INTRODUCTION

President George Bush signed the Civil Rights Act of 1991 ("1991 Act") into law on November 21, 1991. Congress passed the 1991 Act in order to strengthen the prohibitions and sanctions against employment discrimination already provided under Title VII of the Civil Rights Act of 1964. Many sections of the 1991 Act reverse several recent United States Supreme Court decisions adverse to Title VII plaintiffs. For the most part, these sections of the 1991 Act restore the law to its prevailing position before the controversial Supreme Court decisions. The 1991 Act also authorizes compensatory and punitive damages and jury trials for a complaining party who alleges violations of Title VII.

To avoid a veto and to appease the 1991 Act's opponents in Congress, the proponents of the 1991 Act deliberately left many of the important provisions of the 1991 Act ambiguous. One of the more controversial issues surrounding passage of the 1991 Act concerned its retroactive application to discriminatory conduct occurring prior to November 21, 1991. As a result, after the passage of the 1991 Act, many courts could not agree whether an injured party seeking restitution under Title VII for claims of discrimination occurring before No-
nember 21, 1991, was allowed to seek recovery under the provisions provided by the 1991 Act.8

In Landgraf v. USI Film Products,9 the Supreme Court addressed whether the jury trial and compensatory damage provisions allowed under the 1991 Act applied retroactively.10 The Court held that these two provisions did not apply to cases pending on appeal when the 1991 Act was enacted.11 In so holding, the Court reconciled its previous decisions in Bradley v. School Board of City of Richmond12 and Bowen v. Georgetown University Hospital:13 two decisions that commentators and Justice Antonin Scalia have referred to as irreconcilable contradictions in statutory construction rules.14

This Note will first review the Court’s decision in Landgraf.15 This Note will then discuss the 1991 Act, the issue of statutory retroactivity, and the Court’s rules of statutory construction.16 This Note will then critique the Court’s application of its own rules of statutory construction in Landgraf.17 This Note concludes that the Court’s decision in Landgraf is consistent with its own rules of statutory construction.18

FACTS AND HOLDING

On July 21, 1989, Barbara Landgraf, an employee at the Tyler, Texas, plant of USI Film Products ("USI"), filed a sexual harassment suit against USI, its corporate owner, and that company’s successor in interest.19 John Williams, another employee of USI, had repeatedly harassed Landgraf with inappropriate comments and physical con-

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10. Landgraf, 114 S. Ct. at 1489. The Court set Landgraf for argument with another case, Rivers v. Roadway Express, Inc., and limited argument of the two cases to the specific issue of whether sections 101 and 102 of the 1991 Act were applicable to cases pending when the 1991 Act became law. See id.; see also Rivers v. Roadway Express, Inc., 114 S. Ct. 1610, 1513 (1994) (limiting the decision to the retroactive application of section 101).
11. Landgraf, 114 S. Ct. at 1488.
15. See infra notes 19-83 and accompanying text.
16. See infra notes 84-190 and accompanying text.
17. See infra notes 199-254 and accompanying text.
18. See infra notes 255-77 and accompanying text.
Landgraf informed her immediate supervisor of Williams' conduct, but to no avail. She then informed the personnel manager, who conducted a full investigation, determined the allegations to be true, and proceeded to reprimand Williams. The manager's reprimand included transferring Williams to another department within USI; however, the transfer still routinely required Williams to be in Landgraf's work area. Four days after the reported transfer, Landgraf quit her job and timely filed sexual harassment charges with the Equal Employment Opportunity Commission ("EEOC"). The EEOC concluded that Landgraf was likely the victim of sexual harassment in violation of Title VII of the Civil Rights Act of 1964. However, the EEOC further concluded that USI acted appropriately when it transferred Williams to another department within the organization. Consequently, the EEOC dismissed Landgraf's charge and issued her a notice of her right to sue.

After a bench trial, the United States District Court for the Eastern District of Texas also concluded that Landgraf had been the victim of sexual harassment; however, the court further concluded that USI had not constructively discharged Landgraf given the appropriate actions of USI in transferring Williams to another department. In as much as Landgraf was not found to have been constructively discharged, the district court decided in favor of USI.

During the course of Landgraf's appeal, on November 21, 1991, President George Bush signed the Civil Rights Act of 1991 ("1991 Act") into law. Among other provisions, the 1991 Act provides two

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20. Id.
21. Id.
23. Id.
24. Landgraf, 114 S. Ct. at 1488.
25. Id.
26. Id.
27. Id.
28. Id. In order to prove constructive discharge, an aggrieved employee "must prove that 'working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'" Landgraf, 968 F.2d at 429 (quoting Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980)). In addition, constructive discharge must be supported by a greater severity of harassment than the minimum necessary to prove a hostile working environment required by 42 USC § 2000e (1988). Id. at 430. The harassment Landgraf endured, while substantial, did not meet the standard of proof necessary to uphold her claim of constructive discharge. Id.
30. Landgraf, 114 S. Ct. at 1488. Under prior law, the 1964 Act entitled Landgraf to monetary relief only if she proved the discrimination created negative repercussions to employment status, such as a denied promotion, differences in compensation, or termination. Id. at 1491; see 42 U.S.C. § 2000e-5g (1988 Supp. III). Furthermore, the 1964
important remedies to a party complaining of employment discrimination. First, the 1991 Act allows a complaining party to seek compensatory and punitive damages in addition to any relief authorized under section 706(g) of the Civil Rights Act of 1964 ("1964 Act"). Second, if the complaining party seeks compensatory or punitive damages, the party may demand a jury trial under the 1991 Act. Landgraf's appeal to the United States Court of Appeals of the Fifth Circuit asserted that these two provisions of the 1991 Act were applicable to her claim against USI.

The Fifth Circuit denied Landgraf's appeal, specifically finding that the 1991 Act did not apply to her claim. The United States Supreme Court granted certiorari to determine whether the jury trial and damages provisions of the 1991 Act applied to cases which were pending at the time President Bush signed the 1991 Act into law. The Supreme Court affirmed the judgment of the Fifth Circuit by holding that the damages and jury trial provisions allowed under the 1991 Act were not applicable to Landgraf or any other employment.

Act provided only equitable remedies, primarily in the form of backpay. 42 U.S.C. § 2000e-5g (1988 Supp III). The 1991 Act now allows a complaining party to recover for unlawful discrimination in the terms, conditions, or privileges of employment regardless of actual monetary losses suffered by the complaining party. Id. § 2000e-2(a)(1). Overall, the 1991 Act "effects a major expansion in the relief available to victims of employment discrimination." Landgraf, 114 S. Ct. at 1491.

31. Landgraf, 114 S. Ct. at 1490.
32. Id. Section 102(a)(1) provides:
   (a) Right of Recovery. (1) Civil Rights.—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1777 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages . . . in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

[T]he court may enjoin the respondent from engaging in such unlawful employment practices, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.
33. Landgraf, 114 S. Ct. at 1490. Section 102(c) provides that "[i]f a complaining party seeks compensatory or punitive damages under this section—(1) any party may demand a trial by jury." 42 U.S.C. § 1981a (1988 Supp. III).
34. Landgraf, 968 F.2d at 428.
35. Id.
discrimination claim pending at the time of the 1991 Act's enactment.\textsuperscript{37} In reaching its decision, the Court looked to the legislative history of the 1991 Act and the legislative history of the Civil Rights Acts of 1990, the plain language of the 1991 Act, and past case law differentiating between procedural changes which may apply retrospectively and substantive changes affecting vested rights which can only apply prospectively.\textsuperscript{38}

Citing the President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, the Court noted that one reason President Bush vetoed the 1990 legislation was because of "the bill's 'unfair retroactivity rules.'"\textsuperscript{39} Primarily, the retroactive provisions of the 1990 legislation were those provisions which overruled recent Supreme Court decisions on the subject of employment discrimination.\textsuperscript{40} The Court stated that the 1991 Act's silence on the controversial issue of retroactive application evidenced the compromise Congress reached which made the enactment of the 1991 Act possible.\textsuperscript{41} However, the Court noted that the inconsistencies between the 1991 Act and the 1990 legislation were not central to its finding of prospective application.\textsuperscript{42}

The Court also looked to the plain language of the 1991 Act as further support for prospective application.\textsuperscript{43} Landgraf contended that the language of the 1991 Act required the Court to apply the 1991

\textsuperscript{37} \textit{Landgraf}, 114 S. Ct. at 1508.
\textsuperscript{38} \textit{Id.} at 1489-1508. The Civil Rights Act of 1990 was legislation that President Bush vetoed. \textit{Id.} at 1492.

\textbf{§ 15. Application of Amendments and Transition Rules.}

(a) Application of Amendments. - The amendments made by -(1) section 4 shall apply to all proceeding pending on or commenced after June 5, 1989; (2) section 5 shall apply to all proceedings pending on or commenced after May 1, 1989; (3) section 6 shall apply to all proceedings pending on or commenced after June 12, 1989; (4) sections 7(a)(1), 7(b), 8, 9, 10, and 11 shall apply to all proceedings pending on or commenced after the date of enactment of this Act; (5) paragraphs (2) through (4) of section 7(a)(2) shall apply to all proceedings pending on or commenced after June 12, 1989; and (6) section 12 shall apply to all proceedings pending on or commenced after June 15, 1989.

