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## Eastern Enterprises as the Canary in the Coalmine: Will the Supreme Court Hamper the Gulf Workforce by Continuing to Confuse the Constitutionality of Retrograde Liability Provisions?

Jacob Claveloux

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## *EASTERN ENTERPRISES AS THE CANARY IN THE COALMINE: WILL THE SUPREME COURT HAMPER THE GULF WORKFORCE BY CONTINUING TO CONFUSE THE CONSTITUTIONALITY OF RETROACTIVE LIABILITY PROVISIONS?*

### I. INTRODUCTION

Judges could admit, fully and frankly, that they create and enforce unenumerated constitutional rights. . . . Alternatively, federal judges could get out of the business of amending the Constitution by judicial fiat. This would mean that . . . *Eastern Enterprises v. Apfel*<sup>1</sup> should be abandoned. If history provides any guidance, the justices are virtually certain not to follow such a course of action.<sup>2</sup>

On April 20, 2010, the Deepwater Horizon exploded, causing eleven workers to lose their lives and millions of gallons of oil to spill into the Gulf of Mexico.<sup>3</sup> The spill was by far the worst in American history.<sup>4</sup> Analysts predict that the disaster could cost up to \$100 billion.<sup>5</sup> While this figure on its face seems astronomical, even that pales in comparison to the suffering of victims and loss of livelihood. As a social worker who works with fishermen's wives noted "[t]he oil spill is like a cancer or tumor, . . . [i]t is creeping and unpredictable from whether people will have livelihoods or health issues later from helping

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1. 524 U.S. 498 (1998).

2. Ronald J. Krotoszynski, Jr., *The Wages of Crying Wolf Revisited: The Essential Consanguinity of Lochner, Roe, and Eastern Enterprises*, 1 GEO. J. L. & PUB. POL'Y. 133, 133-34 (2002).

3. See Campbell Robertson & Leslie Kaufman, *Size of Spill in Gulf of Mexico is Larger Than Thought*, N.Y. TIMES, Apr. 28, 2010, <http://www.nytimes.com/2010/04/29/us/29spill.html>.

4. Bradley Blackburn & Matt Gutman, *BP Oil Spill Called Worst in U.S. History, as MMS Official Steps Down*, ABCNEWS.COM, May 27, 2010, <http://abcnews.go.com/WN/Media/bp-oil-leak-now-worst-history-surpassing-exxon/story?id=10759905>.

5. Alex Spillius, *BP Oil Spill Could Cost \$100bn*, THE TELEGRAPH, June 18, 2010, <http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/7836982/BP-oil-spill-could-cost-100bn.html>.

clean it up. You just don't know whether it is benign or malignant."<sup>6</sup>

Shortly after oil began pouring into the Gulf of Mexico, much attention turned to whether the American legal system would be able to fairly compensate those who suffered as a result of this unprecedented ecological disaster. Unfortunately, the answer may have been no as Congress included a provision in the Oil Pollution Act of 1990 (OPA), a law passed after the Exxon Valdez spill, that limited an offshore oil vessel owner's liability to \$75 million per incident.<sup>7</sup> Considering the almost unimaginable destruction wrought by BP, \$75 million is "laughable."<sup>8</sup> In an effort to correct this deficiency, the House added a provision to the proposed Consolidated Land, Energy, and Aquatic Resources Act (CLEAR Act) (a bill whose original purpose was to reorganize the federal energy regulatory system) that would eliminate the OPA's \$75 million damages cap.<sup>9</sup> This provision would apply retroactively to cover the April 20, 2010 spill.<sup>10</sup> On July 30, 2010, the House of Representatives passed the CLEAR Act by a vote of 209 to 193.<sup>11</sup> Unfortunately, the Senate has yet to vote on this legislation, and likely never will.<sup>12</sup>

There are numerous reasons why this is so, one of which is the fact that BP has been successful in creating the impression that it is willing to take responsibility for the spill.<sup>13</sup> In the wake of the spill, BP pledged that it would contribute \$20 billion to a victim compensation fund administered by the government.<sup>14</sup> Furthermore, BP representatives stated that the company would disregard the OPA's \$75 million damages cap.<sup>15</sup> Despite BP's apparent willingness to be a responsible corporate citizen, there remains reason to be skeptical about its statements. For example, until a federal judge required BP to put in writing its pledge to

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6. Dana Hedgpeth & David A. Fahrenthold, *Apparent Suicide May Add to the Oil Spill's Toll*, WASH. POST, June 24, 2010, <http://www.cbsnews.com/stories/2010/06/24/politics/washingtonpost/main6613826.shtml>.

7. See 33 U.S.C. § 2704(a) (2006).

8. 156 CONG. REC. H6498 (daily ed. July 30, 2010) (statement of Rep. Holt).

9. See Consolidated Land, Energy, and Aquatic Resources Act of 2009, H.R. 3534, 111th Cong. § 702(a)(1)(B) (2010).

10. *Id.* § 702(b).

11. H.R. 3534 [111<sup>th</sup>], GOVTRACK, <http://www.govtrack.us/congress/bill.xpd?bill=h111-3534> (last visited Feb. 22, 2011).

12. See *id.* The Act has been stalled in the Senate since July 30, 2010. *Id.*

13. See Harry R. Weber, *BP Paying Dividends Seen as 'a Slap in the Face' to Gulf Spill Victims*, HUFFINGTON POST (Feb. 1, 2011), [http://www.huffingtonpost.com/2011/02/01/bp-pays-dividends-upsetti\\_n\\_817121.html](http://www.huffingtonpost.com/2011/02/01/bp-pays-dividends-upsetti_n_817121.html).

14. *Id.*

15. See *id.*

disregard the \$75 million damages cap in the OPA, the company appeared to waver on its commitment to fulfill this pledge.<sup>16</sup> The fact that BP agreed to the judge's demand does not invalidate the concerns addressed by the retroactive nature of the proposed CLEAR Act.<sup>17</sup> BP has a track record of broken promises and it is quite possible that BP could find ways to circumvent its waiver.<sup>18</sup> In its written pledge, BP chose its words carefully, agreeing to waive the damages cap only for "legitimate claims."<sup>19</sup> There remains a very real possibility that once the outrage over the oil spill has dissipated, BP will argue that certain claims are illegitimate, and thus its waiver should not apply. As such, Congress should pass section 702 of the CLEAR Act with the retroactive provision intact to not only ensure that oil companies are fully responsible for spills in the future, but to prevent BP from finding loopholes and escaping its obligations.

This Note will address whether a federal court would be likely to overturn the retroactive provisions of the CLEAR Act. The issue of retroactive liability has long troubled scholars and jurists alike.<sup>20</sup> As Hebert Broom wrote in his legal maxim, "[r]etrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation . . . ought not to change the character of past transactions carried on upon the faith of the then existing law."<sup>21</sup> Despite retroactive liability being disfavored, precedent overwhelmingly indicates that it is constitutional.<sup>22</sup> However, given the current ideological makeup of the Court, it is entirely possible, although unlikely, that this section of the CLEAR Act could be struck down on takings and/or substantive due

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16. Sabrina Canfield, *Saying BP Has Paid 'Lots and Lots,' Attorney Hedges on \$75 Million Cap*, COURTHOUSE NEWS SERVICE (Oct. 15, 2010, 5:46 AM), <http://www.courthousenews.com/2010/10/15/31114.htm>.

17. *See id.*

18. *See* Ann Woolner, *BP = Broken Promises*, PITTSBURGH POST-GAZETTE, May 07, 2010, <http://www.post-gazette.com/pg/10127/1056161-109.stm> ("In a 2005 settlement with the federal Occupational Safety and Health Administration, BP pledged to fix the multiple hazards that exploded part of its Texas City refinery and killed 15 people. Four years later, OSHA alleged more than 700 safety breaches, hundreds of them violations of the 2005 agreement, and proposed a record \$87.4 million fine. . . . In 2000, BP admitted dumping hazardous wastes onto Alaska's North Slope. In 2001 it vowed to clean up air emitted from eight of its refineries in a settlement with the Justice Department over Clean Air Act violations. And yet the Environmental Protection Agency cited one of those plants, in Indiana, for polluting the air again in 2007").

19. *See* Stuart H. Smith, *BP Formally Waives \$75 Million Liability Cap and Positions Itself for Legal Battle*, STUART SMITH BLOG (Oct. 19, 2010), <http://oilspillaction.com/breaking-news-bp-formally-waives-75-million-liability-cap-and-positions-itself-for-legal-battle>.

20. *E. Enters. v. Apfel*, 524 U.S. 498, 533 (1998).

21. *Id.* (citing H. BROOM, *LEGAL MAXIMS* 24 (8<sup>th</sup> ed. 1911)).

22. *See Fern v. United States*, 15 Cl. Ct. 580, 589 (1988).

process grounds. In large part, this Note is an analysis of the potential future of takings and substantive due process jurisprudence using the CLEAR Act as a case study.

## II. CURRENT EVENTS AND THE LEGAL RESPONSE

### A. Deepwater Horizon Spill (Effects and Litigation)

When the Deepwater Horizon offshore drilling unit exploded on April 20, 2010,<sup>23</sup> in addition to killing eleven workers,<sup>24</sup> it unleashed a maelstrom of both massive environmental damage and long-lasting legal ramifications.<sup>25</sup> As BP attempts to both save face<sup>26</sup> and pass some of the blame onto others,<sup>27</sup> they nonetheless are in the middle of what may prove, when all the dust has settled, to be some of the most complicated and perpetual litigation to arise under the OPA (and environmental law generally).<sup>28</sup>

While the battle raging over the astronomical environmental damages caused by the spill have received much of the media and public attention, the rancor brewing beneath the murky surface may be the long-term economic effects that the spill has on the Gulf and beyond.<sup>29</sup>

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23. Robertson, *supra* note 3.

24. *Id.*

25. See Quinn Bowman, *Oil Spill Liability a Complicated Legal Web*, PBS ONLINE NEWSHOUR, June 7, 2010, [http://www.pbs.org/newshour/updates/politics/jan-june10/oillaw\\_06-04.html](http://www.pbs.org/newshour/updates/politics/jan-june10/oillaw_06-04.html); see also Peter J. Henning, *Looking for Liability in BP's Gulf Oil Spill*, N.Y. TIMES DEALBOOK, June 7, 2010, <http://dealbook.nytimes.com/2010/06/07/looking-for-liability-in-bps-gulf-oil-spill/>.

26. See *Texas Maritime Lawyers Support BP's Decision to Waive \$75 Million Dollar Cap for Some Oil Spill Claims*, S.F. CHRONICLE, Oct. 22, 2010, <http://www.sfgate.com/cgibin/article.cgi?f=/g/a/2010/10/22/prwebprweb4687514.DTL>; see also Smith, *supra* note 19. Note, waiver of the OPA \$75 million damages cap was also done under pressure of the court, and that the waiver was not unconditional, merely a waiver for all "legitimate" claims, leaving open the very real possibility that BP will reassert its right to enforce the damages cap against parties that they deem to be illegitimate. See *id.* Since BP has not directly addressed the distinction between directly and indirectly harmed parties, it is possible that they may seek to utilize the damages cap for all suits brought by indirectly harmed parties, an area that is already causing considerable confusion in the legal community. See Rebecca Mowbroy, *Indirect Economic Damages From Gulf of Mexico Oil Spill can be Hard to Define*, TIMES PICAYUNE, Aug. 2, 2010, [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/08/indirect\\_economic\\_damages\\_from.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/08/indirect_economic_damages_from.html); see also Neil King Jr., *Spill Damage Claims Absent the Spill*, WALL ST. J., Aug. 27, 2010, <http://online.wsj.com/article/SB10001424052748703959704575453922212641454.html> (discussing possible claims by tourist communities throughout the gulf region, including areas in Florida which never actually received a drop of oil on their shores).

