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The Civil Rights Act of 1991, Retroactivity, and Continuing Violations: The Effect of Landgraf v. USI Film Products and Rivers v. Roadway

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COMMENT

THE CIVIL RIGHTS ACT OF 1991, RETROACTIVITY, AND CONTINUING VIOLATIONS: THE EFFECT OF *LANDGRAF V. USI FILM PRODUCTS* AND *RIVERS V. ROADWAY EXPRESS*

I. INTRODUCTION

The Civil Rights Act of 1991[1] (the Act) made significant changes to the major employment discrimination statutes. In addition to restoring the law that was in effect prior to a number of Supreme Court decisions which eroded the civil rights statutes,[2] the Act also added remedies that were omitted from previous legislation.[3] One important area that was unclear at the time of the Act's passage was the issue of retroactivity. In light of the Act's unclear legislative history,[4] ambiguous

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1. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 42 U.S.C.).

2. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 259 (1991) (holding that Title VII does not apply to U.S. citizens in foreign countries); West Virginia Univ. Hosp. v. Casey, 499 U.S. 83 (1991) (holding that recovery of expert witness fees in civil litigation could not be shifted to losing party pursuant to § 1988); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (limiting the scope of § 1981); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) (holding that the statute of limitations for challenging seniority systems begins to run at the time the seniority system is adopted); Martin v. Wilks, 490 U.S. 755 (1989) (holding that challenging employment decisions made pursuant to consent decrees is permissible); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (holding that the burden of proof in disparate impact cases rests with plaintiff to demonstrate that it is the application of an employment practice that has led to the disparate impact); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that a defendant in a Title VII gender discrimination case may avoid liability by showing the same decision would have been made without taking gender into account).

3. *See* § 102 of the Act permitting compensatory and punitive damages for intentional discrimination under Title VII; *see also infra* note 30 and accompanying text.

4. *See infra* part II.C.

statutory language,[5] and seemingly contradictory Supreme Court precedent,[6] the Act's retroactive nature has been widely litigated[7] and discussed.[8]

The Supreme Court ruled on the retroactivity issue in the companion cases *Landgraf v. USI Film Products*[9] and *Rivers v.*

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5. *See infra* part II.B.

6. *See infra* part III.

7. As of April 1992, 53 federal district courts had ruled on the issue and refused to apply the act retroactively according to Fray v. Omaha World Herald Co., 960 F.2d 1370, 1383-84 (8th Cir. 1992) (appendix). As of April 17, 1992, 84 federal courts had ruled on the issue with 49 against and 35 for retroactive application according to the Lawyers Committee for Civil Rights Under Law. *See* Ruth Marcus, *A Percolating Legal Dispute on Civil Rights: Government's Differing Positions on Issue of Retroactivity Now Before Supreme Court*, WASH. POST, Apr. 17, 1992, at A21.

8. *See, e.g.*, James H. Coil III & Amy Weinstein, *Past Sins or Future Transgressions: The Debate Over Retroactive Application of the 1991 Civil Rights Act*, 18 EMPLOYEE REL. L.J. 5, 25 (1992) ("Until the Supreme Court unravels the tangled mess created by Congress, the retroactivity issue will continue to plague plaintiffs, employers, their lawyers, and the courts."); Janice R. Franke, *Retroactivity of the Civil Rights Act of 1991*, 31 AM. BUS. L.J. 483 (1993); Jack M.H. Frazier & Michael A. Dymersky, *A Quandary of the Civil Rights Act of 1991: Is the New Law Retroactive?*, 19 J.C. & U.L. 259 (1993); Daniel V. Kinsella, *The Civil Rights Act and the Retroactivity Muddle*, 80 ILL. B.J. 500 (1992); Scott S. Moore, *Retroactivity—the Civil Rights Act of 1991*, 71 NEB. L. REV. 879 (1992); Richard L. Neumeier, *Civil Rights Act Of 1991: What Does It Do? Is It Retroactive?*, 59 DEF. COUNS. J. 500 (1992); Thamer E. Temple III, *Retroactivity of the 1991 Civil Rights Act in Title VII Cases*, 43 LAB. L.J. 299 (1992); David Allen, Comment, *Retroactivity of the Civil Rights Act of 1991*, 44 BAYLOR L. REV. 569 (1992); Michele A. Estrin, Note, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 MICH. L. REV. 2035 (1992); Douglas B. Kauffman, Comment, *Retroactivity of the 1991 Civil Rights Act—That "Little" Issue Congress Failed to Address*, 23 CUMB. L. REV. 425, 425 (1992-1993) ("Every federal court in the United States is now faced with the problem which this proposed amendment presents. Why? Because Congress in this new civil rights legislation punted on the question of whether or not the Act applies retroactively") (quoting King v. Shelby Medical Ctr., 779 F. Supp. 157 (N.D. Ala. 1991)); Brian Neff, Comment, *Retroactivity and the Civil Rights Act of 1991: An Opportunity for Reform*, 1993 UTAH L. REV. 475 (1993); Karen R. Stein, Comment, *Retroactivity of the Civil Rights Act of 1991: A Decision Not To Decide*, 14 BERKELEY J. EMPLOYMENT & LAB. L. 275 (1993); Daniel P. Tokaji, Note, *The Persistence of Prejudice: Process-Based Theory and the Retroactivity of the Civil Rights Act of 1991*, 103 YALE L.J. 567 (1993); Linda Urbanik, Comment, *Executive Veto, Congressional Compromise, and Judicial Confusion: The 1991 Civil Rights Act—Does It Apply Retroactively?*, 24 LOY. U. CHI. L.J. 109 (1992); Rose Mary Wummel, Note, *Escaping the Dead Hand of the Past: The Need for Retroactive Application of the Civil Rights Act of 1991*, 19 J. LEGIS. 223 (1993); Kristine N. McAlister, Recent Development, *Retroactive Application of the Civil Rights Act of 1991*, 45 VAND. L. REV. 1319 (1992).

9. 114 S. Ct. 1483 (1994).

Roadway Express, Inc.[10] In these cases, the Court refused to apply certain provisions of the Act to past conduct. In making these rulings the Court defined a new approach to determine a statute's retroactivity: a court must first determine the congressional intent as to the retroactivity of the statute; if there is no clear statement of such intent, the court will apply the statute retroactively only if vested rights are not affected.[11]

Examination of the Civil Rights Act of 1991 and the *Landgraf* and *Rivers* decisions must begin with a general discussion of retroactivity. Courts have traditionally looked upon the retroactive application of statutes with disfavor.[12] In fact, several constitutional provisions specifically prohibit certain types of retroactive legislation.[13] The constitutionality of retro-

10. 114 S. Ct. 1510 (1994).

11. *See infra* part IV.

12. *See, e.g.*, Ray H. Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 NW U. L. REV. 540 (1956); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960); Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936); Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 229 (1927). This bias comes from a variety of factors, including the ability to plan conduct with certainty of the legal consequences, the desire for stability, fear of individualized legislation, and a strong common law tradition. Hochman, *supra* at 692; *see also* Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 427 (1982) ("[R]etroactive lawmaking violates what is often called the rule of law, namely, an entitlement of persons to guide their behavior by impartial rules that are publicly fixed in advance.").

13. Article I of the United States Constitution prohibits both Congress (U.S. CONST. art. I, § 9, cl. 3) and the states from passing ex post facto laws. These clauses are limited to penal legislation only. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390-91 (1798). Article 1, § 10, cl. 1 prohibits states from passing laws "impairing the Obligation of Contracts." This clause is not interpreted literally. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). Other clauses may also implicate retroactivity concerns. *See* U.S. CONST. amend. V (Takings Clause) and U.S. CONST. art. I, §§ 9-10 (prohibitions on bills of attainder). The Due Process Clauses in the Fifth and Fourteenth Amendments also protect interests of fair notice and reliance. "[A] justification sufficient to validate a statute's prospective application under the [Due Process] Clause 'may not suffice' to warrant its retroactive application." *Landgraf*, 114 S. Ct. at 1497 (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976)).

active civil laws has been questioned in the past,[14] although it is now settled.[15]

One definition of a retroactive statute is a statute that changes the legal significance of pre-enactment conduct.[16] This definition of retroactive legislation is problematic because it can be read to encompass nearly all laws.[17] Therefore, rather than determining the effect of a statute on pre-enactment conduct, it is more helpful to determine the rights that must be protected.[18] Traditional definitions of retroactivity have shrouded the analysis of the retroactivity question with conclusory terms[19]

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14. *Compare* Hochman, *supra* note 12, at 696-97 (asserting three factors to be weighed in determining constitutionality: the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted pre-enactment right, and the nature of the right which the statute alters) *with* Greenblatt, *supra* note 12, at 550 (approaching retroactive statutes not as a "unique problem" but simply using general rules of statutory and constitutional interpretation).

15. Constitutional challenges to retroactive civil legislation are no longer common because the statutes are routinely upheld. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 275 (1988); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.9, at 409 (4th ed. 1991) ("[R]etroactive legislation does have to meet a burden not faced by legislation that has only future effects. . . . But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.") (quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984)).

16. Hochman, *supra* note 12, at 692. One commentator has further divided this idea into three different concepts. A law is retroactive if it extinguishes legal rights previously acquired, if it creates a current right or duty based on a previous act, or if it gives a previous act the effect of creating a right or duty. Smith, *supra* note 12, at 232-33. Another commentator has rejected Smith's division, saying that the differentiation "is more confusing than useful. A distinction . . . [that] seems to rest on semantics." Greenblatt, *supra* note 12, at 544 n.22.

Another commentator has divided retroactive statutes into three different categories: "laws that alter the legal status . . . of some pre-enactment action or event [; . . .] "laws that . . . make a legal judgment regarding that [preenactment] action easier or harder to obtain; . . . [and] laws that do not alter the preenactment status of an action but substantially affect expectations stemming from that action." Munzer, *supra* note 12, at 426.

17. "There is no such thing as a law that does not extinguish rights, powers, privileges, or immunities acquired under previously existing laws. That is what laws are for." Smith, *supra* note 12, at 233.