\textsuperscript{41} \textit{Landgraf}, 114 S. Ct. at 1492. See 137 \textit{Cong. Rec.} S15485 (Oct. 30, 1991) (statement of Sen. 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").
\textsuperscript{42} \textit{Landgraf}, 114 S. Ct. at 1492.
\textsuperscript{43} \textit{Id.} at 1493-96.
Act to all cases pending on appeal at the time of its enactment. 44 Landgraf claimed that three provisions of the 1991 Act, when taken together, created an inference of retroactive application. 45 However, the Court noted that these provisions were minor in relation to the full text of the 1991 Act and thus could not bear the full weight of making the entire 1991 Act, particularly the sections regarding the jury trial and compensatory damage provisions, retroactive. 46 Rather than giving effect to the settled principle espoused in Justice Harry A. Blackmun’s sole dissent that “a statute must . . . be construed in such fashion that every word has operative effect,” the Court contended that Congress would not have taken such an indirect route to ensure retroactive application to pending cases. 47 Furthermore, the Court concluded that the 1991 Act’s legislative history supported a congressional intent to let the courts decide the issue of the 1991 Act’s retroactivity. 48

In order to resolve the retroactivity question left open by the language of the 1991 Act and its legislative history, the Court went on to examine what some have regarded as “two seemingly contradictory” Supreme Court decisions on statutory retroactivity: Bradley v. School Board of City of Richmond 49 and Bowen v. Georgetown University Hospital. 50 The Court in Bradley articulated a rule which generally supports statutory retroactivity. 51 Conversely, the rule articulated in Bowen supports the long-standing principal that retroactivity is not favored absent clear congressional intent to the contrary. 52

44. Id. at 1493. These provisions are sections 402(a), 402(b), and 109(c). Id. Section 402(a) is prefaced by the phrase “[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.” 42 U.S.C. § 1981 (1988 Supp. III). The language of sections 402(b) and 109(c) specifically require prospective application, providing that “[t]he amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.” Id. § 2000e. Section 402(b) states that “[n]otwithstanding 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.” Id. § 1981. Landgraf therefore contended that the only realistic interpretation of section 402(a) would be one that required a retroactive application, otherwise it would be redundant with sections 402(b) and 109(c). Landgraf, 114 S. Ct. at 1493-94.

45. Id. at 1493-94. These provisions are sections 402(a), 402(b), and 109(c). Id. Section 402(a) is prefaced by the phrase “[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.” 42 U.S.C. § 1981 (1988 Supp. III). The language of sections 402(b) and 109(c) specifically require prospective application, providing that “[t]he amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.” Id. § 2000e. Section 402(b) states that “[n]otwithstanding 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.” Id. § 1981. Landgraf therefore contended that the only realistic interpretation of section 402(a) would be one that required a retroactive application, otherwise it would be redundant with sections 402(b) and 109(c). Landgraf, 114 S. Ct. at 1493-94.

46. Landgraf, 114 S. Ct. at 1494-95.

47. Id. at 1508 (Blackmun, J. dissenting) (quoting United States v. Nordic Village, Inc., 112 S. Ct. 1011, 1015 (1992)); id. at 1495.

48. Landgraf, 114 S. Ct. at 1494. The Court stated that “[i]t 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.” Id. at 1496 n.15 (quoting 137 CONG. REC. S15485 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy)).


50. 488 U.S. 204 (1988); Landgraf, 114 S. Ct. at 1496.


Landgraf contended that the rule stated in *Bradley* required the application of the damages and jury trial provisions to her cause of action.\(^5\) However, the Court stated that *Bradley* was never intended to change the traditional presumption against statutory retroactivity.\(^5\) Rather, the Court noted that *Bradley* was distinguishable from the multitude of cases in which the Court had invoked the traditional presumption against statutory retroactivity.\(^5\) The Court stated that the statute at issue in *Bradley* was “collateral to the main cause of action’ and ‘uniquely separable from the cause of action to be proved at trial.’”\(^5\) Furthermore, the Court noted that the new statute in *Bradley* did not alter or impose any unforeseeable burdens on the losing party.\(^5\)

After distinguishing *Bradley*, the Court set out a new rule for addressing retroactivity issues.\(^5\) The Court’s new rule distinguishes between legislation which impairs or takes away vested rights a party possesses under existing law, expands a party’s liability for past conduct, or imposes new duties concerning transactions already past, from legislation which merely invokes procedural changes.\(^5\) If a statute has more than a procedural effect, the Court stated that it will only apply it prospectively.\(^5\) Absent clear congressional intent to the contrary, the Court stated that prospective application is presumed.\(^5\)

Applying this rule, the Court stated that the jury trial provision “[was] plainly a procedural change of the sort that would ordinarily govern in trials conducted after its effective date.”\(^5\) However, the Court stated that a jury trial could only be granted in the event Landgraf sought compensatory or punitive damages.\(^5\) Thus, the Court recognized that the question of whether Landgraf was entitled to a jury trial could only be answered by addressing the nature of compensatory damages.\(^5\) In addressing the compensatory damages provision, the Court stated that this provision affected vested rights and thus “would operate [retroactively] if it were applied to conduct occurring before November 21, 1991.”\(^5\) While conceding that the ability to

54. Id. at 1504.
55. Id. at 1503.
56. Id. (quoting White v. New Hampshire Dep’t of Employment Sec., 455 U.S. 445, 451-52 (1982)).
57. Id. at 1503.
58. Id. at 1499.
59. Id. at 1498-1502.
60. Id. at 1499 n.23.
61. Id. at 1505.
62. Id. at 1505-06.
63. Id. at 1505.
64. Id.
65. Id. at 1499 n.23 & 1506.
recover compensatory damages is only allowed in instances where a defendant engaged in conduct that was already illegal under Title VII, the Court resorted to issues of fairness in finding that the compensatory damages provision, if allowed to operate retroactively, would violate an individual's vested rights.\textsuperscript{66}

Because the damages provisions of the 1964 Act only allowed equitable remedies, primarily in the form of backpay, the Court noted that the 1991 Act fashioned a new cause of action by creating a new right to monetary relief.\textsuperscript{67} Thus, the 1991 Act imposed on employers new liabilities for past actions.\textsuperscript{68} The Court stated that an element of unfairness was inherent in any kind of legislation which imposed new and/or additional burdens on the employer.\textsuperscript{69} Lacking specific congressional intent, the Court refused to retroactively apply the compensatory damages provision because it would increase the monetary burdens on an employer.\textsuperscript{70} The Court noted that "[n]either in Bradley itself, nor in any case before or since in which Congress had not clearly spoken, have we read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment."\textsuperscript{71}

Justice Harry A. Blackmun dissented.\textsuperscript{72} Justice Blackmun's dissent rejected any concerns about fairness to employers.\textsuperscript{73} Rather, Justice Blackmun asserted that the compensatory and punitive damages and jury trial provisions only expanded the remedies available to an individual suffering from illegal discrimination and did not alter the scope of the employer's duty to ensure a discrimination free workplace.\textsuperscript{74} Justice Blackmun did not find anything in these provisions which would infringe upon an employer's vested rights, noting that "there is no such thing as a vested right to do wrong."\textsuperscript{75} Justice Blackmun concluded that "[t]here is nothing unjust about holding an employer responsible for injuries caused by conduct that has been illegal for almost [thirty] years."\textsuperscript{76}

Justice Blackmun also based his dissent on a "straightforward textual analysis" of the 1991 Act.\textsuperscript{77} Justice Blackmun argued that, in

\begin{itemize}
  \item \textsuperscript{66} Id. at 1506 n.35.
  \item \textsuperscript{67} Id. at 1506.
  \item \textsuperscript{68} Id.
  \item \textsuperscript{69} Id. at 1506 n.35.
  \item \textsuperscript{70} Id. at 1506-07.
  \item \textsuperscript{71} Id. at 1507.
  \item \textsuperscript{72} Id. at 1508-10 (Blackmun, J. dissenting).
  \item \textsuperscript{73} Id.
  \item \textsuperscript{74} Id. at 1510 (Blackmun, J. dissenting).
  \item \textsuperscript{75} Id. at 1510 (quoting Freeborn v. Smith, 69 U.S. 160, 175 (1864)).
  \item \textsuperscript{76} Id.
  \item \textsuperscript{77} Id. at 1508-09 (Blackmun, J. dissenting).
\end{itemize}
order to give operative effect to every word of the 1991 Act, sections 402(a), 402(b), and 109(c), when viewed in the context of the whole, clearly evidenced Congress' intent to give retroactive effect to the damages and jury trial provisions.\textsuperscript{78} Section 402(a) is the effective date provision of the 1991 Act and clearly states that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."\textsuperscript{79} Justice Blackmun argued that the "[e]xcept as otherwise provided" language most logically referred to sections 109(c) and 402(b).\textsuperscript{80} Both these sections specifically provided that the 1991 Act is not to apply to certain types of cases pending on November 21, 1991 — the Act's effective date.\textsuperscript{81} Justice Blackmun argued that the clear implication to be drawn from the language of sections 109(c) and 402(b) was that these provisions did not apply to pending cases, but the other provisions of the 1991 Act — including the jury trial and damages provisions — did apply retroactively.\textsuperscript{82} Justice Blackmun concluded that to hold that the 1991 Act did not apply to acts of discrimination which occurred prior to November 21, 1991, would render sections 402(b) and 109(c) "entirely redundant" and would thus fail to give operative effect to every word of the 1991 Act.\textsuperscript{83}

BACKGROUND

THE CIVIL RIGHTS ACT OF 1991

Congress enacted the Civil Rights Act of 1964 ("1964 Act") as a means of eradicating racial discrimination in both the private and public sector employment.\textsuperscript{84} The language of the 1964 Act is sufficiently broad to prohibit discrimination not only on the basis of race,
but also color, religion, sex, and national origin.\textsuperscript{85} Courts have developed two theories of discrimination since the passage of the 1964 Act: disparate treatment and disparate impact.\textsuperscript{86} Disparate treatment encompasses an employer's deliberate, intentional conduct motivated solely by bias against a particular employee or class of employees.\textsuperscript{87} Disparate impact concerns itself with an employer's overall employment practices; such that, what appears to be a neutral employment hiring practice on its face can, in reality, be discriminatory.\textsuperscript{88}

During the first twenty-five years of interpretation, the United States Supreme Court generally followed a consistent pattern of decision-making leading to a somewhat reliable and predictable jurisprudence regarding workplace discrimination.\textsuperscript{89} The Supreme Court's jurisprudence regarding disparate treatment cases has remained relatively unchanged.\textsuperscript{90} However, in the late 1980s, the Court embarked on a fundamental change in its civil rights jurisprudence concerning disparate impact theory to the point where the Court's decisions dramatically favored the employer.\textsuperscript{91} In those decisions, the Court required the employee to prove that the employment hiring practice did not meet any legitimate business necessity and was thus discriminatory.\textsuperscript{92}


It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religions, sex, or national origin.