27. Smith, *supra* note 19.

28. See Bowman, *supra* note 25.

29. See Catherine Clifford, *BP's Lost-Wages List: Shrimpers, Crabbers—and Real-Estate*

The labor force in the gulf region (or at least a part of it), still suffering from Hurricane Katrina's continuing fallout,<sup>30</sup> may prove to be the group left behind as claims and litigation are settled and time continues to pass.<sup>31</sup>

The environmental concerns, as vast and important as they are, will ultimately not result in as many legal disputes as the economic and labor & employment concerns will. The OPA, discussed *infra*, sets strict liability standards for all cleanup efforts after oil spills.<sup>32</sup> This type of liability is not subject to the damages limitations enumerated in section 2704 of the Act, though economic damages, which include lost wages,<sup>33</sup> are subject to section 2704 limitations.<sup>34</sup>

### B. OPA Passed in the Wake of Valdez

A significant distinction exists between directly harmed parties and indirectly harmed parties, as it relates to each group's potential ability to bring claims under the varying causes of action.<sup>35</sup>

The litigation stemming from the Exxon Valdez oil spill is perpetual and remains contentious,<sup>36</sup> and despite the fact that the spill took place over twenty years ago, its ripples are still being felt today.<sup>37</sup> Following the spill, Exxon spent approximately \$2.1 billion in cleanup efforts, over \$1 billion in criminal and civil penalties and damages to the

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*Brokers*, CNN MONEY (June 3, 2010, 6:02 PM), [http://money.cnn.com/2010/06/03/smallbusiness/bp\\_wage\\_claims/index.htm](http://money.cnn.com/2010/06/03/smallbusiness/bp_wage_claims/index.htm).

30. See Robbie Brown, *Fishermen May Be Cleaning the Spill That Put Them Out of Work*, N.Y. TIMES, May 1, 2010, <http://query.nytimes.com/gst/fullpage.html?res=980DEEDE113DF932A35756C0A9669D8B63>.

31. See Thomas Catan & Dionne Searcey, *Dispute Rages on BP Liability for Wages, as Obama Pushes*, WALL ST. J., June 9, 2010, <http://online.wsj.com/article/SB10001424052748703627704575299153313210426.html>.

32. 33 U.S.C. § 2702(a) (2006).

33. *Id.* § 2702 (b)(2)(E) ("Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant").

34. See *id.* § 2704(a).

35. See Deborah S. Bardwick, *The American Tort System's Response to Environmental Disaster: The Exxon Valdez Oil Spill as a Case Study*, 19 STAN. ENVTL. L.J. 259, 275 (2000) ("[I]f owners of a hotel found that tourists were canceling their reservations because an oiled Alaska was less attractive than an unoled Hawaii, they could not recover the indirect injury that the spill caused").

36. See Jason Linkins, *Exxon Valdez: How that Disaster Destroyed the Economy 20 Years Later*, HUFFINGTON POST (May 25, 2011), [http://www.huffingtonpost.com/2010/06/08/Exxon-valdez-how-that-dis\\_n\\_605080.html](http://www.huffingtonpost.com/2010/06/08/Exxon-valdez-how-that-dis_n_605080.html).

37. See *id.* ("The Exxon Valdez disaster, which occurred on March 24, 1989, played a major role in the collapse of the economy some 19 years later").

Federal and Alaskan state government, as well as “another \$303 million in voluntary settlements with fishermen, property owners, and other private parties.”<sup>38</sup> All parties still holding claims against Exxon, including commercial fishermen seeking compensatory damages, were consolidated into one large class by the District Court for the District of Alaska.<sup>39</sup>

This class eventually received a final redress at the hands of the Supreme Court some nineteen years after the disaster,<sup>40</sup> despite the irony that the significant delay in justice meant that many of the harmed parties were not even around to see it.<sup>41</sup> If they were around to see it, they may have been terribly disappointed by the outcome, as the Supreme Court cut the punitive damages Exxon was compelled to pay (via the district court jury’s original holding) from \$5 billion to \$507.5 million, matching the jury’s compensatory award figure.<sup>42</sup>

Many of the people harmed by the Valdez oil spill weren’t even included in the consolidated class because federal maritime tort law, which was found to preempt Alaska tort law, only provides remedies for those who suffer injuries resulting from direct contact with spilled oil.<sup>43</sup> There still exists some minimal concern that the OPA may also be preempted by federal maritime law, in which case the CLEAR Act’s liability adjustment provision will not be applicable.<sup>44</sup> In short, it appears that the OPA liability provision is not preempted by maritime law because the statute includes the following statement:

Notwithstanding any other provision or rule of law, and subject to the provisions of this chapter, each responsible party for a vessel or a

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38. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2613 (2008).

39. *Id.*

40. *See id.* at 2634.

41. *See* Robert Barnes, *Justices Slash Damages for Exxon Oil Spill*, WASH. POST, June 26, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/25/AR2008062500663.html> (“The legal battle has gone on for so long that attorneys for the plaintiffs estimate that at least 20 percent of them are now dead”).

42. *See Baker*, 128 S. Ct. at 2634 (“Today’s ruling adds insult to injury to the fishermen, communities and Alaska natives who have been waiting nearly 20 years for proper compensation following the worst environmental disaster in our nation’s history”). *See also* Barnes, *supra* note 41 (quoting a joint statement from Senators Ted Stevens and Lisa Murkowski, and Representative Don Young).

43. Bardwick, *supra* note 35, at 273.

44. *See* Robert Force, Martin Davies, & Joshua S. Force, *Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases*, 85 TUL. L. REV. 889, 970 (2011) (“The relationship between federal statute, general maritime law, and state law has long raised complex questions of federalism and those questions do not simply go away because of the nonpreemption provisions in OPA”).

facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, . . . is liable for the removal costs and damages specified in subsection (b) that result from such incident.<sup>45</sup>

In response to the Exxon Valdez oil spill, Congress passed the OPA.<sup>46</sup> Amongst other things, the Act created a cause of action for people who suffered economic damages resulting from the discharge of oil from a vessel or facility.<sup>47</sup> One source of particular controversy in the current debate about BP's liability is that the OPA limits the total liability of a "responsible party" to \$75 million per incident, excluding all removal costs.<sup>48</sup> This figure was placed in the bill in the context of the time the bill was passed; the Valdez spill had been "the worst marine environmental disaster this Nation had ever experienced. During this disaster 11 million gallons of oil spilled into the waters of . . . Alaska."<sup>49</sup> By contrast, the Deepwater Horizon spill is estimated to have dumped upwards of 185 million gallons.<sup>50</sup>

Given the enormous impact of the Deepwater Horizon spill, and the eye-opening possibility of damage that is portended by a spill of that magnitude,<sup>51</sup> \$75 million is an embarrassingly small number,<sup>52</sup> when compared with potential costs of multiple billions of dollars.<sup>53</sup>

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45. James Garner, *The Oil Pollution Act of 1990: Interplay with State and General Maritime Law*, HIGHTABLE (July 9, 2010), <https://www.hightable.com/legal-issues/insight/the-oil-pollution-act-of-1990-interplay-with-state-and-general-maritime-law-49419>.

46. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 134 (6th ed. 2009) ("Until 1990, liability for oil spills in U.S. waters was governed by a confusing patchwork of five federal laws, three international conventions, three private international agreements, and dozens of state laws").

47. See Kenneth M. Murchison, *Liability Under the Oil Pollution Act: Current Law and Needed Revisions*, 71 LA. L. REV. 917, 926 (2011).

48. See 33 U.S.C. § 2704(a) ("[T]he total of the liability of any responsible party under section 2702 of this title and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall exceed . . . for an offshore facility except a deepwater port, the total of all removal costs plus \$75,000,000") (emphasis added).

49. Presidential Statement on Signing the Oil Pollution Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1265 (Aug. 18, 1990).

50. See Timothy J. Crone and Maya Tolstoy, *Magnitude of the 2010 Gulf of Mexico Oil Leak*, 330 SCIENCE 634 (2010), available at <http://www.sciencemag.org/content/330/6004/634> (link to the abstract; must be a subscriber to view full content).

51. See John Curran, *The Gulf Oil Disaster: Who's Liable, and for How Much?*, TIME (May 24, 2010), available at <http://www.time.com/time/business/article/0,8559,1991408,00.html> (interviewing Professor Jody Freeman, Harvard Law School, former White House Counselor for Energy and Climate Change).

52. See 156 CONG. REC. H6498 (daily ed. July 30, 2010) (statement of Rep. Holt).

53. See Julia Kollewe, *BP Oil Spill Cost Hits Nearly \$10bn*, THE GUARDIAN, Sept. 20, 2010, <http://www.guardian.co.uk/environment/2010/sep/20/bp-oil-spill-deepwater-horizon-costs-10bn>. As of September 20, 2010, costs had already reached \$10 billion. *Id.*



Naturally, legislators have been busily promoting various plans to increase liability under the OPA since shortly after the Deepwater Horizon spill.<sup>54</sup>

### *C. Acts Proposed to Raise the Damages Cap*

One of the first pieces of legislation proposed in the wake of the spill that addressed the OPA's damages cap was the Big Oil Bailout Prevention Act of 2010, introduced by Representative Rush Holt (D-NJ).<sup>55</sup> Amongst other things, the bill sought to lift the OPA's damages cap, both prospectively and retroactively in order to cover the Gulf oil spill.<sup>56</sup> This proposition was later added to the CLEAR Act, a bill introduced by Representative Nick Rahall (D-WV) long before the Gulf oil spill occurred.<sup>57</sup> When originally proposed, the CLEAR Act's main purpose was to create a more efficient and transparent federal mining and energy regulatory system by consolidating various programs into one entity called the Office of Federal Energy and Minerals Leasing of the Department of the Interior.<sup>58</sup> However after the amendments to life liability caps, the CLEAR Act became known as the Gulf Oil Spill Response Bill.<sup>59</sup>

The CLEAR Act has been stalled in Congress since August 4, 2010.<sup>60</sup> The same is true of all the other bills intended to lift/raise the OPA damages cap that stalled in Congress throughout 2010 and 2011.<sup>61</sup> This is perhaps due in part to BP's "waiver" of the OPA's damages cap,<sup>62</sup> or it may be due to the pressure that certain parts of the oil industry have placed upon legislators,<sup>63</sup> or perhaps both factors play into

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54. See Murchison, *supra* note 47, at 939-40.

55. See David Karas, *Holt Reintroduces Big Oil Bailout Prevention Act*, TIMES OF TRENTON REGIONAL NEWS, Jan 28, 2011, <http://www.nj.com/news/times/regional/index.ssf?/base/news-22/1296197167310560.xml&coll=5>.

56. See *id.*

57. See H.R. 3534, *supra* note 9.

58. *Id.*

59. See Ben Geman & Darren Goode, *House Passes Oil Spill Response Bill But Senate Plans for Legislation Uncertain*, THE HILL, July 30, 2010, <http://thehill.com/blogs/e2-wire/677-e2-wire/111965-house-passes-oil-spill-response-bill-but-senate-plans-uncertain>.

60. H.R. 3534, *supra* note 9. In the case of the CLEAR Act, the Act successfully passed through the House, and stalled in the Senate. *Id.* As of August 4, 2010, the bill was placed on the Senate Legislative Calendar, but has yet to be voted on. *Id.*

61. See Sam Stein, *One Year After BP, Congress Has Yet to Change Oil Spill Liability Cap*, HUFFINGTON POST, June 18, 2011, [http://www.huffingtonpost.com/2011/04/18/one-year-after-bp-congres\\_n\\_850677.html](http://www.huffingtonpost.com/2011/04/18/one-year-after-bp-congres_n_850677.html).

62. See *supra* Part I.

63. See Stein, *supra* note 61.

the stagnancy of these pieces of litigation.<sup>64</sup> Yet, the retroactive liability provisions of the CLEAR Act still provide an interesting legal pathway for analyzing the Supreme Court's analysis of retroactive provisions after *Eastern Enterprises*.

### III. CONSTITUTIONAL GROUNDS FOR POTENTIAL OVERTURN OF CLEAR ACT

#### A. Takings, the Obvious Way or the Eastern Way?

Overwhelmingly, retroactive liability imposition has not been overturned easily on constitutional grounds.<sup>65</sup> "The Due Process Clause does not prohibit retrospective civil legislation, 'unless the consequences are particularly harsh and oppressive.'"<sup>66</sup> The Supreme Court carved out an infamous exception to the typical constitutional upholding of retroactive liability provisions in *Eastern Enterprises*.<sup>67</sup> But the story of *Eastern Enterprises* cannot be told in a void. The decisions in a few key cases illustrate the chasm that had been building in anticipation of the Supreme Court's decision in *Eastern Enterprises*, and evidence the dire need to fill that chasm, even after *Eastern Enterprises*.<sup>68</sup>

#### 1. Takings Jurisprudence Before *Eastern Enterprises*

The judicial deference to Congress's right to retroactively amend its own laws, elucidated in (and leading up to) *Eastern Enterprises*, though the overwhelming standard, belies the ideals pronounced throughout our jurisprudential history. Justice Story, "[i]n his Commentaries on the Constitution. . .reasoned: 'Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.'"<sup>69</sup>

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64. See *id.*

65. See generally *E. Enters. v. Apfel*, 524 U.S. 498, at 522-28 (discussing at length the string of precedent behind denying constitutional challenges to retroactive liability statutes).