18. Greenblatt, *supra* note 12, at 544 n.22, 548.

19. The problems of retroactivity "lie mystically shrouded in the garb of such conclusory legalisms as vested and nonvested rights, jurisdictional and statutory facts, curative and non-curative legislation, and right and remedy." *Id.* at 540.

without an explanation as to why a right must be protected.[20] Common distinctions include substance and procedure,[21] vested and nonvested rights,[22] and the relationship of the timing of an Act's passage to the affected litigation's procedural posture.[23]

While the Court in *Landgraf* and *Rivers* determined the scope of the Act's provisions rather than the constitutionality of an expressly retroactive version of the Act, the Court employed the same language used by commentators discussing retroactivity in general. These definitional problems plagued the *Landgraf* Court in its determination of the scope of the Act. The Court based its decisions on conclusory legal terms and did not exam-

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20. *See* Gregory J. DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered*, 10 OHIO N.U. L. REV. 253, 274 (1983); Greenblatt, *supra* note 12, at 561-62; Gene A. Maguire, Note, *Retroactive Application of Statutes: Protection of Reliance Interests*, 40 ME. L. REV. 183, 203 (1988). One theory is based on protecting expectations that are both rational (based on a common interpretation of the law) and legitimate (based on the purpose of the law). Even rational and legitimate expectations may be outweighed by societal interests. *See* Munzer, *supra* note 12.

21. "[C]ourts relying on the *substantive/procedural rights* analysis have ignored parties' reliance interests." Wummel, *supra* note 8, at 254.

22. Not allowing retroactive effect whenever "substantive" rights are involved "fails to involve courts in any examination of the effects of particular laws and instead applies a stringent and unyielding test. . . . With some statutes, however, retroactivity can . . . actually serve the cause of legality. . . . [I]t can serve to heal infringements of the principles that like cases should receive like treatment." Hicks v. Brown Group, Inc. 982 F.2d 295, 300 (8th Cir. 1992) (Heany, J., dissenting) (citing Estrin, *supra* note 8, at 2048-50).

23. Retroactivity may be thought of as functioning differently in two different situations: cases where the change occurs before the filing of a suit and cases where the change is made after a suit has been filed but before final adjudication. A commentator has indicated that the differing precedent of the Supreme Court, *see infra* part III, can be reconciled based on when the change in law occurred.

> Under Supreme Court precedent, the *Bowen* presumption against retroactivity should apply only to those cases in which the change in statutory law occurs before any adjudication of the dispute, while the *Bradley* presumption in favor of retroactivity should apply only to those cases in which the change in statutory law occurs between the decisions of the trial and appellate courts.

McAlister, *supra* note 8, at 1331. Treating these situations differently is illogical and leads to unfair results. The retroactive nature of a law should either apply to both situations or neither situation. *See, e.g.*, Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 854 (1990) (Scalia, J., concurring); McAlister, *supra* note 8, at 1332.

ine the underlying rights affected by these particular cases and the Act.[24]

The Act amended and expanded five important employment discrimination statutes: Title VII of the Civil Rights Act of 1964 (Title VII),[25] the Civil Rights Act of 1866 (Section 1981),[26] the employment provisions of the Americans with Disabilities Act of 1990 (ADA),[27] the Age Discrimination in Employment Act (ADEA),[28] and the Civil Rights Attorney's Fees Awards Act of 1976.[29] The Act's major provisions include permitting the award of compensatory and punitive damages involving intentional discrimination in Title VII and ADA cases,[30] allowing jury trials in those cases,[31] restoring the scope of section 1981 claims to pre-1989 interpretation,[32] and relaxing the plaintiff's burden in disparate impact[33] and mixed motive cases.[34]

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24. *See infra* part IV.

25. 42 U.S.C. § 2000e to bb-4 (1988 & Supp. V 1993).

26. 42 U.S.C. § 1981 (1988 & Supp. 1993).

27. 42 U.S.C. §§ 12101 to 12213 (1988 & Supp. V 1993).

28. 29 U.S.C. §§ 621 to 634 (1988 & Supp. V 1993).

29. 42 U.S.C. § 1988 (1988 & Supp. V 1993).

30. Before the Act, plaintiffs in Title VII cases were limited to equitable, "make-whole" relief remedies in contrast to § 1981 claims where plaintiffs were entitled to damages in addition to equitable relief. Section 102 of the Act authorizes plaintiffs in Title VII and ADA actions to seek compensatory and punitive damages in cases of intentional discrimination. The damages provisions are not available for disparate impact or mixed motive actions and are limited to cases where the plaintiff can also seek damages under § 1981. Furthermore, damages are limited to a specific dollar amount based on the size of the employer. *See* Stuart H. Bompey & John D. Giansello, *The Civil Rights Act of 1991: An Analysis* in THE CIVIL RIGHTS ACT OF 1991: ITS IMPACT ON EMPLOYMENT DISCRIMINATION LITIGATION 100-02 (Law Institute Handbook 429, 1992).

31. If the plaintiff is seeking compensatory and punitive damages, jury trials are available for Title VII and ADA claims. Section 1981 plaintiffs retain the right to jury trial. *See id.* § 103.

32. Section 101 of the Act was adopted in response to the Supreme Court's ruling in Patterson v. McLean Credit Union, 491 U.S. 164 (1989), which limited § 1981 by holding that it "does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." *Patterson*, 491 U.S. at 171. The *Patterson* decision was unexpected and limited § 1981 beyond the prevailing application by courts at that time. *See* Bompey & Giansello, *supra* note 30, at 99. Section 101 of the Act was intended to restore § 1981 to its pre-*Patterson* status. *Id.* at 99-101. Section 101 defines the right to "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Civil Rights Act of 1991, § 101, 42 U.S.C. § 1981(b) (Supp. V 1993).

33. The disparate impact provisions of the Act are intended to restore the law to

This comment explains that the *Landgraf* and *Rivers* decisions do not adequately deal with the underlying purposes of the Act. Part II examines the Court's test for determining congressional intent in retroactivity cases. The Court considered both the language and the legislative history of the Act while professing to use a clear statement test. Part II also notes that the Court examined evidence far beyond the limits of such a test while ignoring certain canons of statutory construction usually associated with the clear statement approach. Since the Court found no clear congressional intent, it had to apply a judicial presumption as to the retroactivity of the statute.

Prior to *Landgraf*, the Court had utilized two conflicting presumptions regarding the retroactivity of civil legislation. Part III reviews these differing presumptions, and Part IV examines how the *Landgraf* Court formulated a new test to reconcile the conflicting precedent. The new test relies on an artificial distinction that will cause lower courts difficulty in applying the test. The conflicting views of the majority and dissent, while applying similar tests, nevertheless show the difficulty that lower courts inevitably face. Part IV also analyzes the test proposed in the *Landgraf* concurring opinion. This test, while conceptually more satisfying, does not offer lower courts a clearer basis for decision. The underlying problems of the test laid out in *Landgraf* are discussed in Part V. Even if the Court developed a clearer test for the presumption of retroactivity, that test would necessarily ignore the equities of any case involved.

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the state existing before the decision in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). Under the Act, if a plaintiff shows a facially neutral practice has a disproportionately adverse impact on the protected group, the employer must demonstrate that the practice is related to the job in question and is a "business necessity." The plaintiff can then show an alternative practice is available that would not have the adverse impact but the employer did not adopt it. *See* Bompey & Giansello, *supra* note 30, at 104-15.

34. Section 107 of the Act reverses the Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). A plaintiff will prevail by showing an employment decision was motivated in part by an unlawful discriminatory reason. The protected characteristic must only have contributed to the decision, it need not be the only basis for it. *See* Bompey & Giansello, *supra* note 30, at 117-21.

Part VI turns to the doctrine of continuing violations. Continuing violations are used in employment decision cases to assign liability to past conduct. Part VI addresses prior Court decisions regarding the law of continuing violations and highlights the interesting parallels between retroactivity and continuing violations. Part VII suggests that the continuing violation theory may offer a basis for plaintiffs to recover damages for pre-Act conduct even after the *Landgraf* and *Rivers* decisions. This comment concludes with the proposition that Congress must again address the issue due to the Court's recent restrictive reading of the employment discrimination statutes.

II. CONGRESSIONAL DETERMINATION OF RETROACTIVITY

A court must first determine congressional intent when deciding whether a statute must be applied retroactively.[35] One issue raised in *Landgraf* concerned which standard the Court should use to examine that intent. Courts can examine the issue of retroactivity through conventional statutory interpretation, or they can require Congress to provide a clear statement[36] of its intent for a statute to be applied retroactively.

Courts have traditionally employed a variety of methods to determine the meaning of a statute. These methods include looking to the plain language of the statute, the congressional intent evidenced through legislative history, and the "spirit" or "purpose" of the statute.[37] In addition, courts have utilized the

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35. "Where the congressional intent is clear, it governs." Kaiser Aluminum & Chem. Corp. v. Borjorno, 494 U.S. 827, 837 (1990).

36. "[A] statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears." *Id.* at 844 (Scalia, J., concurring) (quoting Miller v. United States, 294 U.S. 435, 439 (1935)); *see also* United States v. Magnolia Petroleum Co., 276 U.S. 160, 162-63 (1928) ("statutes are not to be given retroactive effect . . . unless the legislative purpose so to do plainly appears"); United States Fidelity Guar. Co. v. United States *ex rel* Struthers Wells Co. 209 U.S. 306, 314 (1908) (examining the manifest intent of Congress to answer the question of retroactivity); Murray v. Gibson, 56 U.S. (15 How.) 421, 423 (1853) (applying a retroactive effect only if there is express language or "by necessary and unavoidable implication"); United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806) (stating that statutes should not apply retroactively unless the text is "so clear, strong, and imperative that no other meaning can be annexed to them.").

37. *See* Philip P. Frickey, *The Faegre & Benson Lecture: From the Big Sleep to*

traditional canons of statutory interpretation.[38] Recently, the Court has been more inclined to use a "literalist reading of statutory terms"[39] to determine statutory meaning. A literalist reading of statutes is Justice Scalia's only method of interpretation.[40]

In *Landgraf*, the Court purports to use a clear statement test in examining the Act. The majority, however, examines evidence that goes far beyond a pure clear statement approach.[41] *Landgraf*, therefore, leaves open the question of whether Congress must offer a clear statement as to a statute's retroactivity or if the Court may find retroactivity using other methods of statutory interpretation.

A. *Clear Statement Defined*

The clear statement test, a manifestation of the new textualism method of statutory interpretation,[42] grew out of the problems inherent in the traditional methods of ascertaining congressional intent and purpose.[43] Limiting statutory in-

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the Big Heat: The Revival of Theory in Statutory Interpretation, 77 MINN. L. REV. 241, 241 (1992).

