RETROACTIVE APPLICATION OF THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 TO PENDING CASES: REWRITING A POORLY WRITTEN CONGRESSIONAL STATUTE

I. INTRODUCTION

On April 24, 1996, President Clinton signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996 ("the Act").[1] This Act significantly alters the statutory structure governing the availability of habeas corpus relief.[2] Signed into law on the first anniversary of the Oklahoma City Bombing,[3] the Act is intended to "deter terrorism, provide justice for victims, [and] provide for an effective death penalty," among other purposes.[4]

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1. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. §§ 2241-2266 (1997)).

2. Originally, the writ of habeas corpus was available on a limited basis only to those who were in the custody of the United States authorities, specifically federal prisoners. *See* Judiciary Act of 1789 ch. 20, § 14, 1 Stat. 73, 81-82 (current version at 28 U.S.C. § 2241(a) (1997)); Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153. The Judiciary Act of 1867 expanded appellate jurisdiction, allowing habeas corpus appeals to go directly to the Supreme Court once the final decision has been rendered by the circuit court. For more information on the history of habeas corpus limitations, see *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L.J. 17, 141-45 (1996); WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126-56 (1980).

3. The bill, introduced shortly after the 1995 Oklahoma City bombing, lingered in Congress for almost a year before the President finally signed it into law one year after the bombing. Tom C. Smith, *Crime Legislation Passes in Election Year*, 11-SUM CRIM. JUST. 50 (1996). The bill had bipartisan support ranging from Senator Bob Dole to President Clinton. Thomas C. Martin, *The Comprehensive Terrorism Prevention Act of 1995*, 20 SETON HALL LEGIS. J. 201, 205 (1996). The impetus for the bill was the desire for a plan to combat terrorism; thus the bill's legislative history is replete with references to various plans regarding terrorism. *See id.* at 211-33. Perhaps one of the more controversial sections of the bill, however, was the portion mandating habeas corpus reform. *See id.* at 233. Many of those opposed to habeas reform were concerned about its general inclusion in the terrorism bill. "Many of the stories we hear during this debate rely on their persuasive power on the grief and rage many of us feel after a brutal murder.... Grief and rage are not good foundations for making good policy...." *Id.* at 233, 234, n.162. Moreover, opponents of habeas reform were also concerned that the executions of innocent people would be facilitated by the changes in capital crime procedures. *See id.* Defenders reiterated that habeas reform should be included in the terrorism bill because of the abuse of the appeals processes. *See id.* at 233, 234 n.164. Yet, none of this legislative debate concerned the issue of the Act's application to pending cases. For more information on the legislative history of the Act, see *id.* at 201-40.

4. 110 Stat. 1214. One of the reasons underlying the enactment of this legislation was that scheduled executions were subject to lengthy delays due to extended inmate appeals. Motivated by the Oklahoma City bombing, this legislation also includes regulations, such as those that render terrorism a federal offense, expand the role of the Federal Bureau of Investigations ("FBI") in solving terrorist crimes, and impose the death penalty for terrorist crimes. *See White House Fact Sheet on Terrorism*,

Section 107 of the Act establishes specific habeas corpus procedures for use in capital cases.[5] To apply, the cases must originate in states that comply with the Act's prescribed rules for appointment and funding of counsel.[6]

Sections 101, 102, 104 and 106 of Title I amend existing statutory provisions[7] that dictate the federal courts' consideration of state prisoners' habeas petitions.[8] Section 101 creates a one-year statute of limitations to apply for a writ for habeas corpus.[9] Section 106 requires a certificate of appealability issued by a three-judge panel before a prisoner may file a second or successive motion for a writ of habeas corpus.[10] Section 102 requires a certificate of appealability, issued by a three-judge appellate panel, before a prisoner may appeal the state court's final order in a habeas corpus proceeding.[11] The amendment to Section 2254 limits the situations in which a court may grant a writ of habeas corpus;[12] however, direct petition to the Supreme Court is still unrestricted.[13]

One controversy concerning this Act involves whether to apply the new provisions to cases pending at the time of the Act's enactment. In drafting the

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1996 U.S. Newswire, Sept. 24, 1996, *available in* 1996 WL 12123033. The new law also requires immigration officials to detain and deport any non-citizen who previously has been convicted of any crime. Further, the law eliminates waivers of deportation. For more information concerning the various other provisions of the Act, see Martin, *supra* note 3.