66. *Fern v. United States*, 15 Cl. Ct. 580, 589 (1988) (quoting *Welch v. Henry*, 305 U.S. 134 (1938)) (internal quotation marks omitted).

67. See *E. Enters.*, 524 U.S. at 534, 538.

68. See John Decker Bristow, Note, *Eastern Enterprises v. Apfel: Is the Court One Step Closer to Unraveling the Takings and Due Process Clauses?*, 77 N.C. L. REV. 1525, 1555-56 (1999). "The Supreme Court's decision in *Eastern Enterprises* has thrown takings jurisprudence into a further state of confusion and incoherence." Lisa R. Strauss, Note, *The Takings Clause as a Vehicle for Judicial Activism: Eastern Enterprises v. Apfel Presents a New Twist to Takings Analyses*, GA. ST. U. L. REV. 689, 738 (2000).

69. 524 U.S. at 533 (quoting 2 J. Story, *Commentaries on the Constitution* § 1398 (5<sup>th</sup> ed.

Nonetheless, Justice Story concludes, “[s]till they are. . . left open to the states, according to their own constitutions of government; and become obligatory, if not prohibited by the latter.”<sup>70</sup> The principles Justice Story advocated for in 1833 remained fundamentally unchanged in the years leading up to *Eastern Enterprises*,<sup>71</sup> and even in the wake of the narrow holding of *Eastern Enterprises*, there have remained few cases which have overturned retroactive legislation on constitutional grounds.<sup>72</sup>

The takings clause as it was applied to *Eastern Enterprises*, and indeed as it would potentially apply going forward to parties like BP, stems from a line of analysis known as “regulatory takings” analysis.<sup>73</sup> This entire line of reasoning stretches the takings clause, which states simply within the broad Fifth Amendment, “nor shall private property be taken for public use, without just compensation.”<sup>74</sup> As interpreted by the courts, this clause has been held to prevent the government from taking real property from an owner without compensating the owner appropriately.<sup>75</sup> The “regulatory takings” line of cases stemmed from Justice Holmes’ reasoning that “[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>76</sup> Until that decision in 1922, “virtually no court found a taking when regulation restricted use but amounted neither to outright expropriation nor to permanent physical

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1891)).

70. 2 J. Story, Commentaries on the Constitution § 1398 (5<sup>th</sup> ed. 1891).

71. See *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *United States v. Monsanto Co.*, 858 F.2d 160, 173 (4th Cir. 1988) (“[E]ven if [this legislation] is understood to operate retroactively, it nonetheless satisfies the dictates of due process because its liability scheme is rationally related to a valid legislative purpose.”).

72. See ROBERT MELTZ, CONG. RESEARCH SERV., RL 7-5700, CONSTITUTIONAL ISSUES RAISED BY PENDING BILLS TO INCREASE RETROACTIVELY A LIABILITY LIMIT IN THE OIL POLLUTION ACT 5 (2010), available at [http://transportation.house.gov/Media/file/Full%20Committee/20100609/SSM\\_FC.pdf](http://transportation.house.gov/Media/file/Full%20Committee/20100609/SSM_FC.pdf) (discussing the many Superfund cases evaluated by the court on constitutionality grounds and upheld in *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189-90 (2d Cir. 2003)). Further, given *Eastern Enterprises*’ four-justice plurality, courts have been hesitant to view *Eastern Enterprises*’ holding as particularly precedential, except perhaps in very specific narrow circumstances. *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters*, 240 F.3d 534, 552 (6th Cir. 2001) (“We conclude that *Eastern Enterprises* has no precedential effect on this case because no single rationale was agreed upon by the Court”).

73. See J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89, 90 (1995).

74. U.S. CONST. amend. V.

75. Byrne, *supra* note 73, at 90.

76. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

occupation.”<sup>77</sup> Many scholars argue that the pre-1922 reasoning should still be the standard, and as evidence they cite the “pernicious mess” that has stemmed from the Supreme Court’s haphazard application of regulatory takings analysis.<sup>78</sup>

Prior to *Eastern Enterprises*, the Supreme Court had suggested that the Takings Clause may be appropriately considered in cases involving regulations to pay benefits, however it had denied the possibility that applying “general financial liability, absent a connection to a specific property interest, violates the Fifth Amendment”.<sup>79</sup> The Supreme Court eventually employed the analysis from its 1978 *Penn Central Transportation Co. v. City of New York*<sup>80</sup> decision, in order to stretch takings analysis to its logical extreme in *Eastern Enterprises*.

*Penn Central* involved a seemingly traditional takings claim, in that the property right at issue was the property owner’s right to build above Grand Central Terminal in Manhattan.<sup>81</sup> The Supreme Court affirmed the New York Court of Appeals’ determination that the takings clause had not been violated when New York City designated Grand Central Terminal as a historic landmark, and precluded the appellants’ from building on the property.<sup>82</sup> While often it is facts (whether similarities or differences) that give rise to application of law, in observing the *Eastern Enterprises* plurality’s use of *Penn Central*’s reasoning, the facts of the two cases are vastly different.<sup>83</sup> The plurality’s reasoning instead turned purely on the “law” presented in *Penn Central*.

The *Penn Central* court attempted to boil down some guidelines for use in determining whether a regulatory taking has occurred, however, it was a difficult undertaking because these types of cases often turn on the specific facts of a particular case.<sup>84</sup> Nonetheless, the court laid out a set

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77. Byrne, *supra* note 73, at 94.

78. See *id.* at 90. See also Douglas W. Kmiec, *At Last, The Supreme Court Solves the Takings Puzzle*, 19 HARV. J. L. & PUB. POL’Y 147, 147 (1995) (“Many . . . have viewed the Supreme Court’s takings cases as incoherent, piecemeal, or categorical.”); Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court’s Takings Cases*, 38 WM. & MARY L. REV. 1099, 1099 (1997) (“The regulatory takings issue is notoriously muddled”).

79. Strauss, *supra* note 68, at 689.

80. 438 U.S. 104 (1978).

81. See *id.* at 107.

82. See *id.* at 138.

83. Where *Penn Central* concerned some tangible physical property restriction by the government, *Eastern Enterprises* only addressed a purely economic regulation. See *infra* Part III.A.2 (detailing the facts of *Eastern Enterprises*).

84. See 438 U.S. at 124.

[T]his Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a

of “particular[ly] significan[t]” factors to be used as guidance in these “essentially ad hoc, factual inquiries.”<sup>85</sup> The three factors the court identified in *Penn Central* form the foundation upon which *Eastern Enterprises* plurality takings analysis was built.<sup>86</sup> The three factors to be considered are “[t]he *economic impact* of the regulation on the claimant and, particularly, the *extent to which the regulation has interfered with distinct investment-backed expectations*”, as well as “the *character of the governmental action*.”<sup>87</sup> In *Penn Central*, those factors were applied and no uncompensated takings were found to have occurred, however the factors have been used by many courts since in analyzing takings cases,<sup>88</sup> and proved successful for *Eastern Enterprises*.<sup>89</sup>

## 2. Eastern Enterprises Muddies the Water

The Congressional-deference set forth by Justice O'Connor, speaking for a plurality of the Court in *Eastern Enterprises*, is that “Congress . . . may impose retroactive liability to some degree, particularly where it is ‘confined to short and limited periods required by the practicalities of producing national legislation.’”<sup>90</sup> “However . . . the possibility [remains] that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties’ experience.”<sup>91</sup> This exception is still good law currently (though not without its detractors),<sup>92</sup> and some circuits, in an effort to interpret the precedential value of *Eastern Enterprises*’s opinion, have even transformed this simple sentence into an elemental takings test.<sup>93</sup> This despite the fact that even

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few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely ‘upon the particular circumstances [in that] case.’

*Id.*

85. *Id.*

86. See *E. Enters. v. Apfel*, 524 U.S. 498, 529 (1998).

87. 438 U.S. at 124 (emphasis added).

88. See e.g., *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-27 (1986); *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 643-48 (1993).

89. See *infra* Part III.A.2.

90. 524 U.S. at 528 (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 476 U.S. 717, 731 (1984)).

91. *Id.* at 528-29.

92. See, e.g., Bristow *supra* note 68, at 1526.

93. See *Gibson v. Am. Cyanid Co.*, 719 F. Supp. 2d 1031, 1047-48 (E.D. Wis. 2010).

the *Eastern Enterprises* plurality was employing the factors borrowed from *Penn Central*.<sup>94</sup>

The facts of *Eastern Enterprises* are fairly complicated and can be quite confusing. The challenge arose from an application of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act) to the petitioner, Eastern Enterprises.<sup>95</sup> The Coal Act was Congress' "legislative remedy for what it perceived to be a grave problem in the funding of retired coal miners' health benefits . . . ."<sup>96</sup> The Coal Act was passed in 1992 and was to be applied by the Commissioner of Social Security (Commissioner) to particular companies that had signed onto the 1978 coal wage agreement, which "assigned responsibility to signatory employers for the health care of their own active and retired employees,"<sup>97</sup> or any subsequent coal wage agreement.<sup>98</sup> The Act also was to apply to any other signatory coal operator, regardless of whether they were privy to the 1978 agreement, which had employed a given "retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement."<sup>99</sup>

This language is the portion of the Coal Act that was deemed by the Commissioner to be applicable to Eastern Enterprises.<sup>100</sup> By this time, Eastern Enterprises had cut its ties to the coal industry; beginning in 1963, Eastern Enterprises had transferred "its coal-related operations to a subsidiary, Eastern Associated Coal Corp. (EACC)"<sup>101</sup> EACC was to "assume all of Eastern's liabilities arising out of coal mining . . . operations in exchange for Eastern's receipt of EACC's stock."<sup>102</sup> Further, by 1987, Eastern Enterprises had fully sold all of its interest in EACC to another company, Peabody Holding Company, Inc.<sup>103</sup> "Under the terms of the [stock-sale] agreement . . . Peabody, [subsidiary] CPC, and EACC assumed responsibility for payments to certain benefit plans," including the benefit plans that would have been applicable to the retired coal workers.<sup>104</sup>

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94. See *supra* Part.III.A.1.

95. 524 U.S. at 504.

96. *Id.* at 537.

97. *Id.* at 510.

98. *Id.* at 514-15.

99. *Id.* at 515.

100. *Id.*

101. *Id.* at 516.

102. *Id.*

103. *Id.*

104. *Id.*

In addition to this background, it must also be mentioned that Eastern Enterprises had employed the thousand-plus retired coal miners, for which they were now being asked to provide benefits, during the years from 1929 to 1965.<sup>105</sup> During that pertinent period, the benefits provided to the miners were not so extensive as those from the later 1978 agreement and the subsequent passage of the Coal Act.<sup>106</sup> The pre-1965 industry employment contracts that Eastern Enterprises were a signatory to provided only limited health care benefits to miners “to be funded only out of coal sale royalties fixed at a predetermined rate” and reflected no understanding that the coal companies intended to be indebted to the miners for their post-retirement health benefits.<sup>107</sup>

All this serves to explain why Eastern Enterprises felt unfairly targeted for liability by the Commissioner under the Coal Act’s provisions. The cost to Eastern Enterprises was to be upwards of \$5 million for one year of premiums.<sup>108</sup> Eastern Enterprises chose to seek “a declaratory judgment that the Coal Act violates the Constitution and a corresponding injunction against the Commissioner’s enforcement of the Act as to Eastern.”<sup>109</sup> The company was unsuccessful in this suit at both the District Court of Massachusetts, which granted summary judgment on all counts against Eastern Enterprises, and at the Court of Appeals for the First Circuit, which affirmed.<sup>110</sup> The Supreme Court granted certiorari and reversed, narrowly holding that the Coal Act violated the constitution, perhaps as a taking, or perhaps as a violation of due process.<sup>111</sup>

The opinions represented in the *Eastern Enterprises* decision reflect

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105. See William L. Church, *The Eastern Enterprises Case: New Vigor for Judicial Review?*, 2000 WIS. L. REV. 547, 548 (2000).

