, 13; N.H. Const. pt. I, art. 23; Ohio Const. art. II, 28; Tenn. Const. art. I, 20; Tex. Const. art. I, 16.

n166. McLaughlin v. New York, 784 F. Supp. 961, 971 (N.D.N.Y. 1992). See also James v. American Int'l Recovery, Inc., 799 F. Supp. 1156, 1189 (N.D. Ga. 1992) (stating that Bradley represents an unprecedented departure).

n167. See Schooner Peggy, 5 U.S. (1 Cranch) at 110.

n168. See id.

n169. See Thorpe, 393 U.S. at 282-83.

n170. See id.

n171. See Bradley, 416 U.S. at 710.

n172. See id. at 711-21.

n173. See Simmons v. Lockhart, 931 F.2d 1226, 1230 (8th Cir. 1991).

n174. See Rivers v. Roadway Express, Inc., 511 U.S. 298, 303-04 (1994); Luddington, 966 F.2d at 229.

n175. See Baynes, 976 F.2d at 1373; Gersman, 975 F.2d at 897; Mozee, 963 F.2d at 936; Wright, 913 F.2d at 1574; Criger v. Becton, 902 F.2d 1348, 1354 (8th Cir. 1990).

n176. See Hicks, 982 F.2d at 298; Simmons, 931 F.2d at 1230; American Int'l Recovery, 799 F. Supp. at 1196.

n177. See Brown v. R.J. Reynolds Tobacco Co., 52 F.3d 524, 527, 530 (5th Cir. 1995).

n178. See Rivers, 511 U.S. at 311 (holding that the presumption applies even though an appeal was pending when statute became law); Bradley v. Pizzaco of Nebraska, Inc., 7 F.3d 795, 797 (8th Cir. 1993); Mojica v. Gannett Co., 7 F.3d 552, 558 (7th Cir. 1993). Conversely, the Landgraf rule is not limited just to cases pending when the new law became effective. See Ventre v. Johnson, No. 93-2535, 39 F.3d 1179, 1994 WL 589618 (4th Cir. Oct. 28, 1994).

n179. See Landgraf v. USI Film Prods., 511 U.S. 244, 273, 280, 286 (1994); Mayes v. Chrysler Credit Corp., 37 F.3d 9, 12 (1st Cir. 1994) (stating that the presumption against **retroactive** statutes can be overcome when Congress intends for retroactivity); Rebel Motor Freight, Inc. v. Freeman Drywall Co., 914 F. Supp. 1516, 1522 (W.D. Tenn. 1994); Petropoulos v. Columbia Gas of Ohio, Inc., 840 F. Supp. 511, 515 (S.D. Ohio 1993); Vashon Island Comm. for Self-Government v. Washington State Boundary Review Bd., 903 P.2d 953, 959 (Wash. 1995) (en banc) ("A statute may be applied retroactively if the Legislature intended such a result."). If the legislature intends for a provision of a law to apply to pending trials, then courts abide by this intent, especially if the law involves non-substantive changes. See Ex parte Collett, 337 U.S. 55, 71 (1949) (new rule defining forum non conveniens); Sancho v. Texas Co., 308 U.S. 463, 467 (1940) (new method of enforcing awards).

n180. Compare, e.g., Reyes-Hernandez v. INS, 89 F.3d 490, 492 (7th Cir. 1996) (stating that presumption against retroactivity exists "unless the statute provides explicitly for **retroactive** application"), Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 538 (1st Cir. 1995) (requiring clear statutory language demanding retroactivity), and Chenault v. United States Postal Serv., 37 F.3d 535, 537 (9th Cir. 1994) (same), with Green v. Nottingham, 90 F.3d 415, 419 (10th Cir. 1996) (considering both the language of the act and the legislative history in search of "unambiguous directive"), Conservation Law Found., Inc. v. Busey, 79 F.3d 1250, 1270 (1st Cir. 1996) (holding that legislative history "left no doubt" that retroactivity was contemplated), and United States v. $ 814,254.76 in U.S. Currency, 51 F.3d 207, 212 (9th Cir. 1995) (considering legislative history for evidence of "clear congressional intent" to apply statute retroactively).

n181. See Landgraf, 511 U.S. at 270, 272-73, 280; Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); Greene v. United States, 376 U.S. 149, 160 (1964); United States v. Magnolia Petroleum Co., 276 U.S. 160, 162-63 (1928) ("Statutes are not to be given **retroactive** effect ... unless the legislative purpose so to do plainly appears."); Downer v. United States Dep't of Agric. & Soil Conservation Serv., 894 F. Supp. 1348, 1355 (D.S.D. 1995), aff'd 97 F.3d 999 (8th Cir. 1996).

n182. See United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806); Hot, Sexy & Safer Prods., 68 F.3d at 538.

n183. See Sparks v. Craft, 75 F.3d 257, 262 (6th Cir. 1996) (stating that when no evidence of whether the legislature intended any purpose that requires **retroactive** application, then prospectivity governs); Caddell v. Department of Justice, 96 F.3d 1367, 1371 (Fed. Cir. 1996); Mathews v. Kidder, Peabody & Co., 947 F. Supp. 180, 186 (W.D. Pa. 1996); Hassen v. State Farm Mut. Auto. Ins. Co., 674 So. 2d 106, 109 (Fla. 1996).

n184. See Jeffries v. Wood, 114 F.3d 1484, 1494-96 (9th Cir. 1997) (finding congressional intent that evidenced a wish that the statute apply prospectively); Santa Fe Energy Prods. Co. v. McCutcheon, 90 F.3d 409, 413 (10th Cir. 1996) (holding that royalty rules were intended to apply prospectively); Burfield v. Brown, Moore & Flint, Inc., 51 F.3d 583, 588 (5th Cir. 1995) (stating that the ADA was not intended to be **retroactive)**; Oswald v. LaRoche Chems., Inc., 894 F. Supp. 988, 992 (E.D. La. 1995).

n185. See Landgraf, 511 U.S. at 278; United States v. Bacon, 82 F.3d 822, 824 (9th Cir. 1996) (stating that statute that affects a right to bring an action in court is substantive); Hyatt v. Northrop Corp., 80 F.3d 1425, 1430-31 (9th Cir. 1996) (holding that a statute that defined additional conduct as unlawful was substantive); Brown v. R.J. Reynolds Tobacco Co., 52 F.3d 524, 527 (5th Cir. 1995) (stating that the determination of when a **cause of action accrues** is substantive); Caddell, 96 F.3d at 1371 (stating that substantive change triggers the presumption if law attaches new legal consequences to events completed before its enactment).

n186. See Hughes Aircraft Co. v. United States ex rel. Schumer, 117 S. Ct. 1871, 1878 (1997) (limiting the definition of "jurisdictional" to statutes affecting where a suit may be brought, not whether it may be brought at all); Landgraf, 511 U.S. at 274-80, 285 n.37; Thorpe v. Housing Auth. of Durham, 393 U.S. 268 (1969) (procedural); Hunter v. United States, 101 F.3d 1565, 1572-73 (11th Cir. 1996) (procedural); Bruner v. United States, 343 U.S. 112, 116-17 (1952) (jurisdictional); Williams v. Stegall, 945 F. Supp. 145, 147-48 (E.D. Mich. 1996) (jurisdictional); United States ex rel. Newsham v. Lockheed Missiles & Space Co., 907 F. Supp. 1349, 1356-57 (N.D. Cal. 1995) (jurisdictional); Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974) (remedial); Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 312 n.8 (1945) (remedial); Bayless v. Community College Dist. No. XIX, 927 P.2d 254, 257 (Wash. Ct. App. 1996) (remedial); Paramino Lumber Co. v. Marshall, 309 U.S. 370, 379 (1940) (curative); United States v. Heinszen & Co., 206 U.S. 370, 385-86 (1907) (curative).

n187. See Landgraf, 511 U.S. at 280-86; United States v. $ 814,254.76 in U.S. Currency, 51 F.3d 207, 212 (9th Cir. 1995); State Farm Mut. Auto. Ins. Co. v. LaForet, 658 So. 2d 55, 61 (Fla. 1995).

n188. See, e.g., Brown v. Secretary of the Army, 78 F.3d 645, 654 (D.C. Cir. 1996) (applying the presumption to statute waiving sovereign immunity, where retroactivity would impose on the United States a liability to which it has not explicitly consented).

n189. See, e.g., Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1456 (1995) (invalidating a statute that "prescribes what the law was at an earlier time, when the act whose effect is controlled by the legislature occurred" despite clear expression of legislative intent); O'Reilly v. Town of Glocester, 621 A.2d 697, 705 (R.I. 1993). See also supra notes 128-29 and accompanying text.

n190. See Reynolds v. United States, 292 U.S. 443, 449 (1934); Cox v. Hart, 260 U.S. 427, 435 (1922); In re Estate of Ryan, 928 P.2d 735, 737 (Ariz. Ct. App. 1996).

n191. See Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 99-102 (1992) (Thomas, J., concurring in part).

n192. See Landgraf, 511 U.S. at 269; Lieberman-Sack v. Harvard Community Health Plan of New England, Inc., 882 F. Supp. 249, 255 (D.R.I. 1995) (stating that the fact that legislation changes expectations about the extent of liability is an insufficient basis to strike the law as impermissibly **retroactive)**.

n193. A true **retroactive** effect is what the Landgraf opinion referred to as a "truly "retrospective' application of a statute." Landgraf, 511 U.S. at 279-80 (using the Wheeler test for ascertaining if a law is **retroactive)**. See also Hunter v. United States, 101 F.3d 1565, 1570-72 (11th Cir. 1996); United States ex rel. Anderson v. Northern Telecom, Inc., 52 F.3d 810, 813-14 (9th Cir. 1995); Resolution Trust Corp. v. Ford Motor Credit Corp., 30 F.3d 1384, 1388 (11th Cir. 1994); Hook v. Ernst & Young, 28 F.3d 366, 373 (3d Cir. 1994); Templeton Coal Co. v. Shalala, 882 F. Supp. 799, 813 (S.D. Ind. 1995); Gilbert v. Milliken & Co., 836 F. Supp. 856, 858 (N.D. Ga. 1992); Kluver v. Weatherford Hosp. Auth., 859 P.2d 1081, 1083 (Okla. 1993); Madsen v. Borthick, 769 P.2d 245, 253 (Utah 1988).

n194. See, e.g., Blue Cross & Blue Shield of Kansas City v. Bell, 798 F.2d 1331, 1337 (10th Cir. 1986) (stating that where statute applies to contracts issued or renewed after the effective date of the statute, the statute is not **retroactive,** even though the original contract may pre-dated the statute); Golden Rule Ins. Co. v. Stephens, 912 F. Supp. 261, 266 (E.D. Ky. 1995) (same); In re Estate of Burns, 904 P.2d 301, 303-04 (Wash. Ct. App. 1995).

n195. See Hunter, 101 F.3d at 1570-1572 (holding that amended statute governing appeals in pending habeas corpus and post-conviction relief proceedings applied to habeas cases is not a change that applies with true retroactivity because it does not increase a party's liability

for past conduct, or impose new duties with respect to past transactions); Drinkard v. Johnson, 97 F.3d 751, 766 (5th Cir. 1996) (holding that new standards of review for habeas applicant not truly **retroactive** because they do not increase liability for past conduct); Samaniego-Meraz v. INS, 53 F.3d 254, 256 (9th Cir. 1995) (holding that repeal of discretionary relief from deportation is not a **retroactive** act).

n196. In Hughes Aircraft Co. v. United States ex rel. Schumer, the Court noted that the Wheeler definition described a "sufficient, rather than a necessary, condition" for invoking the presumption against retroactivity. 117 S. Ct. 1871, 1876 (1997) (emphasis in original). Most courts, including Hughes Aircraft, still rely on Wheeler. See United States v. $ 814,254.76 in U.S. Currency, 51 F.3d 207, 210 (9th Cir. 1995) (stating that presumption applies when new statute "significantly increases liability"); Circuit City Stores, Inc. v. Officemax, Inc., 949 F. Supp. 409 (E.D. Va. 1996) (holding that the Federal Trademark Dilution Act may not be applied retroactively because it imposes new duties); Mathews v. Kidder, Peabody & Co., Inc. 947 F. Supp. 180, 186 (W.D. Pa. 1996) (stating that a federal law might impair rights possessed by private parties before law enacted, therefore presumption of prospectivity applies to prevent law from having true **retroactive** effect); FDIC v. Hinch, 879 F. Supp. 1099, 1104 (N.D. Okla. 1995) (stating that the presumption applies if the effect of new statute is to increase liability).

n197. See, e.g., Hochman, supra note 5, at 692: <Indent Quote2><PARA'0 pt'14.4 pt'14.4 pt'>A **retroactive** statute is one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute. The most obvious kind of **retroactive** statute is one which reaches back to attach new legal rights and duties to already completed transactions. However, a statute may be **retroactive** ... which declares preexisting obligations unenforceable in the future.<PARA'0 pt'0 pt'36 pt'>Id. See Miller v. Florida, 482 U.S. 423, 430 (1987).See Slawson, supra note 5, at 217-18 ("[Retroactivity refers either to] laws that make rights or duties depend on past events in the narrow sense of dependence on events that have occurred and terminated before the laws were enacted," or "[to] an effect which occurs when a new law is imposed on society [which] substantially ... disturbs patterns of conduct that represent substantial investments in labor or property"); Union Pac. R.R. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913); see also Munzer, supra note 5, at 426 ("**Retroactive** legislation ... consists of laws that [(1)] alter the legal status, that is, the legal character or consequences, of some pre-enactment action or event, [(2)] make a legal judgment regarding that action easier or harder to obtain, [or (3)] substantially affect expectations stemming from that action.").

n198. See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976) (stating that **retroactive** legislation requires a greater justification than prospective legislation to satisfy due process); Kuhn v. State, 924 P.2d 1053, 1056-57 (Colo. 1996) (stating that a **retroactive** statute is not necessarily unconstitutional).

n199. See Liberty Mut. Ins. Co. v. Paper Mfg. Co., 753 F. Supp. 156, 158 (E.D. Pa. 1990).

n200. See Miller v. Florida, 482 U.S. at 431-33; Cox v. Hart, 260 U.S. 427, 435 (1922); Campos v. INS, 16 F.3d 118, 122 (6th Cir. 1994); De Osorio v. INS, 10 F.3d 1034, 1042 (4th Cir. 1993); FDIC v. Faulkner, 991 F.2d 262, 266 (5th Cir. 1993); McAndrews v. Fleet Bank of Massachusetts, 989 F.2d 13, 16 (1st Cir. 1993); Administrators of the Tulane Educ. Fund v. Shalala, 987 F.2d 790, 798 (D.C. Cir. 1993); Gonsalves v. Flynn, 981 F.2d 45, 48-49 (1st Cir. 1992); Delaware Coca-Cola Bottling Co. v. S & W Petroleum Serv. Inc., 894 F. Supp. 862, 865 (M.D. Pa. 1995); Centigram Communications Corp. v. Lehman, 862 F. Supp. 113, 119 (E.D. Va. 1994); Howell v. Heim, 882 P.2d 541, 547 (N.M. 1994); Burger v. Unemployment Compensation Bd. of Review, 77 A.2d 737, 739 (Pa. Super. Ct. 1951); Cook v. Wyoming Oil & Gas Conservation Comm'n, 880 P.2d 583, 585-86 (Wyo. 1994).

n201. See Concrete Pipe, 508 U.S. at 637; In re Chateaugay Corp., 53 F.3d 478, 489-91 (2d Cir. 1995); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 734 (8th

Cir. 1986).

n202. See Fleming v. Rhodes, 331 U.S. 100, 107 (1947); Reynolds v. United States, 292 U.S. 443, 449 (1934); Pinnock v. International House of Pancakes Franchisee, 844 F. Supp. 574, 584 (S.D. Cal. 1993).Post-Landgraf, some courts found backwards-applying legislation to be non-**retroactive** if it did not bring about any substantive changes. See, e.g., Resolution Trust Corp. v. Ford Motor Credit Corp., 30 F.3d 1384, 1388 (11th Cir. 1994).

n203. See supra notes 200-02.

n204. See, e.g., Kuhn v. State, 924 P.2d 1053, 1057 (Colo. 1996); Colorado Office of Consumer Counsel v. Public Serv. Co. of Colorado, 877 P.2d 867, 870 (Colo. 1994); Karl v. Bryant Air Conditioning Co., 331 N.W.2d 456, 463 (Mich. 1982).

n205. See, e.g., United States v. Security Indus. Bank, 459 U.S. 70, 80-82 (1982); Nasierowski Bros. Inv. Co. v. City of Sterling Heights, 949 F.2d 890, 897-98 (6th Cir. 1991); DeCarion v. Monroe County, 853 F. Supp. 1415, 1419 (S.D. Fla. 1994); cf. Sturges v. Carter, 114 U.S. 511, 519 (1885) (finding a statute to be non-retrospective because "it took away no vested right").

n206. See, e.g., Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994) (holding that new punitive damages provisions as punishment constitute a new right or entitlement for a plaintiff and cannot be applied retroactively).

n207. See, e.g., R.T. Vanderbilt Co. v. Babbitt, 113 F.3d 1061, 1067 (9th Cir. 1997); United States ex rel. Anderson v. Northern Telecom, Inc., 52 F.3d 810, 814-15 (9th Cir. 1995).

n208. Landgraf, 511 U.S. at 268 (explaining that retroactivity encompasses more than just primary retroactivity) (quoting Wheeler, 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156)).

n209. Plaut, 115 S. Ct. at 1456 (identifying clearly **retroactive** legislation) (emphasis in original).

n210. See supra notes 128-29 and accompanying text.

n211. Wheeler, 22 F. Cas. at 767.

n212. Landgraf, 511 U.S. at 269-70. Wheeler's definition of retroactivity is a sufficient, but not a necessary, condition for invoking the presumption against retroactivity. See Hughes Aircraft Co. v. United States ex rel. Schumer, 117 S. Ct. 1871, 1876 (1997).

n213. See Lennox v. Evans, 87 F.3d 431, 432 (10th Cir. 1996); Porter v. Galarneau, 911 P.2d 1143, 1150 (Mont. 1996); Gadsden Fed'n of Teachers v. Board of Educ. of Gadsden Indep. Sch. Dist., 920 P.2d 1052, 1057 (N.M. Ct. App. 1996).

n214. See supra notes 179-84 and accompanying text.

n215. See supra notes 190-95 and accompanying text. See also Hunter v. United States, 101 F.3d 1565, 1572 (11th Cir. 1996) ("The term "rights' [for retroactivity analysis] should not be construed broadly so as to sweep within its ambit mere expectation interests under procedural or remedy rules."); Sechrest v. Ignacio, 943 F. Supp. 1253, 1255 (D. Nev. 1996) (stating that a statute is **retroactive** only if its application to a pending case would impair rights an individual already possessed or increase an individual's liability for past conduct, or would impose new duties with respect to past actions); Delaware Coca-Cola Bottling Co. v. S & W Petroleum Serv., Inc., 894 F. Supp. 862, 865 (M.D. Pa. 1995) ("A law is given **retroactive** effect when it is used to impose a new legal burden on a past transaction or occurrence."); Doe v. Abbott Lab., 892 F. Supp. 811, 814 (E.D. La. 1995) (stating that a law

is **retroactive** when it imposes an important new legal burden on pre-enactment events).

n216. See, e.g., Brown v. R.J. Reynolds Tobacco Co., 52 F.3d 524, 530-31 (5th Cir. 1995) (stating that once a party's **cause of action accrues,** it becomes a vested right that may not be retroactively divested regardless of legislative wishes).

n217. See Maitland v. University of Minnesota, 43 F.3d 357, 361 (8th Cir. 1994) (stating that if a statute reveals Congress' intent that it 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.").

n218. Landgraf, 511 U.S. at 270.

n219. See, e.g., Resolution Trust Corp. v. Fleischer, 892 P.2d 497, 500-01 (Kan. 1995); Steinfeldv. Nielsen, 139P. 879, 896 (Ariz. 1913); Hansen Bros. Enters. v. Board of Supervisors of Nevada County, 907 P.2d 1324, 1344 (Cal. 1996) (remanding to determine extent of company's vested rights to mine and quarry its property).

n220. 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, 29F.3d 383, 385 (8th Cir. 1994). A contract is often seen as a vested right. See Spradlingv. Colorado Dep't of Revenue, 870P.2d 521, 523 (Colo. Ct. App. 1993).

n221. Landgraf, 511 U.S. at 269 (quoting Wheeler, 22 F. Cas. at 757). 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's criticizes the majority opinion's "vested right focus." See id. at 290-93.

n222. Id. at 271.

n223. Id. at 266.

n224. 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.

n225. See, e.g., Lucasv. South Carolina Coastal Council, 505 U.S. 1003 (1992); Loveladies Harbor, Inc.v. United States 28F.3d 1171 (Fed. Cir. 1994); Hendlerv. United States, 952F.2d 1364 (Fed. Cir. 1991).

n226. See, e.g., Rivers v. Roadway Express, Inc., 511 U.S. 298, 304 (1994) (holding that section101 of the 1991 Civil Rights Act cannot be **retroactive** because it imposes "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** which 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 new law cannot take away vested rights, or create new obligations or attach a new disability in respect to past transactions); Saint Vincent Hosp. & Health Ctr., Inc. v. Blue Cross & Blue Shield of Montana, 862 P.2d 6, 9 (Mont. 1993) (invalidating law if it impairs vested right or creates

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 ....").

n227. Landgraf, 511 U.S. at 271.

n228. Id. at 266. See also Plaut, 115 S. Ct. at 1462 (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)).

n229. See Rivers, 511 U.S. at 298 (considering whether section 101 of the 1991 Civil Rights Act should apply retroactively to pre-enactment conduct).

n230. See Landgraf, 511 U.S. at 281-84; Rivers, 511 U.S. at 304.

n231. See Landgraf, 511 U.S. at 265 & n.18 ("The 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 ....").

n232. 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).

n233. See, e.g., Simons v. City of Portland, 887 P.2d 824, 830-831 (Or. Ct. App. 1994).

n234. 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.

n235. See id. at 265, 270.

n236. See Siemon, supra note 16, at 13.

n237. See supra Part II.A.

n238. Compare Schenck v. City of Hudson Village, 937 F. Supp. 679, 689-91 (N.D. Ohio 1996) (holding that approval of preliminary plat accorded same status as final plat approval for due process purposes), and Friends of the Lawv. King County, 869P.2d 1056 (Wash. 1994) (en banc) (holding that approval of preliminary plat created a vested right), with L.M.Everhart Constr.v. Jefferson County Planning Comm'n, 2F.3d 48, 52-53 (4th Cir. 1993) (holding that approval of subdivision plat does not create vested right). See generally Acierno v. Cloutier, 40 F.3d 597, 618-19 (3d Cir. 1994) (discussing different rules for vested rights in real property); Toddv. Morgan, 109 S.E.2d 803, 804-05 (Ga. 1959) (discussing vested rights under deeds to secure debts); Elliotv. Kesler, 799S.W.2d 97, 102 (Mo. Ct. App. 1990) (discussing vested rights in rules of law); Burragev. New Hampshire Police Standards& Training Council, 506A.2d 342, 344 (N.H. 1986) (discussing vested rights in employment).