5. Pub. L. No. 104-132, § 107, 110 Stat. 1214, 1221 (codified as amended at 28 U.S.C. § 2261 (1997)). This new chapter is enacted not merely to limit habeas corpus relief, but also to ensure adequacy of counsel to those in need of representation. Essentially, the new chapter requires death-row inmates to file their petitions for writ of habeas corpus within 180 days of the final denial of their state appeals. *See* 28 U.S.C. § 2263 (1997). Previously, there was no filing deadline. This chapter also states that if the death row inmate fails to challenge his conviction in an initial habeas corpus petition, no other appeals can be filed unless approved by a three-judge court of appeals. 28 U.S.C. § 2244(b). This limitation applies to all general habeas corpus petitions, not just those of death-row inmates.

6. *See* 28 U.S.C. § 2261(b) (1997).

7. *See* 28 U.S.C. §§ 2244(101), (106), 2253(102) and 2254(104) (1997).

8. This is not limited to capital cases.

9. *See* 28 U.S.C. § 2244(d)(1) (1997).

10. Section 2244(b)(1) states that "a claim presented in a second or successive habeas corpus application under § 2254 that was presented in a prior application shall be dismissed." *Id.*

11. 28 U.S.C. § 2244(b)(3)(E) (1997); 110 Stat. 1214, 1221. The petitioner cannot seek Supreme Court review of the three-judge panel's decision. *See id.*

12. 28 U.S.C. § 2254(d) (1997). This amended section only allows habeas relief if the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, a clearly established federal law as determined by the Supreme Court, or if the adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in a state court proceeding. *See id.* Before this new law, prisoners could obtain relief under a wide range of precedents set by lower federal courts, or on the basis of state court rulings not yet evaluated by tested the United States Supreme Court.

13. Felker v. Turpin, 116 S. Ct. 2333 (1996). This case also tested the constitutionality of habeas corpus reform. The Court upheld the changes as constitutional. *See id.* at 2335. For an explanation of habeas corpus reform changes, see Smith, *supra* note 3.

Act, Congress only set an "Effective Date" for Chapter 154.[14] The remainder of the Act does not address its applicability to pending cases.

The federal circuits were split as to whether the provisions of the Act applied to cases pending at the time of its enactment.[15] Those courts holding that the Act did apply[16] reasoned that the structure of the Act required a consolidated approach to the habeas corpus sections in order to achieve their congressional purpose.[17] In addition, they reasoned that a court should apply the law in effect at the time it renders its decision.[18] Finally, because there has never been a guarantee of a fixed statutory framework, applying the Act to pending cases would not have an unfair retroactive effect.[19]

Courts holding that the Act did not apply to pending cases advanced two lines of reasoning. One group reasoned that if the Act were applied to pending cases, there would be a retroactive effect that would change the standard of review and affect the quantum of protection that courts afford the defendant.[20] A second group reasoned that Congress expressly and clearly stated that the sections of the Act were not to apply retroactively.[21] Until very recently, the Supreme Court had not addressed this issue; however, in June, 1997, the Court resolved this split.[22]

This Note seeks to explain the circuit split, trace its development, and evaluate both the Supreme Court's resolution of this conflict among the circuits and the congressional legislation that caused the confusion. Part II.A of this Note examines some of the theoretical bases for the aversion to retroactive application of legislation. Part II.B of this Note examines the Court's reaction to, and adoption of, some of the theoretical aversions discussed previously in Part II.A. Part II.C retraces the Supreme Court's development of the two conflicting canons of construction concerning application of retroactive legislation. Part III of this Note explains in detail

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14. Chapter 154 governs the procedures applicable specifically to capital cases. "Chapter 154 of Title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act." 28 U.S.C. § 2261 (1997) (see Historical and Statutory Notes).

15. *See infra* notes 16-21 and accompanying text. Furthermore, in one case, the court was unable to decide whether to apply the Act retroactively. To alleviate this conflict, the court applied both the Act and pre-Act habeas corpus law. The court then used the law that proved the least damaging to the defendant. *See* Cockrum v. Johnson, 934 F. Supp. 1417, 1424 (E.D. Tex. 1996).