106. See *id.* at 549-50.

107. *Id.* at 549.

108. 524 U.S. at 517.

109. *Id.* at 520. Eastern sought this remedy, despite the availability of a suit for indemnification against Peabody, et al. *Id.* at 531-32. The Supreme Court addressed this matter succinctly.

“[A]lthough the [Coal] Act preserves Eastern’s right to pursue indemnification. . . it does not confer any right of reimbursement. Moreover, the possibility of indemnification does not alter the fact that Eastern has been assessed over \$5 million in. . . premiums and that its liability under the. . . Act will continue for many years. To the extent that Eastern may have entered into contractual arrangements to insure itself against liabilities arising out of its former coal operations, that indemnity is neither enhanced nor supplanted by the. . . Act and does not affect the availability of the declaratory relief Eastern seeks.”  
*Id.*

110. *Id.* at 517. Additionally, “[o]ther Courts of Appeals have also upheld the Coal Act against constitutional challenges.” *Id.* at 519.

111. See *id.* at 538, 550 (Kennedy, J., concurring).

deep disagreement and confusion on the bench, with four Justices declaring the offending portion of the Coal Act violative of the Takings Clause of the Fifth Amendment, while one Justice (Kennedy) concurred in the judgment on strictly Fifth Amendment due process grounds and vehemently opposed the plurality's reasoning.<sup>112</sup> The four-Justice dissent (Breyer, Ginsburg, Souter, and Stevens) "agreed with Justice Kennedy that only due process review was appropriate. However, they concluded that when subjected to review under this standard, the Coal Act *did* pass muster . . . ."<sup>113</sup> Justice Thomas, who signed onto the plurality opinion, added in a brief, yet extremely outlying, concurrence that he personally would consider overturning two hundred years of jurisprudence in applying the Ex-Post Facto Clause of the first article of the Constitution to cases outside of the criminal context.<sup>114</sup>

The plurality holding turned on application of the *Penn Central* three factors, and the court viewed the "Coal Act's allocation scheme, as applied to Eastern," as "unconstitutional [because] it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience."<sup>115</sup> In applying the *Penn Central* factors, the Court found first that the Coal Act "ha[d] forced a considerable financial burden upon Eastern" and thus there had clearly been an economic impact upon Eastern Enterprises.<sup>116</sup> Second, the Coal Act was held to have

[S]ubstantially interfere[d] with Eastern's reasonable investment-backed expectations. The Act's beneficiary allocation scheme reaches back 30 to 50 years to impose liability against Eastern based on the company's activities between 1946 and 1965. Thus, even though the Act mandates only the payment of future health benefits, it nonetheless "attaches new legal consequences to [an employment relationship] completed before its enactment."<sup>117</sup>

Applying the third *Penn Central* factor, the court held:

[T]he nature of the governmental action in this case is quite unusual.

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112. Church, *supra* note 105, at 551.

113. *Id.* at 552.

114. 524 U.S. at 538-39 ("Since *Calder v. Bull.* . . this Court has considered the *Ex Post Facto* Clause to apply only in the criminal context. I have never been convinced of this limitation . . .").

115. *Id.* at 528-29 (plurality opinion)

116. *Id.* at 529.

117. *Id.* at 532 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)).



That Congress sought a legislative remedy for what it perceived to be a grave problem in the funding of retired coal miners' health benefits is understandable; complex problems of that sort typically call for a legislative solution. When, however, that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause. Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised. Accordingly, in the specific circumstances of this case, we conclude that the Coal Act's application to Eastern effects an unconstitutional taking.<sup>118</sup>

The plurality reasoned that application of the above factors added up to an unconstitutional violation of the Takings Clause of the Fifth Amendment, despite their recognition that the Court's previous opinions:

[M]ake clear that Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties. Congress also may impose retroactive liability to some degree, particularly where it is "confined to short and limited periods required by the practicalities of producing national legislation."<sup>119</sup>

Still, the plurality found the Coal Act as applied to Eastern Enterprises to fit within a narrow group of potential cases where retroactive legislation "might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience."<sup>120</sup>

Justice O'Connor's plurality opinion, in which Chief Justice Rehnquist and Justices Scalia and Thomas joined, "represents a divergence in regulatory takings jurisprudence because the analysis removes the necessity that a specific property interest be at stake."<sup>121</sup> The actual holding in *Eastern Enterprises* has retained precedential value, though the reasoning employed by the plurality, that the Coal Act

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118. *Id.* at 537.

119. *Id.* at 528.

120. *Id.* at 528-29.

121. Strauss, *supra* note 68, at 715-16.

was a violation of the Takings Clause, does not necessarily so.<sup>122</sup> The plurality opinion represented a particular brand of extension of takings jurisprudence, one that had been brewing since the Supreme Court began exercising reluctance to regulate economic interests on due process grounds.<sup>123</sup>

Prior to FDR's New Deal proposals, the Supreme Court routinely utilized due process as a means of interpreting, and often overturning, economic regulations.<sup>124</sup> The Due Process Clause, which reads "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law,"<sup>125</sup> is of course born out of the same amendment to the Constitution that houses the takings clause.<sup>126</sup> The Fifth Amendment ends with the Takings Clause, which reads "nor shall private property be taken for public use, without just compensation."<sup>127</sup> Given the close proximity of the clauses, and the fact that both clauses pertain, at least in part, to "property," it is no wonder that after the Court became explicitly reluctant to overturn economic regulations on Due Process grounds,<sup>128</sup> that takings jurisprudence inherited this hefty responsibility.<sup>129</sup>

Most of the Fifth Amendment rights, including due process, were made applicable to the states in the Fourteenth Amendment, which reads similarly, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of lawFalse"<sup>130</sup> The Takings Clause, while not explicitly enumerated in the Fourteenth Amendment, has been held applicable to states as an inherent part of the due process provision of the Fourteenth Amendment.<sup>131</sup> The Supreme Court's willingness to read "takings" into the Fourteenth Amendment's Due Process Clause, which never explicitly mentions the takings language of the Fifth

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122. *Id.* at 715.

123. See Bristow, *supra* note 68, at 1525-26.

124. See generally *Lochner v. N.Y.*, 198 U.S. 45 (1905) (the Supreme Court used the Due Process Clause to interpret the right contract for employees and masters); Bristow, *supra* note 68, at 1525.

125. U.S. Const. amend. V.

126. *Id.*

127. *Id.*

128. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause. . . to strike down. . . laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

129. See Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 607-08 (1996) (discussing the Supreme Court's willingness to "provide the same level of protection for property under the Takings Clause that the *Lochner* Court afforded under the Due Process Clause").

130. U.S. CONST. amend. XIV § 1.

131. See *Chi., Burlington & Quincy R.R. Co. v. City of Chi.*, 166 U.S. 226, 241 (1897).

Amendment, further illustrates the confusion the Court has been unable to solve over where due process ends and takings begins.<sup>132</sup>

As a practical matter, it is not clear how the elements of an illegal “taking” without compensation is even able to be met via a purely economic regulation.<sup>133</sup> The Takings Clause requires that a property right be taken by or for the government, without properly compensating the party whose property was taken.<sup>134</sup> In the traditional sense, the Takings Clause applies to situations that arise under eminent domain takings of property for “public use.”<sup>135</sup> In recent years, eminent domain takings have been allowed even more leeway, explicitly enfranchising the government to take property from one private party and give it to another private party, so long as the government and the receiving private party purport to be acting within the bounds of some “public purpose.”<sup>136</sup>

Notwithstanding the questionable extension of eminent domain takings, at least the element of an identifiable property interest has been met when in the context of taking physical property away from a party.<sup>137</sup> Even extended to the more abstract portions of the traditional property bundle of rights, the specific property interest test has nonetheless been met.<sup>138</sup> *Eastern Enterprises*’ plurality does not so clearly map out any such specific property interest.<sup>139</sup> The conundrum created by the plurality’s opinion suggests that the just compensation element must either be made moot or judicially written out of the takings

132. See generally Jonathan Sullivan, Note, *Eastern Enterprises v. Apfel: How Lochner Got it Right*, 60 OHIO ST. L.J. 1103, 1128-29 (1999) (“Takings Clause Jurisprudence is Substantive Due Process Jurisprudence [and] Substantive Due Process is the Source of the Modern Takings Doctrine . . . the two are not just intertwined; they are nearly identical”).

133. See generally *id.* at 1124-25 (the Takings Clause does not prohibit the government from acting, just requires “just compensation.” However, it is illogical for the government to compensate an individual when the taking amounts to a seizure of cash).

134. U.S. Const. amend. V.

135. See *Chi., Burlington & Quincy*, 166 U.S. at 236.

136. See generally *Kelo v. City of New London*, 545 U.S. 469 (2005) (Finding it constitutional for the government to take property from private individuals and give it to a private company for public benefit in the form of creation of new jobs).

137. See Sullivan, *supra* note 132, at 1119-20 (noting the problem of identifying a property interest when the “[t]he very foundation of the regulatory takings doctrine is an expansion of the concept of property.” Being able to identify specific property interests is essential when fixing just compensation).

138. See, e.g., *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104 (1978). The property right at stake in *Penn Central* was the somewhat abstract right to build upon one’s property. See *id.* In that case, a developer had intended to tear down and rebuild New York City’s Grand Central Terminal, in opposition to the city’s efforts to landmark the building. See *id.*

139. Sullivan, *supra* note 132, at 1125.

clause altogether.<sup>140</sup> Otherwise, the result that remains after *Eastern Enterprises* is that the government may not take one's money (the only "property right" at stake in *Eastern Enterprises*) without giving that party money (the only plain meaning ever given to "just compensation").

The illogic of this approach is highlighted by even the case's concurrence, where Justice Kennedy wrote with the type of vigor usually retained for dissents,

Our cases do not support the plurality's conclusion that the Coal Act takes property. The Coal Act imposes a staggering financial burden on . . . Eastern Enterprises, but it regulates . . . without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so. To the extent it affects property interests, it does so in a manner similar to many laws; but until today, none were thought to constitute takings. To call this sort of governmental action a taking as a matter of constitutional interpretation is both imprecise and, with all due respect, unwise.<sup>141</sup>

Justice Kennedy goes on to concur with the holding of the plurality, however he urges that the Coal Act's unconstitutionality stems from violation of the Due Process Clause,<sup>142</sup> perhaps reinstating the determinative power of due process over economic regulations.<sup>143</sup> In either case, for the plurality to have held that the Coal Act's retroactive imposition of economic liability constituted a taking, this again dulled the power of the Takings Clause as it is worded in the constitution.<sup>144</sup>

Since the constitutional clause reads "without just compensation,"<sup>145</sup> the logical conclusion to a court's overturning of a taking would be to remand the particular case for consideration of the appropriate amount to compensate the victim of the taking. Given the logical leap in the plurality's opinion, the holding in *Eastern Enterprises*

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140. *See id.*

141. *E. Enters. v. Apfel*, 524 U.S. 498, 540 (1998).

142. *See infra* Part III.B.

143. *See infra* Part III.D.