n239. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 504-05 (1987) (considering contract impairment but unless a state actor is itself a contracting party courts should defer to legislative judgment as to the necessity and reasonableness of a measure retroactively impairing private contracts); Mellov. Woodhouse, 872P.2d 337 (Nev. 1994) (discussing when rights in a contract vest).

n240. See United States Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977) ("Complete deference to a legislative assessment of reasonableness and necessity [with regards to a state's modification of its obligations under a contract] is not appropriate because the State's

self-interest is at stake."); Parker v. Wakelin, 937 F. Supp. 46, 57 (D. Me. 1996) (holding that a law that retroactively impairs public contract violates Contracts Clause); McDonald's Corp.v. Nelson, 822F. Supp. 597, 607 (S.D. Iowa 1993) (holding that a **retroactive** statute impairing license agreements violates Contracts Clause); Rothermelv. Florida Parole& Probation Comm'n, 441So. 2d 663, 664 (Fla. Dist. Ct. App. 1983) (stating that statutes which alter contractual rights are within a general rule against retrospective application); Lawrencev. Anheuser-Busch, Inc., 523A.2d 864, 869-70 (R.I. 1987) (stating that a legislature may enact retrospective legislation if it does not impair contractual obligations).

n241. See, e.g., Resolution Trust Corp.v. Town of Highland Beach, 18F.3d 1536, 1546, 1549-50 (11th Cir. 1994) (stating that a change in development project's completion date constituted a taking); A.A. Profiles, Inc.,v. City of Ft. Lauderdale, 850F.2d 1483, 1487-88 (11th Cir. 1988) (holding that rezoning ordinance constituted a taking); Wheeler v. City of Pleasant Grove, 664 F.2d 99, 100-01 (5th Cir. Unit B Dec. 1981) (finding that ordinance which prevented plaintiff's from using their building permit constituted a taking).

n242. See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992) (holding that an owner who is deprived of all economically beneficial use of land is entitled to compensation); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994) (holding that the denial of economically viable use of property as a result of regulation constitutes a taking); Creekside Assocs., Inc. v. City of Wood Dale, 684 F. Supp. 201, 205 (N.D. Ill. 1988) (stating that a taking occurs when legislation deprives the owner of all or an essential use of his property).

n243. See Bowles v. United States, 31 Fed. Cl. 37, 46 (Fed. Cl. 1994).

n244. See Dolan v. City of Tigard, 114 S. Ct. 2309, 2319-20 (1994) (requiring property dedication as a permit condition satisfies takings analysis); City of Portsmouth v. Schlesinger, 46 F.3d 133, 137 (1st Cir. 1995) (subjecting the amount of money necessary to compensate city for impact of increased density to takings analysis); Ehrlich v. City of Culver City, 911 P.2d 429, 443-44 (Cal. 1996) (holding that takings analysis is applicable to monetary exactions).

n245. See Landgraf, 511 U.S. at 283-84 (stating that the "extent" of a party's **retroactive** liability is an important legal consequence to be considered in determining whether to permit secondary retroactivity); Hookv. Ernst& Young, 28F.3d 366, 372-73 (3d Cir. 1994) (stating that previously lawful conduct which is rendered unlawful by subsequent amendment is protected from **retroactive** application); Edwardsv. Edwards, 863P.2d 513, 516 (Or. Ct. App. 1993) (stating that **retroactive** application would create new obligations). See also William Danzer & Co.v. Gulf & Ship Island R.R., 268U.S. 633 (1925) (stating that **retroactive** application of statute of limitations extension would violate due process).

n246. See supra note 218 and accompanying text.

n247. See Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 692 (3d Cir. 1993); Schenck v. City of Hudson Village, 937 F. Supp. 679, 690-91 (N.D. Ohio 1996).

n248. See Caritas Servs., Inc. v. Department of Soc. & Health Servs., 869 P.2d 28, 41 (Wash. 1994) (en banc) ("Due process is violated if the **retroactive** application of a statute deprives an individual of a vested right.").

n249. See Lincoln Gen. Hosp. v. Blue Cross/Blue Shield of Nebraska, 963 F.2d 1136, 1141 (8th Cir. 1992) (finding equittable estoppel from mailing insurance identification card); Portmann v. United States, 674 F.2d 1155, 1167 (7th Cir. 1982) (noting that one of the factors for equittable estoppel is reasonable reliance); Bourne v. Tahoe Reg'l Planning Agency, 829 F. Supp. 1203, 1208-09 (D. Nev. 1993) (stating that developer's reliance on assurances of permit by regional development agency raised valid issue of estoppel);

Mortvedt v. Department of Natural Resources, 858 P.2d 1140, 1143-1144 (Alaska 1993); State ex rel. Department of Revenue v. Driggs, 873 P.2d 1311, 1313 (Ariz. T.C. 1994) (finding reliance on forms and instructions disseminated by the Department); Grand Haven Township v. Brummel, 274 N.W.2d 814, 816 (Mich. Ct. App. 1978) (refusing to enforce injunction to follow zoning regulations on equittable grounds). But see S & M Inv. v. Tahoe Reg'l Planning Agency, 911 F.2d 324, 329 (9th Cir. 1990) (finding no estoppel against the government absent "pervasive pattern of false promises").

n250. While not all of these preconditions must be provable to assure protected legal status, the more that can the greater the likelihood that a court will refuse to apply legislation retroactively.

n251. For cases involving property interests and the Takings Clause, compare Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-05 (1984) (trade secrets are "property" protectable by the Takings Clause), United States v. Security Industrial Bank, 459 U.S. 70, 75-78 (1982) (nonpossessory, nonpurchase-money liens are "property"), Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 596-602 (1935) (mortgages are "property"), Lynch v. United States, 292 U.S. 571, 579 (1934) (valid contracts are "property"), and Avenal v. United States, 100 F.3d 933, 936 (Fed. Cir. 1996) (leases are "property"), with Pittman v. Chicago Board of Education, 64 F.3d 1098, 1104 (7th Cir. 1995) (no property in job tenure), Longshore v. United States, 77 F.3d 440, 443 (Fed. Cir. 1996) (no property in right to participate in federal lottery for a cellular radio license), Branch v. United States, 69 F.3d 1571, 1577-78 (Fed. Cir. 1995) (no property in a rule of common law), and M & J Coal Co. v. United States, 47 F.3d 1148, 1154 (Fed. Cir. 1995) (no property right to mine in such a way as to endanger public health and safety).For cases involving property interests and the Due Process Clause, compare Walz v. Town of Smithtown, 46 F.3d 162, 168 (2d Cir. 1995) (entitlement to excavation permit from town is "property" subject to due process protection), and Brookpark Entertainment, Inc. v. Taft, 951 F.2d 710, 714 (6th Cir. 1991) (liquor license is "property"), with Federal Housing Partners IV v. Cisneros, 55 F.3d 362, 367-68 (8th Cir. 1995) (no property in rental adjustments), and Sylvia Development Corp. v. Calvert County, 48 F.3d 810, 826 (4th Cir. 1995) (no property in acquisition of special zoning designation).

n252. Compare In re Workers' Compensation Refund W. Nat'l Mut. Ins. Co., 46 F.3d 813, 818 (8th Cir. 1995) (stating that a contract exists that is subject to the Contracts Clause when a relationship allocates rights and responsibilities among parties), and Holiday Inns Franchising, Inc. v. Branstad, 29 F.3d 383, 384-85 (8th Cir. 1994) (stating that franchise agreements are contracts protected by the Contracts Clause), with Texaco, Inc. v. Short, 454 U.S. 516, 531 (1982) (stating that a statute cannot impair a contract that did not exist at the time of its enactment), General Motors Corp. v. Romein, 503 U.S. 181, 189 (1992) (holding that the Contracts Clause only applies to state actions that "impair the obligation of pre-existing contracts") (emphasis added), Kestler v. Board of Trustees, 48 F.3d 800, 803-04 (4th Cir. 1995) (finding no contract before rights vest in a retirement scheme), and Aves v. Shah, 914 F. Supp. 443, 447 (D. Kan. 1996) (holding that the Contracts Clause does not apply to a contract that does not precede the challenging legislation).

n253. A vested right is a right that has so definitively **accrued** that it is not subject to defeat by a subsequent legislative act. See Blue Chip Properties v. Permanent Rent Control Bd. of Santa Monica, 216 Cal. Rptr. 492, 497 (Cal. Ct. App. 1985); Caritas Servs, 869 P.2d at 41 (something more than a mere expectation). A vested right may be based in specific state constitutional provisions that prevent vested rights from being impaired retroactively, see People v. D.K.B., 843 P.2d 1326, 1334 (Colo. 1993) (en banc) (Kirshbaum, J., concurring), or in the Due Process Clauses, see Resolution Trust Corp. v. Fleischer, 892 P.2d 497, 506-07 (Kan. 1995).No one has a vested right in the hope that a law will not change, or that private property will be free from subsequent government interference. See **Duke Power** Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 n.32 (1978) (finding no vested interest in any rule of common law); Smart v. Dane County Bd. of Adjustments, 501 N.W.2d 782, 787 (Wis. 1993). A vested right must also be something more than a mere unilateral expectation.

See Phillips v. Curiale, 608 A.2d 895, 901-02 (N.J. 1992); Vashon Island Comm. for Self-Government v. Washington State Boundary Review Bd., 903 P.2d 953, 958 (Wash. 1995) (en banc).

n254. For cases involving the Takings Clause, see Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (city dedication requirement constitutes a taking); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1993) (state law preventing building on lots purchased prior to the law's passage is taking); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (federal law requiring disclosure of pre-existing trade-secret data may be a taking of the property interest in the data); Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992) (federal law restricting rights to presidential papers is a taking); United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990) (federal refusal to approve mining plan is a taking); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (order prohibiting construction on wetlands constituted a taking); Bowles v. United States, 31 Fed. Cl. 37 (Fed. Cl. 1994) (denial of federal permit a taking); Whitney Benefits, Inc. v. United States, 30 Fed. Cl. 411 (Fed. Cl. 1994) (federal reclamation law prohibiting mining in certain areas is a taking); Rybachek v. United States, 23 Cl. Ct. 222 (Cl. Ct. 1991) (Clean Water Act regulations governing discharges from gold placer mining site may be a taking); Healing v. California Coastal Commission, 27 Cal. Rptr. 2d 758 (Cal. Ct. App. 1994) (delay in building permit approval may constitute a taking); Board of County Commissioners of Saguache v. Flickinger, 687 P.2d 975 (Colo. 1984) (governmental interference that substantially interferes with use and possession of property is a taking); Seawall Associates v. City of New York, 542 N.E.2d 1059 (N.Y. 1989) (law requiring owners to accept occupation of rental property by persons not already in residence is a taking).For cases involving the Contracts Clause, see United States Trust, 431 U.S. 1 (covenant between New Jersey and New York cannot be repealed in violation of the Contracts Clause); Educational Employees Credit Union v. Mutual Guaranty Corp., 50 F.3d 1432 (8th Cir. 1995) (unconstitutional **retroactive** alteration of contractual duty regarding capital contributions to credit union); Ross v. City of Berkeley, 655 F. Supp. 820 (N.D. Cal. 1987) (city eviction control legislation violated Contracts Clause); State v. Leavins, 599 So. 2d 1326 (Fla. Dist. Ct. App. 1992) (statute outlawing any mechanical dredge for purpose of taking oysters impaired contract rights under perpetual oyster harvesting leases); Ohio Ass'n of County Board of Mental Retardation & Developmental Disabilities v. Public Employees Retirement System, 585 N.E.2d 597 (Ohio Ct. Common Pleas 1990) (unconstitutional **retroactive** impairment of retirement contract); Association of Pennsylvania State College & University Faculties v. State System of Higher Education, 479 A.2d 962 (Pa. 1984) (**retroactive** impairment of retirement contract); Caritas Services, Inc. v. Department of Social & Health Services, 869 P.2d 28 (Wash. 1994) (en banc) (**retroactive** amendments impaired contracts between state agency and nursing homes).For cases involving the Due Process Clause, see Walz v. Town of Smithtown, 46 F.3d 162 (2d Cir. 1995) (due process violated when property owner compelled to dedicate land in order to obtain utility service); Robinson v. City of Seattle, 830 P.2d 318 (Wash. 1992) (en banc) (ordinance requiring landowners to pay fee or replace rental units before removing or demolishing them violated due process); Cox v. City of Lynnwood, 863 P.2d 578 (Wash. Ct. App. 1993) (denial of application of boundary line adjustment violated due process).

n255. See, e.g., Norton v. Village of Corrales, 103 F.3d 928, 931-32 (10th Cir. 1996) (no property interest in plat approval during time of submission); Zahra v. Town of Southold, 48 F.3d 674, 680-81 (2d Cir. 1995) (no protectable property interest in insulation inspection); Reich v. Beharry, 883 F.2d 239, 244 (3d Cir. 1989) (not all property interests worthy of procedural due process protection are also protected by substantive due process); B-West Imports, Inc. v. United States, 75 F.3d 633, 638 (Fed. Cir. 1996) (interest in import permits not sufficient property right to prohibit government from revoking them without paying just compensation); Board of County Supervisors of Prince William County v. United States, 48 F.3d 520, 524-26 (Fed. Cir. 1995) (interests held by county as a result of a proffer by a developer to perform certain activities in order to obtain zoning approval were not protectable legal interests).

n256. See Concrete Pipe, 508 U.S. at 638-41 ("Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity"); R. A. Gray & Co., 467 U.S. at 733 (**retroactive** federal economic legislation can affect contracts); Davon, Inc. v. Shalala, 75 F.3d 1114, 1125 (7th Cir. 1996) (stating that the Due Process Clause does not prohibit Congress from imposing obligations on employers beyond those voluntarily assumed by contract); Pro-Eco, Inc. v. Board of Comm'rs of Jay County, 57 F.3d 505, 508-10 (7th Cir. 1995) (stating that legislation that adversely affects contracts is not necessarily a taking); Linan-Faye Constr. Co. v. Housing Auth. of Camden, 49 F.3d 915, 931-32 (3d. Cir. 1995) (noting that not every contract gives rise to a protectable property interest).

n257. See Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Mid-American Waste Sys., Inc., v. City of Gary, 49 F.3d 286, 290 (7th Cir. 1995); DeBlasio v. Zoning Bd. of Adjustment for the Township of West Amwell, 53 F.3d 592, 601 (3d Cir. 1995).

n258. As a general rule, private parties do not have protectable property interests in government actions if the government has discretion to deny the request. See, e.g., Crowley v. Courville, 76 F.3d 47, 52 (2d Cir. 1996); Triomphe Investors v. City of Northwood, 49 F.3d 198, 203 (6th Cir. 1995) (no property interest in approval of a permit); Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 826 (4th Cir. 1995) (no property interest in an application for a Transfer Zone District classification).When the discretion of the government body is so narrowly circumscribed that approval of an application is virtually assured, then a party may have a protectable property interest in approval of an application. See Walz v. Town of Smithtown, 46 F.3d 162, 168-69 (2d Cir. 1995) (finding that homeowners possessed entitlement to excavation permit that constituted property right protected by due process).

n259. See, e.g., United States v. Security Indus. Bank, 459 U.S. 70, 71, 81 (1982) (holding that a lien perfected before the law was enacted cannot be retroactively taken in the absence of clear congressional intent); Reserve, Ltd. v. Town of Longboat Key, 17 F.3d 1374, 1379-80 (11th Cir. 1994) (finding that developer has a vested property interest in a building permit it possessed); Nixon v. United States, 978 F.2d 1269, 1284 (D.C. Cir. 1992) (presidential papers are protected property, and therefore the Presidential Recordings and Materials Preservation Act may not restrict former President Nixon's rights to his papers); Nasierowski Bros. Inv. Co. v. City of Sterling Heights, 949 F.2d 890, 897 (6th Cir. 1991) (concluding that developer has a property interest in existing zoning classification after city assured developer that property would not be subject to zoning change and developer engaged in substantial acts in reliance); A.A. Profiles, Inc. v. City of Ft. Lauderdale, 850 F.2d 1483, 1488 (11th Cir. 1988) (holding that original development approval of a wood-chipping operation granted plaintiff a property interest protected from subsequent rezoning); Blumberg v. Pinellas County, 836 F. Supp. 839, 844-45 (M.D. Fla. 1993) (holding that utility customers have property interests in deposits and in the interest generated); CABO Distrib. Co. v. Brady, 821 F. Supp. 601 (N.D. Cal. 1992) (holding that distributor had "property interest" in certificate of label approval issued by the Bureau of Alcohol, Tobacco and Firearms, sufficient to enjoin the Bureau's subsequent revocation of the certificate); S & R Properties v. Maricopa County, 875 P.2d 150, 157-58 (Ariz. Ct. App. 1993) (holding that a right to a tax refund is a substantive right that vests upon pre-amendment verification of erroneous property tax assessment); United Artists Theater Circuit, Inc. v. City of Philadelphia, 595 A.2d 6, 11-13 (Pa. 1991) (a theater building is protected property that cannot be taken from the owner by a historic preservation law).

n260. To trigger the vested rights doctrine, the government promise must be for a benefit to which the promisee is otherwise entitled. See Dyce v. Salaried Employees' Pension Plan of Allied Corp., 15 F.3d 163, 166 (11th Cir. 1994) (stating that because participants would not otherwise be entitled to benefits, the amendment may be applied retroactively). A unilateral expectation on the part of the party claiming a **retroactive** impairment of a vested right, such as where the government has discretion to deny or modify the interest affected by the changed law, is not sufficient. See Triomphe Investors, 49 F.3d at 203. Nor does a contract

necessarily create a protectable promise; a contract with a government entity is only vested when there is some governmental intent to create an enforceable contractual right. See Mid-American Waste, 49 F.3d at 289-90. The critical component of a government promise is the extent to which a government entity has in some way encouraged, induced, or approved private action, and thereby promised the private party a right vested against **retroactive** change. See Reserve Ltd., 17 F.3d at 1381 (vested right in permit after large sums expended in reliance on it); Resolution Trust Corp. v. Conner, 871 F. Supp. 1424, 1426-27 (W.D. Okla. 1993) (state statute improperly took away vested right created by common law to assert claims against bank officials for breach of duties); In re Persky, 134 B.R. 81, 91-92 (Bankr. E.D.N.Y. 1991) (**retroactive** application of statutes affecting vested rights is disfavored); Cline v. City of Boulder, 450 P.2d 335, 338 (Colo. 1969) (a right is vested when an individual has taken steps in substantial reliance upon an act of a governmental entity); WMM Properties v. Cobb County, 339 S.E.2d 252, 255 (Ga. 1986); Lake Shore Estates, Inc. v. Denville Township Planning Bd., 605 A.2d 1106, 1111 (N.J. Super. Ct. App. Div. 1991); see also Friends of the Law v. King County, 869 P.2d 1056, 1060 (Wash. 1994) (en banc) (application for plat approval a vested right); Erickson & Assocs., Inc. v. McLerran, 849 P.2d 688, 690-92 (Wash. Ct. App. 1993); Burch v. Monroe, 834 P.2d 33, 35 (Wash. Ct. App. 1992) (vested right in default judgment which placed lien on property). But see L.M. Everhart Const., Inc. v. Jefferson County Planning Comm., 2 F.3d 48, 52 (4th Cir. 1993) (holding that conditional approval of a subdivision plat does not create vested property right to develop subdivision as approved).

n261. Government agencies are subject to estoppel if they have made some promise that an earlier rule will control private conduct. The promise can take the form of representations, assurances, instructions, or even public statements by government officials. See, e.g., State ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Comm'n, 834 F. Supp. 1205, 1214 (D. Neb. 1993) (public statements); Bourne v. Tahoe Reg'l Planning Agency, 829 F. Supp. 1203, 1209 (D. Nev. 1993) (assurances and representations); State ex rel. Department of Revenue v. Driggs, 873 P.2d 1311, 1313 (Ariz. T.C. 1994) (instructions); Florida Dep't of Transp. v. Dardashti Properties, 605 So. 2d 120, 123 (Fla. Dist. Ct. App. 1992) (representations); Hagee v. City of Evanston, 414 N.E.2d 1184, 1187 (Ill. App. Ct. 1980) (representations). Some jurisdictions require that the promise must rise to a certain level of culpability, which is most easily demonstrated if the promisor (i.e., the government official) had actual or imputed knowledge of the false nature of the promise, making the representation a misrepresentation. See, e.g., City of Long Beach v. Mansell, 476 P.2d 423, 444-45 (Cal. 1970) (in bank); Miller v. State Employes' Retirement Sys., 626 A.2d 679, 682 (Pa. Commw. Ct. 1993).

n262. Private parties may be able to resist **retroactive** changes to contract terms between private parties if the new law's **retroactive** effect on the contractual promises is not limited in any way (e.g., the law does not contemplate gradual applicability, with grace periods). When a law is not limited, its effect on the promises made by the private parties may be characterized as a "sudden, totally unanticipated, and substantial **retroactive** obligation." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 249 (1978). A new law which is "substantially **retroactive**" is one which impairs existing contracts immediately upon its effective date, and which provides no relief to the parties whose contractual right have been abridged in the future. See First Nat'l Bank of Pennsylvania v. Flanagan, 528 A.2d 134, 137-38 (Pa. 1987).An impairment might also be substantial if application of the new law works a change in the remedies under a contract, thereby converting an otherwise enforceable agreement into a "mere promise," and impairing the contract's obligatory force. See Bronson v. Kinzie, 42 U.S. (1 How.) 311, 316-17 (1843); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 197-98 (1819). Some jurisdictions presume a substantial impairment if **retroactive** application of the new law adds a new and unforeseen obligation or duty to the parties' promises in a contract. See, e.g., Dale Baker Oldsmobile, Inc. v. Fiat Motors of N. Am., 794 F.2d 213, 215-16 (6th Cir. 1984); Karl v. Bryant Air Conditioning Co., 331 N.W.2d 456, 463 (Mich. 1982). If the impairment is substantial, protected legal status will not be denied simply because a state is exercising its otherwise legitimate police powers. See, e.g.,

Educational Employees Credit Union v. Mutual Guar. Corp., 50 F.3d 1432, 1438 (8th Cir. 1995).

n263. When the government retroactively denies a property owner the benefits of official promises, there may be a taking. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984) (promise of confidentiality); A.A. Profiles, Inc. v. City of Ft. Lauderdale, 850 F.2d 1483 (11th Cir. 1988) (zoning resolution approving development); Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir. Unit B. Dec. 1981) (building permit).A court may also find a taking if a **retroactive** law has interfered with "distinct investment-backed expectations." See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Golden Gate Hotel Ass'n v. City of San Francisco, 864 F. Supp. 917, 926-27 (N.D. Cal. 1993). An owner of property not only has a protectable expectation, but one which is considered "distinct," if the government has explicitly promised that it will not be retroactively impaired by subsequent law. See Ruckelshaus, 467 U.S. at 1011 (federal government explicitly guaranteed an extensive measure of confidentiality and exclusive use of trade secret data).