\textit{Id.}

\textsuperscript{86} See Brodin, 31 B.C. L. Rev. at 2.

\textsuperscript{87} \textit{Id.} at 3.

\textsuperscript{88} \textit{Id.} at 5.

\textsuperscript{89} \textit{Id.} at 3.

\textsuperscript{90} \textit{Id.} at 4. In the case of disparate treatment, the burden was generally on the plaintiff to show proof of discriminatory motive. \textit{Id.} at 3. If the plaintiff was able to satisfy such a burden, the plaintiff created an inference of discrimination which the employer then had the burden to overcome. \textit{Id.} at 3-4.

\textsuperscript{91} Baumann et al., 33 B.C. L. Rev. at 212-13; see Brodin, 31 B.C. L. Rev. at 8-9. Historically, if disparate impact was the theory to be proved, the plaintiff had the burden of showing the employment practice resulted in disproportionate refusals to hire minority applicants. Brodin, 31 B.C. L. Rev. at 5-6. If the plaintiff was able to show the employment practice resulted in discrimination, the burden shifted to the employer to show a fundamental business necessity. \textit{Id.} at 6. Lacking such business necessity, a court would deem the employment practice discriminatory and in violation of Title VII. \textit{Id.}

\textsuperscript{92} Brodin, 31 B.C. L. Rev. at 9.
Congress reacted to the Court decisions by passing the Civil Rights Act of 1991 ("1991 Act"). The preamble to the 1991 Act reads as follows: "An Act to amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes." One of the 1991 Act's stated purposes, as provided in section 3(4), is "to respond to recent decisions of the . . . Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."

In addition to certain sections that overturn recent adverse Court decisions, Congress enacted several other provisions that strengthen the remedies and protections available to persons who have suffered from discriminatory conduct. Included within these new provisions is section 102, which gives a victim of intentional discrimination the right to recover compensatory and punitive damages in addition to any back pay or reinstatement relief authorized under section 706(g) of the 1964 Act. Furthermore, a complaining party seeking either

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4. Id. (Preamble).
6. See 42 U.S.C. §§ 1981a(b)(1) & (2), (c) (1988 Supp. III) (allowing for the recovery of compensatory and punitive damages and a trial by jury in the event compensatory or punitive damages are sought); id. § 2000e-2 (prohibiting the use of test scores in a discriminatory fashion); 29 U.S.C. § 626(e) (1988 Supp. III) (permitting an individual to file suit within 90 days after receiving notice of dismissal or termination of consideration from the EEOC). See also Ryan, 44 MERCER L. REV. at 918 (stating that several other provisions were added to the 1991 Act to strengthen the remedies available to victims of discrimination).
   (a) Right of Recovery. (1) Civil Rights. — In an action brought by a complaining party under section 706 or 717 of the Civil Rights act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory damages . . . in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

Id. § 1981a(a)(1). Section 706(g) of the Civil Rights Act of 1964 provides that [T]he court may enjoin the respondent from engaging in such unlawful employment practices, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

compensatory or punitive damages may demand a trial by jury under section 102.98 Except for two provisions relating to certain pending disparate impact cases and protections relating to overseas employment, section 402(a) of the 1991 Act provides for an effective date of November 21, 1991.99

UNDERSTANDING RETROACTIVITY

A retroactive law is defined as “one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past.”100 In determining whether a statute applies retroactively, courts first look at a statute’s plain meaning.101 Absent clear congressional intent to the contrary, courts must give operative effect to the plain meaning of the statute.102 When the plain meaning is susceptible to multiple interpretations or is unclear as to a given effect, it becomes appropriate for a court to rely on the legislative history of the statute for guidance as to retroactivity.103 When a statute’s language or its legislative history is ambiguous as to congressional intent on retroactive application, courts are then forced to turn to judicial rules of construction to decide the issue.104

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98. 42 U.S.C. § 1981a(c) (1988 Supp. III). Section 102(c) provides that “[i]f a complaining party seeks compensatory or punitive damages under this section — (1) any party may demand a trial by jury. Id.

99. See 42 U.S.C. § 1981 (1988 Supp. III). Section 402(a) provides that “[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.” Id. Section 109(c) provides: “Application of Amendments. — The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.” Id. § 2000e. Section 402(b) provides: “Certain Disparate Impact 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.” Id. § 1981. But see Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 932 (7th Cir. 1992) (finding that the 1991 Act’s effective date provision is subject to many interpretations), cert. denied, 113 S. Ct. 207 (1992); Vogel v. City of Cincinnati, 959 F.2d 594, 598 (6th Cir. 1992) (interpreting the effective date provision to apply to either pending cases or to acts of discrimination occurring after November 21, 1991), cert. denied, 113 S. Ct. 86 (1992).

100. 82 C.J.S. Statutes § 412 (1953).


102. Id.

103. Id. at 576.

104. Ryan, 33 MERCER L. REV. at 933.
The Historical Development of Statutory Rules of Construction

Courts do not favor retroactivity.\textsuperscript{105} As a result, courts construe such statutes to operate prospectively unless there exists a clear indication that Congress intended retroactive application.\textsuperscript{106} The foundation of this rule can be traced to English common law where the courts, in the exercise of their function to interpret the law involved, "viewed themselves as bound by the rule of construction that no law should be given an operation from a time prior to its enactment unless Parliament had expressly provided that it should have such an effect or unless the words of the Act could have no meaning except by application to [a] past time."\textsuperscript{107} In numerous cases dating as far back as the nineteenth century, the Supreme Court has stated that retroactive legislation is contrary to American jurisprudence.\textsuperscript{108} In fact, American courts historically have viewed retroactive legislation as oppressive.\textsuperscript{109}

However, when the statute is remedial or procedural in nature, courts have created an exception to the general rule against retroactivity.\textsuperscript{110} Courts will permit retroactive application of a remedial statute only if the statute in question merely expands a pre-existing remedy or affects a mode of procedure.\textsuperscript{111} However, there are two conditions that must generally be met before a court will deem a statute remedial and thus give it retroactive operation.\textsuperscript{112} First, the statute cannot affect an individual’s substantive rights; that is, the statute cannot purport to impair or add to an individual’s rights, duties, or obligations.\textsuperscript{113} Second, even if the statute is remedial in nature, it cannot affect existing liabilities to the detriment of the defendant.\textsuperscript{114} A court will not allow the retroactive application of a remedial statute if such a statute enhances the remedy available to a successful plain-

\textsuperscript{106} Id.
\textsuperscript{108} Id. at 780-81 n.22.
\textsuperscript{109} Id. at 780-81.
\textsuperscript{110} Ferrero v. Associated Materials Inc., 923 F.2d 1441, 1445 (11th Cir. 1991).
\textsuperscript{112} Bradley v. School Bd. of City of Richmond, 416 U.S. 696, 720 (1974).
\textsuperscript{113} Ferrero, 923 F.2d at 1445-46. See United States v. Kairys, 782 F.2d 1374, 1381 (7th Cir. 1986) (stating that statutes affecting substantive rights are not remedial in nature), cert denied, 476 U.S. 1153 (1986); Buccino, 578 F. Supp. at 1527 (stating that a statute will generally be applied prospectively if the statute creates a new cause of action or creates new liabilities or obligations).
tiff or imposes an unexpected liability, that if known, would have affected the defendant's behavior.115

In Hastings v. Earth Satellite Corp.,116 the United States Court of Appeals for the District of Columbia gave retroactive effect to a workers' compensation statute that was remedial in nature.117 Robert Hastings suffered a stroke caused by job stress on April 1, 1971.118 Under 1971 law, Hastings could only receive a maximum of $24,000 in workers' compensation.119 However, this ceiling was repealed in 1972.120 One of the issues the court addressed in Hastings was whether the amendment lifting the ceiling was retroactive to pre-1972 claims.121

The court noted that remedial statutes do not normally operate to transform a once legal act into an illegal act.122 Rather, the court stated that remedial legislation merely purports to adjust the extent or procedure for ascertaining the liability for conduct previously known to be illegal.123 The court stated that the removal of the artificial ceiling did not create a new liability for the employer as the liability was always there; in other words, the statutory ceiling was merely a means by which the employer was able to avoid paying the full cost of the injury incurred.124

In Buccino v. Continental Assurance Co.,125 the United States District Court of the Southern District of New York addressed whether it should retroactively apply an amendment to a New York statute that created a private cause of action for unfair and deceptive business practices where none existed previously and which also allowed private individuals to seek treble damages of up to $1,000.126 Joseph Buccino and others, acting in their capacities as fiduciaries of their employee benefit fund, sued Continental Assurance Company and its agents, alleging fraud and breach of fiduciary duty.127 The plaintiffs filed their claim under both federal and New York insurance laws.128 The amendment to the New York statute went into effect af-