144. *Id.*

145. U.S. CONST. amend. V.

could not allow for any such logical result. Instead, what *Eastern Enterprises* held was that the Coal Act as applied to Eastern Enterprises was unconstitutional,<sup>146</sup> as opposed to a determination of the appropriate level of just compensation. Obviously there was no opportunity for a calculation of just compensation in a scenario in which one has no specific property interest to measure and calculate. As stated earlier, the calculation would have been something to the effect of: just compensation (in cash), to replace the regulatory taking (of cash),<sup>147</sup> an altogether confusing method for interpreting the framers intentions when designing the takings clause.<sup>148</sup> Justice Breyer, writing in dissent in *Eastern Enterprises*, and joined by Justices Stevens, Souter, and Ginsburg, expressed concern that just such a logical misstep may lead to the type of scenario in which the Takings Clause applies “when the government simply orders A to pay the government, *i.e.*, when it assesses a tax [.]”<sup>149</sup>

While Justice Breyer may have been unleashing his tax concern as an illustration of the parade of horrors that the plurality’s opinion may unleash, apparently his concern was not so farfetched. In June 2009, the Supreme Court denied certiorari to a case that came up from the Supreme Court of Illinois, *Empress Casino Joliet Corp. v. Giannoulis*.<sup>150</sup> One of the main issues on appeal in that case was whether a tax could be held as violative of the takings clause of the constitution.<sup>151</sup> The Supreme Court of Illinois concluded that a tax was not a subject of the Takings Clause, though amongst the multiple petitions for writ of certiorari to the Supreme Court was one particular petition, written by law professors eager to see the Supreme Court clear the haze surrounding the takings clause jurisprudence since *Eastern Enterprises*.<sup>152</sup>

In *Empress Casino*, the court relied upon the concurring and dissenting opinions of *Eastern Enterprises* to support the holding that

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146. 524 U.S. at 538 (“[W]e conclude that the Coal Act’s allocation of liability to Eastern violates the Takings Clause, and that [the Coal Act] should be enjoined as applied to Eastern.”).

147. See *id.* at 554 (Breyer, J., dissenting)

148. *Id.*

149. *Id.* at 556.

150. *Empress Casino Joliet Corp. v. Giannoulis*, 129 S. Ct. 2764 (2009).

151. See Petition for Writ of Certiorari, *Empress Casino Joliet Corp.*, 129 S.Ct 2764 (2009) (No. 08-945), 2009 WL 208133 at \*i.

152. See Brief for Amici Curiae Law Professors in Support of Petitioners, *Empress Casino Joliet Corp.*, 129 S.Ct. 2764 (2009) (No.08-945), 2009 WL 527000 at \*8-9 (“As the petition demonstrates, there is deep disarray among both federal and state courts as to the applicability of the Takings Clause to laws that impose monetary exactions . . . Matters of this import cannot be left to the doctrinal incoherence of the fractured decision in *Eastern Enterprises*.”).

“the Takings Clause has never been held to apply to an exaction of money unrelated to an identifiable real, personal, or intellectual property interest. In other words, a tax cannot be a taking.”<sup>153</sup> Instead, the court reasoned that the true holding of *Eastern Enterprises* would either be based upon due process grounds or, apparently, nothing at all.<sup>154</sup> Thus, there is at least some current precedent that judicially prefers the due process, rather than the Takings, understanding of the holding in *Eastern Enterprises*.<sup>155</sup>

Many other courts have expressed doubt about the viability of the *Eastern Enterprise* plurality opinion.<sup>156</sup> The Eleventh Circuit, in a 2008 decision, characterized the *Eastern Enterprises* decision as “fragmented” and determined that in such a case, the Court had a right to view the holding as the narrowest ground upon which the concurring opinions agree.<sup>157</sup> Thus, that court decided, there was no proper holding for them to follow, save for that the Coal Act as applied to Eastern Enterprises was unconstitutional in some fashion.<sup>158</sup> The court then proceeded to ignore *Eastern Enterprises*’ takings analysis, and instead utilize some of Justice Kennedy’s due process concurrence as guidance.<sup>159</sup>

Another example of a court declining to extend *Eastern Enterprises* can be found in a 2004 decision by the Eastern District of Illinois.<sup>160</sup> That opinion held that, due to *Eastern Enterprises*’ four Justice plurality opinion, “*Eastern Enterprises* cannot be said to have changed the Court’s Takings Clause precedent and [a party’s] citation to the case can have nothing more than persuasive appeal.”<sup>161</sup>

The courts were not the only forums in which the *Eastern Enterprises* opinion was questioned. In fact, in the years following *Eastern Enterprises*, many members of the legal and academic community came out in strong opposition to the plurality’s opinion.<sup>162</sup>

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153. Chaim Gordon, Note, *Protecting Peter When the Legislature Robs Peter to Pay Paul After Empress Casino v. Giannoulas*, 63 TAX LAW. 1299, 1304 (2010).

154. *See id.*

155. *See infra* Part III.B.

156. *See id.*; *Swisher Int’l, Inc. v. Schafer*, 550 F.3d 1046, 1053 (11th Cir. 2008).

157. *Swisher Int’l*, 550 F.3d at 1053.

158. *See id.* at 1054.

159. *Id.* at 1057.

160. *See Winger v. Banhart*, 320 F. Supp. 2d 741, 745 (C.D. Ill. 2004).

161. *Id.*

162. *See, e.g.*, Strauss, *supra* note 68, at 738; Church, *supra* note 105, at 548; Sullivan, *supra* note 132, at 1128; Bristow, *supra* note 68, at 1555-56.

### 3. Applying *Eastern Enterprises* to the CLEAR Act's Retroactive Lifting of the OPA Damages Cap

While the factual scenario presented by a potential challenge to the constitutionality of a retroactive repeal of the OPA's damages cap does not match up to the facts in *Eastern Enterprises*, the argument would be that the CLEAR Act's retroactive nature constitutes an illegal taking. Despite the factual divergence between the Coal Act as applied in *Eastern Enterprises* and the CLEAR Act as potentially applied to BP, the retroactive similarity, combined with the Supreme Court's protection of corporate interests,<sup>163</sup> may provide a fertile ground for judicial activism in disallowing the repeal of the OPA's damages cap.

Some scholars have posited that BP has three potential takings arguments. First, BP could argue that it possessed "a claimed right to having the relevant law (the current liability cap) remain unchanged."<sup>164</sup> This argument is unlikely to prevail because the Supreme Court in *New York Central Railroad Co.* has held: "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."<sup>165</sup>

Second, BP could argue that the CLEAR Act "effect[s] a taking of its disbursements to cover damages beyond the existing liability cap."<sup>166</sup> In *Penn Central*, the Supreme Court established a three-prong test to address this issue.<sup>167</sup> Under this test, the factors to consider are as follows: (1) the economic impact of government action, (2) the degree to which it interferes with reasonable, distinct investment-backed expectations, and (3) the character of the government action.<sup>168</sup>

BP could argue on the first *Penn Central* factor, that the CLEAR Act poses a grave economic impact upon them. The total monetary cost of damages for BP could be astronomical, given the impact of the Deepwater Horizon spill.<sup>169</sup> This factor alone is not decisive, however. BP will be required to demonstrate that the economic impact of the CLEAR Act is "very substantial, if not severe."<sup>170</sup> In *Concrete Pipe*, the Supreme Court held that a retroactively imposed monetary liability did

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163. See *infra* Part IV.A.

164. Meltz, *supra* note 72, at 3.

165. N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 198 (1917).

166. Meltz, *supra* note 72, at 3.

167. See *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978).

168. *Id.*

169. See Meltz, *supra* note 72, at 4-5.

170. *Id.* at 4.

not effect a taking even where it amounted to 46% of shareholder equity.<sup>171</sup> Based on this case, some predict that the potential additional liability under the CLEAR Act will not fulfill the *Penn Central* “very substantial” standard.<sup>172</sup>

Second, BP could argue that the CLEAR Act’s removal of the OPA’s damages cap significantly interferes with their reasonable investment-backed expectations, in that prior to the CLEAR Act, the company was doing business under the impression that its liability for economic damages would be capped at \$75 million. BP may argue that, just like any other reasonable corporate actor, prior to embarking on their drilling operations, they perform a cost-benefit analysis, and their potential liability under existing law is factored into that analysis. This argument may come across as disingenuous, however a sympathetic court may give it some weight.

In applying the second *Penn Central* factor, it seems unlikely that BP will be successful in arguing that removing the OPA liability cap interfered with its reasonable expectations.<sup>173</sup> Since the 1950s, oil-drilling operations in the Gulf have been thoroughly regulated.<sup>174</sup> Further, after BP entered into the lease at issue in 2008, federal oil spill liability limits have increased significantly.<sup>175</sup> Moreover, when the Supreme Court addressed the second factor of the *Penn Central* test in a case involving retroactive monetary liability, it stated: “Those who do business in [a] regulated field cannot object if the regulatory scheme is buttressed by subsequent amendments to achieve the legislative end.”<sup>176</sup>

BP’s argument may be bolstered by referencing insurance in their cost-benefit analysis calculation, and the fact that it may present an undue burden upon a party to insure themselves at a level above that of the current liability scheme for their industry. However, as the oil industry is such a risky business,

BP is self-insured, which is another way of saying it isn’t insured at all except when it is required to be by law. Why? Because it doesn’t make economic sense for BP to pay the kind of premiums it would be

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171. *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993).

172. Meltz, *supra* note 72, at 4.

173. *See id.* at 4.

174. *Id.*

175. *Id.*

176. *Id.*



charged to cover itself in what is fundamentally a risky business.<sup>177</sup>

BP is insured through “a wholly owned subsidiary, Jupiter Insurance, for the insurance it has to take out” at law.<sup>178</sup> Thus, “[s]elf-insurance in this case means that BP will wear the bill whichever way you cut it — even if Jupiter had had much higher payout limits, BP would have ended up having to recapitalize the insurer.”<sup>179</sup> Given this insurance scheme, BP would have a much harder time arguing that insurance was unavailable at levels above those of the OPA’s damages cap, as the company had apparently not procured their insurance on the open market, and perhaps there was no actual market for them to procure insurance from.

The third *Penn Central* factor as applied to BP could turn on the congressional intent of the CLEAR Act. Were it abundantly clear that the bill was passed solely to punish BP for actions that already took place, BP could argue that the nature of the governmental action constitutes a “taking” akin to the taking found by the plurality in *Eastern Enterprises*.<sup>180</sup> If Eastern Enterprises was able to get around the Coal Act’s enforcement upon them to pay benefits for their former employees, then BP may have some legs for an argument that Congress is unconstitutionally taking from them as a punishment for what they deemed to be an accident in the past. Given some of the language focusing specifically on BP by Congress in support of the CLEAR Act (and the Big Oil Bailout Prevention Act even more explicitly),<sup>181</sup> BP may argue that the lifting of the damages cap was not done to protect economic interests going forward, but instead to retroactively punish them.

BP may also attempt to make the argument that the CLEAR Act affects a taking because BP had a “contract right under [its] lease to exclude application to the lease of laws enacted after it was entered into.”<sup>182</sup> The lease that BP entered into with the United States government contained the following language: “The lease is issued subject to [the Outer Continental Shelf Lands Act, existing regulations thereunder, and certain future regulations thereunder] and all other

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177. Joe Ortiz, *BP Oil Spill Sparks Debate on Captive Insurers*, WALL ST. J. BLOG (June 9, 2010, 9:41 AM), <http://blogs.wsj.com/source/2010/06/09/bp-oil-spill-sparks-debate-on-captive-insurers/>.

178. *Id.*

179. *Id.*

180. See *E. Enters. v. Apfel*, 524 U.S. 498, 538 (1998).

181. See *supra* Part I.A.

182. Meltz, *supra* note 72, at 6.

applicable statutes and regulations.”<sup>183</sup> BP could argue that “all other applicable statutes” does not refer to future statutes.<sup>184</sup> This argument is bolstered by the Supreme Court’s decision in *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, where the Court held that an Outer Continental Shelf lease, with similar language, was governed only by statutes that existed at the time of the contract.<sup>185</sup> Unfortunately for BP, federal courts have long addressed problems involving contracts as breach of contract cases, not takings cases.<sup>186</sup>

### *B. Due Process: Eastern’s Actual Holding?*

Although the *Eastern Enterprises* majority held that the Coal Act was unconstitutional, there was disagreement over which clause supported the holding.<sup>187</sup> While Justice O’Connor, Justice Scalia, Justice Thomas, and Chief Justice Rehnquist all found that the Act violated the Takings Clause, Justice Kennedy held that it violated substantive due process instead.<sup>188</sup> Complicating matters is Justice Breyer’s dissent agreeing with Justice Kennedy that statutes imposing retroactive monetary liability should be analyzed through the due process clause, not the takings clause.<sup>189</sup> Without a clear guiding principle, courts have had considerable trouble applying *Eastern*.<sup>190</sup> Despite the plurality’s opinion, some courts have viewed Justice Kennedy’s concurrence and the dissent’s analysis as the true holding.<sup>191</sup> For example, the United States Court of Appeals for the Third Circuit has noted that “[t]o the extent that *Eastern* embodies principles capable of broader application, we believe that due process analysis encompasses the relevant concerns.”<sup>192</sup>

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183. *Id.*

184. *Id.*

185. *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 616 (2000).