n264. A legally protected expectation exists when a property owner can show that a private decision about the property occurred in the past, in reliance on a state of affairs that did not include the possibility of a new, retroactively-applied law. When it is not reasonably foreseeable that there might be a change in the law, then there is an expectation protected by the Takings Clause against **retroactive** interference. See Creppel v. United States, 41 F.3d 627, 633-34 (Fed. Cir. 1994); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177-78 (Fed. Cir. 1994); United Nuclear Corp. v. United States, 912 F.2d 1432, 1436 (Fed. Cir. 1990); Bowles v. United States, 31 Fed. Cl. 37, 50-52 (Fed. Cl. 1994); NRG Co. v. United States, 24 Cl. Ct. 51, 62 (Cl. Ct. 1991).

n265. When a private party has reasonably relied on past assurances by a government body that the applicable law will not be changed in the future to adversely affect past private actions, due process can prevent a new law from applying to the party. See Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536, 1549 (11th Cir. 1994).

n266. A Contracts Clause violation is more likely when legislation thwarts the contracting parties' reasonable reliance on the terms of an existing contract. See Spannaus, 438 U.S. at 242-44, 246; United States Trust, 431 U.S. at 20-21 n.17, 25; Whirlpool Corp. v. Ritter, 929 F.2d 1318, 1322-23 (8th Cir. 1991); Williams v. Old Am. Ins. Co., 882 P.2d 576 (Okla. Ct. App. 1994). If **retroactive** legislation addresses a topic never before reached by regulation, then reliance interests are legitimate and parties may successfully raise the Contracts Clause. See West End Tenants Ass'n v. George Washington Univ., 640 A.2d 718, 734-35 (D.C. 1994).

n267. See Evans v. Board of County Comm'rs of the County of Boulder, 772 F. Supp. 1178, 1180 (D. Colo. 1991); Heikes v. Heikes, 899 P.2d 1349, 1356-57 (Cal. 1995); Pioneer Trust & Sav. Bank v. County of Cook, 377 N.E.2d 21, 26 (Ill. 1978); County of Kendall v. Aurora Nat'l Bank Trust No. 1107, 579 N.E.2d 1283, 1289 (Ill. App. Ct. 1991); Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 390, 397 (Neb. 1994).In determining whether a law may apply retroactively, it is often better not to focus on whether the right held is "vested," but rather, on whether the law surprises persons who have long relied on a contrary state of the law. If there has been such reliance, the term "vested right" may be only a shorthand description of a judicial determination that a law-making body should not retroactively alter past private action. See Ray H. Greenblatt, Judicial Limitations on **Retroactive** Civil Legislation, 51 N.W. U. L. Rev. 540, 561 (1956). See also Ficarra v. Department of Regulatory Agencies, 849 P.2d 6, 16-17 (Colo. 1993) (en banc); Incorporated Village of Northport v. Guardian Fed. Sav. & Loan Ass'n, 384 N.Y.S.2d 923, 928 (N.Y. Sup. Ct. 1976); Lawrence v. Anheuser-Busch, Inc., 523 A.2d 864, 870 (R.I. 1987); Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas, 615 S.W.2d 947, 956-57 (Tex. Civ. App. 1981).

n268. Some jurisdictions are reluctant to apply statutes retroactively when the new duty or

liability would significantly impair existing substantive rights, and disappoint legitimate reliance interests. See McAndrews v. Fleet Bank of Massachusetts, 989 F.2d 13, 15 (1st Cir. 1993). In other jurisdictions it is thought to be either unconstitutional or illegal to impose unexpected future obligations or penalties on past occurrences. See Lieberman-Sack v. Harvard Community Health Plan of New England, Inc., 882 F. Supp. 249, 255-56 (D.R.I. 1995); Colorado Office of Consumer Counsel v. Public Serv. Co. of Colorado, 877 P.2d 867, 870 (Colo. 1994) (cannot retroactively raise rates paid by ratepayers); State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 61 (Fla. 1995); OSI Indus. 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 to impose a greater liability on a private party); see also Louisiana-Pacific Corp. v. Asarco, Inc., 24 F.3d 1565, 1577-78 (9th Cir. 1994) (new private **cause of action** which imposes liability on private parties should not be **retroactive)**; Rodriguez v. General Motors Corp., 27 F.3d 396, 398-99 (9th Cir. 1994) (same).Conversely, when property owners are on constructive notice that new obligations may be imposed by Congress, there is no constitutional impediment to such **retroactive** legislation. See Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 226-27 (1986); Student Loan Mktg. Ass'n v. Riley, 907 F. Supp. 464, 470 (D.D.C. 1995).

n269. See Heckler v. Community Health Servs. of Crawford County, Inc., 467 U.S. 51, 59-60 (1984) (estoppel against the government may be asserted when there is official affirmative misconduct, upon which a private party has detrimentally relied); Dion v. Secretary of Health & Human Servs., 823 F.2d 669, 673 (1st Cir. 1987) (a private party "should not suffer for an agency's delays and errors"); Decarion v. Monroe County, 853 F. Supp. 1415, 1419 (S.D. Fla. 1994) (state estopped from depriving property owner of building permit); Hy Kom Dev. Co. v. Manatee County, 837 F. Supp. 1182 (M.D. Fla. 1993) (county estopped from declaring permit invalid after developer had obtained the permit and expended $ 2.5 million in reliance on it); State ex rel. Department of Revenue v. Driggs, 873 P.2d 1311 (Ariz. T.C. 1994) (state estopped from collecting additional tax assessment when state forms were incorrect); see also Jafay v. Board of County Comm'rs of Boulder County, 848 P.2d 892, 903 (Colo. 1993); Iazzetti v. Village of Tuxedo Park, 546 N.Y.S.2d 295, 298 (N.Y. Sup. Ct. 1989); Department of Commerce v. Casey, 624 A.2d 247, 253-54 (Pa. Commw. Ct. 1993); State ex rel. Wyoming Workers Compensation Div. v. Rivera, 796 P.2d 447, 450 (Wyo. 1990).For purposes of equitable estoppel, an act of reliance typically entails the expenditures of money or the incurrence of an obligation. See, e.g., Equity Resources, Inc. v. County of Leon, 643 So. 2d 1112, 1118 (Fla. Dist. Ct. App. 1994); Hagee v. City of Evanston, 414 N.E.2d 1184, 1187 (Ill. App. Ct. 1980); El Dorado at Santa Fe, Inc. v. Board of County Comm'rs of Sante Fe County, 551 P.2d 1360, 1366-67 (N.M. 1976). Reliance is reasonable and in good faith if there was no convenient way for the private party to ascertain that the government representation was unreliable or false. See Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536, 1550 (11th Cir. 1994); City of Long Beach v. Mansell, 476 P.2d 423, 42-44 (Cal. 1970) (in bank).

n270. A condition to a successful equitable estoppel action is injury resulting from a government representation or promise. This condition is met when the private party has made such a substantial change in position, incurred such extensive obligations, or made such significant expenditures that it would be unfair to retroactively alter or destroy the benefits acquired under the earlier promise. See Reserve, Ltd. v. Town of Longboat Key, 17 F.3d 1374, 1380 (11th Cir. 1994); Simons v. City of Portland, 887 P.2d 824, 831 (Or. Ct. App. 1994); Kramarevcky v. Department of Soc. Servs., 863 P.2d 535, 549-51 (Wash. 1993) (en banc) (Madsen, J., dissenting).

n271. If one has a vested right, a new law which is secondarily **retroactive** may not be applied so as to impair the right or deprive the holder of it. See Estate of Ridenour v. Commissioner, 36 F.3d 332, 335 (4th Cir. 1994); Pardee Constr. Co. v. California Coastal Comm'n, 157 Cal. Rptr. 184, 189 (Cal. Ct. App. 1979) (amendment would destroy vested rights); Griffin v. City of N. Chicago, 445 N.E.2d 827, 830 (Ill. App. Ct. 1983); Saint Vincent Hosp. v. Blue Cross & Blue Shield of Montana, 862 P.2d 6, 9 (Mont. 1993) (finding that

statute would impair vested rights).The text of the Contracts Clause in Article I, Section 10 provides that the Clause's protection is triggered when a contract is "impaired." A contract is impaired by a statute which alters its terms, imposes new conditions, or lessens its value. See Federated Am. Ins. Co. v. Marquardt, 741 P.2d 18, 23-24 (Wash. 1987).The Supreme Court has established that a "threshold inquiry is "whether the state law has ... operated as a substantial impairment of a contractual relationship.'" Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411 (1983) (quoting Spannaus, 438 U.S. at 244). See also United States Trust, 431 U.S. at 17. The severity of the impairment increases the level of scrutiny to which **retroactive** legislation is subjected. See Spannaus, 438 U.S. at 245. Substantial impairment occurs when legitimate reliance interests and expectations are defeated by the new law. See Association of Surrogates v. New York, 940 F.2d 766, 772 (2d Cir. 1991); Nevada Employees Ass'n v. Keating, 903 F.2d 1223, 1227 (9th Cir. 1990); Haley v. Pataki, 883 F. Supp. 816, 825 (N.D.N.Y. 1995); Arriaga v. Members of the Bd. of Regents, 825 F. Supp. 1, 6 (D. Mass. 1992); Opinion of the Justices (Furlough), 609 A.2d 1204, 1210 (N.H. 1992) (per curiam); Peppers v. Beier, 599 N.E.2d 793, 795 (Ohio Ct. App. 1991).

n272. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982); Panhandle E. Pipe Line Co. v. Madison County Drainage Bd., 898 F. Supp. 1302, 1311 (S.D. Ind. 1995); GTE Northwest, Inc. v. Public Utility Comm'n, 900 P.2d 495, 503 (Or. 1995) (in bank); Hoover v. Pierce County, 903 P.2d 464, 469 (Wash. Ct. App. 1995).

n273. See, e.g., Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825, 841-42 (1987); Armstrong v. United States, 364 U.S. 40, 49 (1960); Christopher Lake Dev. Co. v. St. Louis County, 35 F.3d 1269, 1274-75 (8th Cir. 1994); Blumberg v. Pinellas County, 836 F. Supp. 839, 845-46 (M.D. Fla. 1993); Aspen-Tarpon Springs Ltd. Partnership v. Stuart, 635 So. 2d 61, 68 (Fla. Dist. Ct. App. 1994); Manocherian v. Lenox Hill Hosp., 84 N.Y.2d 385, 394 (N.Y. 1994); see also Norwood v. Baker, 172 U.S. 269, 278-79 (1898) ("The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits **accruing** to him is, to the extent of such excess, a taking ....").This judicial aversion to **retroactive** laws which have "singled out" particular property owners also extends to government actions that deny only one owner use of its property in order to capitulate to the unreasonable fears of the surrounding community. See Cardon Oil Co. v. City of Phoenix, 593 P.2d 656, 659 (Ariz. 1979); Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401, 408 (Neb. 1994).

n274. One common consequence of secondary retroactivity is a reduction of the economic value of existing property affected by the new law. The Supreme Court has confirmed that there may be a taking of property (giving property protected legal status under the Takings Clause) after a reviewing court considers (1) the "economic impact of the [new] regulation," Penn Central, 438 U.S. at 124, and (2) the new law's likelihood of denying the owner "economically viable use of this land," Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). There may be no predictable difference between an adverse economic impact and a denial of economically viable use. What is certain is that there is a categorical taking (and protected legal status) when the new law has the effect of depriving the owner of all future worth, value, or economically beneficial use of property not otherwise characterized as a nuisance under state law. See Lucas, 505 U.S. at 1015-16; New Port Largo, Inc. v. Monroe County, 856 F. Supp. 659, 662 (S.D. Fla. 1994); Healing v. California Coastal Comm'n, 27 Cal. Rptr. 2d 758, 768 (Cal. Ct. App. 1994); Peterman v. Department of Natural Resources, 521 N.W.2d 499, 506-07 (Mich. 1994).Even in the absence of a total taking, it may be unconstitutional for a **retroactive** law to deny the owner the right to economically exploit the land - to sell it for the best price available in the market. See Brown v. United States, 73 F.3d 1100, 1104 (Fed. Cir. 1996); Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994).

n275. See Welch v. Henry, 305 U.S. 134, 147 (1938); Priddy v. City of Tulsa, 882 P.2d 81, 84 (Okla. Crim. App. 1994); Rivett v. City of Tacoma, 870 P.2d 299, 303 (Wash. 1994) (en banc). Laws tend to be characterized as oppressive or burdensome if their **retroactive** application will deprive a person of (1) a legal interest, such as a vested right, (2) an

entitlement to a particular government action, or (3) a private property interest which is specially protected by the Due Process Clause. See Walz v. Town of Smithtown, 46 F.3d 162, 168-69 (2d Cir. 1995) (state-created property right); National Union Fire Ins. v. City Sav., F.S.B., 28 F.3d 376, 394 (3d Cir. 1994) (right to raise defenses and affirmative defenses); HBP Assocs. v. Marsh, 893 F. Supp. 271, 279 (S.D.N.Y. 1995) (property interest in a government service); Garcia v. La Farge, 893 P.2d 428, 437 (N.M. 1995) (imposition of an unreasonably short statue of limitations period); Schirmer v. Homestake Mining Co., 882 P.2d 11, 14 (N.M. 1994); Caritas Servs., 869 P.2d at 41 (vested right). The rationale behind this component of due process is that movement should respect certain settled expectations, and that holders of vested or protectable property rights should be secure against governmental disruption.

n276. A **retroactive** law that impairs private contracts is void under the Contracts Clause if it is not justified by a significant and legitimate public purpose, such as the remedying of a general social or economic problem. If the State is unable to articulate an urgent social need for the new law, or if its intent is to create a windfall for one private group at the expense of another, or if it retroactively redistributes assets to benefit only a selected few, then the private contract affected by the new law is more likely to have protected legal status. See In re Workers' Compensation Refund W. Nat'l Mut. Ins. Co., 46 F.3d 813, 818-19 (8th Cir. 1995) (stating that goal illegitimate if achieved by **retroactive** means); Earthworks Contracting, Ltd. v. Mendel-Allison Constr. of California, Inc., 804 P.2d 831, 837-38 (Ariz. Ct. App. 1990).Similarly, if the impairment is not reasonably necessary to solve some general societal problems, but is instead designed to promote a more profitable private use of property, there may be a Contracts Clause violation. See Pulos v. James, 302 N.E.2d 768, 774-75 (Ind. 1973); Adult Group Properties, Ltd. v. Imler, 505 N.E.2d 459, 464-65 (Ind. Ct. App. 1987).

n277. See Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Unity Real Estate Co. v. Hudson, 889 F. Supp. 818, 827-29 (W.D. Pa. 1995).Courts are suspicious of laws that burden an owner's existing property rights with the purpose of pressing the private property into some kind of public service. The troublesome fact is that private property is being singled out for a burden and the beneficiaries of the burden are persons not otherwise sharing in the burden. Such **retroactive** laws unfairly distribute the practical negative consequences of a new law by producing a future effect which is experienced disproportionately by targeted property owners. This kind of law does not further a legitimate state interest (and is a taking) when the affected property owners have been "forced alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). See also Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994).

n278. A **retroactive** law is "arbitrary" if there is absolutely no evidence to justify imposition of a new rule, or no reason whatsoever for the decision to proceed retroactively. See United States v. Carmack, 329 U.S. 230, 243 & n.14 (1946) (stating that an arbitrary decision is one "without adequate determining principle or [is] unreasoned"); Shelton v. City of College Station, 780 F.2d 475, 483 (5th Cir. 1986) (stating that a law is arbitrary if "the government could have no legitimate reason for its decision"); Brady v. Town of Colchester, 863 F.2d 205, 216 (2d Cir. 1988) (stating that a law is arbitrary when government acts with indefensible reason); Adamson Cos. v. City of Malibu, 854 F. Supp. 1476, 1491 (C.D. Cal. 1994) (finding a law arbitrary when no evidence to justify law); Hixon v. Walker County, 468 S.E.2d 744 (Ga. 1996) (stating that a law is arbitrary if no standards guide discretion).

n279. See Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 692-94 (3d Cir. 1993); National Educ. Ass'n - Rhode Island v. Retirement Bd. of Rhode Island Employees' Retirement Sys., 890 F. Supp. 1143, 1165 (D.R.I. 1995); Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622, 625-26 (Fla. 1990); Upper Deerfield Township v. Seabrook Hous. Corp., 605 A.2d 1160, 1163 (N.J. Super. Ct. Law Div. 1991); Cox v. City of Lynnwood, 863 P.2d 578, 583 (Wash. Ct. App. 1993).On the other hand, the requirements of due process are satisfied

if **retroactive** application of new legislation is rationally related to a legitimate government purpose. See R. A. Gray & Co., 467 U.S. at 729-30; Usery, 428 U.S. at 15-18; Hamama v. INS, 78 F.3d 233, 236 (6th Cir. 1996).

n280. See supra notes 1-3 and accompanying text.

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COMMENT: ALASKA'S NUISANCE STATUTE REVISITED: FEDERAL SUBSTANTIVE DUE PROCESS LIMITS TO COMMON LAW ABROGATION

Jan Erik Hasselman*

* Executive Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 1996-97.

SUMMARY:
... Edwards's attorneys responded that the statute was neither applicable -- APC's actions were never in compliance with pollution regulations and hence were not protected by the statute -- nor constitutional. ... Statutory pollution regulation is not well designed to protect property from damage associated with air and water emissions. ... In summary, substantive due process review today typically is viewed in the context of a dichotomy between economic regulation on the one hand, and regulations impacting "fundamental interests" on the other. ... In one of the earliest of these cases, *New York Central Railroad v. White*, the Supreme Court rejected a due process challenge to New York's Workmen's Compensation Law. ... When a court is presented with a due process challenge to a statute that alters traditional compensatory mechanisms and legal protections of the common law, that court should inquire whether the statute replaces the traditional protections with new ones or other advantages, if it is needed, and whether it will increase the likelihood of injury. ... The Court's treatment of this issue fits uncomfortably into the traditional substantive due process dichotomy of arbitrary and capricious review for economic regulation, and strict scrutiny for laws which restrict fundamental interests. ...

TEXT:

[*347] I. BACKDROP: SITKA, ALASKA: 1992-94

The Alaska Pulp Corporation (APC) pulp mill in Sitka, Alaska was never an exemplar of environmentally sound management. [1] APC, which is owned by a consortium of Japanese corporations, ignored its own consultant's findings that the mill's proposed construction site in Silver Bay was particularly fragile, and proceeded with the lowest cost -- and most environmentally destructive -- waste and emissions discharge system available. [2] Since beginning operations in 1959, the mill had been repeatedly cited by the EPA for violations of its Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit. [3] Because of the mill's chronic inability to comply with its NPDES permit, the EPA in 1986 entered into a consent decree requiring APC's good faith efforts to move towards compliance. [4]

[*348] Local residents charged that the mill was causing the water quality in Sitka Sound to deteriorate aesthetically and ecologically, and complained that foul odors and fumes interfered with the use of their property. [5] Residents also charged that these problems

resulted in a drop in property values and made property difficult to rent or sell. [6] In February, 1992, Sitka resident Larry Edwards filed a class action private nuisance suit on behalf of himself and 120 other landowners along the Sound. [7]

In March, 1993, James Clark, the attorney for Alaska Pulp Corporation, Ltd. (APL is the parent company of APC), began promoting a remarkable legislative enactment designed to circumvent the Edwards suit. [8] Clark circulated a draft of a proposed statutory revision of Alaska's common law **cause of action** for nuisance to state representatives and Alaska Attorney General Charles Cole. Under Clark's proposal, a discharge, emission, occupation, or structure could not be an actionable nuisance if it was licensed, permitted, or otherwise authorized by law. [9] Despite serious questions raised as to the bill's constitutionality, proponents introduced the bill during the 1993 legislative session. [10] The following year, due in large measure to careful shepherding by Sitka's representative in the Alaska Senate, Robin Taylor, [11] the Alaska legislature passed the bill; Governor Walter "Wally" Hickel signed the bill into law in April, 1994. [12]

[*349] Soon thereafter, APC's attorneys filed a motion for judgment on the pleadings, arguing that the new law rendered the Edwards suit moot. [13] Edwards's attorneys responded that the statute was neither applicable -- APC's actions were never in compliance with pollution regulations and hence were not protected by the statute -- nor constitutional. [14] The Alaska Superior Court agreed that the statute was unconstitutional as retroactively applied to the Edwards lawsuit and rejected the defendant's motion. [15] Moreover, rejecting the claim that the statute was a well-considered revision of the common law, the court found that an "important" purpose of the statute was specifically to circumvent the Edwards lawsuit against APC. [16] The court noted, however, that the statute could be read to extinguish future private nuisance claims. [17]

By the time the trial was scheduled to start, APC had closed down its Sitka mill, making the desired injunction against pollution discharges irrelevant. [18] Consequently, the parties agreed to settle. APC **[*350]** set up a $ 2 million trust fund to improve the "quality of life" in Sitka, funding science classes and a community music festival. [19]

II. INTRODUCTION: STATUTORY REVISION OF COMMON LAW PROPERTY PROTECTIONS

Senator Taylor and APL's rather ham-fisted attempt to circumvent a costly lawsuit failed. [20] The story demonstrates, however, that polluting industries successfully can weaken and even destroy traditionally powerful common law protections by turning to sympathetic legislatures. [21] Although the Alaska Superior Court held the law inapplicable to the Silver Bay landowners in the Edwards suit, the court still considered the law valid as applied prospectively, and at the present time every landowner in Alaska faces the prospect of serious property damage at the hands of polluting facilities without the opportunity for a remedy under a private nuisance claim. [22]

Polluting industries in other states will probably find the story of Alaska's effort to override the common law in favor of pollution regulation a useful and interesting model. [23] With national and state legislatures today at times demonstrating an unusual sympathy for corporate and industrial concerns, [24] other states also may attempt to abrogate traditional remedial mechanisms such as nuisance and negligence in favor of regulatory schemes. [25] Future legislators, moreover, **[*351]** probably would draft common law override bills more comprehensively than did the authors of Alaska's anti-nuisance statute. [26]

This Comment contemplates a hypothetical state statute that extinguishes common law remedies for injuries caused by a discharge or emission, providing that the responsible facility is in compliance with pollution regulation or otherwise complies with the law. [27] Unlike Section 09.45.230, however, this hypothetical statute would apply only prospectively and would abrogate the full range of common law remedies, including public nuisance, trespass, strict liability, and negligence.

This Comment argues that a statutory abrogation of the common law that leaves property subject to uncompensable damage is an unconstitutional deprivation of liberty and property without due process. [28] In doing so, this Comment bypasses the conventional view that substantive due process review is always completely deferential where a statute does not impinge upon a "fundamental" interest. Instead, this Comment argues that, where a statute deprives individuals of important common law protections and leaves them with no legal remedies for injuries caused by pollution, judicial scrutiny will be greater. Based on United States Supreme Court precedent, a court probably should find the hypothetical statute posited above to be unreasonable and arbitrary, and consequently violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Section III of this Comment examines the need for common law property protections in light of the nature of pollution standards and regulations such as the Clean Air and Clean Water Acts. Section IV then briefly examines the history of substantive review of legislation under the Due Process Clause and traces the evolution of the current "two-tiered" standard of review. Section V demonstrates that, despite the deference typically due to economic regulation, the Supreme **[*352]** Court examines common law abrogation and liability limitations with a significant quantum of scrutiny, and balances several factors to ensure that the common law change is fair and reasonable. Section VI posits some possible justifications for this implicit higher scrutiny by tracing various themes that run through the Court's constitutional jurisprudence. Finally, Section VII applies the multi-factor reasonableness balancing standard articulated in Section V to the hypothetical common law abrogation statute, and examines why the statute probably should fail.