38. *See, e.g.*, REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 227 (1975); NORMAN SINGER, SUTHERLAND STATUTORY CONSTRUCTION §§ 47.01-47.38 (5th ed. 1992).

39. Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 894 (1982).

40. *See generally* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

41. As Justice Scalia stated:

> The Court, however, is willing to let that clear statement be supplied, not by the text of the law in question, but by individual legislators who participated in the enactment of the law, and even legislators in an earlier Congress which tried and failed to enact a similar law. . . . This effectively converts the "clear statement" rule into a "discernible legislative intent" rule—and even that understates the difference.

Landgraf, 114 S. Ct. at 1522 (Scalia, J., concurring).

42. *See generally* Eskridge, *supra* note 40.

43. *See* Frickey, *supra* note 37, at 249-51. The two other major schools of statutory interpretation are purposivism and intentionalism. The purposivism school, embodied in the works of Hart and Sacks, calls for interpreting statutes so that they are rational and functional, in the same fashion as interpreting constitutions and common law. Posner's "imaginative reconstruction," or intentionalism, encourages judges to determine what the legislature would have decided if faced with the facts in the case at hand. *Id.*

terpretation to only the text in question has been justified in terms of separation of powers between Congress and the judiciary and in terms of the institutional competence of the different branches.[44]

The clear statement approach looks only to the words of the statute, as "the text is all that the two houses of Congress vote on and the President signs."[45] The clear statement, or plain meaning test, looks at the common definitions of the words used, as well as several structural arguments.[46] While the clear statement test has been criticized,[47] the Court professed to adopt it in *Landgraf*.

B. *Language of the Act*

Consistent with the clear statement test, the Court in *Landgraf* first looked at the language of the Act. The petitioners contended that the plain language indicated a congressional intent for retroactivity.[48] The petitioner's argument relied on the statement of section 402(a) that reads: *"Except as otherwise*

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44. Note, *supra* note 39, at 900-04; *see also* Eskridge, *supra* note 40. Judges should limit their power in interpreting statutes for several reasons: they are not elected and should not subvert the will of the elected legislative branch; restrictive judicial interpretation will force the legislature to directly address an issue; the legislature can always overrule judicial statutory interpretations by amending the statutes in question; legislative history is ambiguous and hard to determine for the institution as a whole; and interpretations will be more predictable and certain. *See, e.g.*, Frickey, *supra* note 37, at 253-54; William Luneberg, *Justice Rehnquist, Statutory Interpretation, The Policies of Clear Statement, and Federal Jurisdiction*, 58 IND. L.J. 211 (1983); Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160 (1990).

For the criticism that the clear statement test ignores the various obstacles minority groups face in the political process, see Tokaji, *supra* note 8, at 570-71.

45. Frickey, *supra* note 37, at 254.

46. The structural arguments include how a word or phrase is used elsewhere in the same statute or how it is used in other statutes; how possible meanings fit within the statute as a whole (i.e., does one meaning render other provisions duplicative or superfluous); and the interaction of different statutory schemes (assuming Congress intends all laws to function together). Eskridge, *supra* note 40, at 660-62.

47. *See generally* Eskridge, *supra* note 40. The test has been criticized for being too rigid, unrealistic for congressional processes, and uncritical. *See, e.g.*, Frickey, *supra* note 37, at 258; Note, *supra* note 39, at 905, 907. For reasons supporting the clear statement test, see *supra* note 44.

48. "Petitioner's primary submission is that the text of the 1991 Act requires that it be applied to cases pending on its enactment." *Landgraf*, 114 S. Ct. at 1489.

specifically provided, this Act . . . shall take effect upon enactment."[49] By itself, this provision gives no indication that the act applies retroactively.[50] However, when read in conjunction with two other sections of the Act, sections 402(b) and 109(c), this provision could indicate retroactivity.[51]

Section 402(b) specifically prohibits retroactive application in certain cases: "Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983."[52] This section was written to prevent application of the Act in a specific lawsuit.[53] Section 109(c) exempts the portions of the Act regarding overseas employers from applying retroactively: "The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act."[54]

Sections 402(b) and 109(c) specifically preclude retroactivity. If Congress, in certain sections, stated that the Act does not apply retroactively, the maxim of *expressio unuis est exclusio alterius*[55] would indicate that sections which do not specifically

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49. Civil Rights Act of 1991, § 402(a) (emphasis added) (note to 42 U.S.C. § 1981 (Supp. V 1993)).

50. "That language does not, by itself, resolve the question before us." *Landgraf*, 114 S. Ct. at 1493.

51. Although not addressed by the Court in *Landgraf*, the definition of "complaining party" in § 102 can be read to preclude retrospective application. The term "complaining party" is defined in part as "the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under Title VII . . . ." Civil Rights Act of 1991, § 102(d)(1) (emphasis added). This language indicates that the statute only applies to persons who have not yet brought an action. *See* Van Demeter v. Barr, 778 F. Supp. 83, 85 (D.D.C. 1991).

52. Civil Rights Act of 1991, § 402(b) (note to 42 U.S.C. § 1981 (Supp. V 1993)).

53. "The parties agree that § 402(b) was intended to exempt a single disparate impact lawsuit against the Wards Cove Packing Company." *Landgraf*, 114 S. Ct. at 1493.

54. Civil Rights Act of 1991, § 109(c) (note to 42 U.S.C. § 2000e (Supp V 1993)).

55. The inclusion of one thing implies the exclusion of others. For examples of *exclusio alterius* arguments see, for example, Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 46-47 & n.22 (1989); Coit Independence Joint Venture v. FSLIC, 489 U.S. 561, 571-74 (1989); Karahalios v. National Fed'n of Fed. Employees, Local 1263, 484 U.S. 527, 532-33 (1988); Pittston Coal Group v. Sebben, 488 U.S. 105, 115-17 (1988); Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 836-37 (1988); Honig v. Doe, 484 U.S. 305, 325 (1988); Lukhard v. Reed, 481 U.S. 368, 376-

prohibit retroactivity should apply to preexisting claims. In addition, if the Act did not apply retroactively except for sections 402(b) and 109(c), the language in those sections precluding retroactivity would be superfluous.[56]

The Court rejected both the *exclusio alterius* argument and the surplusage argument by claiming that sections 402(b) and 109(c) are "comparatively minor and narrow provisions in a long and complex statute."[57] The Court then stated that the question of retroactivity was too important[58] to infer congressional intent based on those statutory arguments.[59] The Court refused to "assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message"[60] concerning the Act's effect on pending cases.

Even while claiming to follow a clear statement test, the Court did not accept the structural arguments used to give meaning to statutes. This suggests the Court was not actually using a clear statement test. A likely reason is the Court's feeling that retroactivity is a special case that does not fit into normal methods of interpretation.

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77 (1987) (plurality opinion). This canon was revived by the Court in 1974 in the case of National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers (Amtrak), 414 U.S. 453, 458 (1974) (citing Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929)). *See also* Note, *supra* note 39, at n.28.

For an opinion criticizing *exclusio alterius* arguments, see *In re* American Reserve Corp., 840 F.2d 487, 492 (7th Cir. 1988). This canon has been condemned "because it is not a recognized precept of grammar or logic and poorly reflects the multifaceted decisionmaking structure of Congress." Eskridge, *supra* note 40, at 664.

56. The Court has said it would hesitate "to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackey*, 486 U.S. at 837; *see also supra* note 46.

57. *Landgraf*, 114 S. Ct. at 1493.

58. "Applying the entire Act to cases arising from pre-enactment conduct would have important consequences . . . ." *Id.*

59. "Given the high stakes of the retroactivity question, the broad coverage of the statute, and the prominent and specific retroactivity provisions in the 1990 bill, it would be surprising for Congress to have chosen to resolve that question through negative inferences drawn from two provisions of quite limited effect." *Id.*

60. *Id.* at 1486.

C. *Legislative History of the Act*[61]

The Court, even though professing to use a clear statement test, went on to examine the legislative history of the Act.[62] The Court noted that Congress proposed the Act as a response to a series of Supreme Court decisions interpreting various civil rights provisions.[63] A similar bill passed both houses of Congress in 1990[64] but was vetoed by the President.[65] Congress narrowly failed to override the veto.[66] One of the controversial aspects of the 1990 Act was its retroactivity provisions.[67] The 1991 Act did not contain these provisions. The Court used this fact to discredit the petitioner's textual argument by stating: "[h]ad Congress wished section 402(a) to have such a determinate meaning, it surely would have used language comparable to . . . the 1990 legislation. . . ."[68]

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61. For a general discussion of the political climate and the Act's passage, see Tokaji, *supra* note 8, at 579-85.

62. This is one of the main differences between Justice Scalia's concurrence and the majority opinions in *Landgraf* and *Rivers*. The majority's approach, while not a strict clear statement test, is common. "In almost all of the leading plain meaning cases of the Warren and Burger Courts, the Court checked the legislative history to be certain that its confidence in the clear text did not misread the legislature's intent." Eskridge, *supra* note 40, at 627. The court's delving deep into the legislative history and the failure of the 1990 Act may also be an example of the "imaginative reconstruction" school of interpretation. *See id.* at 630; *see also supra* note 43.

63. "The Civil Rights Act of 1991 is in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964." *Landgraf*, 114 S. Ct. at 1489; *see also supra* notes 26-34 and accompanying text.

64. S. 2104, 101st Cong., 2d Sess. (1990). For a general discussion of the 1990 bill, see Cynthia L. Alexander, Comment, *The Defeat of the Civil Rights Act of 1990: Wading Through the Rhetoric in Search of Compromise*, 44 VAND. L. REV. 595 (1991).

65. *Landgraf*, 114 S. Ct. at 1492; 136 CONG. REC. S16,418 (daily ed. Oct. 22, 1990) (mentioning "unfair retroactivity rules").

66. The override failed by one vote in the Senate. *Landgraf*, 114 S. Ct. at 1492; 136 CONG. REC. S16,562, 16,589 (daily ed. Oct. 24, 1990).

67. The Act provided that specified sections "shall apply to all proceedings pending on or commenced after" specified dates. S. 2104, 101st Cong., 2d Sess., § 15(a)(4) (1990).