186. *See Hughes Commc’ns Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001). The Contract Clause only applies to the states, not to the federal government. *See infra* Part IV.

187. *See generally* *E. Enters. v. Apfel*, 524 U.S. 498 (1998).

188. *Id.* at 550 (Kennedy, J. concurring in the judgment and dissenting in part).

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

190. *See* Steven J. Eagle, *Protecting Property from Unjust Deprivations beyond Takings: Substantive Due*

*Process, Equal Protection, and State Legislation*, in *TAKING SIDES ON TAKING ISSUES: PUBLIC AND PRIVATE PERSPECTIVES* 511, 518-19 (Thomas E. Roberts ed. 2002).

191. *Id.* at 517-18.

192. *Id.* at 519.

Scholars are equally perplexed.<sup>193</sup> To some, the 5-4 holding that the Coal Act implicated the Due Process Clause and not the Takings Clause, signified the revival of substantive due process analysis in the economic context.<sup>194</sup> To others, Kennedy and the dissent's reliance on substantive due process is limited to the specific facts in *Eastern Enterprises*, and should not be interpreted as "giv[ing] a boost" to substantive due process.<sup>195</sup> Alternatively, some critics have asserted that *Eastern Enterprises* ultimately stands for the notion that "the Court should stop enforcing unenumerated rights altogether, for it either cannot or will not find a means to 'discover' them that can be constrained by the Constitution as written."<sup>196</sup>

### 1. Brief History of Substantive Due Process

The idea that a citizen is entitled to due process of law comes from the Fifth Amendment<sup>197</sup> and the Fourteenth Amendment.<sup>198</sup> The Due Process Clauses not only protect procedural rights, they also have been read to provide substantive rights (substantive due process).<sup>199</sup> As such, the Supreme Court has used substantive due process to create rights that are not expressly provided in the Constitution.<sup>200</sup> Such rights have included "the right to own slaves, the right to abortion, and the right to live with one's extended family."<sup>201</sup> In addressing whether a law withstands a constitutional challenge, substantive due process demands that laws are "rationally related to a government purpose."<sup>202</sup>

Starting in the late nineteenth century and continuing into the early twentieth century, the Supreme Court invoked substantive due process to

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193. Compare Robert Ashbrook, *Land Development, The Graham Doctrine and the Extinction of Economic Substantive Due Process*, 150 U. PA. L. REV. 1255, 1294-95 (2002) ("Although seeming to give a boost to substantive due process, this type of plurality decision is perhaps best viewed as narrowly applicable only to its particular facts"), with Eagle, *supra* note 190, at 519 ("In a broader sense, however, *Eastern Enterprises* might serve as a catalyst for a reappraisal of substantive due process").

194. Eagle, *supra* note 190, at 519.

195. Ashbrook, *supra* note 193, at 1294-95.

196. Sullivan, *supra* note 132, at 1136.

197. U.S. Const. amend. V ("[n]o person shall be . . . deprived of . . . property, without due process of law").

198. U.S. Const. amend. XIV.

199. Philip Jordon, *Substantive Due Process Since Eastern Enterprises, With New Defenses Based on Lack of Causative Nexus: The Superfund Example*, 32 B.C. ENVTL. AFF. L. REV. 395, 405 (2005).

200. Sullivan, *supra* note 132, at 1108.

201. *Id.*

202. Jordon, *supra* note 199, at 405.

invalidate a number of state statutes regulating economic matters.<sup>203</sup> Perhaps the most noteworthy case in this area was *Lochner v. New York*.<sup>204</sup> In that case, a bakery owner was charged with violating a New York State law restricting the amount of hours that an employer could require his employees to work.<sup>205</sup> The Court struck down the law on substantive due process grounds, holding that “there was no ‘reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.’”<sup>206</sup> From the late nineteenth century until the 1930s, a period referred to as the *Lochner* era, the Supreme Court regularly rejected economic legislation for violating substantive due process.<sup>207</sup>

In 1937, *West Coast Hotel v. Parrish*, brought an end to the *Lochner* era.<sup>208</sup> Since that case, economic regulation has rarely been invalidated on substantive due process grounds.<sup>209</sup> Instead, substantive due process has been used primarily to “protect unenumerated rights of participation in the political process, particularly those of ‘discrete, insular minorities’ and those that were ‘fundamental rights.’”<sup>210</sup>

## 2. Due Process Challenges to Retroactive Economic Liability Prior to *Eastern Enterprises*

Prior to *Eastern Enterprises*, attacks against retroactive economic laws were rarely successful.<sup>211</sup> For example, more than two decades before *Eastern Enterprises*, the Supreme Court in *Usery v. Turner Elkhorn Mining* dealt with a similar fact pattern, but refused to strike down the statute at issue on substantive due process grounds.<sup>212</sup> *Usery* involved a challenge to Title IV of the Federal Coal Mine Health and Safety Act of 1969 as amended by the Black Lung Benefits Act of 1972, which among other things required coal-mining operators to compensate former employees who contracted pneumoconiosis.<sup>213</sup> The parties challenging the law argued that it violated due process because it

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203. See *id.* at 406.

204. *Id.*

205. *Id.*

206. *Id.* at 407.

207. *Id.* at 406, 408.

208. *Id.* at 408.

209. Sullivan, *supra* note 132, at 1110.

210. *Id.* at 1110-11.

211. See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 3 (1976).

212. See *id.* at 38.

213. See *id.* at 1.

mandated that operators pay miners who came down with the illness, even if they were no longer employed by that operator when the law was passed.<sup>214</sup> Addressing whether the statute violated substantive due process merely because it was retroactive, the Court noted the following:

To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect although, as we have noted, the Act imposed no liability on operators until 1974. And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.<sup>215</sup>

Having settled that a law's retroactive application does not alone make it unconstitutional, the Court noted that there are circumstances when retroactivity may violate due process.<sup>216</sup> However, the Court ruled that Title IV of the Federal Coal Mine Health and Safety Act of 1969 did not present one of those circumstances.<sup>217</sup> In the words of Justice Marshall, "[here] [w]e find . . . that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor the operators and the coal consumers."<sup>218</sup>

The coal-mining operators also contended that the Act violated substantive due process because it spread costs in an arbitrary and irrational manner.<sup>219</sup> Specifically, they argued that it was unconstitutional because it attached liability based "upon past employment relationships, rather than taxing all coal mine operators presently in business."<sup>220</sup> Unfortunately for the Operators, the Court

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214. *Id.* at 12.

215. *Id.* at 15-16.

216. *See id.* at 17 ("Thus, in this case the justification for the retrospective imposition of liability must take into account the possibilities that the Operators may not have known of the danger of their employees' contracting pneumoconiosis, and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law, which imposed no liability on them for disabling pneumoconiosis").

217. *See id.*

218. *Id.* at 18.

219. *Id.*

220. *Id.* ("The Operators note that a coal mine operator whose work force has declined may be faced with a total liability that is disproportionate to the number of miners currently employed. And they argue that the liability scheme gives an unfair competitive advantage to new entrants into the

found that the law was, at the very least, rationally related to Congress's intentions to compensate coal miners who became stricken with pneumoconiosis.<sup>221</sup> As such, it refused to question the wisdom of the Congress' "chosen scheme."<sup>222</sup>

Until *Eastern Enterprises*, *Usery* was the rule, not the exception.<sup>223</sup> Even after *Eastern Enterprises*, many would argue that *Usery* is still controlling law, and that *Eastern Enterprises* was just an aberration confined to its own fact pattern.<sup>224</sup> The federal courts' response to due process challenges to the Comprehensive Environmental Response, Cleanup, and Liability Act (CERCLA) provides support for this proposition. CERCLA was a federal law, which amongst other things imposed retroactive liability on polluters.<sup>225</sup> Fortunately for proponents of the CLEAR Act, the courts have all upheld the retroactive provisions of CERCLA.<sup>226</sup> One notable case dealing with this subject matter is *United States v. South Carolina Recycling & Disposal, Inc.*<sup>227</sup> In said case, the court held that although CERCLA punished polluters for actions taken before the law was passed, it was a remedial "statute that attache[d] liability to present conditions stemming from past acts [and] d[id] not necessarily have retroactive effects that are subject to [substantive] due process limitations."<sup>228</sup>

Another relevant case is *United States v. Northeastern Pharmaceutical & Chemical Co.*<sup>229</sup> In that case, the Court of Appeals for the Eighth Circuit held that a defendant who had disposed of numerous fifty-five gallon drums of toxic waste on a farm was liable for cleanup costs even though it committed this offense before the passage of CERCLA.<sup>230</sup> Like in *Usery*, the party opposing the law at issue argued that it was unconstitutional because it created a "new form of liability" that "upsets otherwise settled expectations."<sup>231</sup> The Eighth Circuit, adopting the reasoning of *Usery*, rejected this contention.<sup>232</sup> The

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industry, who are not saddled with the burden of compensation for inactive miners' disabilities").

221. *See id.*

222. *Id.* at 18-19.

223. *See Jordon, supra* note 199, at 405.

224. *See generally* Ashbrook, *supra* note 193, at 1294-95.

225. Jordon, *supra* note 199, at 398.

226. *Id.*

227. 653 F. Supp. 984 (D.S.C. 1986).

228. *Id.* at 996.

229. 810 F.2d 726 (8<sup>th</sup> Cir. 1986).

230. *Id.* at 749.

231. *Id.* at 733.

232. *Id.* ("[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a

court then applied the traditional due process test, stating that “[d]ue process is satisfied ‘simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.’”<sup>233</sup> Consequently, it found that CERCLA met this standard.<sup>234</sup> The court reasoned that “substantive due process is not violated in cases when an enterprise is assigned liability because it caused or benefited from an activity.”<sup>235</sup>

#### IV. *EASTERN* - A TRANSFORMATION OR RESTATEMENT OF DUE PROCESS PRINCIPLES?

*Eastern Enterprises* was pivotal because it was one of the rare cases where a retroactive monetary provision was deemed unconstitutional, but it is uncertain whether the case transformed substantive due process jurisprudence or merely restated its core principles. While the Supreme Court has yet to clarify *Eastern Enterprises* and the lower courts have had considerable trouble interpreting the case, the latter interpretation is more persuasive. The justices composing the *Eastern Enterprises* majority did not overturn the Act merely because it was retroactive; they did so because its application was arbitrary and unfair.<sup>236</sup> This has long been the test for substantive due process.<sup>237</sup>

##### A. Justice Kennedy's Concurrence

As mentioned *supra*, *Eastern* involved a challenge to a provision of the Coal Act that forced Eastern to pay into an employee health and retirement benefit fund even though it left the coal industry decades before the passage of said act and never agreed to provide such benefits.<sup>238</sup> Unlike the rest of the majority, Justice Kennedy did not believe that the Coal Act affected a taking because in his view, it did not target a “property interest,”<sup>239</sup> but instead required Eastern Enterprises to

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new duty or liability based on past acts”).

233. *Id.*

234. *Id.* at 733-34 (“Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches . . . .”).