III. POLLUTION REGULATION: INSUFFICIENT PROTECTION FOR PROPERTY

Statutory pollution regulation is not well designed to protect property from damage associated with air and water emissions. [29] Emissions that are permissible under pollution regulations still can cause significant damage to individual property or the environment. [30] Moreover, statutory pollution regulation generally does not provide for compensation for damages to private citizens caused by pollution. [31] Common law private actions thus provide a necessary complement to environmental regulations, one which the statutes themselves contemplate. [32] Consequently, the abrogation of common law claims would leave property subject to damage that could not be compensated or remedied by any legal mechanism.

As with any legislation, anti-pollution regulation usually represents a compromise between those who want rigorous environmental protection and those who insist that strict regulation would weaken industries and slow economic progress. [33] Lobbyists for polluting industries **[*353]** often have significant influence in the legislative process, and legislators are often loathe to implement strict environmental regulations that could significantly impact economic competitiveness and employment. [34] As a result, significant levels of pollution are still allowed under virtually all regulatory regimes. [35]

Second, regulatory pollution standards are by their nature broad prescriptions, applicable across a state or the entire nation. [36] These standards attempt to articulate manageable ceilings on emissions to control pollution at the broadest level, and are poorly suited to deal with the myriad of individualized situations and local circumstances that render certain areas more susceptible to harm than others. [37] Local and individualized pollution control continues to rely on the common law, because the common law accounts for local standards of reasonableness that vary from place to place. [38]

Furthermore, environmental regulations do not provide any mechanisms for individuals to secure compensation for individual personal or property damages. [39] Instead, many regulations provide for citizen enforcement provisions, [40] and explicitly retain common law remedies for damages. [41] Under current federal pollution regulations, common law actions provide the sole legal mechanism available to compensate individuals who have been

damaged in some way by pollution. [42]

[*354] Finally, pollution control regulations are heavily oriented towards the protection of human health, and much less oriented towards the protection of property and the environment. [43] For example, the Clean Air Act is divided into primary standards, based on the protection on human health, and secondary standards, broadly based on the protection of "social welfare" but generally referring to effects of air pollution on materials, agriculture, ecosystems, and aesthetics. [44] The primary standards are strict and generally well-enforced. [45] Secondary standards -- those most applicable to the protection of property -- are not only less rigorous in substance, but generally have been enforced poorly. [46]

Thus, pollution control regulations offer at best a slender quantum of protection to property. Even in heavily regulated industries and regions, the traditional mechanisms of the common law have remained necessary to control pollution levels in particular circumstances and to compensate for damages that occur. [47]

IV. THE DUE PROCESS CLAUSE AND THE DEVELOPMENT OF SUBSTANTIVE REVIEW OF LEGISLATION

Before examining why statutes that abrogate common law protections on private property should be subject to significant constitutional scrutiny, a brief explanation of the Due Process Clause generally **[*355]** and the evolution of the United States Supreme Court's substantive review of legislation may be instructive. This history is important in helping to explain why the elevated standard of review for common law abrogation has remained implicit. [48]

Congress passed the Fourteenth Amendment [49] in 1868 in order to secure the protections of law for recently freed slaves. [50] The Due Process Clause of the Fourteenth Amendment was designed to protect individuals from arbitrary or abusive exercises of state power and to prevent unreasonable government deprivations of liberty and property. [51] The original understanding of the Due Process Clause was procedural: to ensure that government utilized appropriate procedures before depriving persons of life, liberty, or property. [52]

Early on, the Supreme Court developed a substantive component of the Due Process Clause. [53] According to the Court, certain government deprivations are inherently violative of due process, regardless of the procedures used. [54] In other words, the government simply cannot take certain acts with legislation. [55] The reach and nature of this substantive review has changed drastically over the years. [56]

[*356] Initially, the Court used substantive due process review to strike down legislation that the Justices felt to be unwise or ill-considered. [57] The zenith of this highly activist approach was the 1905 landmark decision *Lochner v. New York*, in which the Supreme Court used substantive due process review to strike down a New York statute regulating the hours of workers in bakeries. [58] The Court argued that the law arbitrarily and unnecessarily violated a person's freedom to contract his or her own hours, and that the police powers of the state could not override liberties and rights of individuals. [59]

Within thirty years, however, judicial intervention in such economic regulation on due process grounds had been almost completely discredited. [60] In *United States v. Carolene Products Co.*, the Court upheld a milk regulation, applying a presumption of constitutionality to economic regulations in substantive due process attacks. [61] During the ensuing decades, the Court's presumption of constitutionality has included a willingness to imply hypothetical justifications for regulations in order to find them constitutional, even where there was no indication that these reasons in fact motivated the legislators. [62] In 1963, the Court explicitly stated that it had abandoned the use of the Due Process Clause to nullify unwise economic legislation. [63]

[*357] Today, the Court has stated that, as long as the government's purpose is not illegitimate, and the means chosen to effectuate that purpose are not irrational, courts will not interfere with economic legislation on substantive due process grounds. [64] This highly deferential standard of review typically is referred to as the "arbitrary and capricious" or "rational basis" standard. [65] In the realm of property regulation, the government has broad police power authority to restrict use of property as long as that restriction rationally furthers the public interest. [66] Although the "arbitrary and capricious" standard is not one of complete deference, post-Lochner courts only rarely have struck down property regulations on due process grounds. [67] The court's deference may be even greater where the deprivation or restriction is directly created by statute, rather than through the exercise of administrative discretion. [68]

Despite its unwillingness to strike down economic regulations on substantive due process grounds, the Supreme Court continues to utilize substantive due process review to strike down legislation which impinges on so-called "fundamental rights." [69] The category of fundamental rights includes many of those protected by the Bill of Rights [70] as well as other rights not mentioned in the Constitution. [71] **[*358]** The Court has struggled with how to determine whether or not a right should be considered "fundamental," and the categorization of rights as fundamental or not has been at times contentious. [72] Rights deemed fundamental primarily have included aspects of privacy and family affairs, such as marriage, child-rearing and child-bearing. [73]

More recently, the Court has exhibited an increased wariness of expanding the category of rights deemed fundamental. [74] In *Bowers v. Hardwick*, for example, a decision upholding a Georgia statute out-lawing sodomy, the Court warned against the expansion of due process protections into previously unprotected areas of rights:

> The Court is most vulnerable and it comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design in the constitution . . . . There should be, therefore, great resistance to expand the substantive reach of the [Due Process Clause], particularly if it requires redefining the category of rights deemed fundamental. [75]

[*359] Other attempts to persuade the Court that certain rights should be deemed fundamental for the purposes of due process review have failed. [76]

Where the right infringed upon by government regulation in fact is considered fundamental, the Court not only requires that the government purpose behind the law be "compelling," but that the means chosen be "narrowly drawn" or even "necessary" to achieve that end. [77] This standard of review is frequently described as "strict scrutiny." [78]

In summary, substantive due process review today typically is viewed in the context of a dichotomy between economic regulation on the one hand, and regulations impacting "fundamental interests" on the other. [79] The decision as to which standard of review to apply to a regulation usually determines the outcome, because the standard is one of extreme deference for economic regulation, and one of strictest scrutiny where fundamental interests are at stake. [80]

V. SUBSTANTIVE DUE PROCESS REVIEW OF STATE LEGISLATION WHICH ALTERS TRADITIONAL COMMON LAW REMEDIES

The standard of review used by the Court where a statute has eliminated a mechanism of the common law does not fit comfortably into the two-tiered analysis described above. [81] Although common law abrogation appears to be a species of "economic" regulation, [82] the

Court does not utilize the bare-bones rationality review that, according to cases like *Ferguson v. Skrupa* and *United States v. Carolene Products Co.*, statutes of this classification are due. [83] Instead, the **[*360]** Court employs a multi-factor balancing test to ensure that the challenged common law change is reasonable and fair. [84] Although the Court has never held explicitly that the Due Process Clause requires a different standard of review where a common law mechanism is restricted, the Court almost always has applied greater scrutiny in these circumstances. [85] As a result, the nature and boundaries of this heightened review, and the reasons why such a different standard is appropriate, remain unclear. [86]

There are two different models for conceptualizing this heightened review. One possibility is that traditional common law protections inhabit a "gray area" between fundamental rights, such as privacy, and interests subject to economic regulation, such as wages or prices, and consequently is examined with an "intermediate" level of scrutiny. [87] Although the Court has never explicitly articulated this possibility, it has utilized "intermediate" levels of scrutiny in other constitutional **[*361]** contexts. [88] The second possibility is that the Court is in fact using an "arbitrary and capricious" standard of review, but with a different definition of arbitrary than that applied in challenges to, say, business regulations. [89] Under this model, the "rationality" of legislation is not a static, universal standard, but depends upon the context in which rationality is examined. [90] By requiring that an alteration to the common law abrogation be reasonable and fair, the Court may be articulating what it means by "rational" in this context. [91]

The precise due process limitations to common law change are not clear. [92] Legislatures unquestionably have the power to alter the common law by statute. [93] Alteration to the common law frequently is necessary as circumstances change; barring revision to traditional legal concepts would cause the law to stagnate in outdated and inapplicable norms. [94] However, the Court has stated that statutory alteration of the common law is not without constitutional limits, and that there is a fundamental, normative element to the common law which demands constitutional protection from legislative interference. [95] In *Pruneyard Shopping Center v. Robins*, for example, the Court upheld a statute which limited private trespass claims against peaceful leafletters. [96] Justice Marshall joined the opinion of the Court, but wrote separately to warn that the common law could not be always so readily altered:

> **[*362]** On the other hand, I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive [e.g., statutory] law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect. *Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way*. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy. [97]

According to Marshall, then, the Due Process Clause places constitutional limitations on statutory common law abrogation. [98] The Court has never explicitly articulated these limits, but these limits have become at least partially evident through the inquiry the Court has applied in due process challenges to legislative attempts to restrict or alter the common law. [99]

The due process limits to statutory common law abrogation were evident in ***Duke Power*** *v.*

Carolina Environmental Study Group. [100] The plaintiffs in *Duke* -- an environmental group, a labor union, and a number of local property owners -- challenged the constitutionality of the Price-Anderson Act [101] on equal protection and due process grounds. [102] With this Act, Congress sought to encourage private nuclear energy development by setting a statutory limit of $ 560 million on a nuclear plant's liability for injuries resulting from a catastrophic accident. [103] Congress considered the cap, in effect a limitation on the common law right to sue under negligence or strict liability, to be vital to the development of the private nuclear power industry, which could not secure insurance for potentially massive damage claims. [104] The **[*363]** Act required Congress, should an accident result in damages in excess of $ 560 million, to take whatever action was required to protect the public from the consequences of such a disaster. [105] After Congress passed the Act, **Duke Power** Company, a privately-owned utility, began constructing nuclear power plants in North and South Carolina. [106]

The plaintiffs successfully persuaded the United States District Court for the Western District of North Carolina that the Price-Anderson Act violated the Due Process Clause because injuries could occur without any assurance that victims would be compensated adequately. [107] The District Court's decision noted that the statutory limit was not rationally related to potential losses, that it tended to encourage irresponsibility in matters of safety, and that there was no "quid pro quo" for the liability limitation. [108]

The United States Supreme Court disagreed, and reversed. [109] The Court stated that the Price-Anderson Act was "classic" economic regulation, and hence the appropriate standard of review was the "arbitrary and capricious" standard. [110] Thus, the Act came before the Court with a presumption of constitutionality and "the burden [was] on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." [111]

Although purporting to apply an "arbitrary and capricious" standard, the Court nevertheless conducted an examination of the statute that was not nearly so circumscribed. [112] The Court inquired into a number of different factors and circumstances to ensure that the Price-Anderson Act was reasonable and fair to affected individuals. [113] The *Duke* Court's inquiry has been utilized in other due process **[*364]** challenges, which, taken together, provide a working model for the Court's standard of review for common law abrogation cases. [114]

In its examination of the Price-Anderson Act, the *Duke* Court first demonstrated that the Act was necessary; without the Price-Anderson Act, private nuclear energy, an industry perceived as critically important for the nation, certainly would fail. [115] Second, the Court explained that potentially affected residents received an adequate substitute remedy for their lost common law protections. [116] Third, the Court explained why the statutory compensation scheme offered various additional benefits which were unavailable under the common law, as it allowed for more certain compensation for harms and speedier settlement of claims. [117] Fourth, the Court noted that the chance of an accident that would exceed the $ 560 million liability limit was exceedingly remote. [118] Moreover, the Court found that the Act would not increase the risk of an accident because it did not remove safety incentives for plant managers or alter the integrity of the permitting process. [119]

Duke's analysis, when considered along with other Supreme Court cases, indicates that substantive due process review where a legislature alters traditional common law protections is not the black and white test of "rationality" utilized in cases like *Ferguson v. Skrupa*. [120] Rather, review of common law abrogation includes a nuanced balancing of various factors to ensure that the challenged statute is reasonable and fair. [121] This balancing seems designed to draw out the "normative boundaries" of the common law noted by Marshall in *Pruneyard Shopping Center v. Robins*, beyond which governments cannot go. [122] The following discussion examines in greater detail some of these balancing factors, not only those in *Duke* but also those in other cases in which statutes have abrogated common law compensatory mechanisms. [123]

[*365] A. *Statutory Replacements to the Abrogated Common Law Remedies*

In many common law abrogation cases, the Court inquires whether or not the statute that abrogates the common law provides some form of alternative to take its place. [124] The Court's due process concern appears muted where a legislature simply replaces a common law mechanism for compensating harms with a statutory one. [125] Whether some reasonable replacement to altered traditional mechanisms is actually mandated by the Due Process Clause, however, is unclear. [126] The Supreme Court has confronted this question on a few occasions, but never has decided it explicitly. [127] The language and reasoning used in many cases, however, suggests that the Court would in fact require such a substitute were it ever forced to directly confront the question. [128]

In *Duke*, the Court relied heavily on the fact that the Price-Anderson Act provided a "reasonably just alternative" to the common law tort claims that the Act barred in finding that the Act did not represent a deprivation of property without due process. [129] The *Duke* Court avoided holding that the Due Process Clause positively demands some sort of substitute for the common law protections it abrogates. [130] Instead, the Court found that the challenged statutory scheme did in fact provide a reasonable substitute for the abrogated compensatory mechanisms, and thus saw no need to resolve this long-standing question directly. [131] However, the *Duke* Court offered a strong hint that, **[*366]** were it ever forced to confront the issue head-on, some substitute -- or perhaps at least a strong justification on why one is impracticable -- would be required. [132] The Court stated, "[Congress's] panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by the Price-Anderson Act. *Nothing more is required* by the Due Process Clause." [133]

The issue of whether or not the Due Process Clause requires that abrogated or altered common law mechanisms be replaced with some alternative also has been dealt with in due process challenges to worker compensation statutes. [134] In one of the earliest of these cases, *New York Central Railroad v. White*, the Supreme Court rejected a due process challenge to New York's Workmen's Compensation Law. [135] The statute eliminated traditional negligence suits for death or injury in certain industries deemed particularly hazardous and set out a prescribed schedule for compensation regardless of fault. [136] After one railroad employee accidentally was killed, both the railroad and the worker's widow challenged the suit on constitutional grounds. [137] The employee's widow claimed that the statute represented a violation of the Due Process Clause by limiting her to a prescribed amount of compensation, regardless of the circumstances, and deprived her of the opportunity to argue for a fuller recovery. [138]

In at least partial agreement with the plaintiff, the Court expressed doubt that a legislature simply can obliterate traditional protections such as negligence suits without leaving anything in their stead. [139] The Court cautioned that the case should not be read to mean "that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable." [140] As did the Court in *Duke*, **[*367]** however, the Court in *New York Central Railroad* declined to answer the question directly because the workmen's compensation statute, by providing a universally applicable schedule of reasonable compensation, did provide a just and fair substitute to the common law. [141] Although an injured party lost the opportunity to make an argument for higher compensation based on special circumstances or particularly egregious negligence on the employer's behalf, the statute guaranteed to the parties a fair and reasonable compensation. [142] By simply replacing a traditional compensation scheme with a similar statutory one, the workmen's compensation law did not represent a violation of due process. [143]

Although the Court has refused to decide explicitly whether or not the Due Process Clause requires that common law protections be replaced with a reasonable substitute if abrogated, the Court never has been confronted with a statute that does not somehow replace the altered common law mechanism. [144] In light of the importance the Court has attached to this issue and the language utilized in *Duke*, however, the Court eventually may find that the Due

Process Clause demands such a reasonable alternative, or at least some compelling reason why one is not possible. [145]

B. *Other Benefits or Advantages Conferred by the Statute*

Another factor considered by the Court in due process challenges to common law abrogation statutes is whether the statutory alteration of common law provides new, alternative benefits to the party whose common law rights and remedies have been restricted by a statute. [146] Even if a statute does not fully replace the compensatory **[*368]** mechanisms of the common law, the Court apparently will balance that loss with other advantages which **accrue** to the affected parties. [147]

In *Duke*, for example, the Supreme Court found that the statutory liability scheme not only reasonably replaced the common law, but, by offering to the affected parties a variety of advantages unavailable under common law tort remedies, was in fact superior. [148] The Court noted that it was not at all clear that a plant could even pay an amount as large as $ 560 million in common law tort claims in the event of a catastrophic accident in the first place. [149] The Price-Anderson Act assured that plants would be able to provide at least that amount of compensation. [150] Moreover, the statute ensured more equitable compensation than could the common law. [151] Under traditional liability rules, the first few parties in massive claims often exhaust all of a defendant's resources, leaving slower-moving parties with no compensation whatsoever. [152] The Act, in contrast, ensured that everyone would be compensated, regardless of speed or litigation strategy. [153] The Act further obviated the need to prove fault or other wrongdoing in order to receive compensation, as would be necessary under a common law **cause of action.** [154] Under the Act, compensation for loss would follow regardless of the cause of the accident, including "acts of God" which provide an affirmative defense to tort claims. [155] Consequently, **[*369]** the Act's compensation system ensured speedy, certain, and efficient settlement of claims, something for which the common law, the Court noted, is not well known. [156]

The same reasoning was utilized by the Court in *New York Central Railroad* to analyze New York's Workmen's Compensation Act. [157] Although workers gave up the possibility of large settlements in a common law suit, they received in exchange the certainty that some reasonable compensation would be paid, and paid quickly. [158] The worker was spared the difficulties of proving negligence or the amount of damages, as would be necessary under the common law. [159] As a result of these benefits to the parties who had lost their traditional right to sue their employer, the Court held, "the particular rules of the common law affecting the subject-matter are not placed by the Fourteenth Amendment beyond the reach of the law making power of the State." [160]

The Supreme Court never has considered benefits beyond those directly associated with the nature of the remedy provided for under the statute as cognizable in due process balancing. [161] State courts attempting to follow the U.S. Supreme Court's treatment of the issue of other benefits, however, have been hesitant to expand the category of cognizable benefits to balance against the loss of common law rights. [162] For example, several state supreme courts have stated that the "benefit" of lower medical costs and insurance premiums could not justify restricting the amount of compensation available in malpractice suits. [163]

[*370] As with the question of "reasonable alternatives," the Court never has stated explicitly that such alternative benefits or advantages are required by the Due Process Clause when common law rights are restricted. [164] However, the language of these cases suggests that such alternative benefits remain an important balancing factor in due process scrutiny. [165]

C. *The Need for the Common Law Change*

Another factor that the Supreme Court has considered in due process inquiries into common

law alteration is the need for the challenged statute. [166] Nominally, the Court treats the inquiry into the need of a statute very differently depending on whether it is applying the rational basis test for economic legislation or the strict scrutiny test reserved for fundamental rights. [167] However, the Court's inquiry into the need for statutes which abrogate the common law does not fit comfortably into this dichotomy, and demonstrates further that due process scrutiny implicitly is higher for statutes which alter the common law. [168]

A demonstration of the "need" for a statute is an important element of the strict scrutiny due process review used where statutes impinge upon fundamental rights. [169] According to Justice Harlan, the scope of the liberties protected by the Due Process Clause "includes a freedom from all substantial arbitrary impositions and *needless restraints*," and recognizes that "certain interests require *particularly careful scrutiny of the state needs asserted* to justify their abridgment." [170] As a result, the Court requires that statutes which restrict a fundamental interest be drawn as narrowly as possible. [171] According to the Court in *Roe v. Wade*, statutes which unnecessarily or over-expansively restrict fundamental interests violate the Due Process Clause. [172]

[*371] In due process challenges to legislation that does not impact fundamental interests, on the other hand, the Court has explicitly stated that courts have no business asking whether or not the legislation is needed. [173] Courts are consequently not invited to question the necessity of a challenged statute when using "rational basis" scrutiny. [174] As the Supreme Court stated in *Whalen v. Roe*, "state legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part." [175] Indeed, such invasive judicial scrutiny of state regulation is the essence of judicial interference with legislation from the discredited *Lochner* era. [176]

However, the Supreme Court appears to demand that significant alterations to the common law be necessary for some government objective in order to comport with the Due Process Clause. [177] This is true even where the Court insists that it is using the "rational basis" scrutiny for economic legislation. [178] Justice Marshall explicitly stated that necessity was a due process consideration where legislatures abrogate common law rights. [179] "Indeed," Justice Marshall stated, "our cases demonstrate that there are limits on governmental authority to abolish 'core' common-law rights, including rights against trespass, *at least without a compelling showing of necessity* or a provision for a reasonable alternative remedy." [180]

In *Duke*, the Court predicated a conclusion that the Price-Anderson Act's liability cap did not violate due process on its finding that the Act was necessary for the development of the private nuclear power industry. [181] Without such a cap, both Congress and the Court found, the industry simply could not develop. [182] Because the liability limitation was necessary to that legitimate objective, the Court noted, it **[*372]** bore a rational relationship to Congress's goal. [183] The language of the opinion suggests that the link between the rationality of a statute and the need for it is quite direct: "The record before us fully supports the need for the imposition of a statutory limit on liability to encourage private industry participation and *hence bears a rational relationship* to Congress's concern for [encouraging private nuclear power development]." [184]

In *Duke*, the Court seemed to suggest that the challenged common law alteration was an effective means of handling a serious policy problem. [185] The policy in question was complex, and the consequences of not altering the common law were potentially grave. [186] "Rational" in this context thus appears not only to mean that the common law change is conceivably related to a legitimate government end, but that the legislation is required to address squarely a genuine policy issue. [187] This reasoning suggests that where the statutory abrogation of common law rights is not really needed in order to effectuate a policy goal, courts should not consider the statute to be rational. [188] Courts will not necessarily query whether or not a challenged statute is the best possible or even the only available means of effectuating the intended goal. [189] Rather, the Court's inquiry suggests that where statutes

deprive individuals of traditional protections and remedies, the Due Process Clause at the very least demands that the deprivation be warranted by the circumstances. [190]

D. *Risk of Harm*

A final factor in the due process balancing of common law abrogation is the likelihood of harm and whether the challenged restriction of common law remedies will result in an increased risk of harm to those individuals whose common law rights have been restricted. [191] In some instances where common law rights are restricted by statute, the Court has inquired into how likely it is that affected parties would **[*373]** ever have the opportunity to exercise those rights. [192] Moreover, the Court has inquired if the restriction of common law rights and remedies would result in an increase in the likelihood of injuries that those rights were meant to prevent. [193] In other words, a restriction of a common law right seems more violative of the Due Process Clause where the absence of a remedy removes incentives for parties to avoid harming others.