117. Hastings, 628 F.2d at 93-94.
118. Id. at 86.
119. Id. at 89 n.2.
120. Id. at 92.
121. Id. at 92-94.
122. Id. at 93.
123. Id. at 94.
124. Id.
127. Id. at 1520.
128. Id.
ter the alleged incident giving rise to the plaintiffs' cause of action occurred.\textsuperscript{129} The district court denied the plaintiffs' application of the amended New York state statute, stating that the remedy afforded by the amendment went beyond simple modification of the pre-existing statute.\textsuperscript{130} The court held that the amendment created a whole new right of action for private citizens and expanded significantly the wrongdoer's liability beyond the restitution of money or property allowed under the former statute.\textsuperscript{131}

\textbf{Modern Rules of Statutory Construction}

Two of the courts most recent decisions on the question of retroactivity seem to contradict one another.\textsuperscript{132} In \textit{Bradley v. School Board of City of Richmond},\textsuperscript{133} the Court seemed to create a presumption in favor of retroactivity by requiring a court to give effect to the law in place at the time a decision is rendered unless such an application would manifest a substantial injustice, or Congress had specifically directed otherwise.\textsuperscript{134} In \textit{Bowen v. Georgetown University Hospi-}

\begin{itemize}
\item \textsuperscript{129} \textit{Id.} at 1520, 1526.
\item \textsuperscript{130} \textit{Id.} at 1527.
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} Allen, 44 \textit{Baylor L. Rev.} at 583.
\item \textsuperscript{133} 416 U.S. 696 (1974).
\item \textsuperscript{134} \textit{Bradley}, 416 U.S. at 711. See \textit{United States v. Security Industrial Bank}, 459 U.S. 70, 79 (1982) (stating that "the principal that . . . judicial decisions operate retrospectively, is familiar to every law student"). \textit{But see} \textit{Chevron Oil Co. v. Huson}, 404 U.S. 97, 108 (1971) (failing to give effect to a recent judicial pronouncement and deciding against applying the law in effect at the time the decision was rendered, principally because of the injustice such an application would have on the injured party, Gaines Ted Huson). Huson suffered personal injuries while working on an oil rig owned and operated by Chevron which was located on the Outer Continental Shelf off the Gulf Coast of Louisiana. \textit{Id.} at 98. In \textit{Chevron Oil Co.}, Huson did not discover his injury until many months after the act occurred and waited two years before commencing his action against Chevron. \textit{Id.} Historically, personal injury claims such as Huson's were decided under federal admiralty law which provided for a longer statute of limitations than that afforded under Louisiana state law, which was one year. \textit{Id.} at 99. During the pretrial discovery stages of Huson's lawsuit, the Supreme Court decided \textit{Rodrigue v. Aetna Casualty & Sur. Co.}, 395 U.S. 352 (1969). \textit{Huson}, 404 U.S. at 99. \textit{Rodrique} reversed a long line of federal court decisions holding that admiralty law and not state law applied to personal injury claims occurring on the Outer Continental Shelf. \textit{Huson}, 404 U.S. at 107. Under \textit{Rodrique's} ruling, the one year statute of limitations specified for personal injury under Louisiana state law would apply which would effectively bar Huson any right of recovery. \textit{Id.} at 99; see \textit{Rodrique v. Aetna Casualty & Sur. Co.}, 395 U.S. 352, 356 (1969).

The Court concluded that \textit{Rodrique} controlled the statute of limitations issue. \textit{Huson}, 404 U.S. at 100. However, the Court refused to apply the ruling to Huson noting that "retroactive application of the Louisiana statute of limitations to this case would deprive [Huson] of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable." \textit{Id.} at 108. In reaching its decision, the Court stated that nonretroactive application of judicial decisions would be considered under three instances:
The Court stated that "congressional enactments and administrative rules [should] not be construed to have retroactive effect unless their language requires this result."136

The Bradley Rule

In Bradley, the Court addressed whether it should apply retroactively the Education Amendments Act of 1972 ("EAA").137 The EAA granted a federal court the discretion to award reasonable attorney fees in school desegregation cases.138 The EAA became effective on July 1, 1972.139 The petitioners initiated their suit against the Richmond School Board in 1961, seeking desegregation.140 Finally, on April 5, 1971, the court approved Richmond's desegregation plan.141 The district court also granted the petitioners' motions, ordering a "significant award of attorneys' fees."142 The United States Court of Appeals for the Fourth Circuit heard arguments on the issue of attorneys' fees on March 7, 1972; however, it did not render a decision until after July 1, 1972, the effective date of the EAA.143 The Fourth Circuit reversed the district court's award of attorneys' fees, commenting that the EAA did not apply because no orders were pending or appealable and final judgment had been rendered before July 1, 1972.144 The United States Supreme Court reversed, holding "that a court is to apply the law in effect at the time it renders its decision, unless doing

139. Bradley, 416 U.S. at 710.
140. Id. at 699.
141. Id. at 703-04.
142. Id. at 705-06.
143. Id. at 709 n.13.
so would result in manifest injustice or there is statutory direction or legislative history to the contrary.\textsuperscript{145}

In reaching its decision, the Supreme Court stated that a law should not be given retroactive application if such an adjudication would serve manifest injustice on the parties.\textsuperscript{146} The Court articulated three areas of concern that a court needed to review in the absence of congressional intent or expressed statutory language before deciding against application of the law in place at the time a decision is rendered: "[1] the nature and identity of the parties; [2] the nature of their rights[,] and [3] the nature of the impact of the change in law upon those rights."\textsuperscript{147} The Court stated that there was no matured or unconditional right affected by the award of fees; and furthermore, there was no increased burden on the school board in as much as the board was already required to provide nondiscriminatory education to all students in the district.\textsuperscript{148} Therefore, the Court concluded that the

\textsuperscript{145} Bradley, 416 U.S. at 711. Central to the Court's holding were two past decisions; see id. at 711-17; Thorpe v. Housing Auth. of City of Durham, 393 U.S. 268 (1969); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801). The Court's decision in Schooner Peggy was the origin of the Court's ruling in Bradley that a court should apply the law in effect at the time a decision is rendered. Bradley, 416 U.S. at 711. However, the facts of Schooner Peggy were unique in that it concerned the application of a convention with France which specifically allowed for the return of all captured property which had not yet been condemned prior to the signing of the convention. Schooner Peggy, 5 U.S. (1 Cranch) at 107.

It was not until the Court's decision in Thorpe that a more expansive reading of Schooner Peggy was given effect. Bradley, 416 U.S. at 714. In fact, Schooner Peggy was the basis of the Thorpe decision. Allen, 44 BAYLOR L. REV. at 586. Thorpe involved a situation where the law changed while the case was pending on appeal. Thorpe 393 U.S. at 269-70. Joyce Thorpe was evicted by the Housing Authority of the City of Durham, North Carolina ("Housing Authority") on September 17, 1965. Id. at 271. While her eviction appeal was pending, the Department of Housing and Urban Development ("HUD") promulgated new procedural requirements pertaining to evictions. Id. at 272-72. However, HUD's regulation's did not specify whether the eviction procedures were to apply to pending cases. See Bradley, 416 U.S. at 714-15; Allen, 44 BAYLOR L. REV. at 586. The Court held that the regulation should apply to Thorpe based on "[t]he general rule ... that an appellate court must apply the law in effect at the time it renders its decision." Thorpe, 393 U.S. at 281. The Court's holding invalidated an eviction which had occurred almost eighteen months prior. Id. at 271, 274.

Justice Antonin Scalia in his concurring opinion in Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990), noted the confusion that Thorpe created regarding statutory construction rules. Bonjorno, 494 U.S. at 843-44 (Scalia, J. concurring). Justice Scalia further noted in his concurrence that the Court in Bradley expanded the confusion created by Thorpe because Bradley's "formulation of the governing principal was arguably more far-reaching." Id. at 849 (Scalia, J. concurring). Justice Scalia stated that the Thorpe formulation suggested the idea of retroactivity would only apply if the law was changed between the lower court's decision and the decision of the appellate court. Id. On the other hand, Justice Scalia noted that Bradley suggested all judicial decisions must apply the law in effect at the time the decision is rendered regardless of when the change in law occurred. Id.

\textsuperscript{146} Bradley, 416 U.S. at 711.
\textsuperscript{147} Id. at 717.
\textsuperscript{148} Id. at 721.
award of attorneys' fees did not promote an injustice against the school board.\textsuperscript{149}

In a later decision, the Court reversed an appellate ruling which relied on \textit{Bradley} to find that the applicable law was the law in effect at the time the decision was rendered.\textsuperscript{150} In \textit{Bennett v. New Jersey},\textsuperscript{151} the Court recognized that the circumstances of the case were such that if the law in effect at the time the decision was rendered was applied, manifest injustice would result.\textsuperscript{152} In \textit{Bennett}, the State of New Jersey sought review of a final decision of the Secretary of Education which required New Jersey to refund $1,031,304 in federal grant money advanced under Title I of the Elementary and Secondary Education Act, money which had been improperly spent during the years 1971-72.\textsuperscript{153} On appeal, New Jersey argued that the 1978 Amendments to Title I permitted use of funds in the manner expended.\textsuperscript{154} The United States Court of Appeals for the Third Circuit concurred and remanded the case to the Secretary of Education to confirm whether the expenditures conformed to the 1978 Amendments.\textsuperscript{155} On review, the Supreme Court concluded:

\begin{quote}[T]he presumption announced in \textit{Bradley} does not apply here. . . . This holding rested on the general principle that a court must apply the law in effect at the time of its decision . . . which \textit{Bradley} concluded holds true even if the intervening law does not expressly state that it applies to pending cases. \textit{Bradley}, however, expressly acknowledged limits to the principle. "The Court has 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." 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.\textsuperscript{156}

The Court noted that the Third Circuit's reliance on \textit{Bradley} was inappropriate.\textsuperscript{157} The Court stated that \textit{Bradley} itself commented that substantive changes should not be allowed to operate retroactively.\textsuperscript{158} Furthermore, the Court recognized that "[r]etroactive application of changes in the substantive requirements of a federal grant

\textsuperscript{149} Id. at 717.