16. Lennox v. Evans, 87 F.3d 431 (10th Cir. 1996); Leavitt v. Arave, 927 F. Supp. 394 (D. Idaho 1996); Zuern v. Tate, 938 F. Supp. 468 (S.D. Ohio 1996).

17. *See, e.g., Leavitt*, 927 F. Supp. at 397.

18. *See Lennox*, 87 F.3d at 434.

19. *See Leavitt*, 927 F. Supp. at 398-99.

20. *See* United States v. Barnett, No. 96 C 1274, 1996 WL 400016 (N.D. Ill. July 15, 1996).

21. *See* Warner v. United States, 926 F. Supp. 1387 (E.D. Ark. 1996); United States v. Trevino, No. 96 C 828 1996 WL 252570 (N.D. Ill. May 10, 1996).

22. *See infra* notes 163-71 and accompanying text.

the Supreme Court's attempt to resolve the confusion concerning the two canons of construction by developing one test to determine whether to apply legislation to cases pending at the time of its enactment. Part IV examines the circuit split, looking specifically at three groups of cases that used the same Supreme Court test yet still adopted three contrary holdings. Part V of this Note evaluates the Supreme Court's interpretation of the Act, and proposes new legislation to relieve the confusion created by the poorly written legislation.

II. HISTORY

A. Theoretical Bases for the Aversion to Retroactive Legislation

A rule-based legal system provides "grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled."[23] Relying on one another to obey rules is difficult when those rules are either unclear or are modified in their application to actions committed in the past when the law was different. This illustrates the initial indignity that gave rise to the bias against retroactive application of laws.

Commentators suggest that the American bias against ex post facto laws[24] stems from the abuse of such laws in England before and during the American colonization,[25] as well as from abuse in America in the early stages of American colonization.[26] This explains the express prohibition of ex post facto laws that the Framers included in the Constitution.[27] Ex post facto laws, characterized by retroactive application, were regarded as subversive to justice and open to easy abuse.[28] It was understood that the retroactive application was not implemented for a general purpose, but to affect one person or one situation in particular. When law is expected to apply to everyone equally, individualization is distasteful. In addition, "[i]ndividuals enjoy more freedom of action when legal obligations are clear."[29]

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23. JOHN RAWLS, A THEORY OF JUSTICE 235 (1971). For a general discussion of the principle of the rule of law, see LON FULLER, THE MORALITY OF LAW (1964).

24. The phrase "ex post facto" includes and describes all retroactive laws.

25. *See* Cummings v. Missouri, 71 U.S. 277, 323 (1866) (detailing abuse in England).

26. Bryant Smith, *Retroactive Laws and Vested Rights*, 6 TEX. L. REV. 409, 412 (1928). Interestingly, there is some suggestion that this bias against retroactive legislation truly saw its start in Ancient Greece with the dilemma of Timokrates and the Athenian Ambassadors. For more information, see Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 775 (1936) (citing VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE 139, 140).

27. U.S. CONST. art. 1, § 9, cl. 3 and § 10, cl. 1.

28. *See* Smith, *supra* note 26, at 412.

29. Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive*

On the other hand, the ability of the government to apply a law retroactively is not without support. In *Cromwell v. McLean,*[30] the court stated that retroactively applied law is not necessarily objectionable in itself.[31] If the legislature has the power to act prospectively, it may also do so retroactively. Essentially, this doctrine represents the belief that retroactive application of a law does not render the law automatically void.[32]

Retroactive application allows the courts and the legislatures to personalize law that should not be personalized. This seems to be one aspect that makes retroactive application distasteful.[33] However, the legislature may make prospective laws with specific groups of people in mind, having the same personalized effect. In addition, one could argue that the new law should apply because in time, the legislature will become more enlightened and more informed about the law.[34]

Lack of notice is an important factor in the aversion to retroactively applied laws.[35] However, some commentators suggest that the importance of notice is overstated,[36] arguing that many people never truly know the exact law, never consult law books, and never seek advice from an attorney. Even prospectively applied laws, however, may apply to those who have no

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Lawmaking, 84 GEO. L.J. 2143, 2144 (1996).