In *Duke*, the Court took pains to note the vanishingly small possibility that the Price-Anderson Act's liability limits would ever be invoked at all. [194] The risk of a nuclear accident that would cause more than $ 560 million in damage, the Court found, was almost nonexistent. [195] In so stating, the Court seemed to suggest that legislatures could reasonably restrict rights which almost certainly never would be invoked. [196]

Furthermore, the Supreme Court disputed the District Court's conclusion that the liability limitation would encourage irresponsibility and increase the likelihood of an accident. [197] Nothing in the liability limitation, noted the Supreme Court, undermined the rigor or integrity of the permitting process for nuclear power plants. [198] Moreover, "the risk of financial loss and possible bankruptcy to the utility is in itself no small incentive to avoid the kind of cavalier conduct implicitly attributed to licensees by the District Court." [199] Thus, according to the Supreme Court, the liability limitations of the Price-Anderson Act in no way detracted from the protection of the public. [200]

This inquiry was mirrored in a due process challenge to a government immunity statute in *Martinez v. California*. [201] The challenged statute in *Martinez* granted total immunity to state employees from liability resulting from injuries occurring as a result of parole board **[*374]** decisions. [202] The due process challenge was raised by a family that was prevented from suing the parole board after a dangerous felon, whom the board had released, raped and murdered their daughter. [203]

The Supreme Court rejected the challenge, finding that the immunity statute was too attenuated from the murder to constitute cognizable government action. [204] Immunity from tort suits does not violate due process, the Court held, simply because it incrementally impacts the probability of harm to an innocent bystander. [205] This statute did not encourage irresponsible action, the Court noted, but rather was one consideration in one small piece -- the parole board's release of the felon -- in a complex chain of events. [206] In other words, the immunity statute did not violate the Due Process Clause because it did not contribute to the injury suffered by the family. [207] Under this analysis, however, if immunity from tort claims did in fact significantly contribute to an injury, the immunity statute would implicate due process concern. [208]

In both *Duke* and *Martinez*, the Supreme Court emphasized that the abrogation of common law tort remedies did not increase the likelihood of harm to others. [209] This reasoning suggests that a limitation on common law liability that does increase the likelihood of harm -- perhaps by reducing the incentive for due care -- may run afoul of the general due process inquiry into fairness and reasonableness. [210]

E. *Summary*

When a court is presented with a due process challenge to a statute that alters traditional compensatory mechanisms and legal protections of the common law, that court should inquire whether the statute replaces the traditional protections with new ones or other advantages, if it is needed, and whether it will increase the likelihood of injury. [211] These distinct but related balancing factors suggest that the Due Process Clause demands that common law abrogation be basically **[*375]** reasonable and fair. [212] In other words, the United States Supreme Court has implicitly stated that statutes that unnecessarily render individuals subject to uncompensated injuries are irrational, and hence violative of the Due Process Clause. [213] This reasonablenessbased conception of "rationality" is a far cry from that applied to purely economic due process challenges, wherein a regulation is immune from due process challenge as long as legislators conceivably could have concluded that the chosen means would effectuate a legitimate objective. [214] Cases like *Duke* undercut the notion that courts always will be extremely deferential when confronted with "economic" regulation. [215]

VI. UNDERSTANDING THE COURT'S HEIGHTENED DUE PROCESS SCRUTINY OF COMMON LAW ABROGATION: SOME UNDERLYING THEMES

How is the United States Supreme Court's reasonableness balancing consistent with the general post-Lochner view that economic regulation is subject to almost total due process deference from the courts? What is the reason for the Court's examination of the reasonableness and fairness of common law alterations? Because the Court **[*376]** has never even acknowledged explicitly that common law alteration demands scrutiny for reasonableness, the justification for this scrutiny remains hidden. However, common law abrogation implicates certain issues which the Court has noted merit particular concern. History and tradition, for example, play a central role in the articulation of due process boundaries. [216] Statutes which alter ancient common law mechanisms consequently seem to merit greater due process scrutiny than statutes which alter less traditional rights. [217] Moreover, the Court appears to be responding to issues of "natural law" and fundamental fairness, concerns that may be implicated where legislatures eliminate traditional legal protections. [218] Finally, the Court also has articulated a due process requirement of a "right to redress," and thus demands that individuals be left with some sort of reasonable compensatory mechanism. [219]

This section attempts to trace some of these themes in greater detail. Although these factors are not always explicitly discussed in common law abrogation cases, the concerns and interests that they represent could be influencing the Court to utilize a standard of review which does not fit into the traditional dichotomy of substantive due process review. [220]

A. *"Natural Justice" Concerns: Due Process as Ensuring the Fundamental Fairness of Statutes* [221]

One possible explanation for the Court's willingness to examine closely common law abrogation and liability limitations is that these legislative acts often implicate issues of fundamental fairness and natural justice. [222] Natural justice stands for the proposition that there are fundamental, normative standards of fairness that cannot be ignored, **[*377]** even absent specific constitutional provisions. [223] According to some Supreme Court justices, the Due Process Clauses of the Fifth and Fourteenth Amendments incorporate some element of "fundamental fairness." [224] Natural justice seems to be an applicable consideration where traditional protections of the common law have been abrogated and individuals are left subject to injuries that cannot be compensated. [225]

According to the United States Supreme Court in *Calder v. Bull*, some legislative deprivations are so unfair that they violate the social compact, the very purpose for which people enter into organized society. [226] This "compact" exerts normative limitations on legislative authority. [227] Legislation that oversteps these boundaries is not a rightful exercise of state authority, and hence is void. [228] This social compact limit in large measure drives substantive due process review, the judicial articulation of the limits on legislative power. [229]

[*378] Many commentators -- and some members of the Supreme Court -- have viewed the Ninth Amendment to the Constitution [230] as the Constitutional "source" of unenumerated natural law rights to be protected by the courts. [231] As Justice Goldberg pointed out in *Griswold v. Connecticut*, the history of the Ninth Amendment demonstrates that the framers intended to ensure that the first eight amendments did not exhaust the basic and fundamental rights guaranteed by the Constitution. [232] "The Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." [233] The right to decide how and when to procreate, Goldberg insisted, must be among these basic rights if the Ninth Amendment was to have any meaning at all. [234] In other words, Goldberg saw the Court's role as protecting basic, fundamental values from government interference, even if not specifically mentioned in the Constitution. [235]

The judicial inquiry into alternatives, necessity, and the risk of harm appears to represent an attempt to ensure that the challenged common law alteration is not in conflict with concepts of natural justice and basic fairness. [236] In the examination of New York's workers' compensation law, for example, the Court balanced the various factors such as statutory replacement of the common law and other quid pro quo benefits specifically within the context of natural justice. [237] The Court found that the challenged workers' compensation statute merely redistributed the risks and benefits of employment in a way that was basically fair to both employer and employee, and reasonable given the balance of risks and costs under the common **[*379]** law. [238] The Court further noted the fact that employees were not forced to participate in the liability limitation scheme, because employment with a regulated industry was optional. [239] In light of its basic fairness and reasonableness, the Court determined that the statute did not violate the Due Process Clause. [240]

In sum, the Due Process Clause appears to implicitly include some component of basic fairness. [241] Whether articulated in terms of "natural law," the social compact which undergirds the Constitution, or the Ninth Amendment reservation of "other" rights that cannot be constitutionally infringed, the Court appears concerned with the issue of basic fairness when it protects rights with the Due Process Clause of the Fourteenth Amendment. [242] Natural law concerns are most obviously utilized when the Court is protecting the narrow realm of rights deemed "fundamental" from legislative interference. [243] However, as the Court explicitly noted in *New York Central Railroad v. White*, natural justice is also a relevant issue where the challenged statute is considered "economic" regulation. [244]

B. *Substantive Due Process Limits as a Reflection of History and Tradition*

The United States Supreme Court has relied heavily on tradition and history to articulate the boundaries imposed by the Due Process Clause on government action. [245] "Due process" means, most fundamentally, **[*380]** the "law of the land," tracing its roots back to the Magna Carta and the basic social understandings rooted deep in early English history. [246] Due process jurisprudence thus has come to exemplify what Justice Harlan referred to as "respect for the teachings of history, [and] solid recognition of the basic values that underlie our society . . . ." [247] According to the Court, long adherence to a particular rule does not conclusively establish that rule as a requirement of due process. [248] However, long adherence to a rule "reflects a profound judgment about the way in which the law should be enforced and justice administered." [249] As a result, many due process challenges look to the historical basis of the common law right asserted when deciding if a government restriction or alteration of that right has gone too far. [250]

In *Ingraham v. Wright*, for example, the Court found a constitutionally protected liberty interest in freedom from corporal punishment, largely because of the historical and traditional basis for that right. [251] The Court explained:

> The Due Process Clause . . . was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." [252]

[*381] Likewise, in *Moore v. City of East Cleveland*, Justice Powell, writing for the plurality, found that a zoning ordinance violated the Due Process Clause in large measure because of the statute's affront to traditional concepts of liberty within the family. [253] He stated, "the Constitution protects the sanctity of the family *precisely because* the institution of the family is deeply rooted in this Nation's history and tradition." [254] Although the history of the substantive reach of the Due Process Clause counseled restraint, noted Powell, that history does not demand abandonment in the face of government action which offends such long-held values. [255]

Conversely, due process challenges to government restriction of historically unprotected interests are far more likely to fail. [256] In *Michael H. v. Gerald D.*, for example, the Court upheld a statute which gave presumptive parental rights to married couples as against third-party biological fathers. [257] Justice Scalia noted that tradition supports relationships that develop within a unitary family, and does not give any rights to adulterous fathers. [258] The Court's requirement that rights protected by the Due Process Clause have deep roots in tradition, Scalia noted, was to "prevent future generations from lightly casting aside important traditional values . . . ." [259] Similarly, the Court in *Bowers v. Hardwick* held that the Georgia statute outlawing sodomy was not unconstitutional, in part because homosexual conduct always had been subject to proscription. [260] The banning of homosexual conduct had "ancient" roots and long-standing acceptance in United States history. [261] As a result, the Due Process Clause did not protect the right to engage in homosexual sodomy. [262]

[*382] Under the Court's treatment of due process challenges, a key factor is the nature of the right asserted, and how long that right has been recognized. [263] The greater the breach with history, the Court has implicitly asserted, the greater the due process protection the Court will give. [264]

C. *Due Process and the Right to a Remedy by Some Effective Procedure*

Abrogation and liability limitation statutes conflict with another theme of the legal system: the due process right of redress for injury. [265] No constitutional provision expressly states that there is a right of redress in the courts, and the Supreme Court repeatedly has allowed such a right to be limited or altered. [266] However, the Court explicitly has stated that statutes which limit access to the courts must provide some alternative means of redress for injuries. [267]

In *Gibbes v. Zimmerman*, the Court upheld a South Carolina statute that prohibited the institution of legal actions against a bank without the consent of the Governor. [268] The Court noted that individuals have no constitutionally protected property interest in any particular remedy, and that the challenged statute provided a procedure that guaranteed creditor interests no differently than individual suits. [269] The Court went on to state, however, that the Due Process Clause required some remedy for the redress of wrongs. [270] Individuals are "guaranteed by the Fourteenth Amendment . . . the preservation of [a] substantial right to redress *by some effective procedure*." [271] The admonition had been noted several times before, for example in *Crane v. Halo*. [272] The Court in *Crane* stated, "No one has a vested

right in any given mode of procedure . . . and *so long as a substantial and* **[*383]** *efficient remedy remains or is provided* due process of law is not denied by a legislative change." [273]

The requirement of some means of redress presumably underlies the Court's inquiry into whether or not statutes provide for a reasonable substitute to the altered common law remedies. [274] Thus, the Court in *New York Central Railroad v. White* relied on the fact that, even though injured employees lost their right to sue in tort, the statute guaranteed a reasonable compensation. [275] Because the statute provided some means of redressing workplace injuries, the restriction on the right to sue was "not placed by the Fourteenth Amendment beyond the reach of the law making power of the State." [276] Statutes that remove common law protections and leave individuals subject to injuries that cannot be remedied may consequently run afoul of the Due Process Clause. [277]

D. *Summary*

The Court scrutinizes due process challenges to common law restrictions with greater scrutiny than the highly deferential "arbitrary **[*384]** and capricious" test utilized in economic regulation cases. [278] Instead, the Court considers a variety of factors to ensure that the challenged statute is reasonable and fair, and that individuals are not unnecessarily left subject to uncompensable harms. [279] The Court has never explicitly stated that common law change merits a higher standard of due process review. [280] Nonetheless, the "reasonableness balance" used by the Court reflects a number of important judicial concerns, such as natural justice, history and tradition, and the right to redress injuries by some effective procedure. [281] These major themes of the law provide some possible explanations why courts inquire more closely into statutory alterations to the common law.

VII. APPLICATION: THE CONSTITUTIONALITY OF STATUTES WHICH ABROGATE COMMON LAW PROTECTIONS IN FAVOR OF POLLUTION REGULATIONS

According to the reasonableness balancing test, a court probably should find the hypothetical common law abrogation statute posited at the beginning of this Comment to be a violation of the Due Process Clause. [282] Applying the various factors used by the Court in its balancing test to the proposed common law bar, the statute appears very different than the statutes upheld in *Duke* and *New York Central Railroad*. [283] Moreover, looked at in light of the values and concerns which drive the reasonableness balancing test, such as natural justice, history and tradition, and the right of redress, the hypothetical statute offends many of these bases for judicial concern. [284] According to the standard of review enunciated in *Duke, New York Central Railroad*, and related cases, the hypothetical common law bar probably should be considered an unconstitutional deprivation. [285]

[*385] A. *Applying "Reasonableness Balancing" Review to the Hypothetical Statute*

1. Reasonable Alternatives to the Abrogated Mechanisms

The hypothetical statute provides for no alternative remedial mechanism for individuals who have lost common law rights to sue in tort. [286] In stark contrast to the Price-Anderson Act, the hypothetical statute provides no government commitment to compensate landowners injured by industrial pollution allowed under pollution regulations. [287] Unlike the Workmen's Compensation Law, there is no guarantee of a reasonable, albeit reduced, sum of compensation. [288] Pollution regulation alone does not provide a reasonable alternative to tort claims because regulation still allows for significant property damage in particular circumstances. [289] Neither the hypothetical statute nor the pollution control regulations themselves provide for compensation for harms that occur to third parties by facilities that are in compliance. [290] Consequently, under the statute affected landowners would be left unprotected from pollution-based harms, without any mechanism whatsoever to obtain compensation for injuries. [291]

The Court never has held that abrogated common law mechanisms must be replaced with some reasonable alternative. [292] If ever confronted with a case which demands that the Court finally resolve this question, it is impossible to predict the outcome. [293] However, even if the Due Process Clause does not in fact demand one, a replacement to altered common law remedies weighs in favor **[*386]** of a statute's constitutionality. [294] The hypothetical statute provides none. [295]

2. The Existence of Alternative Benefits

In *Duke* and *New York Central Railroad*, the Court balanced the restriction on common law rights with new advantages offered by the alternative remedy. [296] Because the hypothetical statute does not offer any replacement to the tort claims it abrogates, no alternative benefits of the sort considered in *Duke* and *New York Central Railroad* are applicable. [297] This absence makes it less likely that a court would consider the statute to be constitutional. [298]

Additional benefits to affected individuals under the hypothetical statute could conceivably **accrue** from the economic or commercial advantages of restricted tort actions. A bar on common law damage claims potentially could increase profits for local corporations, thereby creating jobs for residents, and augmenting tax revenue for the government. [299] However, the Court's discussion of "quid pro quo" benefits has centered exclusively on the nature and extent of the remedy provided for under the challenged statutory compensation scheme, and never has extended to the consideration of benefits unrelated to the replacement remedy. [300] Moreover, state courts have been wholly unenthusiastic about considering such attenuated benefits a sufficient quid pro quo for the loss of common law rights. [301]

[*387] 3. The Necessity of Barring Private Actions for Pollution Damage

Rationality review appears to incorporate an inquiry into whether or not a challenged alteration to the common law is warranted. [302] This inquiry is fact specific and the result would depend upon the circumstances. [303] In Alaska, the anti-nuisance statute did not appear to be particularly necessary to achieve any government objective. Unlike the demonstrated need for the Price-Anderson Act's limitation on tort liability with regard to the development of private nuclear power, [304] there is little evidence that the Alaska nuisance bar was particularly necessary to solve a general policy problem. [305] Rather, Alaska statute Section 09.23.450 appears to have been a legislative boon to one politically well-connected corporation -- the Alaska Pulp Corporation -- to escape a particular lawsuit for property damage. [306]

At the time the Alaska legislature passed Section 09.45.230, private nuisance actions in Alaska were extraordinarily infrequent. [307] The statute's proponents could not point to any indication that nuisance suits for pollution damage impacted the profitability of Alaskan industry. [308] As a result, Section 09.23.450 appears to deprive individuals of their common law protections without any demonstration that the deprivation was warranted. [309] According to the Court's analysis in *Duke*, a deprivation of a traditional right that is not necessary may be irrational. [310]

[*388] 4. Likelihood of harm

The nature and application of pollution regulations allow permissible industrial activity to seriously damage property. [311] Consequently, individuals under the hypothetical common law bar are subject to substantial risk of property damage without any mechanism to compensate for those harms. [312] In *Duke*, the Court determined that the risk of such an accident was so infinitesimally small that limiting tort liability seemed reasonable. [313] In contrast, harm to landowners where industries are bound only by statutory regulations appears far more likely. [314] This elevated risk may consequently raise due process concerns. [315]

Moreover, the hypothetical statute could increase the likelihood of pollution-based injuries to property. [316] Presumably, the threat of private tort actions encourages industries to restrain

pollution beyond the level of compliance with pollution standards. [317] The statute removes these incentives for industrial managers to reduce potentially damaging pollution. [318] As a result, the abrogation of private tort remedies potentially increases the likelihood of harm. [319]

The Court in *Duke* did not quarrel with the District Judge's conclusion that the increased likelihood of harm caused by the Price-Anderson Act rendered it violative of due process. [320] The Court simply disagreed that the Act would increase that likelihood. [321] The factors noted by the *Duke* Court, that the integrity of the permitting process remained unchanged and that the threat of bankruptcy obviated any potential decrease in care, are inapplicable to the hypothetical statute. [322] The integrity of the permitting process is irrelevant because **[*389]** pollution-based harms to property can still occur under allowable emissions. [323] The risk of bankruptcy, an applicable consideration where the harm risked is a nuclear catastrophe, is not a concern where the harm is property damage to others caused by continuing air and water emissions. [324] According to the *Duke* Court's reasoning, a statute that actually makes uncompensable injury more likely would implicate due process concerns. [325]

B. *Examining the Hypothetical Statute in Light of the Concerns Underlying the Reasonableness Balance*

Under the specific factors balanced by *Duke* and its legal kin, the hypothetical common law abrogation statute probably would fall short of meeting the due process requirement of reasonableness. [326] Examining the statute from the perspective of the legal themes that underlie those factors, the reasons for its likely unconstitutionality become more apparent. [327] By allowing politically influential corporations to damage or destroy private property without any mechanism for compensation or remedy, the statute violates fundamental notions of fairness and justice. [328] By eliminating literally ancient common law rights with nothing in their stead, the statute offends the tradition due process is designed to protect. [329] Furthermore, by eliminating every avenue of remedy for injuries to property, the hypothetical statute deprives individuals of their due process right to redress. [330] Consequently, the hypothetical statute offends many of the concerns that drive the Court's reasonableness balance review and further demonstrates why the statute should fail that review.

[*390] 1. Natural Justice and Fairness Concerns

A statute which licenses politically powerful industries to damage, and even destroy, private property while providing no means of redress to its owners implicates the Court's implicit but ubiquitous concern with generalized issues of fundamental fairness and natural justice. [331] Uncompensable harm in these circumstances likely would strike many people as a basic outrage, an affront to the concept of "ordered liberty," [332] and would conflict with the Court's multi-factor inquiry into reasonableness. [333] The inquiry into necessity, alternative remedial mechanisms, other benefits and the risk of harm ultimately ensures that a common law abrogation is fair. [334]

The hypothetical statute "fails" many or even all of the reasonableness balancing factors. [335] Moreover, the statute seems unfair in other respects. For example, the Court may be treating common law alterations differently depending on whether or not participation in the altered scheme is consensual. [336] Participation in the hypothetical statute's liability limits would not be consensual. [337] The bar would apply regionally; affected individuals would have to either participate or move to a different area. [338] The statute would therefore remove the common law protections of a captive audience. [339] The cases, however, **[*391]** suggest that non-consensual common law alterations are subject to stricter due process scrutiny. [340]

While the Court has considered natural justice and fairness concerns to discern "fundamental" interests, [341] these concerns are apparently equally applicable to other rights. [342] Not only does the statute conflict with most of the factors used to ensure reasonableness and fairness,

but the statute "feels" unfair and unreasonable in a way that the Price-Anderson Act and the Workmen's Compensation Act do not. [343]

2. Due Process Limits as a Reflection of History and Tradition

Some common law protections and remedies represent traditions and mechanisms which stretch back to the very origins of the legal system. [344] Common law actions in private nuisance, for example, developed in medieval England and have been used without interruption for hundreds of years. [345] As such, common law property protections are presumed to reflect a "profound judgment" as to how the law should be administered. [346] According to the Supreme Court, rights that have long been recognized and respected are entitled to greater due process protection than rights without such long-standing acceptance. [347] The greater the basis in tradition and history for a particular right or interest, the less enthusiastic the Court will be about seeing it abrogated by statute without reasonable alternatives or other trade-offs. [348]

3. The Due Process Right of Redress

The hypothetical statute restricts common law rights to sue for damages without leaving any alternative mechanisms in their **[*392]** stead. [349] Landowners whose property has been damaged by pollution within regulated standards consequently have no remedy at law either for injunctions or compensation. [350] According to the Supreme Court in *Gibbes v. Zimmerman*, such an absolute loss of a right of remedy may directly violate the Due Process Clause. [351]

VIII. CONCLUSION

By using a multi-factor balancing test to examine statutory alterations to common law rights, the Court appears to demand that common law abrogation be reasonable and fair. The Court's treatment of this issue fits uncomfortably into the traditional substantive due process dichotomy of arbitrary and capricious review for economic regulation, and strict scrutiny for laws which restrict fundamental interests. Whether the Court's reasonableness and fairness review represents some implicit intermediate standard of review, or rather a more substantive conception of "rationality," however, remains unclear.