68. *Landgraf*, 114 S. Ct. at 1494. "In the absence of the kind of unambiguous directive found in § 15 of the 1990 bill, we must look elsewhere for guidance on whether § 102 applies to this case." *Id.* at 1496; *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 441-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silento to enact statutory language that it has earlier discarded in favor of other language." (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 392-93 (1980) (Stewart, J., dis-

Members of Congress made conflicting statements as to the intended retroactivity of the Act.[69] For example, in the Interpretive Memorandum of the meaning of the Act, two principal sponsors differed on the retroactivity question. Senator Danforth asserted that the new law should be applied prospectively: "[N]ew statutes are to be given prospective application only, unless Congress explicitly directs otherwise, which we have not done in this instance."[70] Senator Kennedy, on the other hand, concluded that the Act should apply retroactively: "Many of the provisions of the Civil Rights Act of 1991 are intended to correct erroneous Supreme Court decisions and to restore the law to where it was prior to those decisions. In my view, these restorations apply to pending cases. . . ."[71] Given the confusion generated by the legislative history of the Act,[72] there is ample reason to believe that Congress left the determination of retroactivity to the courts.[73]

D. *Agency Interpretation*

Interestingly, the Court did not address the issue of deference to an administrative agency's interpretation of a statute.

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senting))); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 84-89 (1988). Using legislative inaction to determine congressional intent has been criticized for ignoring the fact that Congress is a discontinuous, collective, and public decisionmaker. Eskridge, *supra* at 94.

69. *Landgraf*, 114 S. Ct. at 1495-96.

70. 137 CONG. REC. S15,483 (daily ed. Oct. 30, 1991) (interpretive memorandum of Senator Danforth).

71. 137 CONG. REC. S15,963 (daily ed. Nov. 5, 1991) (interpretive memorandum of Senator Kennedy).

72. For other statements advocating prospective only application, see 137 CONG. REC. S17,685 (daily ed. Nov. 19, 1991) (Senators Levin and Rudman); 137 CONG. REC. H9542, H9548-49 (daily ed. Nov. 7, 1991) (Representative Hyde); 137 CONG. REC. S15,485 (daily ed. Oct. 30, 1991) (Senator Danforth); 137 CONG. REC. S15,472, S15,478 (daily ed. Oct. 30, 1991) (views of Senators Dole, Burns, Cochran, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnel, Murkowski, Simpson, Seymour and Thurmond). For other statements advocating retroactive effect, see 137 CONG. REC. H9549 (daily ed. Nov. 7, 1991) (Representative Fish); 137 CONG. REC. H9526, H9530-31 (daily ed. Nov. 7, 1991) (Representative Edwards); 137 CONG. REC. S15,485 (daily ed. Oct. 30, 1991) (Senator Kennedy).

73. *See* 137 CONG. REC. S15,485 (daily ed. Oct. 30, 1991) (Senator Kennedy) (stating "it will be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment").

The Equal Employment Opportunity Commission (EEOC) originally issued a policy statement that the Act did not apply retroactively.[74] The EEOC then reversed its position in April 1993 and declared it would interpret the Act to apply retroactively.[75] The EEOC also filed a joint amicus brief arguing in favor of retroactivity in the *Landgraf* case.[76]

In *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[77] the Court announced the following test to determine the appropriateness of deference to an agency's interpretation: If Congress has not clearly expressed its intent, the court must determine whether the agency's construction of the statute is a permissible one.[78] If the agency interpretation is reasonable and was committed to the agency's care by the statute, the court should adopt it.[79]

Given the ambiguous legislative history and possible textual interpretations, the agency's present construction of the statute is reasonable. The question then becomes whether the retroactive nature of the Act was committed to the agency's care. The Court has allowed agency construction of statutes to expand an agency's jurisdiction.[80] Even though the EEOC policy statement was not the result of the regular rulemaking procedure, it is submitted that the policy statement should receive a degree of deference from the Court.[81]

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74. *EEOC Policy Guidance on Retroactivity of Civil Rights Act of 1991*, Daily Lab. Rep. (BNA) No. 1, at D-1 (Jan. 2, 1992).

75. *EEOC Changes Retroactivity View Regarding 1991 Civil Rights Act*, 61 U.S.L.W. 2593 (Apr. 6, 1993); *EEOC Reiterates Vote to Change Policy on Retroactivity of 1991 Civil Rights Act*, Daily Lab. Rep. (BNA) No. 71, at A-1 (Apr. 15, 1993).

76. *U.S. Supreme Court Brief Filed by Federal Government in* Landgraf v. USI Film Products *and* Rivers v. Roadway Express, Inc., Daily Lab. Rep. (BNA) No. 84, at D-24 (May 4, 1993).

77. 467 U.S. 837 (1984).

78. *Id.* at 842-43.

79. *Id.* at 842-44.

80. *Id.* at 861.

81. *But see* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 970 (1992); Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes? A New Doctrinal Basis for Chevron U.S.A. v. Natural Resources Defense Council*, 1991 WIS. L. REV. 1275, 1296 (1991).

Another interesting consideration is the fact that the agency construction of the statute changed dramatically with the new administration. For a related discussion on how courts should deal with changing agency interpretations and judicial precedent

III. COURT DETERMINATION OF RETROACTIVITY: CONFUSING PRECEDENT

By ignoring certain rules of statutory construction, the Court was forced to determine the retroactivity of the Act by relying on a judicial presumption. The Court recognized two presumptions regarding retroactivity of a statute. Cases favoring the application of a statute retroactively are typified by the case of *Bradley v. School Board of Richmond.*[82] Cases favoring only prospective application are typified by the case of *Bowen v. Georgetown University Hospital.*[83] The past rulings of the Court offer contradictory presumptions about retroactivity.[84] Analysis of the Supreme Court's major decisions on retroactivity is important in understanding *Landgraf.*

A. Bradley: *Presumed Retroactive*

A line of cases culminating in *Bradley v. School Board of Richmond*[85] demonstrates one of the judicial maxims concerning presumed retroactivity of a statute. This maxim, which fa-

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see Jahan Sharifi, Comment, *Precedents Construing Statutes Administered by Federal Agencies After the* Chevron *Decision: What Gives?*, 60 U. CHI. L. REV. 223 (1993).

82. 416 U.S. 696 (1974).

83. 488 U.S. 204 (1988).

84. In Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990), Justice O'Connor mentioned the "apparent tension" between the two rules, but the Court declined to "reconcile the two lines of precedent." *Id* at 837. Because the statute in question showed a congressional intent (that it only be applied prospectively), the Court did not need to apply either presumption in this case. *Id.*

Justice Scalia, in a concurring opinion, directly faced the issue of the *Bradley/Bowen* conflict. Recognizing that the cases "are in irreconcilable contradiction," Scalia called for the overruling of *Thorpe* and *Bradley*. *Kaiser Aluminum*, 494 U.S. at 841. Citing a long list of authority, Scalia concluded that the great weight of past precedent was for applying laws prospectively only and that *Thorpe* and *Bradley* were aberrations of the general rule. *Id.* at 840-54.

The cases may be reconciled by the fact that *Bradley* was interpreting a statute while *Bowen* dealt with administrative rulemaking. However, that distinction fails to survive closer scrutiny. Both *Thorpe* and *Bradley* use the same presumption of retroactivity even though one deals with a regulation and the other with a statute. *Thorpe* and *Bowen* both deal with regulations but use different presumptions. *Thorpe* stated that its reasoning "has been applied where the change was constitutional, statutory, or judicial." *Thorpe*, 393 U.S. at 282.

85. 416 U.S. 696 (1974).

vors retroactivity, states "a court is to apply the law in effect at the time it renders its decision."[86]

The presumption utilized by *Bradley* was first articulated in *United States v. Schooner Peggy*.[87] In *Schooner Peggy*, the Court considered the applicability of a specific treaty in a case involving the disposition of a captured French ship.[88] The treaty was signed while an appeal was pending.[89] The Court applied the treaty, saying "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed."[90] The treaty at issue in *Schooner Peggy* expressly mandated retroactive application,[91] and thus, the Court's holding did not reach the issue of applying new law in the absence of express language.

In *Thorpe v. Housing Authority of Durham*,[92] the Court broadened the *Schooner Peggy* holding. The Court mandated the use of Department of Housing and Urban Development (HUD) eviction procedures that required a hearing to explain the reasons for eviction from public housing.[93] HUD issued the procedures while the case was pending appeal.[94] Even without express language that the requirements should apply retroactively, the *Thorpe* Court mandated their retroactive use.[95] The Court based this decision on the holding in *Schooner Peggy*[96] but made no effort to explain why *Schooner Peggy* should apply in cases where no express language supports retroactivity.

Bradley, a school desegregation suit against the School Board of Richmond, Virginia, refined the retroactive presumption even further. Relying on its equitable powers, the district court

86. *Id.* at 711.
87. 5 U.S. (1 Cranch) 103 (1801).
88. *Id.* at 103.
89. *Id.* at 107.
90. *Id.* at 110.
91. *Id.* at 107.
92. 393 U.S. 268 (1969).
93. *Id.* at 277-81.
94. *Id.* at 272.
95. *Id.* at 283.
96. *Id.* at 282.

awarded the plaintiffs attorney's fees.[97] While the appeal was pending, Congress passed a statute authorizing courts to award attorney's fees in such cases.[98] Because nothing in the statute mandated retroactive application, the circuit court refused to apply the statute retroactively and reversed the district court's award of attorney's fees.[99]

The Supreme Court reversed and reinstated the award of attorney's fees based on the presumption that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[100] The Court listed three factors to consider when determining if retroactive application would result in manifest injustice: (1) the nature and identity of the parties, (2) the nature of the rights affected, and (3) the nature of the impact of the change of law on those rights.[101] Applying these factors, the Court in *Bradley* found no injustice in applying the attorney's fees provision retroactively.[102]

Any statute analyzed under *Bradley* must be presumed retroactive unless there is congressional intent to the contrary or "manifest injustice" would result. *Bradley* does leave the Court with a way to prevent the retroactive application of laws, but the underlying presumption is that all laws act retroactively. This base presumption conflicts with the presumption underlying *Bowen v. Georgetown University Hospital*.[103]

B. Bowen: *Presumed Prospective*

In contrast to the *Bradley* doctrine, a strong line of Supreme Court precedent supports the rule that statutes should not

97. *Bradley*, 416 U.S. 696, 705-06 (1974)
98. *Id.* at 709.
99. *Id.* at 709-10.
100. *Id.* at 711.
101. *Id.* at 717.
102. *Id.* at 720-21.
103. 488 U.S. 204 (1988). *See infra* part III.C.