\textsuperscript{151} 470 U.S. 632 (1985).

\textsuperscript{152} Bennett, 470 U.S. at 639-40.

\textsuperscript{153} Id. at 636.

\textsuperscript{154} Id. at 637.

\textsuperscript{155} Id.

\textsuperscript{156} Id. at 639 (citations omitted).

\textsuperscript{157} Id. at 638.

\textsuperscript{158} Id.
program would deny both federal auditors and grant recipients fixed, predictable standards for determining if expenditures are proper."\textsuperscript{159} As the Court noted, retroactive application of the 1978 Amendments would require audits to be predetermined in response to statutory changes and would prevent recipients from knowing with certainty the eligibility requirements for any given year or program.\textsuperscript{160}

The \textit{Bowen} Rule

The Supreme Court's decision in \textit{Bowen v. Georgetown University Hospital}\textsuperscript{161} parallels the Court's historical treatment of the issue of reactivity.\textsuperscript{162} In \textit{Bowen}, the Court stated that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."\textsuperscript{163} 

\textit{Bowen} concerned a 1981 cost-limit schedule promulgated by the Secretary of Health and Human Services ("Secretary") which altered the method of calculating reimbursable expenses for hospitals participating in governmental funded programs under Medicare.\textsuperscript{164} Several hospitals in the District of Columbia area brought suit seeking to have the cost-limit schedule invalidated.\textsuperscript{165} On April 29, 1983, the district court invalidated the schedule, concluding that the Secretary failed to give adequate notice and opportunity for hearing before issuing the schedule, thus violating the Administrative Procedure Act.\textsuperscript{166} Rather than appeal this ruling, the Secretary reissued the 1981 schedule after giving notice and seeking public comment on the proposed reissue of the schedule.\textsuperscript{167} The schedule went into effect on November 26, 1984.\textsuperscript{168} However, because of significant changes in cost-reimbursement procedures under Medicare, the Secretary planned to apply the schedule to reimbursement requests dating from July 1, 1981.\textsuperscript{169} In effect, the Secretary enacted a retroactive rule sweeping away any ramifications from the original rule's invalidation.\textsuperscript{170} Once again, several hospitals in the District of Columbia area sought to have the ret-

\textsuperscript{159.} \textit{Id.} at 640.
\textsuperscript{160.} \textit{Id.}
\textsuperscript{161.} \textit{488 U.S. 204} (1988).
\textsuperscript{162.} \textit{See Bowen}, \textit{488 U.S.} at 208-16.
\textsuperscript{163.} \textit{Id.} at 208.
\textsuperscript{164.} \textit{Id.} at 205-06.
\textsuperscript{165.} \textit{Id.}
\textsuperscript{166.} \textit{Id.} at 206.
\textsuperscript{167.} \textit{Id.} at 207.
\textsuperscript{168.} \textit{Id.} The rule was to apply exclusively to the fifteen month period beginning July 1, 1981. \textit{Id.}
\textsuperscript{169.} \textit{Bowen}, \textit{488 U.S.} at 207.
\textsuperscript{170.} \textit{Id.}
proactive application of the rule invalidated. The district court found in favor of the hospitals, holding that the circumstances of the case did not demand proactive application. The United States Court of Appeals for the District of Columbia and the Supreme Court affirmed the decision.

Unanimously, the Court stated that the Secretary's attempt to issue a rule retroactive to conduct occurring some fifteen months prior went beyond the agency's rulemaking authority. Lacking a specific grant of power to promulgate retroactive rules and regulations from Congress under the Medicare Act, the Court concluded that the Secretary was prohibited from such conduct. In reaching its decision, the Court looked to its long history of cases finding disfavor with retroactive application of laws. The Court specifically stated that "[t]he power to require readjustments for the past is drastic. It... ought not to be extended so as to permit unreasonably harsh action without very plain words.'


Since the Supreme Court's decision in Landgraf v. USI Film Products, the United States Court of Appeals for the Eighth and Tenth Circuits have decided several cases specifically addressing the application of the damages and other provisions of the 1991 Act to pending cases. Consistent with the Court's application of statutory rules of construction, these decisions denied application of the applicable provisions of the 1991 Act to acts of employment discrimination occurring prior to November 21, 1991. These decisions are also con-
sistent with other recent circuit court opinions on the subject of the 1991 Act’s retroactive application.\textsuperscript{181}

In \textit{Polacco v. Curators of University of Missouri},\textsuperscript{182} the Eighth Circuit reversed a jury award of $60,000 in compensatory damages to Mary Polacco who had sued her employer on the basis that her educational funding was terminated on account of sex discrimination.\textsuperscript{183} The Eighth Circuit specifically reversed the jury award of compensatory damages, noting that "[t]he Supreme Court has now clarified that compensatory damages may not be recovered under [section] 102 for 'conduct occurring before November 21, 1991.'"\textsuperscript{184}

On June 30, 1994, the Tenth Circuit decided \textit{Simons v. Southwest Petro-Chem}\textsuperscript{185} under the rule announced in \textit{Patterson v. McLean Credit Union},\textsuperscript{186} a rule that the 1991 Act overruled.\textsuperscript{187} \textit{Simons} involved an employment discrimination claim alleging race discrimination under 42 U.S.C. § 1981 ("Section 1981").\textsuperscript{188} June Simons attempted to show that she was not given light work assignments and

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\textsuperscript{181} See Chenault v. United States Postal Serv., 37 F.3d 535, 536-37 (9th Cir. 1994) (affirming the lower court's ruling that the 1991 Act's provisions for compensatory and punitive damages did not apply because the cause of action occurred prior to the Act's effective date); Brinkley-OBU v. Hughes Training, Inc., 36 F.3d 336, 355 (4th Cir. 1994) (approving the district court's jury instruction that compensatory damages could be awarded based solely on the employer's discriminatory conduct occurring after November 21, 1991); Carter v. Sedgwick County, 36 F.3d 952, 955 (10th Cir. 1994) (refusing to reinstate Carter's compensatory and punitive damage awards because the 1991 Act's damages provisions are not to be applied retroactively). See also Michael K. Wyatt & Jay Nordlinger, Following the U.S. Supreme Court's Ruling that the 1991 Civil Rights Act is not Retroactive, Lawyers will need to Determine Exactly what Law Applies, The Nat'L L.J., June 20, 1994, at B5 (discussing the gap created by the Supreme Court's \textit{Landgraf} decision and the law to be applied to cases pending as of November 21, 1991); Susan A. Cardoza, 1991 Civil Rights act is Retroactive?? Can Supreme Court's Ruling be Circumvented??, 94 LAW. WRKLY. USA 542 (1994) (discussing the practical considerations of the \textit{Landgraf} decision to civil rights lawyers).

\textsuperscript{182} 37 F.3d 366 (8th Cir. 1994).

\textsuperscript{183} Polacco, 37 F.3d at 368.

\textsuperscript{184} \textit{Id.} at 370 (quoting \textit{Landgraf v. USI Film Prods.}, 114 S. Ct. 1483, 1506 (1994)).

\textsuperscript{185} 28 F.3d 1029 (10th Cir. 1994).

\textsuperscript{186} 491 U.S. 164 (1989).

\textsuperscript{187} Simons, 28 F.3d at 1031.

\textsuperscript{188} \textit{Id.} at 1030.
was terminated because of her race. The United States District Court for the District of Kansas refused to hear this argument because of the Patterson ruling which held that Section 1981 "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." Despite the fact that Patterson was specifically overruled by section 101 of the 1991 Act, the Tenth Circuit noted that it was required to follow Patterson's rule in affirming the district court's decision.

ANALYSIS

In Landgraf v. USI Film Products, the United States Supreme Court ended the debate over the retroactive application of the jury trial and damages provisions of the Civil Rights Act of 1991 ("1991 Act"). Since the inception of the 1991 Act, courts and commentators have agreed that the effective date provision of the 1991 Act is ambiguous and susceptible to multiple interpretations especially with regards to pre-existing claims. Furthermore, the legislative history of the 1991 Act is also inconclusive. Given the ambiguous language of the 1991 Act and its inconclusive legislative history, the Court was forced to rely on its prior statutory construction decisions in order to

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189. Id.
190. Id. (quoting Patterson, 491 U.S. at 171).
191. Id. at 1031-32. The Tenth Circuit noted the fact that the 1991 Act overruled Patterson, but the Supreme Court's decision in Rivers was dispositive of the Simons' outcome. Simons, 28 F.3d at 1032. In Rivers, as was the case in Simons, the plaintiffs attempted to sue their employer under section 1981, claiming they were fired as a result of their race. Id.; Rivers, 114 S. Ct. at 1513. Also synonymous with Simons, the Roadway Express employees based their complaint on conduct which occurred prior to November 21, 1991. Rivers, 114 S. Ct. at 1513. The Supreme Court concluded that section 1981 as amended could not be applied to Rivers because section 1981 brings with it important new legal obligations which fall "within the class of laws that are presumptively prospective." Rivers, 114 S. Ct. at 1515. As a result, both Rivers and Simons were denied further pursuit of their employment discrimination claims under section 101 of the 1991 Act. Simons, 28 F.3d at 1030; Rivers 114 S. Ct. at 1519-20.
193. See Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1488. See also David Allen, Comment, Retroactivity of the Civil Rights Act of 1991, 44 BAYLOR L. REV. 569, 582 (stating that the 1991 Act's application to pending cases is ambiguous).
194. Jennifer Jolly Ryan, Back to the Future: The Application of the 1991 Civil Rights Act to Pre-Existing Claims, 44 MERCER L. REV. 911, 933 n.176. See also Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 932 (7th Cir. 1992) (finding that the 1991 Act's effective date provision is subject to many interpretations), cert. denied, 113 S. Ct. 207 (1992); Vogel v. City of Cincinnati, 959 F.2d 594, 598 (6th Cir. 1992) (interpreting that the effective date provision is applicable to either pending cases or only applicable to acts of discrimination occurring after November 21, 1991), cert. denied, 113 S. Ct. 86 (1992).
resolve whether the 1991 Act applied to acts of discrimination which occurred prior to November 21, 1991.\footnote{Ryan, 44 MERCER L. REV. at 933.}