30. 123 N.Y. 474 (1890). In this case, the plaintiff and defendant were arguing over who had rightful title to the land in controversy. In addition to deciding whether title had in fact passed, the court also addressed whether a newly written law perfected the title that the tax-sales attempted, but failed, to transfer. *See id.* at 488-89. The court decided that the legislature did not have the right to take land from one and give it to another under the guise of confirming a sale when no title had actually passed from the owner to the purchaser. *See id.* at 489. The court noted that there were situations where the legislature could cure a defect from a prior statute, but this was not one of them. *See id.* at 490. The court held that the legislative power did not reach to the transfer of title simply by attempting to confirm a void sale. *See id.* at 493.

31. Specifically, the court stated that

> [I]f the thing omitted and which constitutes the defect be of such a nature that the legislature might by prior statute have dispensed with it, or if something had been done, or done in a particular way, which the legislature might have made immaterial, the omission of irregular act may be cured by a subsequent statute.

Id. at 490.

32. Retroactivity alone is not grounds for an objection. Laws are not unconstitutional unless there are other objections to their application. Smith, *supra* note 26, at 415. Scott Pearson suggests that the Nuremberg trials exemplify a positive retroactive application of a statute. The need to punish justified the application of newer laws to those who acted pursuant to the positive law in Nazi Germany. Scott M. Pearson, *Canons, Presumptions and Manifest Injustice: Retroactivity of the Civil Rights Act of 1991*, 3 S. CAL. INTERDISC. L.J. 461, 476 (1991).

33. *See* Smith, *supra* note 26, at 417.

34. *See id.* at 417, n.26.

35. The argument here is that one cannot regulate her own conduct according to the law if there is no notice of the law and of what conduct the law prohibits.

36. *See* Smith, *supra* note 26, at 419.

practical notice.[37]

In sum, retroactively applied laws, however disliked, may not be an inherent violation of people's rights.[38] Yet, the determination is neither easily nor automatically made.[39]

B. The Supreme Court's Adoption of the Theoretical Aversions to Retroactive Legislation

Early in the development of the aversion to retroactive application of legislation, the United States Supreme Court held that because this retroactive application was contrary to basic rules of jurisprudence, "in the absence of an express command or 'necessary implication' to the contrary, [the court] will presume that a law is designed to act prospectively."[40] Thus, new legislation is applied from the date of its enactment, if no other date is accorded the legislation.[41] Subsequent decisions relied upon the premise that it would be unjust to apply a law that was neither known of nor written at the time of the action.[42] However, a law generally only applied retroactively if it deprived one of a vested right.[43] The Supreme Court frequently wrote in

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37. This is to say that there are those who, having never read law books, are not aware of laws and therefore have no notice of them even when those laws are only applied prospectively.

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> On the other hand, laws of a retroactive nature, affecting the rights of individuals, not adverse to equitable principles and highly promotive of the general good, have often been passed and as often approved . . . I very much question whether there is an existing government in which laws of a retroactive nature and effect, impairing vested rights, but promotive of justice and the general good, have not been passed.

Smead, *supra* note 26, at 785, n.36 (citing Goshen v. Stonington, 4 Conn. 209 (1822)).

39. Bryant Smith explains a methodology to determine the validity of retroactive legislation. According to Smith, one needs to make an allowance for the automatic prejudice against this form of legislation, and then realize that the retroactive legislation cannot be judged in a vacuum, but rather must be judged as it appears in each circumstance. Smith, *supra* note 26, at 421.

40. United States v. Schooner Peggy, 5 U.S. 103 (1801). For an explanation of this case, see *infra* notes 77-82 and accompanying text.

41. When the circuit split over retroactive application of the Act is analyzed, this canon of construction conflicts with another canon of statutory construction. *See infra* notes 69-74 and accompanying text.

42. In *Dash v. Van Kleeck*, for example, the prosecution sought to utilize a statute providing the sheriff with a defense when a prisoner escaped. 7 Johns, 477, 503 (N.Y. 1811); *see also* Smead, *supra* note 26, at 782-83. Yet this statute was not enacted until after the escape occurred and trial had commenced. Chief Justice Story noted that applying the law would defeat the plaintiff's suit already commenced concerning a right that had already vested. In addition, the plaintiff would then have to incur costs of trial. *See id.*

43. Justice Story was one of the first to recognize the two different meanings of retroactive laws. In a circuit court case he asked, "[i]s it [the term retrospective laws] confined to statutes, which are enacted to take effect from a time anterior to their passage, or does it embrace all statutes, which, though operating only from their passage, affect vested rights and past transactions?" *Id.* at 782 (citing Society for the Propagation of the Gospel in Foreign Parts v. Wheeler, 2 Gall. C.C. 105, 139 (1814)).