operate retroactively.[104] The Court reaffirmed this proposition in *Bowen v. Georgetown University Hospital*.[105]

In 1972, Congress authorized the Secretary of Health and Human Services to promulgate regulations to limit the amount Medicare would reimburse health care providers for services rendered to Medicare beneficiaries.[106] These cost-limit rules were first implemented in 1974, and new schedules were issued annually.[107] In 1981, the cost-limit schedule was based on different methods of calculation.[108] Various hospitals in the District of Columbia area filed suit claiming this new index violated the Administrative Procedure Act (APA).[109] The court agreed, and instead of appealing the decision, the Secretary reverted to the old schedule.[110] In 1984, the Secretary initiated a rulemaking procedure to reissue the 1981 cost schedule retroactively.[111] The result of this rulemaking was the same as if the original schedule had never been set aside.[112]

A group of seven hospitals who benefited from the invalidation of the old index challenged the retroactive rule. The hospitals claimed the retroactive rulemaking was invalid under both the APA and the Medicare Act.[113]

While the holding in *Bowen* was specific to statutes that delegate authority to administrative agencies, the decision demonstrates the Court's bias against retroactive legislation. Stating that "[r]etroactivity is not favored in the law," the Court held that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires th[e] result."[114] In continuing with its broad language, the Court stated: "The power to require readjustments for the

104. *See generally* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 842-44 (Scalia, J., concurring).
105. 488 U.S. 204 (1988).
106. *Id.* at 205-06.
107. *Id.* at 206.
108. *Id.*
109. *Id.*
110. *Id.* at 207.
111. *Id.*
112. *Id.*
113. *Id.* at 207-08.
114. *Id.* at 208.

past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words."[115]

Finding no such "plain words" in the language of the rule, the Court held that the Secretary had no authority to promulgate retroactive rules.[116] The Court's holding did not mandate a presumption against retroactivity; it simply held that the APA and the Medicare Act do not clearly delegate the authority to enact retroactive rules.

In a concurring opinion, Justice Scalia illustrated his clear statement approach to statutory interpretation.[117] The APA defined the word "rule" as "the whole or a part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy."[118] Justice Scalia commented: "The only plausible reading of the italicized phrase is that rules have legal consequences only for the future. . . . In short, there is really no alternative except the obvious meaning."[119]

Even though the holding can be read narrowly, *Bowen* is often cited for a presumption of prospective-only effect. This presumption conflicts with the *Bradley* precedent. Interestingly, the *Bowen* court failed to mention the *Bradley* decision.

C. Bennett: *Attempts at Reconciliation*

In 1985 the Supreme Court did not apply the *Bradley* presumption in *Bennett v. New Jersey*.[120] *Bennett* involved an action by the federal government to recover money granted to New Jersey. The Court had to determine which federal regulations specified the proper use of the money, those in effect at the time of the grant or those in effect at the time of the suit.[121]

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115. *Id.* (quoting Brimstone R.R. & Canal Co. v. United States, 276 U.S. 104, 122 (1928)).
116. *Id.* at 215.
117. *See supra* part II.A.
118. *Bowen*, 488 U.S. at 216 (quoting 5 U.S.C. § 551(4) (1988)).
119. *Id.* at 216-17.
120. 470 U.S. 632 (1985).
121. *Id.* at 633-34.

Justice O'Connor, writing for the Court, concluded that reliance on the *Bradley* presumption would be "inappropriate."[122] O'Connor noted that the *Bradley* court expressly acknowledged limits to the presumption.[123] For this reason, the Court refused "to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional."[124] The *Bradley* Court, however, did not discuss this limitation or explain its scope in regard to the attorney's fees provision at issue in that case.[125]

The Court went on to state, "This limitation comports with another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect."[126] The Court declined to explain the relationship of this rule with the holding in *Bradley*.[127] This substantive rights approach was eventually adopted by the majority in *Landgraf*.[128]

The *Bennett* limitation of *Bradley* was also applied in several circuit court cases involving the Civil Rights Act of 1991. In *Vogel v. Cincinnati*,[129] the Sixth Circuit held that the Act did not apply retroactively. In trying to reconcile *Bradley* and *Bowen*, the Sixth Circuit stated that *Bradley* "should . . . not be applied in contexts where 'substantive rights and liabilities,' broadly construed, would be affected."[130]

In *Mozee v. American Commercial Marine Service Co.*,[131] the Seventh Circuit also refused to apply the Act retroactively. Relying on *Bennett*, the court held that the *Thorpe-Bradley* presumption applies only when retroactive application of the statute would not "infringe upon or deprive a person of a right

122. *Id.* at 638.
123. *Id.* at 639.
124. *Id.* (quoting *Bradley*, 416 U.S. 696, 720 (1974)).
125. *Bradley*, 416 U.S. at 720.
126. *Bennett*, 470 U.S. at 639.
127. *See* Neff, *supra* note 8, at 486.
128. *See infra* part IV.A.
129. 959 F.2d 594 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992).
130. *Id.* at 598 (quoting United States v. Murphy, 937 F.2d 1032, 1037-38 (6th Cir. 1991)).
131. 963 F.2d 929 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992).

that had matured or become unconditional."[132] The presumption of prospective-only application was then extended to procedural provisions on appeal.[133] By retroactively applying these procedural provisions, substantive rights may be affected since a new trial would likely be ordered.[134] This new trial would create "manifest injustice" to the litigants.[135] In a strong dissent, Judge Cudahy criticized the result as unjust, relying on the fact that the conduct was proscribed at the time of occurrence and was not subject to penalty for the short time that the *Patterson* case was controlling law.[136]

IV. LANDGRAF: *RECONCILIATION OR AN UNWORKABLE DISTINCTION?*

In *Landgraf,* the Court attempted to reconcile the differing precedents of *Bradley* and *Bowen* by reading *Bradley* with the *Bennett* limitation. As is evidenced by the disagreement between the majority and dissent, this attempted reconciliation does not offer lower courts a clear method for applying a judicial presumption.

A. *Justice Stevens' Majority Opinion and Justice Blackmun's Dissenting Vested Rights Analysis*

1. The Facts of Landgraf

Barbara Landgraf worked at USI Film Products (USI) from September 4, 1984 until January 17, 1986.[137] The evidence showed that John Williams, a fellow employee, subjected Landgraf to continuous and repeated "inappropriate remarks and physical contact."[138] After complaints to her supervisor brought no results, Landgraf reported the incidents to her per-

132. *Id.* at 936 (quoting Bennett v. New Jersey, 470 U.S. 632, 639 (1985)).
133. *Id.* at 937.
134. *Id.*
135. *Id.*
136. *Id.* at 940-41 (Cudahy, J., dissenting).
137. *Landgraf,* 114 S. Ct. at 1488.
138. *Id.*

sonnel manager.[139] Shortly after the personnel manager initiated remedial actions, Landgraf resigned.[140] The Equal Employment Opportunity Commission (EEOC) determined that Landgraf had been the victim of sexual harassment creating a hostile work environment in violation of Title VII.[141] Landgraf brought suit on July 21, 1989. The district court found Landgraf had been the victim of sexual harassment; however, she had not been constructively discharged.[142]

While Landgraf's appeal was pending, Congress passed the Civil Rights Act of 1991.[143] Thus, she argued on appeal that the damage and jury trial provisions of the 1991 Act[144] should apply to her case.[145] The Fifth Circuit concluded that neither the jury trial provisions nor the damage provisions applied retroactively to Landgraf's case.[146]

2. Laying Out the Test

Justice Stevens began his analysis of judicial presumptions by stating "there is no tension between the holdings in *Bradley* and *Bowen*."[147] After this assertion, Stevens went through a discussion of the Court's preference for prospectivity[148] based on the idea that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."[149]

To conform to the principle of fairness, Justice Stevens chose the narrow definition of retroactivity originally offered by Justice Story: "all statutes, which, through operating only from

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139. *Id.*

140. *Id.* The personnel manager conducted an investigation, reprimanded Williams and transferred him to another department. *Id.*

141. *Id.* (referring to the Civil Rights Act of 1964, tit. 7, 42 U.S.C. § 2000e (1988)).

142. *Landgraf*, 114 S. Ct. at 1488.

143. *Id.*

144. Civil Rights Act of 1991, § 102, 42 U.S.C. § 1981a (Supp. V 1993)..

145. Landgraf v. USI Film Products, Inc., 968 F.2d 427, 432-33 (5th Cir. 1992), *aff'd*, 114 S. Ct. 1483 (1994).

146. *Id.* at 432.

147. Landgraf v. USI Film Products, Inc., 114 S. Ct. 1483, 1496 (1994).

148. *Id.* at 1497; *see also* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 840 (1990) (Scalia, J., concurring).

149. *Landgraf*, 114 S. Ct. at 1497.

their passage, affect vested rights and past transactions."[150] A statute affects vested rights if "the new provision attaches new legal consequences to events completed before its enactment."[151] If a vested right is affected, the statute raises retroactivity concerns, and the Court will not apply the statute to past conduct without congressional intent. If a statute does not affect vested rights, then it does not raise fairness concerns, and it will be applied to past conduct.

Stevens then asserted that *Bradley* did not upset this general reasoning.[152] He accomplished this by narrowly reading *Bradley* to apply the presumption of retroactivity only in certain situations, not in every situation as the broad maxim in *Bradley* would suggest.[153] Stevens would apply the *Bradley* presumption only in cases where vested rights are not affected. Statutes that affect the legality of prospective relief (such as authorizing the use of injunctions) do not affect vested rights,[154] nor do statutes changing jurisdiction.[155] In addition, retroactivity concerns are generally not raised by changes in procedural rules. "Because rules of procedure regulate secondary conduct rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive."[156]

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150. *Id.* at 1499 (quoting Society for Propagation of the Gospel v. Wheeler, 22 F. Cas. (C.C.D.N.H.) (No. 13,156) 756, 767 (1814) (interpreting ban on retrospective legislation in the New Hampshire Constitution)).

151. *Id.*

152. "Our holding in *Bradley* is similarly compatible with the line of decisions disfavoring 'retroactive' application of statutes." *Id.* at 1503.

153. Stevens limits *Bradley* by applying the "maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Id.* at 1497 (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821)).

154. *See id.* at 1501. Passage of § 20 of the Clayton Act which governed injunctive relief against labor picketing could be applied to pending cases because "relief by injunction operates in futuro." American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 201 (1921).