Based on the Court's past precedent, the \emph{Landgraf} opinion appropriately identified and classified the nature of the jury trial provision and damage award provisions.\footnote{See infra notes 223-54 and accompanying text.} Furthermore, the Court's conclusions regarding these provisions were entirely consistent with its past precedent.\footnote{See infra notes 223-77 and accompanying text.} Not only did \emph{Landgraf} settle the retroactively issue of two of the more important provisions of the 1991 Act, the Court also reconciled what Justice Antonin Scalia and other commentators have referred to as two contradictory rules of statutory construction.\footnote{See infra notes 255-77 and accompanying text.}

**The Court's Textual Analysis of Section 402(a) Was Correct**

In \emph{Landgraf}, the Supreme Court concluded that the textual language of the 1991 Act and its legislative history did not provide the necessary manifestation of congressional intent to make the 1991 Act retroactive.\footnote{Landgraf, 114 S. Ct. at 1493-96.} This analysis is correct given that courts have historically viewed retroactive legislation as oppressive.\footnote{Elmer E. Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 MINN. L. REV. 775, 778 (1935).} Furthermore, courts have generally preferred prospective application of a statute without clear congressional intent to allow retroactive application.\footnote{See United States v. Security Indus. Bank, 459 U.S. 70, 79 (1982) (identifying the first rule of statutory construction as prospective application and not retroactive unless retroactive application is the unequivocal intention of the legislature). See also Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (noting that the law does not favor retroactivity); Gleason v. Gleason, 256 N.E.2d 513, 516 (N.Y. 1970) (noting that the general principle of law is prospective application of a statute without a clear indication of congressional intent to justify retroactive application).}

Justice Harry Blackmun argued that retroactive application of the 1991 Act was necessary in order to give operative effect to every word of the 1991 Act.\footnote{Landgraf, 114 S. Ct. at 1509 (Blackmun, J. dissenting).} Justice Blackmun asserted that section 402(a) called for retroactive application and was only qualified by section 109(c) and 402(b).\footnote{See Ryan, 44 MERCER L. REV. at 926-27. See also Mozee, 963 F.2d at 932-33 (identifying plaintiff's textual argument for retroactive application of the 1991 Act rests on the interplay between sections 109(c), 402(a), and 402(b)).} Section 402(a) states that "[e]xcept as otherwise specifically provided, this Act and the Amendments made by this Act shall take effect upon enactment."\footnote{Landgraf, 114 S. Ct. at 1509 (Blackmun, J. dissenting).} Section 109(c) specifically limits the applicability of protections afforded by the 1991 Act to cer-

\begin{itemize}
  \item \footnote{Ryan, 44 MERCER L. REV. at 933.}
  \item \footnote{See infra notes 223-54 and accompanying text.}
  \item \footnote{See infra notes 223-77 and accompanying text.}
  \item \footnote{See infra notes 255-77 and accompanying text.}
  \item \footnote{Landgraf, 114 S. Ct. at 1493-96.}
  \item \footnote{Elmer E. Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 MINN. L. REV. 775, 778 (1935).}
  \item \footnote{See United States v. Security Indus. Bank, 459 U.S. 70, 79 (1982) (identifying the first rule of statutory construction as prospective application and not retroactive unless retroactive application is the unequivocal intention of the legislature). See also Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (noting that the law does not favor retroactivity); Gleason v. Gleason, 256 N.E.2d 513, 516 (N.Y. 1970) (noting that the general principle of law is prospective application of a statute without a clear indication of congressional intent to justify retroactive application).}
  \item \footnote{Landgraf, 114 S. Ct. at 1509 (Blackmun, J. dissenting).}
\end{itemize}
tain foreign employment of American citizens to acts of discrimination occurring after November 21, 1991.\textsuperscript{206} Section 402(b) specifically prohibits the application of the 1991 Act to disparate-impact claims occurring before November 21, 1991.\textsuperscript{207} Thus, Justice Blackmun argued that the entire 1991 Act, except sections 109(c) and 402(b), must be applied retroactively, otherwise sections 109(c) and 402(b) would be entirely redundant.\textsuperscript{208}

However, Justice Blackmun's analysis failed to take into consideration past Supreme Court cases dating as far back as the nineteenth century which mandate an express command from the legislature to apply a statute retroactively.\textsuperscript{209} Absent such an expressed command, the courts "presume that a law is designed to act prospectively."\textsuperscript{210} The 1991 Act's effective date provision, section 402(a), does not identify in clear and unequivocal language congressional intent to have the entire 1991 Act, and in particular the damages provision, apply to cases pending as of November 21, 1991.\textsuperscript{211} The fact that the 1991 Act is lacking a clear and unequivocal statement of legislative intent regarding retroactive application is more than apparent given the divergent views of the various lower courts interpreting the 1991 Act to mandate both prospective and retroactive application.\textsuperscript{212} For example, the United States Court of Appeals for the Seventh Circuit noted in \textit{Mozee v. American Commercial Marine Service Co.},\textsuperscript{213} that the "take effect upon enactment" language of section 402(a) provides no guidance as to the 1991 Act's application to pending cases.\textsuperscript{214} The court in \textit{Mozee} found section 402(a) ambiguous:

\begin{itemize}
  \item \textsuperscript{206} 42 U.S.C. \$ 2000e (1988 Supp. III); \textit{see supra} note 45 and accompanying text. \textit{See also} Ryan, 44 MERCER L. Rev. at 927 (noting that courts have construed the language of section 109(c) as intending to prevent the reopening of \textit{EEOC v. Arabian American Oil Co.}, 111 S. Ct. 1227 (1991)).
  \item \textsuperscript{207} 42 U.S.C. \$ 1981 note (1988 Supp. III); \textit{see supra} note 45 and accompanying text. \textit{See also} Ryan, 44 MERCER L. Rev. at 927 (noting that courts have construed section 402(b) as intending solely to prevent the reopening of \textit{Wards Cove Packing Co. Inc. v. Antonio}, 490 U.S. 642 (1989)).
  \item \textsuperscript{208} \textit{Landgraf}, 114 S. Ct. at 1509 (Blackmun, J. dissenting). \textit{See} Ryan, 44 MERCER L. Rev. at 926-27. \textit{See also} \textit{Mozee}, 963 F.2d at 932-33 (identifying that plaintiff's textual argument for retroactive application of the 1991 Act rests on the interplay between sections 109(c), 402(a), and 402(b)).
  \item \textsuperscript{209} \textit{See} Smead, 20 MINN. L. Rev. 781 n.22 (detailing Supreme Court decisions between 1801 and 1930 stating that retroactive legislation would not be favored).
  \item \textsuperscript{210} \textit{Id.} at 781.
  \item \textsuperscript{211} \textit{Mozee}, 963 F.2d at 932. \textit{See} \textit{Security Indus. Bank}, 459 U.S. at 79 (requiring unequivocal and inflexible terms and the manifest intent of Congress in order to apply a statute retroactively).
  \item \textsuperscript{212} \textit{Mozee}, 963 F.2d at 932. \textit{See} Ryan, 44 MERCER L. Rev. at 921 (noting that the Sixth and Seventh Circuits and a majority of district courts have stated that the language of the 1991 Act regarding retroactive application to pending cases is ambiguous).
  \item \textsuperscript{213} 963 F.2d 929 (7th Cir. 1992).
  \item \textsuperscript{214} \textit{Mozee}, 963 F.2d at 932.
It is susceptible to several interpretations: it might mean that the 1991 Act applies to conduct which occurred after the enactment, it might mean that the Act applies to cases filed after the enactment, it might mean that the Act applies to all proceedings beginning after the enactment, it might mean that the Act's provisions apply to all pending cases at any stage of the proceedings, or it might mean that the Act's procedural provisions apply to proceedings begun after enactment and the substantive provisions apply to conduct that occurs after the enactment.\(^\text{215}\)

In addition to the statutory ambiguity, the legislative history of the 1991 Act provides no clear indication of congressional intent with regards to the retroactivity issue.\(^\text{216}\) The retroactivity debate in Congress fell upon party lines.\(^\text{217}\) Senator John C. Danforth, the Republican sponsor of the 1991 Act, stated that “the provisions of this legislation [should] take effect upon enactment and [should] not apply retroactively.”\(^\text{218}\) Whereas Senator Edward Kennedy, the 1991 Act's chief Democratic sponsor, stated that “[i]t [would] be up to the courts to determine the extent to which the bill [would] apply to cases and claims that [were] pending on the date of enactment.”\(^\text{219}\)

Finally, Justice Blackmun’s support for retroactive application of the 1991 Act so as to give operative effect to every word, regardless of a clear mandate from Congress, failed to consider the effect retroactive application would have on the substantive rights of the parties.\(^\text{220}\) Only if a statute is found to be remedial will courts allow retroactive application absent clear congressional intent to the contrary.\(^\text{221}\) Therefore, lacking clear language to support retroactive application of the 1991 Act, the Court correctly addressed the effect that retroactive application of the 1991 Act would have on the substantive rights of the parties.\(^\text{222}\)

\(^{215}\) Id. (emphasis added).
\(^{216}\) Id. at 933.
\(^{217}\) Allen, 44 BAYLOR L. REV. at 577.
\(^{220}\) See supra notes 105-31 and accompanying text.
\(^{222}\) See supra notes 100-31 and accompanying text; see also infra notes 223-54 and accompanying text.
The Court's Retroactivity Analysis was Correct

The Jury Trial Provision

The Court in *Landgraf* began its analysis as to the retroactivity of the jury trial provision of section 102(c)(1) and the compensatory damages award provision in section 102(a)(1) by first addressing the nature of these two provisions. The Court stated that the jury trial provision "is plainly a procedural change of the sort that would ordinarily govern in trials conducted after its effective date." The Court noted that the jury trial provision, if standing alone, would presumably apply to pre-enactment cases no matter when the underlying conduct occurred. In as much as the Court stated that a jury trial would be available to a complaining party regardless of when the underlying cause of action actually occurred, the jury trial provision was not found to impair or add to an individual's rights, duties, or obligations.