If this proposed reasonableness balancing standard is accurate, then legislatures may not be able to abrogate common law mechanisms such as nuisance and trespass in favor of existing statutory pollution control machinery. Unless pollution standards incorporate some mechanism to compensate individuals injured by polluting facilities, and unless the common law alteration can be shown necessary to some important goal, such statutes probably violate the due process protections of the 14th Amendment.

Moreover, the substantive component of the Due Process Clause is a dynamic, evolving concept. [352] Thus, even if a court were to disagree that the Due Process Clause has historically demanded a higher level of scrutiny where traditional protections are legislatively abrogated, there is no reason why such scrutiny could not be applied now. [353] Due process review has changed drastically over the last ninety years, from a powerful tool used to strike down legislation deemed unwise, [354] **[*393]** to the opposite pole of extraordinary deference, [355] and most recently to a mechanism for judicial protection of fundamental rights. [356] Due process evolves to meet the changing needs of society and evolving notions of fairness and justice. [357] If the Due Process Clause does not currently protect private property from damage by politically wellconnected corporations and their allies in local legislatures, perhaps it should.

FOOTNOTES:

n1 *See* Plaintiff's Pretrial Memorandum at 1-6, Edwards v. Alaska Pulp Corp., (Alaska Super. Ct., Sept. 12, 1994) (No. 1SI-92-257 CI) [hereinafter *Sept. 12 Memorandum*] (on file with B.C. ENVTL. AFF. L. REV.).

n2 *Id.* at 3.

n3 *Id.* at 4.

n4 United States v. Alaska Pulp Corp., No. CIV.A86-331, 1986 EPA Consent LEXIS 105, at *1. At one point, the EPA grew so weary of accepting fines from the company -- essentially payments to continue to pollute -- that the agency began returning them. *See Sept. 12 Memorandum, supra* note 1, at 5. The mill also operated under a consent order with the state Department of Environmental Conservation for repeated violations of state air standards. *Id.* at 6.

n5 *Sept. 12 Memorandum, supra* note 1, at 8-13. The Pretrial Memorandum cited a 1991 Department of Environment and Conservation report that found that the mill was the source of toxic floating sludge, a darkening of the water, and toxics in sediments and fish tissue. *Id.* at 8. It also cited a 1992 City of Sitka report which found the mill responsible for illegally high sulfur dioxide and particulate matter discharges. *Id.* at 9. Finally, it noted that the United States Forest Service confirmed that the health and diversity of lichens increased dramatically with increased distance from the mill, and that the ecological impacts were noticeable as far away as eleven miles from the mill. *Id.*

n6 *Id.* at 10-12; *see also* Ian Mader, *House Moves on Anti-lawsuit Bill*, JUNEAU EMPIRE, Mar. 21, 1994, at 3.

n7 *See Sept. 12 Memorandum, supra* note 1, at 1.

n8 *See* Plaintiff's Memorandum in Opposition to Defendant's Motions for Judgment on the Pleadings or Alternatively for Summary Judgment, at Exhibit 1, Edwards v. Alaska Pulp Corp., (Alaska Super. Ct., July 20, 1994) (No. 1SI-92-257 CI) [hereinafter *July 20 Memorandum*] (on file with B.C. ENVTL. AFF. L. REV.).

n9 *Id.*

n10 *Id.* at 5.

n11 Senator Taylor's zealous advocacy on behalf of APC over the years had earned him the moniker "the Senator from APC." Telephone Interview with James McGowan, attorney for plaintiff Larry Edwards (Feb. 8, 1996) [hereinafter *McGowan Interview*].

n12 *July 20 Memorandum, supra* note 8, at 5. Alaska Statute § 09.45.230 (the final version of the bill which was passed) states in part:

> A person may not maintain an action under this section based upon an air emission or water or solid waste discharge . . . where the emission or discharge was expressly authorized by and is not in violation of a term or condition of
>
> (1) a statute or regulation
>
> (2) a license, permit or order that is
>
> > (A) issued after public hearing by the state or federal government; and

(B) subject to

(i) continuing compliance monitoring;

(ii) periodic review by the issuing agency;

(iii) renewal on a periodic basis; or

(iv) AS 46.40; or

(3) a court order or judgment.

ALASKA STAT. § 09.45.230 (1995).

n13 *See July 20 Memorandum, supra* note 8, at 1-2.

n14 *Id.* at 2-3. Plaintiff's attorneys primarily based their challenge on the due process clause and interpreting case law of the Alaska Constitution. *See id.*

n15 *See* Edwards v. Alaska Pulp Corp., No. 1SI-92-257 CI, slip op. at 4 (Alaska Super. Ct., Sept. 22, 1994) (memorandum and order addressing the constitutionality of Section 09.45.230.) [hereinafter *Sept. 22 Order*]. The Alaska Superior Court noted that, under federal law, vested rights cannot be abridged by a statute that effectively takes away an **accrued cause of action** to enforce those rights. *Id.* at 2 (citing Greyhound Food Management, Inc. v. City of Dayton, 653 F. Supp. 1297 (S.D. Ohio 1986), *aff'd*, 852 F.2d 866 (6th Cir. 1989)). Moreover, under the Alaska Constitution, an unlitigated claim is a property interest that cannot be taken away by government action without due process of law. *Id.* at 3 (citing Bush v. Reid, 526 P.2d 1215 (Alaska 1973)). It also represented an uncompensated taking of property. *See id.* at 2 (citing Wickwire v. City and Borough of Juneau, 557 P.2d 783 (Alaska 1976)).

n16 *Id.* at 4 n.6.

n17 *Id.* at 4.

n18 Naftali Bendavid, *Edwards, et al. v. Alaska Pulp Corp., et al.*, LEGAL TIMES, Oct. 24, 1994, at 16.

n19 *Id.* Although this article refers to the settlement as a "fairy tale" end to the divisive litigation, *id.*, the story was far from over. *See* Jane Fritsch, *EPA hears 'Hands Off' Alaska Pulp*, THE COMMERCIAL APPEAL (Memphis), Aug. 27, 1995, at 7A. APC had left over a million pounds of dioxin and other toxin-laced fly ash at its abandoned mill site. *Id.* When the EPA began investigating it for Superfund listing, Alaska Senator Frank Murkowski attempted to prevent the listing. *Id.*

n20 *See supra* text accompanying notes 8-17. The fact that the statute was a blatantly obvious attempt to extinguish the Edwards lawsuit was not its only weakness. *See* ALASKA STAT. § 09.45.230. Section 09.45.230 applied only to private nuisance, leaving open the possibility of creative efforts to circumvent the common law damages bar by using public nuisance, strict liability, trespass, or negligence claims. *See id.*

n21 *See supra* text accompanying notes 8-17; *see also Sept. 22 Order, supra* note 15, at 4 ("The perception that a large corporation can go to the legislature and extinguish an existing property right belonging to a single individual has to be detrimental to the perception of the administration of justice.").

n22 *See Sept. 22 Order, supra* note 15, at 4.

n23 *See State Reform of Tort Laws Proceeds During Calls For Federal Intervention*, U.S. LAW WEEK, May 24, 1995, at 1-18 [hereinafter *State Reform of Tort Laws*].

n24 *See generally* Zygmunt J.B. Plater, *Environmental Law as a Mirror of the Future: Civic Values Confronting Market Force Dynamics in a Time of Counter-Revolution*, 23 B.C. ENVTL. AFF. L. REV. 733 (1996).

n25 *See State Reform of Tort Laws, supra* note 23.

n26 *See supra* note 20.

n27 The reason for examining the constitutionality of a non-existent statute is that something akin to the "hypothetical" posited above may become reality in the future. The shortcomings of Alaska's Section 09.45.230 -- **retroactive** application to existing suits, and application only to private nuisance -- are quite obvious. Industry lawyers and lobbyists will easily conjure up a more airtight version of the same idea.

n28 *See infra* text accompanying notes 282-351. This comment focuses on substantive due process review of legislation. Other constitutional challenges to this hypothetical statute are promising as well, perhaps chief among them a "takings" challenge. The author of this Comment wrote a term paper on the takings challenge to Alaska's nuisance statute for an environmental law class. This paper is on file with BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

n29 *See infra* text accompanying notes 33-47. This section is by no means meant as a comprehensive critique of pollution regulation. Rather, it is intended to demonstrate that the common law remains critically important for the protection of property from damage caused by pollution.

n30 *See* cases cited *infra* note 47.

n31 *See infra* text accompanying notes 39-42.

n32 *See, e.g.*, 42 U.S.C. § 7604(e) (1994) (Clean Air Act) ("Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief . . . ."); 33 U.S.C. § 1365(e) (1994) (Clean Water Act) (identical language to 42 U.S.C. § 7604(e) except with "effluent" replacing the term "emission"); *see also* International Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987) (noting that "savings clause" demonstrates that Clean Water Act is not meant to preempt state nuisance claims).

n33 *See* Robert McClure, *This Year, Conserve is a Bad Word: Lobbyists for Environmental Groups Can't Get Any Major Legislation Passed*, ORLANDO SENTINEL-TRIB., Apr. 2, 1993, at B5.

n34 Indeed, industry has frequently attempted to evade all responsibility for pollution, despite often overwhelming evidence to the contrary. *See* ZYGMUNT J.B. PLATER, ET AL; ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 760 (1992) [hereinafter PLATER, ENVIRONMENTAL LAW] (noting that when regulators considered clean air problem in early 1970s, automakers strenuously denied that cars contributed to smog).

n35 *See id.* at 774, 818.

n36 For example, the federal Clean Air Act establishes National Ambient Air Quality Standards (NAAQS) applicable on a nationwide basis. *See* PLATER, ENVIRONMENTAL LAW,

supra note 34, at 773.

n37 Interview with Zygmunt J.B. Plater, Professor of Law, Boston College Law School, in Newton, MA (Nov. 16, 1995).

n38 *See* Scott C. Seiler, Comment, *Federal Preemption of State Law Environmental Remedies after* International Paper Co. v. Ouellette, 49 LA. L. REV. 193, 194 n.4 (1988).

n39 *See* W. David Slawson, *The Right to Protection from Air Pollution*, 59 S. CAL. L. REV. 667, 742 & 759-61 (1986). Professor Slawson notes that public regulation and private enforcement are both critically important, as each accomplish objectives the other cannot. *Id.* at 760.

n40 *See, e.g.*, 33 U.S.C. § 1365(a) (Clean Water Act section allowing any individual to commence a civil action against persons in violation of the Act's provisions, or the state for failing to enforce the Act).

n41 *See supra* note 32.

n42 *See* Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549, 1559-60 (1991). This is true even if the facility causing damage was in compliance with the regulations. *See* Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 1972 U.S.C.C.A.N. 3746-47 ("Compliance with requirements under this act would not be a defense to a common law action for pollution damages.").

n43 *See* Samuel Hayes, *Clean Air: From the 1970 Act to the 1977 Amendments*, 17 DUQ. L. REV. 33, 35-36 (1978-79).

n44 *Id.* at 35.

n45 *See* 42 U.S.C. § 7410(a). This section requires primary standards to be met "as expeditiously as possible" but in no case later than three years after EPA approval. *Id.*

n46 Hayes, *supra* note 43, at 36. State implementation plans must only state a "reasonable time" in which the secondary standards will be attained. *See* PLATER, ENVIRONMENTAL LAW, *supra* note 34, at 787-88. In practice, there has been little pressure to meet secondary standards. *Id.*

n47 Many states have explicitly ruled that facilities in compliance with pollution regulations can be liable for nuisance and other common law damages. *See, e.g.*, Galaxy Carpet Mills, Inc. v. Massengill, 338 S.E.2d 428, 429-30 (Ga. 1986) (holding that carpet dye plant could be held liable in nuisance despite permit from Environmental Protection Division); Borland v. Sanders Lead Co., 369 So. 2d 523, 526-27 (Ala. 1979) (noting that compliance with state air pollution law did not shield lead recovery plant from trespass suit seeking damages caused by company's pollutants). However, such a view is not universal. *See* New England Legal Found. v. Costle, 666 F.2d 30, 33 (2d. Cir. 1981) (noting that courts' reluctance to enjoin activities specifically authorized by legislatures is even greater where issue is technically complex and where Congress has granted administrative authority to an agency having technical expertise); Borough of Collegeville v. Philadelphia Suburban Water Co., 105 A.2d 722, 731 (Pa. 1954) (a structure authorized by the legislature cannot be a nuisance).

n48 *See infra* text accompanying notes 81-215.

n49 "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction

the equal protection of the laws." U.S. CONST. amend. XIV, § 2.

n50 *See* Slaughter-House Cases, 83 U.S. 36, 71 (1872); Charles A. Miller, *The Forest of Due Process Law: The American Constitutional Tradition, in* DUE PROCESS 17 (J. Roland Pennock and John W. Chapman, eds., 1977).

n51 Daniels v. Williams, 474 U.S. 327, 329-30 (1985); Honda v. Oberg, 114 S. Ct. 2331, 2342 (1994).

n52 *See* JOHN E. NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW 355 (4th ed. 1991). Judicial review of procedural due process challenges examines the nature of the interest and the amount of procedural protection which is due, and employs a balancing test to determine what procedures are appropriate. *See* Matthews v. Eldridge, 424 U.S. 319, 335 (1975). Procedural due process applies to systems of individualized deprivations, not directly legislated ones. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 682-83 (2d ed. 1988).

n53 NOWAK & ROTUNDA, *supra* note 52, at 351. Many commentators agree that this substantive component of due process review was not intended by the authors of the 14th Amendment. *See, e.g.*, Louis Henkin, "*Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74, 85 (1963) (noting that substantive due process review may be "wholly a judicial creation").

n54 *See* Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) ("Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three."). Justice Harlan's view of substantive due process as protecting rights from legislative interference was borne out four years later, in *Griswold v. Connecticut. See* 381 U.S. 479, 484-85 (1964). Justice Harlan, however, took issue with the Court's narrow "penumbra" basis for finding protected rights. *Id.* at 500-02 (Harlan, J., concurring).

n55 *Id.* at 484-85.

n56 *Compare* Lochner v. New York, 198 U.S. 45, 64 (1905) (striking down labor regulation in bakeries as interfering with rights of contract) *with* Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) (upholding statute prohibiting non-lawyers from engaging in business of debt adjusting) *and* Roe v. Wade, 410 U.S. 113, 153 (1973) (invalidating Texas statute's near-total prohibition of abortion as interfering with due process right of privacy).

n57 *See Lochner*, 198 U.S. at 64; Allgeyer v. Louisiana, 165 U.S. 578, 593 (1897).

n58 *Lochner*, 198 U.S. at 64.

n59 *Id.* at 60, 62.

n60 *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937); Nebbia v. New York, 291 U.S. 502, 525 (1934). In *West Coast Hotel*, the Court upheld a state minimum wage law for women, directly overruling Lochner-era precedent. 300 U.S. at 400 (overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923)). However, some commentators have argued that the Court's shift is not necessarily a total repudiation of the *Lochner* approach. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 880 (1987). In *West Coast Hotel* -- often seen as the keynote example of the modern "hands off" approach -- the Court seemed more concerned with the need for the minimum wage legislation at issue in the case than with the importance of judicial restraint. *Id.* Professor Sunstein even argues that *Lochner* has never really been overruled. *Id.* at 875.

n61 United States v. Carolene Products Co., 304 U.S. 144, 148 (1938).

n62 *See* Williamson v. Lee Optical, 348 U.S. 483, 487 (1955).

n63 Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963). Despite the Court's strong language in *Ferguson*, some commentators have argued that the substantive due process review discredited by *Lochner* continues, albeit without the sensitive due process vocabulary. *See* Zygmunt J.B. Plater and William Lund Norine, *Through the Looking Glass of Eminent Domain: Exploring the 'Arbitrary And Capricious' Test and Substantive Rationality Review of Governmental Decisions*, 16 B.C. ENVTL. AFF. L. REV. 661, 729-30 (1989) ("It is hardly new to assert that generic' substantive due process never disappeared from the courts. Because of the profession's aversions to the excesses of the old 'economic' substantive due process cases, however, it is rarer to find judges overtly identifying their inquiries as substantive due process."); Miller, *supra* note 50, at 31 (substantive review shifted to less "unpalatable phraseology" -- i.e., other constitutional language -- after *Lochner*).

n64 *See Ferguson*, 372 U.S. at 730-31.

n65 Plater and Norine, *supra* note 63, at 702. According to Plater and Norine, arbitrary and capricious review consists of four categories: the authority of the government to undertake the act; whether or not the purpose of the act is a proper, public one; whether there is a reasonable relationship of ends to means; and whether or not the burden on any individual is undue. *Id.* at 665.

n66 *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926).

n67 *See* Plater and Norine, *supra* note 63, at 699-701. For an example of a property regulation struck down for failing the strict scrutiny reserved for "fundamental interests," see Moore v. City of E. Cleveland, 431 U.S. 494, 505-06 (1977) (striking down housing ordinance restricting freedom of extended family members to reside together as interfering with fundamental liberty interests).

n68 *See* Plater and Norine, *supra* note 63, at 667 n.15.

n69 *See* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

n70 *See* Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) (holding that certain fundamental interests protected by Bill of Rights apply to states under the 14th Amendment); Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting) (arguing that framers of 14th Amendment intended to apply Amendment to all of Bill of Rights). For a complete discussion of whether and to what extent the 14th Amendment includes all the rights guaranteed under the Bill of Rights, see Henkin, *supra* note 53 *passim*.

n71 *See, e.g., In re* Winship, 397 U.S. 358, 364 (1970) (holding that Due Process Clause protects accused from conviction except upon proof beyond a reasonable doubt of every fact necessary to sustain conviction).

n72 *See Griswold*, 381 U.S. at 485-86, 499 (Goldberg, J., concurring), 499-501 (Harlan, J., concurring). The differing conceptions of what constitutes a fundamental right resulted in several separate opinions in *Griswold v. Connecticut*, the case which first applied substantive due process protection to fundamental rights. *Id.* Justice Douglas's majority opinion based judicial intervention on a "penumbra theory" of rights. *Id.* at 485-86. Certain rights not specifically mentioned in the Constitution "emanate" from the guarantees in the Bill of Rights, he said, and "help give them life and substance." *Id.* Justice Goldberg stated that the Ninth Amendment demonstrated that the framers of the Constitution believed that certain fundamental rights existed in addition to the rights protected in the Bill of Rights. *Id.* at 499

(Goldberg, J., concurring). In order to determine what rights are fundamental, Goldberg stated, judges should "look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'" *Id.* at 493 (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1933)). Justice Harlan, on the other hand, stated that the Due Process Clause protects basic values "implicit in the concept of ordered liberty." *Griswold*, 381 U.S. at 500 (Harlan, J., concurring). The inquiry should not depend on the Bill of Rights or its emanations, he said, because the Due Process Clause "stands . . . on its own bottom." *Id.* Justice Harlan's view seems to have been borne out in later cases, which held that certain interests represent basic human rights which are of fundamental importance to society, without being tied to particular constitutional guarantees. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973).

n73 *See* John H. Ely, *Forward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 11 (1978). Non-privacy oriented rights deemed fundamental for purposes of due process protection include the right of interstate travel, United States v. Guest, 383 U.S. 745, 757 (1966), and the right to refuse unwanted medical treatment. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

n74 *See* Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986).

n75 *Id.* at 194-95.

n76 *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 596-98 (1977) (upholding state statute requiring collection of information about prescription drug users); Kelley v. Johnson, 425 U.S. 238, 244 (1976) (upholding statute requiring short haircuts for police officers).

n77 *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

n78 *See* NOWAK & ROTUNDA, *supra* note 52, at 575. Strict scrutiny review has been used more frequently in equal protection challenges. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (striking down statute prohibiting miscegenation as being unnecessary to accomplishment of permissible state objective).

n79 NOWAK & ROTUNDA, supra note 52, at 374, 388.

n80 *See* Fullilove v. Klutznik, 448 U.S. 448, 507 (1980).

n81 *Compare* **Duke Power** Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 82-94 (1978) *with* Roe, 410 U.S. at 155 *and* Ferguson v. Skrupa, 372 U.S. 726, 730-32 (1963); *see also* Jeffrey P. DeGraffenreid, Comment, *Testing The Constitutionality Of Tort Reform With A Quid Pro Quo Analysis: Is Kansas' Judicial Approach An Adequate Substitute For A More Traditional Constitutional Requirement?*, 31 WASHBURN L.J. 314, 320 (1992) (noting that the *Duke* Court could "certainly" have sustained Price-Anderson Act by using only rational relationship test).

n82 *See Duke*, 438 U.S. at 82-83.

n83 *See Ferguson*, 372 U.S. at 730-31; United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). Under that standard, a reviewing court would merely inquire if the purpose is legitimate, and if the means chosen are rationally related to those ends, i.e., if legislators conceivably could have concluded that the means chosen would effectuate the desired ends. *Id.*

n84 *See Duke*, 438 U.S. at 82-94; *see also* Crowell v. Benson, 285 U.S. 22, 41 (1932) (suggesting that standard is one of reasonableness where common law remedies are altered, not simple rationality).

n85 *Compare* Ferguson, 372 U.S. at 730-31 *with* Duke, 438 U.S. at 82-94 and New York Cent. R.R. v. White, 243 U.S. 188, 196-206 (1917). *But see* Silver v. Silver, 280 U.S. 117, 122 (1929). In *Silver*, the Court applied rational basis scrutiny to a Connecticut statute which provided that no person carried gratuitously as a guest in an automobile could recover from the owner or operator for injuries caused by its negligent operation. *See id.* at 122-23. The Court stated, "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Id.* at 122. However, just two years after *Silver*, the Court upheld a federal workers' compensation statute only after ensuring that the statute provided a replacement to abrogated rights to sue in tort and was consequently not unreasonable. *See Crowell*, 285 U.S. at 41. One reason for the difference might be that the Court decided *Silver* on equal protection grounds, and never actually discussed the Due Process Clause. *See Silver*, 280 U.S. at 121-23.

n86 *See Duke*, 438 U.S. at 82-94. Note that the **retroactive** elimination of a vested claim or **cause of action** is quite a different issue. *See, e.g., Sept. 22 Order, supra* note 15, at 4; Elizabeth L. Loeb, Note, *Constitutional Fallout From The Warner Amendment: Annihilating The Rights Of Atomic Weapons Testing Victims*, 62 N.Y.U. L. REV. 1331, 1355 (1987). The concern here is prospective abrogation of rights, remedies or claims.

n87 *See* Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977). The Court has never explicitly utilized an intermediate standard for substantive due process challenges, and explicitly refused to apply one to the Price-Anderson Act in *Duke. See Duke*, 438 U.S. at 83-84. However, in a due process challenge to a zoning regulation prohibiting certain extended family members from residing in the same household, Justice Powell, writing for a plurality, used language which suggested intermediate due process scrutiny. *See Moore*, 431 U.S. at 499. Without explicitly applying strict scrutiny review, Powell stated that courts must "examine closely" statutes infringing upon important rights of family autonomy. *Id.* The Court struck down the statute. *Id.* at 499-500.