235. Jordon, *supra* note 199, at 400.

236. See *E. Enters. V. Apfel*, 524 U.S. 498, 539 (1998).

237. See Jordon, *supra* note 199, at 416.

238. See *id.* at 411.

239. *E. Enters.*, 524 U.S. at 540. According to Justice Kennedy, a person or corporation may hold a property interest in an estate in land, intellectual property, and a bank account. *Id.*

“perform an act, the payment of benefits.”<sup>240</sup> Further, Justice Kennedy felt that the Due Process Clause would provide a more appropriate remedy than the takings clause.<sup>241</sup>

Relying on *Usery v. Turner Elkhorn Mining Co.*, Kennedy held that the test for determining if a retroactive law violates the Due Process Clause is whether “the legislature acted in an arbitrary and irrational way.”<sup>242</sup> As such, a law may be rejected on “due process grounds only under the most egregious of circumstances.”<sup>243</sup> Furthermore, under the traditional analysis, a retroactive law does not offend the Due Process Clause if it is “clearly just and reasonable, and conducive to the general welfare.”<sup>244</sup> Applying this analysis to the facts in *Eastern Enterprises*, Justice Kennedy held that the Coal Act was unconstitutional because it was not reasonably related to the government’s interest in support of the statute.<sup>245</sup> Kennedy noted that in the past, the Court has upheld laws imposing retroactive monetary liability on employers when such laws were remedial,<sup>246</sup> but this was not one of those statutes.<sup>247</sup> Kennedy’s opinion was grounded on the idea that it was arbitrary and irrational to impose liability on a company that had not caused the injury nor had any expectation that it would have to pay pension benefits.<sup>248</sup>

### B. Dissent

The dissent agreed with Justice Kennedy’s decision to analyze the facts in *Eastern Enterprises* under the Due Process Clause.<sup>249</sup> Like Kennedy, Justice Breyer stated that the takings clause did not apply to this case because the clause is concerned with “providing *compensation* for legitimate government action that takes ‘private property’ to serve the ‘public’ good,” not with “preventing arbitrary or unfair government action.”<sup>250</sup> Moreover, like Kennedy, Breyer asserted that the majority

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240. *See id.*

241. *Id.* at 547. “[I]n a case such as this one, it cannot be said that monetary relief against the Government is an available remedy.” *Id.* at 521 (majority opinion).

242. *Id.* at 547 (Kennedy, J., concurring in the judgment and dissenting in part).

243. *Id.* at 550.

244. *Id.* at 549 (citing 1 KENT, COMMENTARIES ON AMERICAN LAW, at \*455-56).

245. *Id.*

246. *Id.* Statutes which “impose an ‘actual measurable cost of the [the employer’s] business’ which the employer had been able to avoid in the past” may be constitutional. *Id.*

247. *Id.* at 549-50.

248. *See Jordon, supra* note 199, at 414 (citing 524 U.S. at 549-50 (Kennedy, J., concurring in the judgment and dissenting in part)).

249. *Id.* (citing 524 U.S. at 554 (Breyer, J., dissenting)).

250. 524 U.S. at 554.



should not have used the takings clause because the Coal Act did not implicate property; it merely imposed “ordinary liability to pay money, and not to the Government, but to third parties.”<sup>251</sup> Notably, Breyer articulated that if the Coal Act targeted a specific fund of money, it might have violated the takings clause.<sup>252</sup> But since the Coal Act imposed only a general liability, such an analysis would be inappropriate.<sup>253</sup> In Breyer’s view, the Due Process Clause provided a much more appropriate avenue for determining the constitutionality of the Coal Act.<sup>254</sup> In addressing substantive due process, Breyer addressed the fear that relying upon the Due Process Clause could revive *Lochner*, but quickly dismissed it.<sup>255</sup>

Breyer’s substantive due process analysis can be broken down into one question: “[would it be] fundamentally unfair to require Eastern to make *future* payments for health care costs of retired miners and their families, on the basis of Eastern’s past association with these miners?”<sup>256</sup> Finding that a sufficient relationship existed between Eastern and the miners, Justice Breyer answered in the negative.<sup>257</sup>

### *C. Substantive Due Process Going Forward*

While Kennedy’s ultimate decision may have diverged from past challenges to retroactive economic legislation, his reasoning did not. Some may interpret Kennedy’s statement that severely retroactive legislation violates due process because such laws “change the legal consequences of transactions long closed . . . [and] destroy the reasonable certainty and security which are the very objects of property ownership,”<sup>258</sup> as proof that the Court was becoming less comfortable affirming laws that upset settled expectations. This statement, however, is in accordance with the traditional substantive due process analysis.<sup>259</sup> Upsetting settled expectations has always been a factor in the due process test, just not a determinative one.<sup>260</sup>

Ultimately, Kennedy, as well as the other justices, focused on the

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251. *Id.*

252. *Id.* at 555.

253. *Id.*

254. *See id.* at 556.

255. *Id.* at 557.

256. *Id.* at 558-59.

257. *Id.* at 559.

258. *Id.* at 548 (Kennedy, J., concurring in the judgment and dissenting in part).

259. *See id.* at 549-50.

260. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

same question they asked in *Usery*: did Eastern “cause the harm, and if not, did it enjoy a sufficiently direct benefit from the harm?”<sup>261</sup> Stated otherwise, if a “reasonable nexus” existed between Eastern and the alleged harm, imposing new liability on the company would not be arbitrary or irrational. In *Usery*, the Court found that such a nexus existed because the coal mine operators challenging Title IV of the Federal Coal Mine Health and Safety Act of 1969 directly benefitted from the work that led many miners to become ill with pneumoconiosis.<sup>262</sup> Similarly, in the CERCLA cases, courts found that requiring polluters to pay cleanup costs for actions taken before CERCLA was passed was appropriate because they caused the pollution and directly benefitted from it.<sup>263</sup> In *Eastern Enterprises* however, the Court found that the “causative nexus” was far too attenuated.<sup>264</sup> That is because Eastern, unlike the operators in *Usery*, left the coal industry long before the passage of the Coal Act.<sup>265</sup>

Since *Eastern Enterprises*, the only retroactive liability laws to be struck down on due process grounds are ones where the “causative nexus” between the party facing liability and the harm to be remedied is attenuated, if not non-existent altogether.<sup>266</sup> For example, in *Gibson v. American Cyanamid Co.*, the Eastern District of Wisconsin struck down as unconstitutional a Wisconsin common law rule that allowed plaintiffs who couldn’t determine which company sold the specific paint that caused their lead ingestion injuries to sue any company that sold paint in that state.<sup>267</sup> In that case, the plaintiff used this rule to sue a company that did not sell paint itself, but rather was the predecessor in interest of another company that at one time sold paint in Wisconsin.<sup>268</sup> Like other courts before it, the Eastern District of Wisconsin held that “it violates due process when there is no nexus or provable connection between a damages award and the harmful conduct of the defendant.”<sup>269</sup>

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261. Jordon, *supra* note 199, at 416.

262. 428 U.S. at 39.

263. See, e.g., *U.S. v. Ne. Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 749 (8th Cir. 1986).

264. Jordon, *supra* note 199, at 414 (citing 524 U.S. at 550 (Kennedy, J., concurring in the judgment and dissenting in part)).

265. *Id.* at 410.

266. See, e.g., *Gibson v. Am. Cyanamid Co.*, 719 F. Supp.2d 1031, 1052 (E.D. Wis. 2010).

267. *Id.*

268. *Id.* at 1048-49.

269. *Id.* at 1052.

*D. Application of substantive due process analysis to the CLEAR Act*

Even after *Eastern Enterprises*, the standard for establishing a violation of substantive due process rights in the context of retroactive economic legislation is highly unfavorable to BP's cause. In order to demonstrate such a violation, it would have to establish that the legislation at issue has no "rational legislative purpose."<sup>270</sup> Considering that BP was directly responsible for the Gulf oil spill, it would be extraordinarily difficult for the company to successfully make this argument. Conversely, it would be quite easy for the government to construct a compelling argument that section 702 does in fact serve a rational purpose. One such purpose could be to increase the likelihood that BP, the party responsible for the spill, provides appropriate redress to those harmed by it.

*Eastern Enterprises* is unlikely to save BP. Unlike in that case, where there was a weak causative nexus,<sup>271</sup> the connection between BP and the oil spill is strong. Not only did BP own the Macondo well, but it also benefitted enormously from offshore oil drilling and continues to do so.<sup>272</sup>

BP may argue that section 702 of the CLEAR Act violates due process because it upsets its settled expectation that it would only be liable for \$75 million in economic damages per spill. However, courts have consistently held that this is not enough to create a due process violation.<sup>273</sup> Even absent this precedent, BP's argument here would be unlikely to succeed because it was foreseeable that in the event of a highly destructive spill, BP would be required to pay more than \$75 million in economic damages. This is because the OPA does not shield BP for acts of gross negligence,<sup>274</sup> nor does the damages cap apply to state tort laws.<sup>275</sup>

Even in the unlikely case that courts reverse their long held stance

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270. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984).

271. *Jordon*, *supra* note 199, at 414 (citing *E. Enters. V. Apfel* 524 U.S. 498, 550 (Kennedy, J., concurring)).

272. Offshore Field Development Projects: Macondo, SUBSEAIQ, [http://www.subseaiq.com/data/Project.aspx?project\\_id=562&AspxAutoDetectCookieSupport=1](http://www.subseaiq.com/data/Project.aspx?project_id=562&AspxAutoDetectCookieSupport=1) (last visited Feb. 21, 2012).

273. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976).

274. 33 U.S.C. § 2704(c)(1)(A) (2006).

275. *See Quinn Bowman, Oil Spill Liability a Complicated Legal Web*, PBS ONLINE NEWSHOUR, June 7, 2010, [http://www.pbs.org/newshour/updates/politics/jan-june10/oillaw\\_06-04.html](http://www.pbs.org/newshour/updates/politics/jan-june10/oillaw_06-04.html); *see also* Peter J. Henning, *Looking for Liability in BP's Gulf Oil Spill*, N.Y. TIMES DEALBOOK, June 7, 2010, <http://dealbook.nytimes.com/2010/06/07/looking-for-liability-in-bps-gulf-oil-spill/>.

that retroactive liability is not automatically unconstitutional, an argument could be made that section 702 is not retroactive because it is addressing a harm that is ongoing. As noted *supra*, this argument was adopted by the *South Carolina Recycling & Disposal* court.<sup>276</sup> Specifically, that court noted that CERCLA was a remedial statute, not a retroactive statute, because it “attache[d] liability to present conditions stemming from past acts.”<sup>277</sup> Considering that those residents and businesses in the Gulf region will likely be dealing with the BP spill for years, if not decades, to come, such logic also applies to the instant case.

#### V. ALTERNATIVE CONSTITUTIONAL GROUNDS FOR OVERTURNING RETROACTIVE LIABILITY

In addition to takings and due process arguments, it is worth briefly considering arguments premised on the Ex-Post Facto Clause, Impairment of Contracts Clause, and the Bill of Attainder Clause. While applying article I, section 9: “No Bill of Attainder or ex post facto Law shall be passed” language to retroactive civil legislation may seem the logical constitutional argument, it would be futile for BP to argue that eliminating the OPA damages is unconstitutional under the ex-post facto clause because such clause was determined long ago to be applicable only to criminal cases, not to civil liabilities.<sup>278</sup> Similarly, it would be futile for BP to argue that section 702 of the CLEAR ACT violates the Impairment of Contracts Clause,<sup>279</sup> because the Supreme Court established that the clause, by its plain meaning, only applies to laws passed by the states, not the federal government.<sup>280</sup>

BP’s potential Bill of Attainder argument, although highly unlikely to succeed, may have some traction. The Bill of Attainder Clause prohibits Congress from enacting legislation that effectively “[declares] guilt, and [imposes] punishment upon, an identifiable individual [or entity], without provision of the protections of a judicial trial.”<sup>281</sup> According to the Supreme Court, in order for legislation to trigger the Bill of Attainder Clause, it must: “(1) single out a specific person or

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276. See *supra* Part III.B.; *United States v. S.C. Recycling & Disposal, Inc.*, 653 F. Supp. 984, 996 (D. S.C. 1986).

277. 653 F. Supp. at 996.

278. *Calder v. Bull*, 3 U.S. 386, 399 (1798).