The Court's analysis was correct. As a pure procedural statute, the right to a jury trial could be viewed merely as adjusting the means of ascertaining the defendant's liability for conduct already known to be illegal. As was the case with the cost limit amendment in *Hastings v. Earth Satellite Corp.*, the jury trial provision did not transform a once legal act into an illegal act, nor create uncertainty, which if known, could have caused the defendant to act otherwise.

However, the 1991 Act only allows the party complaining of employment discrimination to seek a jury trial in the event compensatory damages are sought. Therefore, only by addressing the nature of the compensatory damages award provision could the Court have determined whether a jury trial was truly available to acts of employment discrimination which occurred before the effective date of the 1991 Act — November 21, 1991.

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224. Id. at 1505.
225. Id.
226. Id.
227. See infra notes 228-31 and accompanying text.
230. See supra notes 122-23 and accompanying text; see *Hastings*, 628 F.2d at 93-94.
The Compensatory Damages Provision

In Landgraf, the Court determined that, "[u]nlike certain other forms of relief, compensatory damages are quintessentially backward-looking. [Such] damages may be intended less to sanction wrongdoers than to make victims whole, but they do so by a mechanism that affects the liabilities of defendants."\textsuperscript{233} The Court in Landgraf also determined that the introduction of such a damage privilege would have a pronounced impact on a party’s rights by creating a new cause of action and imposing on employers a new liability for past actions.\textsuperscript{234} The Court noted that the creation of a new damages award would serve to work as an incentive for employers to take additional steps to prevent discriminatory conduct before it occurs.\textsuperscript{235} Thus, the Court concluded that the compensatory and punitive damages award provisions would have a substantive legal effect if applied to acts of discrimination occurring before November 21, 1991, and therefore should be applied prospectively.\textsuperscript{236}

The Court’s analysis of the nature of the 1991 Act’s damages provision conformed with its past precedent on the issue of statutory construction, while Justice Blackmun’s characterization of the damages provision as remedial contradicted the Court’s past precedent.\textsuperscript{237} Applying the historical rules of statutory construction, compensatory damages could be allowed to a complaining party for actions occurring prior to November 21, 1991, only if the damages award does not impair or add to a party’s substantive rights and does not affect existing liabilities to the detriment of the defendant.\textsuperscript{238}

In order to meet the first condition, the compensatory damages award cannot change the legal consequences of an act completed prior to the effective date of the 1991 Act.\textsuperscript{239} Section 102 of the 1991 Act does not make illegal that which was legal prior to the 1991 Act’s enactment.\textsuperscript{240} Rather, the compensatory damages provision only concerns discriminatory conduct which was previously prohibited under Title VII.\textsuperscript{241} Thus, section 102(a)(1) does not seem to affect an employer’s substantive rights in that it only applies to conduct which was rendered illegal under the 1964 Act.\textsuperscript{242} However, in order to survive

\begin{footnotes}
\footnotetext[233]{\textit{Id.} at 1506.}
\footnotetext[234]{\textit{Id.}}
\footnotetext[235]{\textit{Id.} at 1506 n.35.}
\footnotetext[236]{\textit{Id.} at 1506.}
\footnotetext[237]{See supra notes 105-77 and accompanying text.}
\footnotetext[238]{See supra notes 110-15 and accompanying text.}
\footnotetext[239]{See United States v. Kairys, 782 F.2d 1374, 1381 (7th Cir. 1986).}
\footnotetext[240]{Landgraf, 114 S. Ct. at 1506.}
\footnotetext[241]{Id.}
\footnotetext[242]{See supra notes 237-41 and accompanying text.}
\end{footnotes}
the exception to the general rule against retroactivity, the damages provision cannot affect existing liabilities to the detriment of the employer.\textsuperscript{243}

Compensatory damages are just the sort of legal change that would impact the planning of private parties.\textsuperscript{244} For example, if USI had prior knowledge of the damages provisions of section 102(a)(1), USI may have altered its behavior to avoid paying compensatory damages.\textsuperscript{245} Having met only one of the two conditions necessary to sustain a retroactive application of a procedural or remedial statute, the Court was correct in holding that the compensatory damages provision, and by necessity, the jury trial provision are subject to prospective application only.\textsuperscript{246}

This conclusion comports with the decision of the United States District Court for the Southern District of New York in \textit{Buccino v. Continental Assurance Co.}\textsuperscript{247} In \textit{Buccino}, the district court declined to retroactively apply a New York statute which was enacted while \textit{Buccino} was pending and which would have allowed Buccino and others a new cause of action and added new monetary penalties where none had existed previously.\textsuperscript{248}

Similar to the compensatory damages provision of the 1991 Act, the New York statute failed to satisfy the two conditions a remedial statute must meet before it can be applied to pending cases.\textsuperscript{249} The New York statute's creation of a whole new right of action was viewed by the district court as a significant substantive change adding to an individual's rights and obligations.\textsuperscript{250} Furthermore, the addition of the penalty created a new liability for the defendant where none had existed in the past.\textsuperscript{251}

Justice Blackmun's characterization of the damages provision as remedial cannot stand in the context of the historical rules of statutory construction.\textsuperscript{252} The Court acknowledged that the damages provision did not make illegal that which was legal, the main premise of Justice Blackmun's argument.\textsuperscript{253} However, Justice Blackmun's dis-
sent ignored the second element of retroactivity — the effect on existing liabilities — which the Court found dispositive of the 1991 Act’s prospective application.254

**Reconciliation of Landgraf with the Bowen and Bradley Rules**

Over the past twenty years, the Court has developed two distinct lines of cases regarding retroactive application of legislative acts: *Bowen v. Georgetown University Hospital*255 and *Bradley v. School Board of City of Richmond*.256 Justice Scalia and commentators have argued that these lines of cases are seemingly irreconcilable.257 Notwithstanding past claims of conflict between *Bowen*, which holds that retroactivity is not favored, and *Bradley*, which establishes a presumption of retroactivity in the absence of manifest injustice or legislative intent to the contrary, the Court in *Landgraf* noted that “there is no tension between the holdings in *Bradley* and *Bowen*, both of which were unanimous decisions.”258 Specifically, the Court announced that *Bradley* did not alter the well-settled presumption against retroactive application of statutes.259 Rather, according to the Court, *Bradley* sustained the presumption regarding statutory construction that courts must apply a statute prospectively if retroactive application would work a manifest injustice.260

In addition, instead of overruling *Bradley*, the Court emphasized the distinction between statutes which are merely procedural in nature versus those that affect a party’s vested rights.261 The Court articulated a new rule of statutory construction, concluding that a court shall not give a statute retroactive effect if to do so “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.”262 Although not specifically stated as such in *Landgraf*, the new statutory construction rule put forth in *Landgraf* merely reiterates the criteria enumerated in *Bradley, Bennett v. New*

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254. See supra notes 72-83 and accompanying text; see also supra notes 110-15 and accompanying text.
256. 416 U.S. 696 (1974); Allen, 44 BAYLOR L. REV. at 582.
257. *Bonjorno*, 494 U.S. at 841 (Scalia, J. concurring); see Allen, 44 BAYLOR L. REV. at 582.
259. Id. at 1503.
260. *Bradley*, 416 U.S. at 711; see supra notes 137-59 and accompanying text.
262. Id. at 1506.
and Chevron Oil Company v. Huson. This criteria requires a court to look at the injustice which would be created should it give retroactive effect to a statute or judicial pronouncement.

Bradley is consistent with the long history of statutory construction disfavoring retrospective legislation but allowing retroactive application of remedial statutes. The Bradley outcome would not have been any different had the Court focused more on the remedial nature of the attorneys' fees award. The court in Bradley acknowledged that a law should not be given retroactive application if such application would produce a manifest injustice. This exception is not any different from the conditions a remedial statute must meet before it is given retroactive application under Landgraf — namely, the remedial statute cannot affect an individual's substantive rights, nor can the statute affect existing liabilities to the detriment of the defendant.

Had the Court decided Landgraf under the exceptions articulated in Bradley, the outcome would not have changed. Bradley demonstrates that a court is only to apply the law in effect at the time a decision is rendered unless manifest injustice would result. According to Bradley, a court should find manifest injustice if retroactive application of a given law would infringe or deprive a person of a right which had matured or become unconditional or retroactive application would create a new and unanticipated liability upon a party without notice or opportunity to be heard. These exceptions to the Bradley rule are really no different than the conditions which must be met in order for a court to give remedial or procedural statutes retroactive application. A court will not apply even strictly remedial or procedural statutes and judicial pronouncements retroactively if an individual's substantive rights would be affected.