155. *Landgraf*, 114 S. Ct. at 1501-02. "Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Id.* at 1502 (quoting Hallowell v. Commons, 239 U.S. 506, 508 (1916)).

156. *Id.* at 1502.

In footnote twenty-nine of the opinion,[157] however, Stevens gave examples of some exceptions to this procedural test: "A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial."[158] In addition, amendments to federal procedural rules apply retroactively only if "just and practicable."[159] Stevens also stated, in apparent conflict with earlier statements, that the Court does "not restrict the presumption against statutory retroactivity to cases involving 'vested rights.' . . . Nor do we suggest that concerns about retroactivity have no application to procedural rules."[160]

Stevens appeared to construct a framework for determining when retroactivity concerns were warranted. If a statute affects a person's vested rights, then retroactivity would not be presumed. One method of determining if vested rights are affected is whether the statute changes procedural rules or substantive rights. But in footnote twenty-nine, Stevens retreats from this general rule. After reading this footnote, it is not clear which test the Court is using.

Stevens then compared *Thorpe* and *Bradley* to the vested rights framework, and he interpreted *Thorpe* as involving procedural issues regarding the requirement of a hearing.[161] This interpretation appears to be in line with his original substantive/procedural distinction. *Bradley* involved attorney's fees that were "collateral to the main cause of action."[162] In addition, the Court was already allowed to award attorney's fees pursu-

157. *Id.* at 1502 n.29.

158. *Id.*

159. *Id.* (quoting Order Amending Federal Rules of Criminal Procedure, 495 U.S. 969 (1990)). This test may be similar to the "manifest injustice" test articulated in *Bradley*.

160. *Id.*

161. *Id.* at 1502-03. The Court in *Thorpe* may have also allowed retroactive application to avoid determining the constitutionality of the prior eviction procedures or because of equitable concerns about the fairness of private parties dealing with old rules subsequently replaced with new rules by the government. *Id.* at 1503 n.30.

162. *Id.* at 1503 (quoting White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445, 451-52 (1982)).

ant to its power to grant equitable relief.[163] Therefore, the statute affected no vested rights. It is unclear how the *Bradley* case fits into the substantive/procedural distinction and how to distinguish the attorney's fees provisions from the compensatory damages provisions at issue in *Landgraf*.

3. Applying the Vested Rights Test to the Civil Rights Act of 1991

The Court applied the vested rights test to each provision of the 1991 Civil Rights Act separately.[164] Two sections of the Act were "readily classified."[165] The first, section 102(c)(1), introduces a right to jury trial.[166] If this section simply authorized the right to a jury trial, it would apply to cases filed before and tried after the passage of the Act since it is a procedural change.[167] But because section 102(c)(1) conditioned the right of a jury trial on other provisions of the Act, the "jury trial option must stand or fall with the attached damages provisions."[168] Section 102(b)(1) authorizes punitive damages in cases of malice or reckless indifference.[169] Because of the similarity between criminal sanctions and punitive damages, a vested right is clearly involved, and a clear congressional intent must be shown.[170]

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163. *Id.*

164. *Id.* at 1505.

165. *Id.*

166. "If a complaining party seeks compensatory or punitive damages under this section—(1) any party may demand a trial by jury. . . ." Civil Rights Act of 1991, § 102(c)(1), 42 U.S.C. § 1981a(b)(1) (Supp. V 1993).

167. *Landgraf*, 114 S. Ct. at 1505.

168. *Id.*

169. "COMPENSATORY AND PUNITIVE DAMAGES.—(1) DETERMINATION OF PUNITIVE DAMAGES.—A complaining party may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual." Civil Rights Act of 1991, § 102(b)(1), 42 U.S.C. § 1981a(b)(1) (Supp. V 1993).

170. *Landgraf*, 114 S. Ct. at 1505-06. Even with clear congressional intent, this section may violate the Ex Post Facto Clause of the Constitution. *See supra* note 13. The Court declined to address this issue because there was no clear congressional intent that the clause operate retroactively. *Id.*

A third section could not be so readily classified. Section 102(a)(1), at issue in *Landgraf*, authorizes the recovery of compensatory damages.[171] While recognizing that the recovery of compensatory damages is authorized only for conduct that had previously been prohibited,[172] the Court refused to apply section 102(a)(1) to past conduct. Stating that compensatory damages are "quintessentially backward-looking,"[173] the Court ruled that the imposition of compensatory damages, by creating a remedy where there was none, essentially creates a new cause of action.[174] USI took measures to remedy the situation before the problem reached a stage where they would have been liable under the old statute. Attaching liability to their actions in this case would upset their expectations of the law.[175]

The problem with the vested rights analysis used by Stevens is that it does not offer a clear method of determining what laws will be presumed to have retroactive effect. The respondent in *Landgraf* had no right to discriminate against Landgraf either before or after the passage of the Act. The Act merely gave the petitioner compensation for previously illegal conduct. It is not clear why this would upset an employer's expectation of the law or how an employer's behavior would change based on the new liability. It is also unclear why expectations of the law would be affected differently when faced with the liability for compensatory damages rather than attorney's fees.

4. Blackmun's Dissent Shows a Flaw in the Vested Rights Test

This is precisely the point Justice Blackmun made in his dissent.[176] Blackmun rejected the majority's contention that

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171. "RIGHT OF RECOVERY.—(1) CIVIL RIGHTS.—In an action brought by a complaining party . . . against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory and punitive damages as allowed in subsection (b). . . ." Civil Rights Act of 1991, § 102(a)(1), 42 U.S.C. § 1981a(a)(1) (Supp. V 1993).

172. *Landgraf*, 114 S. Ct. at 1506.

173. *Id.*

174. *Id.*

175. *Id.* & n.35.

176. *Landgraf*, 114 S. Ct. at 1508 (Blackmun, J., dissenting).

the plain language of the statute did not show congressional intent to apply the statute retroactively.[177] But "[e]ven if the language of the statute did not answer the retroactivity question, it would be appropriate under our precedents to apply section 102 to pending cases."[178] Since there "is no such thing as a vested right to do wrong,"[179] no expectations will be unsettled by the compensatory damage provision. No conduct would have changed due to the Act, and therefore, no vested rights would be affected.

B. *Justice Scalia's Primary Conduct Analysis in Concurrence*

Justice Scalia also noted this problem in his concurring opinion.[180] Scalia pointed out the inconsistencies in the majority's opinion between the stated rule and the exceptions listed in footnote twenty-nine.[181] Because of the inconsistency, Scalia proposed a different rule. Scalia would not allow any statute to act on past conduct absent clear congressional intent.[182] However, the act must be examined to determine the primary conduct regulated and when the primary conduct occurs.[183]

For example, a statute changing jurisdiction would apply to all actions from the moment it was passed.[184] The conduct regulated by the statute is judicial action.[185] Applying a jurisdictional change immediately may change where an individual files suit but would not affect any past judicial action.[186]

Justice Scalia never came to a conclusion about attorney's fees provisions because determining the regulated conduct is difficult.[187] He tried to differentiate between the purposes of encouraging people to file suits and facilitating suits already in

177. *Id.* at 1508-09; *see also supra* part II.
178. *Landgraf*, 114 S. Ct. at 1509 (Blackmun, J., dissenting).
179. *Id.* at 1510 (quoting Freeborn v. Smith, 69 U.S. (2 Wall.) 160, 175 (1865)).
180. *Id.* at 1522, 1524.
181. *Id.* at 1524.
182. *Id.*
183. *Id.* at 1524-26.
184. *Id.* at 1525.
185. *Id.*
186. *Id.*
187. *Id.*

progress.[188] If the purpose of the award is to encourage suits, the primary event would be the filing of the suit, and all suits filed after passage of the change would be eligible for fees.[189] However, if the purpose of the award is to facilitate suits, the primary event would be the termination of the suit and all suits pending during passage would be eligible.[190] This distinction makes little, if any, sense. First, most statutes do not have specific language indicating the specific intent of each provision.[191] In addition, Congress would likely have both purposes in mind. Under the primary conduct analysis offered by Scalia, it is not clear how the Court would rule on specific provisions.

Even if attorney's fees present a difficult situation, Justice Scalia stated that "[o]rdinarily . . . the answer is clear."[192] Scalia determined the primary conduct involved in *Landgraf* is the prevention of discriminatory conduct, and therefore the Act only applies to conduct occurring after its passage.[193]

C. Rivers *and Curative Legislation*

The first application of the *Landgraf* test occurred in the companion case of *Rivers v. Roadway Express*.[194] *Rivers* involved the application of section 101 of the Act. Section 101 changed § 1981's[195] prohibition of racial discrimination in the making and enforcement of contracts to involve all phases of the contractual relationship.[196]

Maurice Rivers and Robert Davison were employed as garage mechanics by Roadway Express.[197] On August 22, 1986, Roadway managers told Rivers and Davison to attend disciplinary

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188. *Id.*
189. *Id.*
190. *Id.*
191. Since Justice Scalia does not interpret statutes by looking beyond their plain language, it is not clear how he would determine the purpose of a specific provision. For a discussion of the clear statement test, see *supra* part II.A.
192. *Id.* at 1526.
193. *Id.*
194. 114 S. Ct. 1510 (1994).
195. 42 U.S.C. § 1981 (1988).
196. *Rivers*, 114 S. Ct. at 1513-14.
197. *Rivers*, 114 S. Ct. at 1513.

hearings.[198] They refused to attend because they did not receive their contractually required two days written notice.[199] As a result they were suspended but were eventually awarded back pay based on successful grievances.[200] Then, Roadway managers again told Rivers and Davison to attend disciplinary hearings without the required notice.[201] When Rivers and Davison again refused to attend, they were discharged.[202]

Rivers and Davison filed a complaint alleging that they were discharged based on their race, and they insisted on the same notice of hearings afforded white employees.[203] Before the trial began, the Supreme Court issued its ruling in *Patterson v. McLean Credit Union*.[204] That ruling reformulated the common interpretation of § 1981 claims.[205] On the basis of the *Patterson* decision, the district court dismissed the § 1981 claims.[206] After a bench trial on Rivers' and Davison's Title VII claims, the court entered judgment for the defendant.[207]

On appeal, Rivers and Davison argued two points. They first argued that their discharge claims fit the *Patterson* definition of § 1981.[208] They then asserted that their discharge claims were also allowed under section 101 of the new Civil Rights Act.[209] The Sixth Circuit dismissed the claims based on the 1991 Act but remanded the claim for a jury trial because the discharge fit under the *Patterson* § 1981 definition.[210] The Supreme Court issued certiorari on the sole question of whether section 101 of the 1991 Act applies to pending cases.[211]

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198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. 491 U.S. 164 (1989).
205. *See id.*
206. *Rivers*, 114 S. Ct. at 1514.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*

Statutes enacted to restore a prior understanding of the law are called curative statutes.[212] Curative statutes are usually applied retroactively because they restore expectations rather than unsettle them.[213] In *Rivers*, the discriminatory conduct took place before *Patterson*. The Act merely restored the notion of § 1981 claims as they existed before *Patterson*, when the conduct took place.