n88 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 199-204 (1976) (applying "intermediate" scrutiny in equal protection challenge to statute which discriminates between genders in sale of beer). The Court in *Duke* explicitly rejected petitioner's argument that it should utilize intermediate scrutiny to review the Price-Anderson Act. *Duke*, 438 U.S. at 83-84. However, the possibility of intermediate scrutiny in due process challenges has never been foreclosed explicitly. *Id.*

n89 *Compare Ferguson*, 372 U.S. at 730-31 *with Duke*, 438 U.S. at 82-94 *and New York Cent. R.R.*, 243 U.S. at 196-206.

n90 *See Duke*, 438 U.S. at 82-94; *New York Cent. R.R.*, 243 U.S. at 196-206.

n91 *See Duke*, 438 U.S. at 82-94; *New York Cent. R.R.*, 243 U.S. at 196-206.

n92 *See Duke*, 438 U.S. at 82-94; *New York Cent. R.R.*, 243 U.S. at 196-206.

n93 *See* Silver v. Silver, 280 U.S. 117, 121 (1929); Munn v. Illinois, 94 U.S. 113, 134 (1876) ("A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself . . . may be changed at the will, or even at the whim, of the legislature *unless prevented by constitutional limitations*.") (emphasis added).

n94 *See Silver*, 280 U.S. at 122.

n95 *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring); *Munn*, 94 U.S. at 134.

n96 *Pruneyard*, 447 U.S. at 88. The Court noted that the statute infringed on neither any recognized property right nor any First Amendment rights of the mall owners. *Id.*

n97 *Pruneyard*, 447 U.S. at 93-94 (Marshall, J., concurring) (emphasis added).

n98 *Id.*

n99 *See supra* text accompanying notes 124-215.

n100 *See* **Duke Power** Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 82-94 (1978).

n101 42 U.S.C. § 2210 (1970 & Supp. V).

n102 *Duke*, 438 U.S. at 67-68.

n103 *Id.* at 63-64. As a federal statute, the Price-Anderson Act was challenged under the due process clause of the Fifth Amendment. *Id.* at 67. There is, however, no meaningful difference between the due process protections of the Fifth and the Fourteenth Amendments. *See* Twining v. State of New Jersey, 211 U.S. 78, 101 (1908); Carrol v. Greenwich Ins. Co. of New York, 199 U.S. 401, 410 (1905).

n104 *Duke*, 438 U.S. at 63-64. The nuclear power industry had petitioned Congress for relief because, despite the remote likelihood of a major accident, potential liabilities still dwarfed the ability of the industry and private insurance companies to absorb the risk. *Id.*

n105 *Id.* at 66-67; *see* 42 U.S.C. § 2210(e).

n106 *Duke*, 438 U.S. at 67.

n107 Carolina Envtl. Study Group v. United States Atomic Energy Comm'n, 431 F. Supp. 203, 222-25 (W.D.N.C. 1977).

n108 *Id.* at 222-24. The decision also found that the statute, by forcing victims of nuclear accidents to bear all of the injury, violated the Equal Protection Clause. *Id.* at 224-25.

n109 *Duke*, 438 U.S. at 67.

n110 *Id.* at 83. The Court found that the statute was 'classic' economic regulation because the record showed that Congress sought to encourage private nuclear power while providing for public compensation in the event of a nuclear accident. *Id.* It was therefore a legislative effort to adjust "the burdens and benefits of economic life," the very definition of economic regulation. *Id.* (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).

n111 *Duke*, 438 U.S. at 83-84 (citing *Usery*, 428 U.S. at 15).

n112 *See id.*; DeGraffenreid, *supra* note 81, at 320.

n113 *Duke*, 438 U.S. at 82-94.

n114 *See, e.g.*, New York Cent. R.R. v. White, 243 U.S. 188, 196-206 (1917). This "model" of reasonableness balancing is set forth below. *See supra* text accompanying notes 124-215.

n115 *Duke*, 438 U.S. at 84.

n116 *Id.* at 87-94. The government had promised as part of the same legislation to take whatever steps would be necessary to make up for any shortfall between the liability limit and the actual damages suffered. *See id.*

n117 *Id.* at 89-94.

n118 *Id.* at 86 n.28.

n119 *Id.* at 87.

n120 *See Duke*, 438 U.S. at 84-94; Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963).

n121 *See Duke*, 438 U.S. at 84-94.

n122 *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring).

n123 Although the factors are discussed individually, they are elements of a balancing test wherein a shortcoming in one area might be made more constitutionally "palatable" by a strong showing in another. The exact weight to be accorded any single factor, however, is unclear.

n124 *See, e.g., Duke*, 438 U.S. at 87-92; New York Cent. R.R. v. White, 243 U.S. 188, 201-02 (1917).

n125 *See Duke*, 438 U.S. at 87-92; *New York Cent. R.R.*, 243 U.S. at 201-02.

n126 *Duke*, 438 U.S. at 88.

n127 *See* Fein v. Permanente Medical Group, 474 U.S. 892, 892-95 (1985) (White, J., dissenting). The *Fein* case provided such an opportunity, but the Court dismissed the case for want of a substantial federal question. *Id.* The refusal to deal with the question of whether or not the Due Process Clause demands a "quid pro quo" in exchange for lost common law rights prompted a dissent from Justice White. *Id.* White noted that the circuits and states were split on whether or not the Due Process Clause required a reasonable alternative, and that the Supreme Court should settle the issue. *Id.*

n128 *See infra* text accompanying note 133.

n129 *Duke*, 438 U.S. at 87-92. Congress, as part of the challenged legislation, had committed itself to compensating any injuries or property damage that were not covered by the $ 560 million in liability insurance to be carried by the nuclear plants. *Id.* at 93. In other words, no one would suffer uncompensated damage under the Act; Congress would have to pay whatever the plant owners could not. *Id.*

n130 *Id.* at 88.

n131 *Id.*

n132 *Id.* at 93.

n133 *Id.* (emphasis added). The district court, in fact, had held that the Due Process Clause requires some reasonable, certain and adequate provision for obtaining compensation. Carolina Envtl. Study Group v. United States Atomic Energy Comm'n, 431 F. Supp. 203, 223 (W.D.N.C. 1977). The United States Supreme Court did not disagree with this statement; it merely viewed the Price-Anderson Act as providing the necessary quantum of protection. *Duke*, 438 U.S. at 87-93.

n134 *See* New York Cent. R.R. v. White, 243 U.S. 188, 201-02 (1917).

n135 *Id.*

n136 *Id.* at 192.

n137 *Id.* at 190.

n138 *Id.* at 196-97. The Railroad also mounted a due process claim because it was being held liable regardless of fault. *Id.* at 196-97. That argument was rejected. *Id.* at 209.

n139 *New York Cent. R.R.*, 243 U.S. at 201 ("It perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead.").

n140 *Id.* at 205.

n141 *Id.* at 201.

n142 *Id.* at 201-02.

n143 *Id.* Fifteen years later, the Supreme Court relied on *New York Central Railroad* to sustain the Longshoreman and Harbor Workers Act, a federal workers' compensation plan. Crowell v. Benson, 285 U.S. 22, 41 (1932). The statute was found constitutional only after the Court concluded that "the classifications of the statute [and] the extent of the compensation provided are [not] unreasonable." *Id.*

n144 *See supra* note 127.

n145 *See* **Duke Power** Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 93 (1978).

n146 *See, e.g., New York Cent. R.R.*, 243 U.S. at 201. Although the "other benefits" inquiry is closely related to that of "reasonable alternatives," it can be considered distinct. In the "alternatives" category, the Court inquires simply if there is some alternative remedial mechanism offered by the challenged statute in exchange for the common law rights the statute restricts or abrogates. *See id.* at 200-03. The "benefits" inquiry carries that examination further, to determine if the statute provides additional advantages or benefits that the affected parties did not have under the common law. *See Duke*, 438 U.S. at 87-93. While these advantages are typically linked to the nature of the remedy, the Court has never stated that non-remedial benefits cannot be considered. *See id.* Many commentators and cases lump the two categories together as a general category of "quid pro quo" for lost rights. *See id.*; DeGraffenreid, *supra* note 81, at 317-29. The separation into distinct sub-categories for the purposes of this argument reflects the fact than some decisions appear to treat the two separately, as well as the fact that some cases have looked to benefits unrelated to the remedy (for example, the general benefit of lower medical costs in malpractice award restrictions) in balancing due process concerns. *See infra* notes 161-63 and accompanying text.

n147 *See Duke*, 438 U.S. at 87-93; *New York Cent. R.R.*, 243 U.S. at 201-06.

n148 *Duke*, 438 U.S. at 89-92.

n149 *Id.* at 92 n.36. Expert testimony offered to the District Court indicated that the **Duke Power** Company could not be expected to accumulate more than $ 200 million in damage claims without reaching the point of insolvency. *Id.* Even with the full amount of private insurance available, the company could not pay the $ 560 million provided for under the Price-Anderson Act. *Id.*

n150 *Id.*

n151 *Id.* at 89-92.

n152 *Id.* at 90. The Court cited the testimony of the Chairman of the Nuclear Regulatory Commission: "The prospect of inequitable distribution would produce a race to the courthouse door in contrast to the present system of assured orderly and equitable compensation." *Id.* (citing *Hearings on H.R. 8631 Before the Joint Committee on Atomic Energy*, 94th Cong., 1st Sess. 69 (1975)).

n153 *Duke*, 438 U.S. at 91-92.

n154 *Id.* at 91.

n155 *Id.* at 91-92. The Court noted that the "act of God" scenario -- an earthquake or major storm -- would be more likely as the cause of a massive accident at a nuclear plant than under general circumstances. *Id.*

n156 *Id.* at 92.

n157 New York Cent. R.R. v. White, 243 U.S. 188, 201-04 (1917).

n158 *Id.* at 201.

n159 *Id.* at 202-04.

n160 *Id.* at 202.

n161 *See, e.g.*, **Duke Power** v. Carolina Envtl. Study Group, 438 U.S. 59, 87-93 (1978); *New York Cent. R.R.*, 243 U.S. at 199-207.

n162 *See, e.g.*, Carson v. Maurer, 424 A.2d 825, 836 (N.H. 1980); Arneson v. Olson, 270 N.W.2d 125, 135-36 (N.D. 1978); Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976).

n163 *Arneson*, 270 N.W.2d at 136; *Wright*, 347 N.E.2d at 742; *see also* Smith v. Department of Ins., 507 So. 2d 1080, 1089 (Fla. 1987) (holding that affordable health insurance was too speculative a benefit to balance against cap on non-economic damages in state tort claims); *Carson*, 424 A.2d at 837 ("It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation.").

n164 *See, e.g., Duke*, 438 U.S. at 87-93; *New York Cent. R.R.*, 243 U.S. at 199-207.

n165 *See* Baptist Hosp. v. Baber, 672 S.W.2d 296, 298 (Tex. Ct. App. 1984) ("It is safe to reflect, we think, that where a true quid pro quo does exist, it strengthens the statute's constitutionality.").

n166 *See Duke*, 438 U.S. at 84.

n167 *Compare* Roe v. Wade, 410 U.S. 113, 155 (1973) *with* Whalen v. Roe, 429 U.S. 589, 597 (1976).

n168 *See Duke*, 438 U.S. at 84.

n169 *See* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

n170 *Id.* (emphasis added).

n171 *See* Roe, 410 U.S. at 155.

n172 *Id.*

n173 *See* Whalen v. Roe, 429 U.S. 589, 597 (1976); Berman v. Parker, 348 U.S. 26, 32-33 (1954); Plater and Norine, *supra* note 63, at 693-97.

n174 *Whalen*, 429 U.S. at 597; Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n, 313 U.S. 236, 246 (1940) ("We are not concerned, however, with the wisdom, need, or appropriateness of the legislation.").

n175 *Whalen*, 429 U.S. at 597.

n176 *See* Lochner v. New York, 198 U.S. 45, 64 (1905).

n177 *See* **Duke Power** Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 84 (1978).

n178 *Id.* at 83.

n179 Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 94 (1980) (Marshall, J., concurring).

n180 *Id.* (emphasis added).

n181 *Duke*, 438 U.S. at 84.

n182 *Id.* at 63-65.

n183 *Id.* at 84.

n184 *Id.* (emphasis added).

n185 *See id.* at 84.

n186 *See Duke*, 438 U.S. at 84.

n187 *See id.*

n188 *See id.*

n189 *See id.* at 84.

n190 *See id.*

n191 *Duke*, 438 U.S. at 86-88.

n192 *See id.*

n193 *See id.* at 86-88; Martinez v. California, 444 U.S. 277, 281 (1980).

n194 *Duke*, 438 U.S. at 86-88. The Court cited a 1975 study that found that the chances of an accident causing $ 100 million in damages and minor health effects was one in 20,000. *Id.* at 86 n.28. The chances of an accident causing $ 14 billion in damages, 3300 fatalities, and 45,000 early illnesses was estimated to be one in one billion. *Id.*

n195 *Id.* at 86.

n196 *Id.*

n197 *Id.* at 87.

n198 *Id.*

n199 *Duke*, 438 U.S. at 86.

n200 *See id.* at 87.

n201 444 U.S. 277, 283 (1980).

n202 *Id.* at 279.

n203 *Id.* at 280.

n204 *Id.* at 281.

n205 *Id.*

n206 *Martinez*, 444 U.S. at 281.

n207 *See id.*

n208 *See id.*

n209 *See id.*; *Duke*, 438 U.S. at 86.

n210 *See Martinez*, 444 U.S. at 281; *Duke*, 438 U.S. at 86.

n211 *See supra* text accompanying notes 124-210.

n212 *See id.* While the distinct balancing factors provide a logical categorization for analysis, the inquiry is ultimately holistic and integrating. The *New York Central Railroad* Court held:

> *Viewing the entire matter*, it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

New York Cent. R.R. v. White, 243 U.S. 188, 205 (1917) (emphasis added). The *Duke* Court echoed this theme when it stated:

> When appraised in terms of both the extremely remote possibility of an accident where liability would exceed the limitation and Congress' now statutory commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" any such disaster, we hold the congressional decision to fix a $ 560 million ceiling . . . to be within permissible limits and not violative of due process.

Duke, 438 U.S. at 86-87.

n213 *See* *Duke*, 438 U.S. at 86-87.

n214 *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963). Had the Court applied the standard of review used in these cases to the Price-Anderson Act, the Court could have reached its result much more quickly. *See* DeGraffenreid, *supra* note 81, at 320. The most basic rationality review of the Price-Anderson Act would simply state that encouraging private nuclear power development is a proper government objective, and that Congress could have conceivably believed that the Act's liability limitations would help effectuate that goal. *See* *Ferguson*, 372 U.S. at 730-31.

n215 *See* *Duke*, 438 U.S. at 84-94.

n216 *See infra* Section VI.B.

n217 *See id.*

n218 *See infra* Section VI.A.

n219 *See infra* Section VI.C.

n220 *See, e.g.*, *Duke*, 438 U.S. at 82-94; New York Cent. R.R. v. White, 243 U.S. 188, 196-206 (1917).

n221 The issues of natural justice, natural law and the role of basic fairness concerns in constitutional due process jurisprudence are complex and numerous. A full discussion of this topic is beyond the scope of this paper. The purpose of this section is to touch on the concern of natural justice, and how the Court's review seems to reflect an underlying concern that statutes should be reasonable and fair in their effect on individuals. For a more recent revisitation of the issue of natural law generally, see Symposium, *Perspectives on Natural Law*, 61 U. CIN. L. REV. 1 (1992).

n222 *See* *New York Cent. R.R.*, 243 U.S. at 202 ("Of course, we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice.").

n223 *See* Calder v. Bull, 3 U.S. 386, 392-94 (1798).

n224 *See, e.g.*, *In re* Winship, 397 U.S. 355, 372 n.5 (1970) (Harlan, J., concurring). Justice Harlan's frustration with one of his colleague's narrow interpretation of the Due Process Clause prompted the following footnote:

> I cannot refrain from expressing my continued bafflement at my Brother Black's insistence that due process, whether under the Fourteenth Amendment or the Fifth Amendment, does not embody a concept of fundamental fairness as part of our scheme of constitutionally ordered liberty. His thesis flies in the face of a course of judicial history reflected in an unbroken line of opinions that have interpreted due process to impose restraints on the procedures government may adopt in its dealing with its citizens . . . as well as the uncontroverted scholarly research . . . respecting the intendment of the Due Process Clause of the Fourteenth Amendment . . . .

Id. (citations omitted); *see also* NOWAK & ROTUNDA, *supra* note 52, at 388 ("Fundamental

rights analysis is simply no more than the modern recognition of the natural law concepts first espoused by Justice Chase in Calder v. Bull.").

n225 *See New York Cent. R.R.*, 243 U.S. at 203.

n226 *Calder*, 3 U.S. at 394.

n227 NOWAK & ROTUNDA, *supra* note 52, at 351. Presumably, the idea of a "social compact" underlay Justice Marshall's warning in *Pruneyard* that there are fundamental elements of the common law that simply cannot be abrogated. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring).

n228 *Calder*, 3 U.S. at 388.

n229 *Id.; see also* J. Roland Pennock, *Introduction, in* DUE PROCESS xv, xviii, xxvi (J. Roland Pennock & John W. Chapman, eds., 1977) (due process review incorporates an element of "fundamental fairness" as well as justice and rationality). Although in form the Court has adopted Justice Iredell's plea for judicial restraint, in substance it continues to utilize "natural law" to review acts of the other branches of government. *See* NOWAK & ROTUNDA, *supra* note 52, at 351.

n230 "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

n231 Griswold v. Connecticut, 381 U.S. 479, 490 (1964) (Goldberg, J., concurring); *see also* Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 313-22 (1987); Ronald E. Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 IND. L.J. 203, 219-22 (1974).

n232 *Griswold*, 381 U.S. at 490 (Goldberg, J., concurring).

n233 *Id.* at 492.

n234 *Id.* at 491.

n235 *See id.* at 499. Other Justices have noted that certain rights are constitutionally protected even absent the Ninth Amendment. *See id.* at 500-02 (Harlan, J., concurring). Justice Harlan emphasizes respect for the "teachings of history" and the basic values that underlie society. *See id.* at 501-02; *infra* text accompanying notes 245-64.

n236 *See, e.g.*, **Duke Power** Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 93 (1978); New York Cent. R.R. v. White, 243 U.S. 188, 203 (1917); Crowell v. Benson, 285 U.S. 22, 41 (1932).

n237 *New York Cent. R.R.*, 243 U.S. at 202.

n238 *Id.* at 203-04. With regard to the Railroad's due process challenge, the Court noted:

> It is plain that, *on grounds of natural justice*, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by commonlaw standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise,

> irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall -- that is, upon the injured employee or his dependents.

Id. (emphasis added).

n239 *Id.* at 203. ("Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both . . . ."). This inquiry explicitly took place within the context of natural law and fairness. *Id.* at 203-05.

n240 *Id.*

n241 *See supra* text accompanying notes 69-78.

n242 *See supra* text accompanying notes 222-40.

n243 *See* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1964).

n244 *New York Cent. R.R.*, 243 U.S. at 196-206.

n245 *See, e.g.*, Honda v. Oberg, 114 S. Ct. 2331, 2339 (1994) ("As this Court has stated from its first Due Process cases, traditional practice provides a touchstone for constitutional analysis."); *Griswold*, 381 U.S. at 486 ("We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system."); Tumey v. Ohio, 273 U.S. 510, 523 (1926) ("These cases show that, in determining what due process of law is, under the Fifth or Fourteenth Amendment, the Court must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors . . . .").

n246 *See* FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 3-18 (1986). The influence of the Magna Carta as the fundamental basis of what due process means has long been remarked upon. *See, e.g., In re* Winship, 397 U.S. 358, 379 (1970) (Black, J., dissenting) ("One of the earliest cases in this Court to involve the interpretation of the Due Process Clause of the Fifth Amendment declared that 'the words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Charta.'") (citing Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 276 (1856)); Pennock, *supra* note 229, at xv ("due process of law" is the official English translation of the Magna Carta's "*per leggem terrae*").

n247 *Griswold*, 381 U.S. at 501 (Harlan, J., concurring).

n248 *In re* Winship, 397 U.S. at 361-62.

n249 *Id.* (citing Duncan v. Louisiana, 391 U.S. 145, 155 (1968)).

n250 *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 672-73 (1977); *In re* Winship, 397 U.S. at 361-62.

n251 *Ingraham*, 430 U.S. at 672-73.

n252 *Id.* (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

n253 Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977). In *Moore*, the challenged local ordinance proscribed limits on who could live in the same household. The regulation stated that certain combinations of extended family members -- grandchildren who were

cousins, for example -- could not live in the same house together. *Id.* at 496-97.

n254 *Id.* at 503 (emphasis added).

n255 *Id.* at 502. Powell was likely referring to the discredited Lochner-era judicial intervention in economic and social regulation. *See* Lochner v. New York, 198 U.S. 45, 64 (1905); *supra* text accompanying notes 57-68.

n256 *See* Michael H. v. Gerald D., 491 U.S 110, 121-30 (1989).

n257 *Id.*

n258 *Id.* at 124-27.

n259 *Id.* at 122 n.2.

n260 Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986). The majority's focus on homosexual conduct in this decision, when the statute banned all sodomy, baffled the dissent. *See id.* at 200 (Blackmun, J., dissenting).

n261 *Id.* at 192-94.

n262 *Id.* at 196.

n263 *See id.*; Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977); Ingraham v. Wright, 430 U.S. 651, 672-73 (1977).

n264 *Moore*, 431 U.S. at 503; *Ingraham*, 430 U.S. at 672-73.

n265 *See* Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933).

n266 *See, e.g.*, Silver v. Silver, 280 U.S. 117, 122 (1929).

n267 *Gibbes*, 290 U.S. at 332.

n268 *Id.* at 329-30. The statute applied under particular emergency circumstances, while the state was in control of the bank. *Id.*

n269 *Id.* The Court therefore rejected petitioner's due process challenge to the statute. *Id.*

n270 *Id.* at 332.

n271 *Id.* (emphasis added). Interestingly, *Gibbes* and its kin are rarely cited in recent times. However, they have never been explicitly overruled or otherwise discredited.

n272 258 U.S. 142, 147 (1922).

n273 *Id.* (citations omitted) (emphasis added); *see also* Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437, 439 (1903) ("substantial or efficacious remedy" must remain or be given when statutes alter existing remedies); Ritzholt v. Marsh, 105 F.2d 937, 939 (D.C. Cir. 1939).

n274 *See, e.g.*, **Duke Power** Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 87-92 (1978); New York Cent. R.R. v. White, 243 U.S. 188, 201-03 (1917).

n275 *New York Cent. R.R.*, 243 U.S. at 201-03.

n276 *Id.* at 202; *see also* *Duke*, 438 U.S. at 92-93 (ensuring that victims of a nuclear accident would be compensated for injuries, and therefore their common law rights to sue could be restricted without offending Due Process Clause).