dictum that not all retroactive laws were necessarily unjust.[44] On the other hand, laws that affected criminal rights were more frequently deemed unjust.[45]

Though the Supreme Court has not been able to establish a clear test to determine whether retroactively applied legislation is valid,[46] it has evaluated this question using three factors.[47] One such factor is the extent to which the public interest is served by the enactment of the legislation.[48] Another factor is the extent to which the asserted pre-enactment right is abrogated.[49] Finally, to determine validity, the nature of the right affected by a retroactive statute is also taken into consideration.[50] Courts are less likely to alter rights against the government, such as criminal rights, retroactively.[51] All of these factors play a part in courts' adjudication of the validity of retroactively applied

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He determined that retroactive laws encompassed the latter definition. Otherwise, the purpose of the restriction to protect rights would be lost. Protection of rights must include vested rights, and should not be limited to the time frame of the retroactive statue. *See id. See also* Ray A. Brown, *Vested Rights and the Portal-to-Portal Act*, 46 MICH. L. REV. 723 (1948) and Pearson, *supra* note 32, at 474 (short synopsis of the various definitions used to explain retroactivity).

44. *See* Smead, *supra* note 26, at 786.

45. *See* Miller v. Florida, 482 U.S. 423 (1987); Weaver v. Graham, 450 U.S. 24 (1981); Williams v. Lee, 33 F.3d 1010 (8th Cir. 1994); United States v. Parriett, 974 F.2d 523 (4th Cir. 1992); Greenfield v. Scafati, 277 F. Supp. 644 (D. Mass. 1967). *See also infra* notes 57-58 and accompanying text.

46. In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, the Court noted the "apparent tension" between the doctrines used to decide whether to apply a new statute to pending cases. 494 U.S. 827, 828, 837 (1990).

47. For a more in-depth explanation of these factors, see Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960).

48. If public interest is of great importance, retroactive application may be easier to accept. If there is no discernible public purpose underlying the retroactive application of a law, courts will be even less inclined to enforce the law. *See* FHA v. The Darlington, Inc., 358 U.S. 84, 93 (1958) (Harlan, J., dissenting). On the other hand, if the statute serves to remedy legitimate public concerns, courts will be more lenient towards the retroactive legislation. *See* Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 39-40 (1940). However, when standing alone this element concerning the nature of the public interest may not be sufficient to sway a judge.

49. Presumably, the legislature may alter or modify existing rights, but may not totally abolish the right itself. *See* League v. Texas, 184 U.S. 156, 158 (1902). However, the Court has not been satisfied in relying solely on the clear abrogation or extinguishing of rights. In Lynch v. United States, 292 U.S. 571, 582-83 (1934), the Court recognized that the modification of a substantial part of a remedy, or all of a remedy, may have the effect of removing the right entirely. *See also* Smith, *supra* note 26, at 244.

50. If the right has been completely vested, a court may be less likely to enforce a retroactive statute to remove that right. However, Charles B. Hochman points out that case law does not support this contention. *See* Hochman, *supra* note 47, at 717. To support this conclusion, Hochman cites Louisville & Nat'l R.R. Co. v. Mottley, 219 U.S. 467 (1911), and Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948).

51. "[D]ue to the suspicion with which the same entity's entering into and later altering a contract is viewed, it seems that the Court has tended to apply a stricter standard to statutes retroactively affecting rights against the government." Hochman, *supra* note 47, at 724. This concerns not only criminal rights, but also statutory gratuities and penalties against the government. *See id.*

statutes.

While courts may disagree as to the factors courts will consider in determining retroactive applicability, most do agree that it is more difficult to rationalize retroactive changes in criminal legislation.[52] Even the modern approach to the retroactive applicability of legislation tends to recognize that criminal legislation is unworthy of retroactive application,[53] depending on whether the changes are substantive or procedural.[54] However, courts are willing to take a more lenient approach to retroactive legislation in the areas of taxation, property, and contracts.[55]

The core of the Ex Post Facto Clause protects against criminalizing an action that was not considered a crime when committed, or increasing the severity of the crime's classification.[56] When confronted with legislation that increases an offender's sentence, the Supreme Court has consistently refused to apply the new legislation to cases pending at the time of the legislation's enactment.[57] In addition, the Court has refused to apply new legislation that imposes greater legal obstacles to an early release.[58] One theory attempting to

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52. *See* Smead, *supra* note 26, at 791-92 n.51. *See also* Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 462-70 (1982).