The Court in *Rivers*, however, rejected the notion that a statute designed to cure an incorrect interpretation by a court shows an intent that the statute apply retroactively.[214] Finding no clear statement that the Act apply retroactively and relying on *Landgraf*'s presumption of prospective-only effect in areas of vested rights,[215] section 101 was found not to be retroactive. The *Rivers* decision ignores the purpose of section 101 of the Act which is to restore the interpretation of § 1981 to pre-*Patterson* status.

V. RETROACTIVITY ANALYSIS AFTER *LANDGRAF* AND *RIVERS*

A. *Statutory Interpretation of the Act*

Congress could not decide the retroactive nature of the Civil Rights Act of 1991. Given the history of the Civil Rights Act of 1990 and the political compromises that formed the Act of 1991, Congress was clearly reserving the issue for the courts. In

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212. Curative statutes may act in several ways. They may restore prior agreements of individuals which were not effective due to procedural defects. They may correct statutes worded incorrectly, or they may restore interpretation of a statute after an incorrect court ruling. *See, e.g.*, 16A AM. JUR. 2D *Constitutional Law* § 678; Hochman, *supra* note 12, at 703-06.

213. *See* Hochman, *supra* note 12, at 705; Munzer, *supra* note 12, at 468.

214. "Because retroactivity raises special policy concerns, the choice to enact a statute that responds to a judicial decision is quite distinct from the choice to make the responding statute retroactive." *Rivers*, 114 S. Ct. at 1515.

215. There is some question as to whether the rights affected in *Rivers* should be classified as vested. As noted earlier, § 101 merely restored the notion of § 1981 claims to include conduct that was proscribed when it occurred. The Court in *Rivers*, however, said "because § 101 amended § 1981 to embrace all aspects of the contractual relationship, including contract terminations, it enlarged the category of conduct that is subject to § 1981 liability. . . . [T]he important new legal obligations § 101 imposes bring it within the class of laws that are presumptively prospective." *Id.*

Landgraf, however, the Court implied that the issue of retroactivity is a special situation that cannot be resolved with traditional statutory interpretation. The Court ignored its own clear statement test by examining legislative history, ignored its own rules of statutory construction that invoke the canon of *exclusio alterius*, and ignored its own rules of deference to administrative agencies. After the *Landgraf* decision, it is unclear to what extent the Court will examine congressional intent, but it seems unlikely that a statute will be presumed to operate retroactively without specific language to that effect.

B. *Applying the Vested Rights Analysis*

The framework the Court initially laid out does not apply a presumption of retroactivity if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[216] The application of this test is unclear. The Court ruled that the compensatory damage provision of the Act increases the party's liability for their past conduct and therefore cannot apply retroactively. The Court does not sufficiently distinguish compensatory damages from an award of attorney's fees.[217] It is not clear if the amount of liability is the difference (a lawyer's fees provision may be a comparatively small increase in liability compared to compensatory damages) or if the difference is that courts already had equitable powers to grant attorney's fees before the statutory change.

The Court attempted to form a substantive/procedural differentiation[218] but almost immediately retreated from such a blanket rule.[219] Any substantive/procedural differentiation is bound to cause problems for a lower court. For example, in reference to the compensatory damages provisions in the Act, one court stated "[t]here can be no dispute that a right to seek compensatory damages in a jury trial is a major substantive

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216. *Landgraf*, 114 S. Ct. at 1505.

217. The Court distinguished the two awards by saying that attorney's fees are "collateral to the main cause of action." *Id.* at 1503.

218. *See supra* notes 147-56, 161-63 and accompanying text.

219. *See supra* notes 150-56 and accompanying text.

provision."[220] Another court characterized the same provisions by stating "compensatory damages and jury trials are not substantive rights . . . these rights are remedies and procedural rights."[221]

The Court based its objection to retroactivity on the fact that parties' expectations of the law may be unsettled. As Justice Blackmun's dissent shows, it is unclear what this unsettling effect would be. It is not easily understood how or why parties would have changed their actions based on a knowledge of the liability since the underlying conduct was unlawful before the passage of the Act.[222] It is true that added liability may have an increased deterrent effect on discriminatory behavior, but, as Justice Blackmun points out, "there is no such thing as a vested right to do wrong,"[223] and parties should not need added deterrent to stop a practice that had been illegal for some time.[224] This seems especially true in the *Rivers* situation.

In *Landgraf*, therefore, the Court attempted to reconcile precedent that offered two seemingly contradictory presumptions of retroactivity. The vested rights analysis used by the majority suggests that substantive changes in the law should not be retroactive unless there is clear congressional intent. Procedural changes, on the other hand, may be applied retroactively. As the Court discovers, this distinction is not always clear. Attorney's fees provisions do not affect vested rights and can act retroactively, but compensatory damages do affect vested

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220. Khandelwal v. Compuadd Corp., 780 F. Supp. 1077, 1081 n.5 (E.D. Va. 1992); *see also* Sudtelgte v. Sessions, 789 F. Supp. 312, 315 (W.D. Mo. 1992) (awarding damages perspectively only).

221. United States v. Department of Mental Health, 785 F. Supp. 846, 853 (E.D. Cal. 1992); *see also* Lee v. Sullivan, 787 F. Supp. 921, 932 (N.D. Cal. 1992) (holding that compensatory damages are authorized under a procedural and remedial statute).

222. "[T]he court finds it unlikely defendant would have acted differently had it known its full potential liability." Graham v. Bodine Elec. Co., 782 F. Supp. 74, 77 (N.D. Ill. 1992).

223. Landgraf v. USI Film Products, 114 S. Ct. 1483, 1510 (1994) (Blackmun, J., dissenting) (quoting Freeborn v. Smith, 67 U.S. (2 Wall.) 160, 175 (1865)).

224. It may be that some individual's interests that were unsettled due to Supreme Court decisions interpreting the Civil Rights Act were restored by the 1991 amendments. Applying the amendments retroactively would actually protect interests that arose before 1989. *See* Estrin, *supra* note 8, at 2074; *supra* notes 212-13 and accompanying text.

rights and cannot act retroactively. The primary conduct analysis proposed by Justice Scalia may offer a more workable solution to the retroactivity question, but it too has trouble in certain situations.

The formulaic tests laid out in *Landgraf* and *Rivers* neglect to examine the equities in each specific case. In both *Landgraf* and *Rivers,* the law proscribed the employers' conduct. The remedies offered by section 102 to Landgraf would have increased her employer's liability but would not have affected the employer's conduct. The situation in *Rivers* is even clearer. The Act restored the party's expectations of the law at the time the conduct occurred.

The test defined in *Landgraf* is unclear both as a distinction between substance and procedure and in terms of a substantive or vested rights analysis. Even if the test were clear, any bright line test fails to examine the specific situation of the case at hand, and it fails to ensure that the parties in the case are treated fairly.

VI. CONTINUING VIOLATIONS

Continuing violation cases offer an interesting parallel to the retroactivity cases. In each situation, events that were not the subject of a valid claim are subject to penalty. The same language and terms are used in both types of cases. A continuing violation is a series of discriminatory acts which constitute a pattern of violation or the maintenance of an unlawful practice or policy.[225] The continuing violation theory is used to extend the charge-filing deadlines for discriminatory acts and to allow suits when the normal time limitations have passed.[226] Charges brought under continuing violation theory are based on past events, and these past events can be subject to sanctions.[227]

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225. MERRICK T. ROSSEIN, 1 EMPLOYMENT DISCRIMINATION: LAW AND LITIGATION § 12.4(4) (1994).

226. *See id.*

227. *See id.*; BARBARA L. SHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1043 (1983).

Continuing violation cases fit into three common situations. If an act occurs within the charge-filing deadline that either (1) is part of a pattern of discrimination; (2) shows the maintenance of a discriminatory system such as seniority or promotion systems; or (3) gives present effect to past discrimination, then past acts may be subject to liability.[228]

In the 1977 decision of *United Air Lines v. Evans*,[229] the Supreme Court essentially discredited the third category of continuing violation claims. In 1968, the plaintiff Carolyn Evans had been forced to resign her stewardess position based on the airline's no marriage rule.[230] Evans was rehired in 1972 but without benefit of her previous seniority.[231] After United failed to credit her with her pre-1972 seniority, Evans filed a discrimination charge. Evans claimed that the failure to credit her with the seniority gave "[a] present effect to the past illegal act."[232] After initially affirming the district court's dismissal of the charge based on the non-timely filing of the complaint, the Seventh Circuit reheard the case after the Court's decision in *Franks v. Bowman Transportation Co.*[233]

In *Franks*, the Court upheld the award of retroactive seniority to a class of black applicants who had been denied truck driving jobs.[234] In upholding the award, the Court stated that the central purpose of Title VII is to "make persons whole for injuries suffered on account of unlawful employment discrimination."[235] The court went on to state that "[a]dequate relief may

228. SHLEI & GROSSMAN, *supra* note 227, at 1046.

229. 431 U.S. 553 (1977). Before *Evans*, the continuing violation theory encompassed a series of acts against different employees that evidenced a pattern of discrimination. *See, e.g.*, Melani v. Board of Higher Educ., 12 Empl. Prac. Dec. (CCH) ¶ 11,068 (S.D.N.Y. 1976) (finding that a refusal to hire women may be considered a continuing pattern of discrimination); Jamison v. Olga Coal Co., 335 F. Supp. 454 (S.D. W. Va. 1971) (finding that the employer may have engaged in a pattern or practice of denying employment for promotions to blacks, which is actionable under Title VII).

230. *Evans*, 431 U.S. at 554. The no marriage rule was held to violate Title VII in Sprogis v United Airlines, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

231. *Evans*, 431 U.S. at 555.