279. U.S. CONST. art. I, §10 (“[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts”).

280. See *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984).

281. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 468 (1977).

class and (2) be punitive.”<sup>282</sup> To determine whether a particular law is punitive, the Court considers whether the punishment the law imposes has traditionally been prohibited by the Bill of Attainder Clause, and whether such law furthers a non-punitive objective.<sup>283</sup> Additionally, the Court may look at whether there are “less burdensome alternatives” to achieve that objective.<sup>284</sup> In making the determination whether a law violates the Bill of Attainder Clause, the court weighs all aforementioned factors together.<sup>285</sup> Thus no single factor is determinative.<sup>286</sup>

BP may argue that by making section 702 retroactive, Congress is specifically punishing the oil company for the Gulf oil spill. In support of this assertion, BP may point to comments made by Representative Holt of New Jersey during a debate in Congress over the CLEAR Act.<sup>287</sup> In particular, BP may cite Holt’s comment that “[u]nder the current law, BP is responsible for . . . only . . . \$75 million False For a spill of this magnitude, a limit as low as \$75 million is laughable.”<sup>288</sup> Furthermore, BP may bring up Holt’s statement that, “[a]fter the spill began, I led 85 of my colleagues in introducing the Big Oil Bailout Prevention Act, which would raise the liability cap now and retroactively . . . the CLEAR Act will ensure that BP is legally liable for all economic and natural resource damages it has caused.”<sup>289</sup> However, even if BP successfully demonstrates that section 702 of the CLEAR Act singles out the company, the bill will likely survive a constitutional challenge if it furthers a “nonpunitive legislative purpose.”<sup>290</sup> It is not hard to imagine arguments that Section 702 serves such a purpose. One such argument that proponents of the bill could make is that the purpose of the bill is to ensure that taxpayers are not responsible for paying for injuries which resulted from the oil spill caused by a private company.

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282. Meltz, *supra* note 72, at 7 (citing *Nixon*, 433 U.S. 425).

283. *Id.* at 7-8.

284. *Id.* at 8.

285. *Id.*

286. *Id.*

287. 156 CONG. REC. H6498 (daily ed. Jul. 30, 2010) (statement of Rep. Holt).

288. *Id.*

289. *Id.*

290. *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 674 (9th Cir. 2002).

## VI. SUPREME COURT STANDS UP FOR THE BIG GUY, AT THE EXPENSE OF THE AMERICAN WORKER

### *A. The Supreme Court Has Moved in a Decidedly Pro-Corporate Interest Direction.*

Particularly in the wake of the much maligned January 2010 decision in *Citizens United v. Federal Election Commission*,<sup>291</sup> many observers have gone back to look at the Supreme Court's position when one litigant in a case is either a major corporation or, indeed, the "nation's largest business group," the US Chamber of Commerce.<sup>292</sup> In a study by the Constitutional Accountability Center, it was found that in recent Supreme Court cases, "the Chamber won 68% of the cases in which it had participated, [and] also that its success was drawn largely along ideological lines: a cohesive, five-Justice conservative majority voted for the Chamber 74% of the time, over 30 points more than had the Court's moderate/liberal bloc."<sup>293</sup> The Chamber of Commerce often weighs in on one side of cases pending at the Supreme Court, and the Chamber then "participate[s] as either a party, or, more often, as an *amicus curiae*, a 'friend of the court.'"<sup>294</sup> The position taken by the Chamber of Commerce is always pro-business, in fact the Chamber's slogan, "Fighting for your Business," is prominently plastered on their

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291. 130 S. Ct. 876 (2010). In *Citizens United*, the Supreme Court "expanded corporate campaign spending power by holding that, although '[t]he government can regulate corporate political speech through disclaimer and disclosure requirements,' it is unconstitutional for the government to suppress corporate political speech entirely. In doing so, the Court struck down . . . previous decisions that limited the ability of corporations to spend money on electioneering communications in federal elections." Breanne Gilpatrick, *Removing Corporate Campaign Finance Restrictions in Citizens United v. Federal Election Commission*, 34 HARV. J.L. & PUB. POL'Y 405, 405 (2011) (citing 130 S. Ct. at 886). This decision has been met with much criticism from the legal community, already on its way to surpassing even the negative reaction to *Eastern Enterprises*. See, e.g., *id.*; Alexander Polikoff, *So How Did We Get Into This Mess? Observations on the Legitimacy of Citizens United*, 105 NW. U. L. REV. COLLOQUY 203 (2011); Robert L. Kerr, *Naturalizing the Artificial Citizen: Repeating Lochner's Error in Citizens United v. Federal Election Commission*, 15 COMM. L. & POL'Y 311 (2010).

292. See Mark Sherman, *Supreme Court Favors Business, Study Says: Research Mirrors Democrats' Stance on Picking Kagan*, BOSTON GLOBE, June 11, 2010, available at [http://www.boston.com/news/nation/washington/articles/2010/06/11/supreme\\_court\\_favors\\_business\\_study\\_says/](http://www.boston.com/news/nation/washington/articles/2010/06/11/supreme_court_favors_business_study_says/).

293. *Open for Business: Tracking the Chamber of Commerce's Supreme Court Success Rate from the Burger Court through the Rehnquist Court and into the Roberts Court*, Constitutional Accountability Ctr., 1 (Dec. 2010), [http://theusconstitution.org/blog.history/wp-content/uploads/2010/12/Rehnquist-Chamber-Study-12-17-10.pdf](http://theusconstitution.org/blog/history/wp-content/uploads/2010/12/Rehnquist-Chamber-Study-12-17-10.pdf). [hereinafter "Open for Business"].

294. *Id.*

literature, including their website.<sup>295</sup> Perhaps the fighting for your business mantra has recently gone too far. The Chamber itself has become so swept up by conservative interests, all in the name of protecting American business, that the Chamber has been characterized as blindly supporting countless conservative causes, some with little specific effect on the business community.<sup>296</sup>

Some analysts have gone so far as to characterize the friendliness with which the Supreme Court has bestowed upon the Chamber and corporate interests as a throwback to the ever-reviled *Lochner* era.<sup>297</sup> In discussing the *Citizens United* decision as the contemporaneous example, a study by the Constitutional Accountability Center noted:

The *Lochner* era lasted only as long as the Court continued to have five Justices willing to sign on to its insupportable ideas. When the Court changed, the *Lochner*-era precedents, and the idea that corporations had the same fundamental rights as 'We the People,' were quickly disowned. *Citizens United* deserves a similar fate.<sup>298</sup>

It shouldn't seem a stretch to extend the sentiment expressed in opinions like the one quoted, and shared by the likes of President Obama,<sup>299</sup> beyond the *Citizens United* decision and onto the general behavior of the Supreme Court in their ever-increasing deference to corporations. In fact, the Supreme Court has clearly moved in the

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295. See U.S. CHAMBER OF COMMERCE, <http://www.uschamber.com/> (last visited Feb. 8, 2011).

296. See Brad Friedman, Fox "News" Fans Flood Anti-U.S. Chamber Campaign with Death Threats, *Racial Attacks*, HUFFINGTON POST, Dec. 14, 2009, [http://www.huffingtonpost.com/brad-friedman/fox-news-fans-flood-anti\\_b\\_389276.html](http://www.huffingtonpost.com/brad-friedman/fox-news-fans-flood-anti_b_389276.html). The Fox News Fans' behavior came in reaction to a liberal organization, the "Velvet Revolution" having put a \$200,000 "bounty" out for the arrest and conviction of Chamber of Commerce CEO Tom Donahue. See Judson Berger, *Activist Group Puts Bounty on Chamber of Commerce CEO*, FOXNEWS.COM, Dec. 7, 2009, <http://www.foxnews.com/politics/2009/12/07/liberal-group-offers-reward-information-chamber-boss/>.

297. See David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past and Uncertain Future of Corporate Personhood in American Law*, Constitutional Accountability Ctr., 2 (2010), [http://www.theusconstitution.org/upload/fck/file/File\\_storage/A%20Capitalist%20Joker\(1\).pdf?phpMyAdmin=TzXZ9IzqiNgbGqj5tqLH06F5Bxe](http://www.theusconstitution.org/upload/fck/file/File_storage/A%20Capitalist%20Joker(1).pdf?phpMyAdmin=TzXZ9IzqiNgbGqj5tqLH06F5Bxe).

298. *Id.*

299. See Darlene Superville, *Obama Weekly Address VIDEO: President Blasts Supreme Court Over Citizens United Decision*, HUFFINGTON POST, Jan. 23, 2010, [http://www.huffingtonpost.com/2010/01/23/obama-weekly-address-vide\\_n\\_434082.html](http://www.huffingtonpost.com/2010/01/23/obama-weekly-address-vide_n_434082.html) ("Obama said [*Citizens United*] means public servants who stand up to Wall Street banks, oil companies, health insurers and other powerful interests could find themselves under attack when election time rolls around").

direction of pro-corporations generally, as some recent studies have shown.<sup>300</sup> This clear shift in ideology could be perceived as a warning of the shape of things to come, that the Supreme Court may grasp at opinions like the *Eastern Enterprises* plurality in order to do the bidding of corporations like BP.

*B. How the Gulf Labor Force Will be Affected by the Supreme Court's Pro-Corporate Reaching*

This Note considers the possible link between the Supreme Court's current jurisprudence, corporate favoritism, and the retroactive nature of a bill like the CLEAR Act, on a major corporation (BP) and a major industry (oil). This Note contends that it is entirely possible that the Supreme Court could extend their narrow *Eastern Enterprises* plurality to invalidate provisions of the CLEAR Act if passed, and given the Supreme Court's bent towards corporate interests, the current Court would be acting wholly in concert with many of their recent 5-4 decisions, if they were to overturn the repeal of the damages cap that the CLEAR Act provides.

While BP and their stockholders would be the potential victor in a constitutional invalidation of the damages cap repeal, the victims of this scenario would most likely be the labor force in the gulf region. Since the OPA has no damages cap linked to cleanup efforts,<sup>301</sup> purely environmentally affected parties should be able to achieve some redress, although even this may take many years. Workers in the Gulf, such as fisherman, shrimpers, tourism and hospitality industry workers, could potentially fall victim to a future litigation battle in which BP declares their losses as illegitimate, thus negating BP's waiver of the damages cap. Again, using the Exxon Valdez litigation history as a guide, this Note contends that this very situation may not resolve itself for decades, long after popular support for holding BP accountable has wavered.

The party left holding the bag will be the innocent workers in the Gulf, stripped of their livelihoods through no fault of their own, following the double whammy of Hurricane Katrina and the Deepwater

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300. See Open for Business, *supra* note 293. For illustration the studies provide methodology for their research, as well as some helpful charts that clearly show the positions taken by various Justices and Courts regarding all cases in which the Department of Commerce appears as party or *amicus curiae*. *Id.*

301. Nathan Richardson, *Deepwater Horizon and the Patchwork of Oil Spill Liability Law* 3 (Resources for the Future, May 2010), available at <http://www.rff.org/rff/documents/RFF-BCK-Richardson-OilLiability.pdf>.



Horizon oil spill. And while responsibility for Katrina's damage may fall only upon Mother Nature, with some possible exacerbation from FEMA, there is a traceable party to hold responsible for compensating the victims of the Gulf oil spill.

## VII. CONCLUSION

Despite the feeling that has become pervasive in Congress, and beyond to the public at large, that BP has been a (somewhat) responsible corporate actor, stepped up to the plate and begun to take care of the victims of the oil spill, this should serve as no excuse for congressional acquiescence. While BP may have adopted a supposedly noble agenda, one look at the tribulations of the Gulf labor force makes clear that reform is still absolutely necessary.

BP and its supporters (stockholders, the Chamber of Commerce, and other large oil conglomerates) may argue that its waiver has made irrelevant the need to raise the damages cap, though future affected communities may still need the protection that would come from passing the CLEAR Act. It is easy to forget, that at the time of the Exxon Valdez spill, the very idea of another spill that could be astronomically larger in proportion and damage, wasn't even on legislators minds. Shouldn't we learn from our mistakes, including those of a shortsighted Congress? Just because the magnitude of the BP oil spill seemed unrealistic to legislators in 1990, doesn't give today's elected officials in Washington the right to ignore the possibility that the next oil spill to come along may make the Gulf spill look like a drop of motor oil in a street puddle.

Building upon the popular support for holding BP accountable, the CLEAR Act (or similar legislation) should still be passed; and full resistance to any legal challenge to the Act's retroactivity should be mounted in order to ensure that the Supreme Court doesn't make the grave mistake of overturning the Act's repeal of the damages cap. *Eastern Enterprises'* plurality was wrong, in much the same way that the *Lochner* decision was wrong, and just like the jurisprudence coming from the time following *Lochner*, the current Supreme Court's corporate support will be looked back upon in the future as an aberration. Not allowing the CLEAR Act to wallow in committee and perish, paired with loud opposition to the corporate Court's agenda, may be the first significant shot in the struggle against corporate dominance of the American justice system, and the best shot that the labor force in the Gulf has at being compensated for its enormous loss.

Jacob Claveloux\* and Jon Stockman\*\*

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