53. "[S]tatutes affecting limitation periods and criminal procedure are harder to justify...." Munzer, *supra* note 52, at 462.

54. The courts' decisions concerning the applicability of retroactive legislation that alter criminal procedure are inconsistent. *Compare* Thompson v. Utah, 170 U.S. 343 (1898) (using an 8-man jury instead of a 12-man jury deprived the defendant of a constitutional right guaranteed at the time of the commitment of the crime), *overruled by* Collins v. Youngblood, 497 U.S. 37, 51 (1990) *and* Kring v. Missouri, 107 U.S. 221 (1883) (altering the effect of a guilty plea violated ex post facto clause disadvantaging defendant), *overruled by* Collins v. Youngblood, 497 U.S. 37, 50 (1990) *with* Hopt v. Utah, 110 U.S. 574, 587-90 (1884) (upholding a change that allowed a convicted felon to testify, thereby convicting the defendant based on testimony that was inadmissible at the time the crime was committed) *and* Thompson v. Missouri, 171 U.S. 380 (1898) (upholding a change allowing comparative handwriting samples to be introduced).

55. For a more detailed explanation of why these areas support a more lenient approach as to retroactive application of the laws, see Munzer, *supra* note 52, at 445-61.

56. Under Article 1 of the United States Constitution, neither Congress nor any State shall pass any "ex post facto Law." U.S. CONST. art. 1, § 9, cl. 3; U.S. CONST. art. 1, § 10, cl. 1. Justice Chase explained his understanding of the "ex post facto" phrase in Calder v. Bull, 3 Dall. 386 (1798). Included within the ambit of this clause was any legislation that made illegal an action that once was legal, all laws that aggravate a crime and make it more serious than it was when committed, those laws that increase the punishment, and all laws that alter the rules of evidence and give defendants less protection than the law required when the offense was committed. Courts have generally used this understanding to explain the "ex post facto" clause. *See* Miller v. Florida, 482 U.S. 423, 429 (1987).

57. For example, *Miller v. Florida* involved a newly enacted sentencing guideline that increased the punishment. *See Miller*, 482 U.S. at 425-26. The increased punishment was not automatically given to the convicted defendant; rather, under the new scheme, a judge was more likely to find a reason to impose the harsher penalty. *See id.* at 426. The Court reasoned that because the new legislation disadvantaged the offender, it could not be applied retroactively to cases pending at the time the Act was passed. *See id.* at 435.

58. *See* Weaver v. Graham, 450 U.S. 24 (1981). The Court would not apply the state's change in

explain this refusal suggests that defendants rely on the current laws when choosing to act in violation of that law.[59] However, this theory has its strongest support when referring to criminalizing an act that previously was not considered a crime.[60] A stronger theory about the difference in treatment focuses on the liberty interest in the criminal context versus the civil context.[61] Finally, it has been theorized that the true reason for the Supreme Court's more diligent protection of criminal rights lies in the realization that the political process is less likely to listen to the criminal 'lobbyists' and more likely to concern itself with the interest groups that have more clout.[62]

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its good-time credit policy retroactively because it "constricts the inmate's opportunity to earn early release." *Id.* at 35-36. The new legislation made it more difficult for prisoners to accumulate credits. *See id. See also* Williams v. Lee, 33 F.3d 1010 (8th Cir. 1994) (legislation enhancing penalty for parole violations could not be applied retroactively); United States v. Parriett, 974 F.2d 523 (4th Cir. 1992) (refusal to apply retroactively a statute enhancing the penalty for drug use during supervised release); Greenfield v. Scafati, 277 F. Supp. 644 (D. Mass. 1967) (refusing to apply similar good-time credit changed retroactively). *But see* United States v. Reese, 71 F.3d 582 (6th Cir. 1995) (upholding the retroactive application of similar provisions that enhanced the penalty for drug use during supervised release), *cert. denied*, 116 S. Ct. 2529 (1996). On the other hand, courts are more lenient in the application of retroactive law-making in the civil context. *See e.g.*, United States v. Carlton, 512 U.S. 26 (1994) (limiting the availability of tax deductions for proceeds of sales of stock to employee stock ownership plans); General Motors Corp. v. Romein, 503 U.S. 181 (1992) (upholding the retroactive application of patent system statute); United States v. Darusmont, 449 U.S. 292 (1981) (upholding the retroactive application of a new minimum tax provision); United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988) (upholding retroactive application of a new environmental statute imposing liability on handlers and transporters of hazardous waste); Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948) (upholding retroactive application of statute expanding liability of employers for work performed by employees during World War II).