232. 431 U.S. at 557.

233. 424 U.S. 747 (1976).

234. *Id.* at 757-70.

235. *Id.* at 764.

well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application."[236] Based on *Franks*, the Seventh Circuit ruled that Evans' claim was not time-barred because the present denial of seniority "is an instrument that extends the impact of past discrimination."[237]

On appeal, the Supreme Court reversed but conceded that the seniority system gave a present effect to the past discrimination.[238] Because Evans had not filed a complaint within the time period after her discharge, the discriminatory discharge must be treated as lawful.[239]

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal effect.[240]

The seniority system as it operated does not constitute a "present *violation*,"[241] and therefore was not a continuing violation. The Court distinguished *Franks,* stating that it dealt with a "remedy issue," not a "violation issue."[242] The dissenting Justices would not have barred Evans' claim based on the fact that she was subject to the effects of the past discrimination at the present time.[243]

The parallels between *Evans* and *Landgraf* are clear. Each woman was subject to court-determined discrimination. Each woman sought relief based on past events that were unlawful. In Evans' case, the past events had not yet been deemed un-

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236. *Id.* at 764-65.
237. Evans v. United Airlines, Inc., 534 F.2d 1247, 1250 (7th Cir. 1976), *rev'd*, 431 U.S. 553 (1978).
238. Evans, 431 U.S. at 558.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.* at 559.
243. *Id.* at 560-61.

lawful, while in Landgraf's case, the remedies were not yet law. The language in *Evans* clearly equates the two situations, stating that they are "the legal equivalent" of each other. *Landgraf* and *Evans* seem to be in complete agreement.

However, in *Bazemore v. Friday*,[244] the Court seemed to turn its back on the *Evans* rule. Before the effective date of Title VII, the North Carolina Agricultural Extension Service maintained two racially segregated branches with black employees receiving lower wages than comparable white employees.[245] The two branches were merged in response to Title VII, but the salary inequities remained.[246] The Court held that the maintenance of the salary differences was actionable even though it dated from pre-Act conduct.[247]

The Court distinguished *Evans* by determining that the seniority system in *Evans* did not presently discriminate because it treated all employees similarly regardless of their sex.[248] The salary structure in *Bazemore*, however, is a present violation because "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII."[249] The Court ruled that the Fourth Circuit's error in ruling that the present salary system is not a present violation "is too obvious to warrant extended discussion."[250] In both *Evans* and *Bazemore*, the employees were subject to disparate treatment in pay and benefits based on actions that occurred before the time of the filing of the complaint. Both employees were subject to the continuing effects of the violation, yet only one of the employers was subject to penalties.

The Court again ruled on the continuing violation theory in *Florida v. Long*.[251] Men received lower state pension benefits than women before the practice was clearly outlawed in *Arizona Governing Committee for Tax Deferred Annuity & Deferred*

244. 478 U.S. 385 (1986).
245. *Id.* at 394.
246. *Id.*
247. *Id.* at 395.
248. *Id.* at 396 n.6.
249. *Id.* at 395.
250. *Id.*
251. 487 U.S. 223 (1988).

Compensation Plans v. Norris.[252] The *Long* Court had to decide at what date the state was required to provide equal benefits and whether employees who retired before that date were entitled to adjusted benefits.[253]

At first glance this case seems similar to *Bazemore* because each check received by the pensioners created another wrong that should be actionable. The Court differentiated *Bazemore* by finding that pension systems are funded on an actuarial basis and are based on a past assessment of an employee's service.[254] The payroll system in *Bazemore* was individually determined based on a present analysis of an employee.[255] Florida was not required to provide equal benefits until after the *Norris* decision, when it was made clear that such systems were unlawful.[256] Employees who retired before *Norris* were not entitled to increased benefits to remedy the past discrimination.[257]

In denying increased benefits to employees who retired before *Norris*, the Court used the language of retroactivity: "It is essentially retroactive to disrupt pension funding assumptions by requiring further adjustments based on conduct that could not reasonably have been considered violative of Title VII at the time retirements occurred and funding provisions were made."[258] The decision of whether the adjustments could be applied to past retirees was based on the state's expectations at the time of the retirements.[259] It was precisely on the issue of expectations that the dissenting justices disagreed.[260] Justice Blackmun would have required pension adjustments for all retirees who retired after the Court's decision in *Los Angeles Department of Water & Power v. Manhart*.[261] In *Manhart*, the Court ruled that pension plan contributions could not be dif-

252. 463 U.S. 1073 (1983).
253. *Long*, 487 U.S. at 225.
254. *Id.* at 239.
255. *Id.*
256. *Id.* at 237-38.
257. *Id.* at 240.
258. *Id.*
259. *Id.* at 239-40.
260. *Id.* at 240-41.
261. 435 U.S. 702 (1978).

ferentiated on the basis of gender.[262] Justice Blackmun believed that this made the law sufficiently clear to put Florida on notice that its pension plan distributions were violative of Title VII.[263] Justice Blackmun also mentioned the expectation approach:

> Although retroactive relief is not mandatory in a Title VII case, . . . the make-whole purpose of Title VII creates a "presumption in favor of retroactive liability [that] can seldom be overcome." [I]n the context of pension plans . . . the presumption of retroactive liability may be defeated if the relevant law concerning Title VII was not sufficiently clear at the time of the violation.[264]

Justice Stevens would have ruled that "failure to 'top-up' the pre-*Manhart* retirees' future benefit payments is akin to the perpetuation of past discrimination that we condemned in *Bazemore*."[265]

Interestingly, one of the Court's decisions "overruled" by the Civil Rights Act of 1991 is the continuing violation case of *Lorance v. AT&T Technologies*.[266] *Lorance* severely limits continuing violation theory in challenging seniority systems. Three women challenged an AT&T seniority plan as being the product of a "conspir[acy] to change the seniority rules, in order to protect incumbent male testers and to discourage women from promoting into traditionally-male tester jobs."[267] The women were not affected by the change in the seniority system until they were demoted three years after the system took effect.[268] They claimed that any demotion based on the seniority system was an intentionally discriminatory alteration of their contractual rights.[269] The Court disagreed, saying that the seniority system was facially neutral and mere adherence to that system

262. *Id.* at 714-18.
263. *Long*, 487 U.S. at 240-41.
264. *Id.* at 241 (Blackmun, J., dissenting) (quoting *Manhart*, 435 U.S. at 719).
265. 487 U.S. at 248 (Stevens, J., dissenting).
266. 490 U.S. 900 (1989).
267. 490 U.S. at 903.
268. *Id.* at 902.
269. *Id.* at 905.

was not a present violation.[270] Section 112 of the Civil Rights Act of 1991 amended Title VII to change the effective date for the running of the limitations period.[271] Section 112 essentially codified the pre-*Lorance* continuing violation theory for challenges to seniority systems.

In both retroactivity and continuing violation situations, the Court precedent is confusing and conflicting. Both situations rely on the importance of stable expectations given a certain course of conduct.

VII. *LANDGRAF'S* EFFECT ON CONTINUING VIOLATION THEORY

In a continuing violation case, the employer must commit a violation of current law. Damages for past unlawful actions will not be granted if a timely charge was not filed. In a retroactivity situation, even if the employer committed acts which were unlawful at the time (as in *Rivers*) and a timely complaint is filed, the employer will not be liable for damages based on unlawful conduct if the basis for the claim is a law that was enacted after the conduct occurred.

The continuing violation theory may, in certain instances, offer a plaintiff a claim to recover damages for pre-Act conduct when a straight claim under the 1991 Act would not. If plaintiffs can demonstrate a violation took place after November 21, 1991, they may be able to receive damages for actions prior to that time if they can show a pattern of discrimination that dates back to a pre-1989 policy.

Before the 1989 decisions limiting the effect of Title VII and § 1981, the law was "sufficiently clear" that damages for discriminatory conduct could date back to the first act in a pattern of discrimination. Under the more liberal *Bazemore* rule, damages may be available from either the passage of the statute or the beginning of the pattern of discrimination. Even under the

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270. *Id.* at 905-10.

271. The date is now the later of when (1) the seniority system is adopted, (2) an individual becomes subject to the system, or (3) an individual is injured by the application of the system. Civil Rights Act of 1991, § 112(2), 42 U.S.C. § 2000e-5(e)(2) (Supp. IV 1992).

stricter *Long* or *Evans* rules, if the employer has reasonable notice that the past acts were unlawful, damages are available as long as a present violation exists.

This argument is strongest when applied to the purely remedial portions of the Act such as section 101. Section 101 amended the § 1981 claims basis to the pre-*Patterson* understanding. The pattern of discrimination is not disturbed even though the employer did not believe his actions were illegal for the brief time between the *Patterson* decision and the 1991 Act. Even under the new damages provisions such as section 102, if a present violative act can be shown, a pattern of unlawful discrimination will exist from the time of the first act of misconduct.

This argument is weakened by the Court's ruling in *Landgraf* that the new damages provisions essentially create a new cause of action even though the underlying conduct remained unlawful. The Court might likely rule that the latter situation is similar to *Long* where the law was not sufficiently clear to put the employer on notice of the new, higher damages.

VIII. CONCLUSION

The *Landgraf* and *Rivers* retroactivity decisions undermine the principle articulated in *Long* that the "make-whole purpose of Title VII creates a 'presumption in favor of retroactive liability [that] can seldom be overcome.'"[272] This "make-whole" purpose underlies all of the anti-discrimination suits amended by the Civil Rights Act of 1991. The *Landgraf* and *Rivers* decisions set out a bright line test for the judicial presumption of the retroactivity of statutes. If a statute affects vested rights, it can not be presumed retroactive. This test, while defined vaguely, is almost impossible to apply. In addition, it undermines issues of fairness and reliance in individual cases.

272. *Long*, 487 U.S. at 242 (Blackmun, J., concurring in part and dissenting in part) (quoting Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 719 (1978)).

A continuing violation theory may allow certain plaintiffs to receive damages for past actions that would normally be unavailable under the Civil Rights Act of 1991 due to the Act's nonretroactivity. The Court is unlikely to accept this argument given its trend in the last five years to read employment discrimination statutes restrictively. The Civil Rights Act of 1991 was an attempt to reverse some of the more restrictive readings by the Court. Given the decisions in *Landgraf* and *Rivers*, Congress may need to address these issues again in the near future.

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