n277 *Gibbes*, 290 U.S. at 332; *see also* Honda v. Oberg, 114 S. Ct. 2331, 2342 (1994). In a 1994 decision, the Court in *Honda* found that an Oregon statute prohibiting judicial review of punitive damage awards violated the Due Process Clause. *Honda*, 114 S. Ct. at 2339-41. Judicial review of punitive damage awards, stated the Court, is a procedural protection against arbitrary or unfair deprivations of property. *Id.* The prevention of such arbitrary deprivations, stated the Court, is the very purpose of the Due Process Clause. *Id.* at 2342. Abrogating this traditional procedural protection consequently violated due process. *Id.* This outcome raises the possibility that the line between procedure and substance, when applied to the common law, is blurred. *See id.* at 2338-42. Common law rights and remedies are procedures, but legislation altering those rights and remedies is by definition substance. *See* Ettor v. City of Tacoma, 228 U.S. 148, 155 (1913) (matters of remedy for substantive rights are procedural issues). In *Honda*, the Court applied neither the rational basis standard, strict scrutiny, nor the balancing test articulated in *Matthews v. Eldridge* used to determine what process is due. *Honda*, 114 S. Ct. at 2339-42; *see* Matthews v. Eldridge, 424 U.S. 319, 332-35 (1975); *see also* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 85 (1982) (substance and procedure are two aspects of same phenomenon). This topic is beyond the scope of this paper.

n278 *See supra* text accompanying notes 81-215.

n279 *See id.*

n280 *See, e.g.*, *Duke*, 438 U.S. at 82-94; *New York Cent. R.R.*, 243 U.S. at 196-206.

n281 *See supra* text accompanying notes 221-77.

n282 *See supra* text accompanying note 27. As noted, Alaska's § 09.45.230 was written too incompletely to serve as the model for this analysis because it did not prohibit public nuisance, trespass or negligence claims. *See id.* As such, the statute would probably not hinder substantially claims for compensation resulting from pollution. *See id.*

n283 *See infra* text accompanying notes 286-325.

n284 *See infra* text accompanying notes 326-351.

n285 *See* **Duke Power** Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 82-94 (1978); New York Cent. R.R. v. White, 243 U.S. 188, 196-206 (1917).

n286 *See supra* text accompanying note 27.

n287 *See* *Duke*, 438 U.S. at 92-93.

n288 *See* *New York Cent. R.R.*, 243 U.S. at 200-02.

n289 *See supra* text accompanying notes 29-47.

n290 *See id.* Citizen suit provisions to require government enforcement of pollution regulations are of little value to an individual who has been harmed by a facility in compliance with applicable standards and seeks compensation. *See supra* text accompanying notes 39-42.

n291 *See id.*

n292 *See, e.g.*, **Duke Power** Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 87-88 (1978); *supra* note 27 and accompanying text.

n293 *Compare* David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1198 n.6 (1992) (considering it safe to conclude that the Constitution does not require alternative for abrogated rights) *with* DeGraffenreid, *supra* note 81, at 320 (noting that Court in *Duke* had the opportunity to decide quid pro quo issue but did not, demonstrating that they do not want to dispense with requirement).

n294 *See* Duke, 438 U.S. at 87-93.

n295 *See supra* note 27 and accompanying text.

n296 *Duke*, 438 U.S. at 89-93; New York Cent. R.R. v. White, 243 U.S. 188, 200-04 (1917).

n297 *See* Duke, 438 U.S. at 89-93; *New York Cent. R.R.*, 243 U.S. at 200-04.

n298 *See* Baptist Hosp. v. Baber, 672 S.W.2d 296, 298 (Tex. Ct. App. 1984) (even if not required, a "true quid pro quo" strengthens the statute's constitutionality).

n299 In the case of Alaska's anti-nuisance statute, such economic benefits are rather difficult to discern. *See* ALASKA STAT. § 09.23.450. There is no indication that nuisance suits threatened the viability of Alaskan industrial enterprises, or even cut into profits. *See infra* text accompanying notes 304-10. In fact, only one nuisance suit based on pollution damage was underway in the state at the time the statute was passed, and even that was considered quite unusual. *McGowan Interview, supra* note 11.

n300 *See* Duke, 438 U.S. at 89-93; *New York Cent. R.R.*, 243 U.S. at 200-04.

n301 *See supra* notes 163-64 and accompanying text; Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976) (noting that lower medical costs for all do not provide a cognizable quid pro quo for the limitation of medical malpractice awards).

n302 *See supra* text accompanying notes 166-90.

n303 *See* Duke, 438 U.S. at 84. Thus, rather than examine the abstract hypothetical statute against a non-existent factual background, the necessity inquiry will be applied to Alaska's § 09.45.230.

n304 *Id.*

n305 *See Bill Would Muzzle Pollution Lawsuits*, JUNEAU EMPIRE, Apr. 21, 1994, at 1 [hereinafter *Bill Would Muzzle*].

n306 *See Sept. 22 Order, supra* note 15, at 4 n.6 (noting that an "important" purpose of the statute was to extinguish the lawsuit brought by Larry Edwards and his neighbors).

n307 *See supra* note 299. In fact, the Edwards nuisance suit against APC came as a total surprise to the local legal community. *McGowan Interview, supra* note 11.

n308 *See Bill Would Muzzle, supra* note 305, at 1. According to Senator Robin Taylor, the representative who shepherded the anti-nuisance bill through the Alaska legislature, he introduced the bill to prevent environmental activists from blocking new development. Dirk Miller, *AG Questions Bill on Nuisance Suits*, JUNEAU EMPIRE, Mar. 10, 1994, at 1. Taylor referred to opponents of his bill as "eco-loonies." *Id.*

n309 *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 94 (1980) (Marshall, J., concurring) (noting that precedent demonstrates that "core" common law rights cannot be abrogated without a showing of compelling necessity or a reasonable replacement).

n310 *See* **Duke Power** Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 84 (1978). Under the hypothetical statute, however, circumstances could demonstrate a need for some common law bar. *Id.* If private industry were struggling under the burden of multiple common law suits for damages caused by pollution, a reviewing court could potentially find that a common law bar is necessary to the realization of a government purpose. *Id.* Of course, necessity is only one of several factors to be considered in the reasonableness balancing test. *See supra* note 123.

n311 *See supra* text accompanying notes 29-47.

n312 *See supra* text accompanying notes 39-42.

n313 *Duke*, 438 U.S. at 86-87.

n314 *See supra* text accompanying notes 29-47.

n315 *See Duke*, 438 U.S. at 86-87.

n316 *Id.* at 87.

n317 *See* PLATER, ENVIRONMENTAL LAW, *supra* note 34, at 109-12.

n318 *See supra* text accompanying notes 39-42.

n319 *See Duke*, 438 U.S. at 87.

n320 *Id.; see* Carolina Envtl. Study Group v. United States Atomic Energy Comm'n, 431 F. Supp. 203, 223 (W.D.N.C. 1977) ("The tendency of such low ceiling [*sic*] is to diminish rather than to heighten steps necessary to protect the public and the environment.").

n321 *Duke*, 438 U.S. at 87.

n322 *See id.*

n323 *See supra* text accompanying notes 29-47. Even if the permitting and regulatory process of pollution control is flawless, the real issue is that permissible pollution can still damage property. *Id.*

n324 *See Duke*, 438 U.S. at 87. To the contrary, an industry would probably benefit economically from the opportunity to pollute without being forced to compensate third parties for harms which result from that pollution. *See* PLATER, ENVIRONMENTAL LAW, *supra* note 34, at 109-12.

n325 *See Duke*, 438 U.S. at 87.

n326 *See supra* text accompanying notes 286-325.

n327 *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring); Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933); New York Cent. R.R. v. White, 243 U.S. 188, 202 (1917).

n328 *See supra* text accompanying notes 221-44.

n329 *See supra* text accompanying notes 245-64.

n330 *See supra* text accompanying notes 265-77.

n331 *See supra* text accompanying notes 245-64; *see also* New York Cent. R.R., 243 U.S. at 202. The rather seedy tale of the passage of Alaska's § 09.23.450 -- and the role of powerful private interests in the legislative process -- supplements the egregiousness of that statute's effects. *See supra* text accompanying notes 1-19.

n332 Griswold v. Connecticut, 381 U.S. 479, 500 (1964) (Harlan, J., concurring) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1947)).

n333 *See supra* text accompanying notes 81-215.

n334 *See* New York Cent. R.R., 243 U.S. at 202.

n335 *See supra* text accompanying notes 286-325.

n336 *Compare* Silver v. Silver, 280 U.S. 117, 122 (1929) (liability limits for guest passengers in vehicles) *and* New York Cent. R.R., 243 U.S. at 200-04 (workers accept employment -- and hence worker's compensation statute -- voluntarily) *with* **Duke Power** Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 87-93 (1978) (liability limitation applies equally to everyone). It may be possible to distinguish *Silver*, which used a highly deferential rational basis test, from *Duke*, which employed the reasonableness balancing standard, on the basis of implied consent to the common law limit. *See Duke*, 438 U.S. at 87-93; *Silver*, 280 U.S. at 122. Moreover, the *Silver* decision, although frequently cited for the proposition that the common law can be changed without replacement, never explicitly deals with the due process argument. *Silver*, 280 U.S. at 117; *see* DeGraffenreid, *supra* note 81, at 317 n.17. Several states have held *Silver* inapplicable to due process challenges to common law restrictions, or have decided that *Silver* is no longer good law. *See In re* Aircrash in Bali, 684 F.2d 1301, 1312 (9th Cir. 1982) (citing Thompson v. Hagan, 523 P.2d 1365 (Idaho 1974); McGeehan v. Bunch, 540 P.2d 238 (N.M. 1975); Lakonen v. Eighth Judicial Dist. Court, 538 P.2d 574 (Nev. 1975); Henry v. Bauder, 518 P.2d 362 (Kan. 1974)).

n337 *See supra* text accompanying note 27.

n338 *See id.*

n339 *See id.*

n340 *Duke*, 438 U.S. at 63-64.

n341 *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 499-501 (1964) (Harlan, J., concurring).

n342 *See* New York Cent. R.R. v. White, 243 U.S. 188, 203 (1917).

n343 *Compare supra* text accompanying note 27 *with Duke*, 438 U.S. at 63-64 *and* New York Cent. R.R., 243 U.S. at 200-04.

n344 *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 957-58 (3rd ed. 1993) (citing William Aldred's Case, 9 Co. Rep. 57b, 77 Eng. Rep. 816 (K.B. 1611)).

n345 *Id.*

n346 *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1964) (majority opinion rests protection of privacy in marriage context on tradition); *see also In re* Winship, 397 U.S. 358,

362 (1970).

n347 *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986); Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977); Ingraham v. Wright, 430 U.S. 651, 672-73 (1977); *see also* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 94 n.3 (1980) (Marshall, J., concurring).

n348 *See Pruneyard*, 447 U.S. at 94 (Marshall, J., concurring).

n349 *See supra* text accompanying note 27.

n350 *See supra* text accompanying notes 20-47.

n351 *See* Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933).

n352 *See* Pennock, *supra* note 229, at xx.

n353 *See* Hurtado v. California, 110 U.S. 516, 530-31 (1884). The Court in *Hurtado* noted that "the Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future . . . ." *Id.* Due process is to be determined by a "gradual process of judicial inclusion and exclusion." *Id.* at 534.

n354 *See, e.g.*, Lochner v. New York, 198 U.S. 45, 64 (1905).

n355 *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1923).

n356 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973).

n357 *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (The scope of application of constitutional guarantees "must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation"); Miller, *supra* note 50, at 3; *see also* Pennock, *supra* note 229, at xx (describing how values shift from a strong belief in laissez-faire to faith in necessity of government regulation was reflected in courts' interpretation of due process in first half of this century).

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SYMPOSIUM: WHEN DOES RETROACTIVITY CROSS THE LINE?: WINSTAR, EASTERN ENTERPRISES AND BEYOND: The New Retroactivity Causation Standard

Jan G. **Laitos** *

* John A. Carver, Jr., Professor of Law and Director, Natural Resources and Environmental Law Program, University of Denver College of Law.

SUMMARY:
... [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. ... 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." ... [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. ... 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. ...

TEXT:
[*1123]

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. **[*1124]**

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 **[*1125]** 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 **[*1126]** 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 "attached 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 "divested Eastern of property long after the company believed **[*1127]** 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 nowretired 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) **[*1128]** 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. **[*1129]**

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] **[*1130]**

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. **[*1131]**

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. **[*1132]** 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 risktaking. [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 preenactment 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 **[*1133]** 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 **[*1134]** 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 **[*1135]** 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, **[*1136]** 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 "the 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 **[*1137]** 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 "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." [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 distribution. **[*1138]** [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 targeted **[*1139]** 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] **[*1140]** 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 existing **[*1141]** 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 states 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 **[*1142]** 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 **[*1143]** 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 TP 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: **[*1144]**

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 **[*1145]** 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 **[*1146]** 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:

There 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 **[*1147]** 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 **[*1148]** theory, many postEastern 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 **[*1149]** 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 Enterprises **[*1150]** 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: "Though . . . [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 antiretroactivity 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 **[*1151]** Enterprises case suggest that private parties may, in certain situations, acquire a protected legal status that prevents the operation of a newlyenacted 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 preenactment 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 plaintiffowner'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 preenactment status, immunizing that expectation from **retroactive** change under the Takings Clause. An investmentbacked **[*1152]** expectation conferring protected legal status can exist as a result of preenactment 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 [*1153]** 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 provide **[*1154]** 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 p **[*1155]** ension 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 antidiscrimination 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] . . . **[*1156]** unjustly imposes a burden on a petitioner that should 'be compensated by the government, rather than remaining 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 **[*1157]** 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 common-sense 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 **[*1158]** 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-andeffect 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 **[*1159]** 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 "singled 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 **[*1160]** 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]

FOOTNOTES:

n1 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).

n2 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).

n3 524 U.S. 498 (1998).

n4 See Eastern Enters., 524 U.S. at 498.

n5 See id. (referencing Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3036, 3037 (1992) (codified at 26 U.S.C. § 9701 (1994)).

n6 See id.

n7 Id.

n8 Id. at 528.

n9 Eastern Enters., 524 U.S. at 500.

n10 Id. at 502-38.

n11 Id. at 538-50 (Kennedy, J. concurring in the judgment and dissenting in part).

n12 Id. at 551-66 (Breyer, J., dissenting).

n13 See, e.g., Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

n14 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 calculation "made in a vacuum").

n15 Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Eastern Enters., 524 U.S. at 532.

n16 Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994).

n17 Eastern Enters., 524 U.S. at 532 (citing Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

n18 Id. at 533 (quoting H. Broom, Legal Maxims 24 (8th ed. 1911)).

n19 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).

n20 Eastern Enters., 524 U.S. at 534.

n21 See id. at 522.

n22 364 U.S. 40 (1960).

n23 Eastern Enters., 524 U.S. at 522 (quoting Armstrong, 364 U.S. at 49).

n24 Id. at 523 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

n25 "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.

n26 Id. at 532.

n27 Id. at 534.

n28 Eastern Enters., 524 U.S. at 537 (emphasis added).

n29 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.

n30 Id. at 546.

n31 Id. at 547-50.

n32 Id. at 549.

n33 Eastern Enters., 524 U.S. at 550.

n34 Id.

n35 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 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).

n36 See, e.g., Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 233-44 (1995).

n37 511 U.S. 244 (1994).

n38 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).

n39 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).

n40 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).

n41 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).

n42 See Frank H. Knight, Risk, Uncertainty & Profit 197-232, 313-75 (1921).

n43 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.").

n44 See Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994); see also Phillips v. Curiale, 608 A.2d 895, 899 (N.J. 1992).

n45 Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring).

n46 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 (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).

n47 General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992).

n48 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).

n49 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)).

n50 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").

n51 See Berman v. Parker, 348 U.S. 26, 32-33 (1954) ("The 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).

n52 See generally U.S. Const. amend. V.

n53 See generally John Rawls, A Theory of Justice (1971).

n54 Id. at 60-63.

n55 Id. at 31, 150-52.

n56 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).

n57 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)).

n58 Texaco v. Short, 454 U.S. 516, 529 (1982).

n59 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978) (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

n60 Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987); Lawton v. Steele, 152 U.S. 133, 136-37 (1894).

n61 See generally Leigh Raymond, The Ethics of Compensation: Takings, Utility, and Justice, 23 Ecology L.Q. 577 (1996).

n62 364 U.S. 40 (1960).

n63 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.

n64 Id. at 49 (emphasis added).

n65 Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 227 (1986).

n66 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).

n67 Rawls, supra note 53, at 60 ("Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.").

n68 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.

n69 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").

n70 Rawls, supra note 53, at 283.

n71 United States v. Armstrong, 364 U.S. 40, 49 (1960).

n72 Rawls, supra note 53, at 179-81.

n73 Id. at 180.

n74 Id. at 61.

n75 Id. at 62.

n76 Armstrong, 364 U.S. at 49.

n77 Supra note 41, at 197.

n78 Eastern Enters., 524 U.S. at 536.

n79 Id. at 549.

n80 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).

n81 526 U.S. 687 (1999).

n82 Del Monte Dunes, 526 U.S. at 698.

n83 Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

n84 483 U.S. 825 (1987).

n85 512 U.S. 374 (1994).

n86 See Landgraf, 511 U.S. at 270 (citing United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806)).

n87 See id. at 280; Craig v. Eberly, 164 F.3d 490, 493-95 (10th Cir. 1998).

n88 See Landgraf, 511 U.S. at 266; accord Eastern Enters., 524 U.S. at 502 (plurality opinion).

n89 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.

n90 Landgraf, 511 U.S. at 270.

n91 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).

n92 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).

n93 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.

n94 Id. at 271.

n95 Id. at 266.

n96 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.

n97 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).

n98 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 "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. . . . ").

n99 Landgraf, 511 U.S. at 271.

n100 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)).

n101 511 U.S. 298 (1994) (considering whether § 101 of the 1991 Civil Rights Act should apply retroactively to pre-enactment conduct).

n102 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).

n103 Landgraf, 511 U.S. at 265 & n.18 ("The 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. . . . ").

n104 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).

n105 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.

n106 483 U.S. 825 (1987).

n107 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.").

n108 Id. (emphasis added).

n109 Id. at 835-36 n.4.

n110 See Armstrong, 364 U.S. at 49.

n111 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].

n112 Raymond, supra note 61, at 612.

n113 Nollan, 483 U.S. at 841.

n114 Id. at 835-36 n.4.

n115 512 U.S. 374 (1994).

n116 Dolan, 512 U.S. at 386.

n117 Id. at 386 (emphasis added); see also Douglas Kmiec, At Last, The Supreme Court Solves the Takings Puzzle, in Takings: LandDevelopment Conditions and Regulatory Takings After Dolan and Lucas 112-13 (David L. Callies ed., 1996).

n118 Id. at 395-96.

n119 See generally id.

n120 Id. at 391.

n121 See generally Dolan, 512 U.S. at 395-96.

n122 Id. at 384 (citing United States v. Armstrong, 364 U.S. 40, 49 (1960)).

n123 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).

n124 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.

n125 Armstrong, 364 U.S. at 49.

n126 Rawls, supra note 53, at 28, 61-63, 112; Raymond, supra note 61, at 615.

n127 See generally Dolan, 512 U.S. at 386.

n128 485 U.S. 1 (1988) (holding that the takings claim was premature).

n129 Pennell, 485 U.S. at 4.

n130 Id. at 5.

n131 Id. at 15-24 (Scalia, J., concurring in part and dissenting in part).

n132 Id. at 19 (Scalia, J., concurring in part and dissenting in part) (citing Armstrong, 364 U.S. at 49).

n133 Id. at 20 (Scalia, J., concurring in part and dissenting in part).

n134 Pennell, 485 U.S. at 23 (Scalia, J., concurring in part and dissenting in part).

n135 Id. at 21-22 (Scalia, J., concurring in part and dissenting in part).

n136 Id. at 22 (Scalia, J., concurring in part and dissenting in part); see Kmiec, supra note 117, at 1652-54.

n137 The causation test was earlier suggested in **Laitos,** supra note 35, at 10.09A; **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).

n138 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).

n139 See, e.g., American President Lines, Ltd. v. United States, 291 F.2d 931, 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).

n140 156 F.3d 1246 (D.C. Cir. 1998).

n141 178 F.3d 649 (3d Cir. 1999).

n142 Apfel, 156 F.3d at 1246.

n143 Id. at 1256.

n144 Id. at 1247.

n145 Id.

n146 Id. (emphasis added).

n147 Apfel, 156 F.3d at 1256-57.

n148 178 F.3d 649 (3d Cir. 1999).

n149 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.

n150 Id. at 670.

n151 Id. at 661.

n152 Id. at 662.

n153 Unity Real Estate, 178 F.3d at 663.

n154 See supra notes 88-104 and accompanying text.

n155 See supra notes 96-99.

n156 See supra notes 102-04.

n157 See supra notes 91-94.

n158 See supra notes 90, 99.

n159 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).

n160 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).

n161 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).

n162 Golf Club of Plantation, Inc. v. City of Plantation, 717 So. 2d 166 (Fla. Dis. Ct. App. 1998).

n163 Eastern Enters., 524 U.S. at 547.

n164 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).

n165 Eastern Enters, 524 U.S. at 549 ("The **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).

n166 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).

n167 U.S. Const. art. I, § 10, cl. 1.

n168 United States Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977).

n169 Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978).

n170 Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411 (1983).

n171 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).

n172 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).

n173 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).

n174 Town Pump, Inc. v. Board of Adjustment, 971 P.2d 349, 353 (Mont. 1998).

n175 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 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).

n176 United States v. Illinois Pollution Control Bd., 17 F. Supp. 2d 800, 808-09 (N.D. Ill. 1998).

n177 Avco Community Developers, Inc. v. South Coast Regional Comm'n, 553 P.2d 546,

551 (Cal. 1976).

n178 See supra notes 22-28, 33-35 and accompanying text.

n179 See supra notes 61-65 and accompanying text.

n180 See supra notes 66-76 and accompanying text.

n181 See Eastern Enters., 524 U.S. at 522 ("noting that when . . . 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).

n182 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).

n183 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).

n184 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. . . . ").

n185 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).

n186 Thomas, 165 F.3d at 709.

n187 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))).

n188 Id.

n189 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 6567. 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.

n190 584 N.W.2d 309 (Iowa 1998).

n191 Bormann, 584 N.W.2d at 311.

n192 Id. at 312.

n193 Id. at 322 (emphasis added).

n194 Id.

n195 See supra notes 71-76 and accompanying text.

n196 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).

n197 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."); see also Unity Real Estate Co. v. Hudson, 178 F.3d 649 (3d Cir. 1999).

n198 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).

n199 See supra notes 105-12 and accompanying text.

n200 See supra notes 114-25 and accompanying text.

n201 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).

n202 See, e.g., Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency, 561 F.2d 1327, 1330 (9th Cir. 1977).

n203 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).

n204 Eastern Enters., 524 U.S. at 501-02 (plurality opinion).

n205 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.

n206 Eastern Enters., 524 U.S. at 533-34 (plurality opinion); id. at 547-49 (Kennedy, J., concurring).

n207 Id. at 2149, 2153 (plurality opinion); id. at 2159 (Kennedy, J., concurring).

n208 See supra note 62.

n209 See supra note 110.

n210 See supra notes 177-203 and accompanying text.

n211 See supra notes 52-76 and accompanying text.

n212 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

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