The compensatory damages provision satisfies Bradley's manifest injustice test. Retroactive application of the compensatory damages provision would create manifest injustice because it is the "type of legal change that would have an impact on private parties' planning

264. 404 U.S. 97, 106-07 (1971); see supra notes 132-77 and accompanying text.
265. See supra notes 132-77 and accompanying text.
266. See infra notes 267-69 and accompanying text.
267. See supra notes 110-15 and accompanying text.
268. Bradley, 416 U.S. at 711.
269. See supra notes 110-15 and accompanying text.
270. See infra notes 271-77 and accompanying text.
272. Id. at 720.
273. See supra notes 110-15 and accompanying text.
274. See supra notes 105-36 and accompanying text.
275. See infra notes 276-77 and accompanying text.
...[by attaching] an important new legal burden to [the employer's] conduct." Thus, under Bradley, the Court in Landgraf could not have applied retroactively the compensatory damages provision due to the detrimental effects such awards would have on an employer's rights and liabilities.277

LOOKING FORWARD: EMPLOYMENT DISCRIMINATION CLAIMS AFTER LANDGRAF

Court Decisions After Landgraf

The decisions in Landgraf, Bowen, and Bradley all evidence the Supreme Court's consistent application of long-established rules of statutory construction.278 Based on these well-established rules of statutory construction and the lack of clear statutory language or legislative history, there really was only one justifiable outcome to Landgraf and the issue of the 1991 Act's retroactive application to acts of employment discrimination occurring prior to November 21, 1991.279 The Court's decisions against retroactive application of sections 101 and 102 of the 1991 Act in Rivers v. Roadway Express, Inc.280 and Landgraf, respectively, have had the unwelcomed effect of delaying the true effective date of the 1991 Act.281

In the Eighth Circuit alone, three cases concerning the 1991 Act's application to acts of employment discrimination occurring prior to November 21, 1991 have been decided since the Court's Landgraf decision: Wright v. General Dynamics Corp.,282 Polacco v. Curators of Univ. of Missouri,283 and Harlston v. McDonnell Douglas Corp.284 In each of these cases, the Eighth Circuit denied relief under the 1991 Act to the complaining employee, basing its decisions on the Court's decision in Landgraf.285 As with Landgraf, the determinative fact in each of these cases was whether the alleged acts of employment discrimination occurred prior to November 21, 1991.286 In fact, the

276. Landgraf, 114 S. Ct. at 1506.
277. Id.
278. Landgraf, 114 S. Ct. at 1496-1508; Bowen, 488 U.S. at 208-15; Bradley, 416 U.S. at 710-21; see supra notes 192-277 and accompanying text.
279. See supra notes 105-277 and accompanying text.
282. 23 F.3d 1478 (8th Cir. 1994) (decided May 20, 1994).
283. 37 F.3d 366 (8th Cir. 1994) (decided July 11, 1994).
284. 37 F.3d 379 (8th Cir. 1994) (decided September 29, 1994).
285. See Wright v. General Dynamics Corp., 23 F.3d 1478, 1479 (8th Cir. 1994); Polacco v. Curators of Univ. of Missouri, 37 F.3d 366, 368 (8th Cir. 1994); Harlston v. McDonnell Douglas Corp., 37 F. 3d 379, 381 (8th Cir. 1994).
286. Wright, 23 F.3d at 1479; Polacco, 37 F.3d at 370; Harlston, 37 F.3d at 381. In Landgraf, the Court was not concerned with the individual facts surrounding Lan-
Eighth Circuit in *Polacco* reversed a jury award of $60,000 in compensatory damages solely because *Polacco* was not “fortunate” enough to have suffered intentional employment discrimination after November 21, 1991.\(^{287}\)

In addition, on June 30, 1994, the United States Court of Appeals for the Tenth Circuit decided *Simons v. Southwest Petro-Chem. Inc.*,\(^{288}\) under the rule promulgated by the Supreme Court in *Patterson v. McLean Credit Union*.\(^{289}\) Despite the fact that section 101 of the 1991 Act overturned *Patterson*, *Simons* had no cause of action under 42 U.S.C. § 1981 as amended by section 101 because her employers’ alleged acts of employment discrimination occurred prior to November 21, 1991.\(^{290}\) The rule in *Patterson* effectively denied *Simons* a cause of action under Title VII.\(^{291}\)

Each of these cases illustrates that the 1991 Act really did not take effect upon enactment as the language of section 402 of the 1991 Act suggests.\(^{292}\) As the Tenth Circuit was required to do in *Simons*, other jurisdictions will be required to decide cases which were pending as of November 21, 1991, under the former and controversial Supreme Court interpretations of the many provisions of the Civil Rights Act of 1964.\(^{293}\) Thus the 1991 Act’s stated purpose — “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination” — is not effectuated.\(^{294}\) Congress must assume responsibility for these decisions and the resulting delay in the effectiveness of this important piece of legislation due to its failure to pass an unambiguous statute.\(^{295}\)

dgraf’s claim, but rather found the “controlling question [to be] whether the Court of Appeals should have applied the law in effect at the time the discriminatory conduct occurred, or at the time of its decision in July 1992.” *Landgraf*, 114 S. Ct. at 1489.

288. 28 F.3d 1029 (10th Cir. 1994).
291. Id. at 1031; see *Patterson v. McLean Credit Union*, 491 U.S. 164, 175-80 (1989).
292. Compare notes 177-90 and accompanying text (stating that the Eighth Circuit and Tenth Circuit refused to apply the 1991 Act because the discrimination claims at issue occurred prior to November 21, 1991) with 42 U.S.C. § 1981 (1988 Supp. III) (providing that “except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment”).
293. Ryan, 44 MERCER L. REV. at 956; *Simons*, 28 F.3d at 1031-32.
Practical Considerations After Landgraf

Because of the recent court interpretations enumerated above, commentators are cautioning civil rights lawyers to analyze carefully the dates that any acts of discrimination allegedly occurred in order to determine what substantive law applies, what damages are recoverable, and whether a jury trial is available. Commentators are also encouraging plaintiffs' lawyers to find ways to present pre-Act conduct to the jury. Specifically, plaintiffs' lawyers should try and allege a "chain of events" if at least some of the alleged acts occurred after November 21, 1991. This can be done in three different ways: (1) pre-Act conduct may be used to prove a hostile work environment in order to show cumulative discriminatory conduct; (2) pre-Act conduct may be beneficial in proving liability for a post-Act discharge; and (3) pre-Act conduct coupled with post-Act conduct may demonstrate an employer's reckless disregard or malice and thus subject the employer to punitive damages.

On the other side, defense lawyers should argue that the right to a jury trial is only available for post-Act conduct specifically covered under the new emotional distress and punitive damage provisions. Thus, as far as damages decided by the jury are concerned, defense lawyers should argue that pre-Act conduct is irrelevant. Defense lawyers should also argue that pre-Act conduct is irrelevant solely on the basis of the 1991 Act's effective date. In any event, both plaintiffs and defendants counsel will be looking to the courts to decide the relevance of pre-Act conduct to proof of post-Act discrimination.

CONCLUSION

The United States Supreme Court's decision in Landgraf v. USI Film Products has settled the issue of whether the Civil Rights Act of 1991 ("1991 Act") applies to cases pending on November 21, 1991. The Supreme Court decided that the 1991 Act, specifically

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298. Id.
299. Id.
300. Id.
301. Id. Traditional Title VII remedies in the form of back pay and/or reinstatement would still be left for the judge to decide. Id.
302. Cardoza, 94 LAW. WKLY. USA at 542.
303. Id.
305. See Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1488 (1994).
the compensatory and punitive damages provision provided under section 102(a), should not be applied to acts of employment discrimination which occurred prior to November 21, 1991.\textsuperscript{306} The Court reached its decision by adhering to the well-established principles of statutory construction originating in the English common law.\textsuperscript{307} The Court also reconciled what Justice Antonin Scalia referred to as two irreconcilable lines of precedent.\textsuperscript{308} The Court recognized that the unanimous Court decisions in \textit{Bradley v. School Board of City of Richmond}\textsuperscript{309} and \textit{Bowen v. Georgetown University Hospital}\textsuperscript{310} were decided based on the same underlying principle of statutory construction — the principle that a court may not give retroactive application to a statute if the statute adversely affects an individual's substantive rights or imposes an unexpected liability on the defendant.\textsuperscript{311}

The Court's decision in \textit{Landgraf} has had the unwelcomed effect of delaying the true implementation of the 1991 Act. Rather than taking effect upon enactment as the language of the 1991 Act suggests, the 1991 Act is really only available to victims of employment discrimination who are "fortunate" enough to have experienced discriminatory conduct after November 21, 1991. For those victims of discrimination resulting from acts occurring prior to November 21, 1991, their cases must still be decided under the laws prevailing at the time the act occurred. Many of these cases are still wending their way through the judicial system today. Consequently, the courts will be forced to decide those cases on rules of law which the 1991 Act overturned. Only the Congress is to blame for this result. Congress' failure to provide concrete direction to the courts concerning application of the 1991 Act to pending employment discrimination claims has led to the inconsistent treatment victims of employment discrimination must withstand.

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\textsuperscript{306} \textit{Id.}
\textsuperscript{307} See \textit{id.} at 1496-1508.
\textsuperscript{308} \textit{Id.} at 1496-1505.
\textsuperscript{309} 416 U.S. 696 (1974).
\textsuperscript{310} 488 U.S. 204 (1988).
\textsuperscript{311} \textit{Landgraf}, 114 S. Ct. at 1496-1505.