59. The reliance theory is based on the idea that individuals should be able to rely on existing law when planning their affairs and conduct. *See id.* Krent, *supra* note 29, at 2160. Reliance largely depends upon notice, which in reality is a fiction. Everyone is not clearly on notice of that which is against the law and that which is not. *See id.* at 2161. Criminal law, however, does not demand notice, as "ignorance of the law is no excuse if the conduct is mala in se." *Id.*

60. It would be unfair to impose on someone a law making their actions illegal when they were legal at the time the person decided to act. *See id.* However, when the accused knew that the action was illegal and the only alteration is the sentence for the crime, the rationale is less clear. *See id.* at 2162. It is unlikely that the accused accurately knew the exact sentence that could be imposed for the crime before committing it. *See id.* It is also unlikely that the accused, if caught, heavily contemplated the sentence. *See id.* It appears that few criminals think they will be caught; therefore, fair notice and reliance as to sentencing are unattainable. *See id.* Most Courts of Appeals have rejected the reliance theory because it involves a costly case-by-case analysis of the parties' expectations. *See* Pearson, *supra* note 32, at 511-12.

61. The loss of a large amount of money due to a retroactively applied law may seem unfair, but the loss of the years spent in prison is a greater loss of liberty. *See id.* Krent, *supra* note 29, at 2166. The liberty interest is stronger in the criminal context than in the civil. *See id.* On the other hand, the reliance interest appears stronger in the civil context than the criminal. *See id.* at 2166-67. *See supra* note 60 and accompanying text.

62. Under this theory, those affected by criminal laws are less likely to have support in the political process and in the legislature. These individuals are less likely to exist in the same social circles as politicians. *See* Krent, *supra* note 29, at 2168. On the other hand, those involved in civil litigation are more likely to have the wealth and social status necessary to influence legislation that

Whatever the reason, it is evident that the Court scrutinizes retroactive application more carefully when dealing with criminal legislation.

Courts have adopted most of the general interpretations of retroactive legislation. In doing so, they have relied upon the reasons against retroactivity to explain those factors considered in their evaluation.[63] Courts continue to use the above factors and to apply the canons of statutory construction developed by the Supreme Court when making decisions about retroactive legislation.[64] Arguably two contradictory canons emerged out of the case law addressing retroactive legislation.

C. Case Law Development of the Two Conflicting Canons of Construction

"Where it is claimed that a law is to have a retrospective[[65]] operation, such must be clearly the intention, evidenced in the law and its purposes, or the court will presume that the lawmaking power is acting for the future only and not for the past. . . ."[66] The court articulated this first canon, applying it to retroactive legislation determination, in *White v. United States*.[67] The Court created a presumption against retroactive application of new legislation that may be overturned only by a demonstration of express congressional intent.[68] This canon developed out of the general dislike for retroactively applied legislation.

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concerns civil laws. *See id.* at 2174. Legislators more often enact criminal laws to appease public opinion and to win the next election. Here, the criminal defendant cannot find adequate protection from the legislature because of natural self-serving interests. *See id.* at 2169-74.

63. *See supra* Part II.A and accompanying footnotes.

64. *See infra* notes 67 and 71 and accompanying text.

65. In this context, the word retrospective is synonymous with retroactive.

66. White v. United States, 191 U.S. 545, 552 (1903).

67. This case concerned retroactive application of a Navy personnel act that modified officers' compensation. *See id.* at 549. Under the Act, officers appointed from civil life were credited with five years' service. *See id.* at 550. The Court held that this section would not apply retroactively to those hired before the enactment because Congress did not expressly intend to apply the section retroactively. *See id.* at 555. This canon was fully supported by precedent developed from approximately 1806. *See* United States v. Heth, 7 U.S. 399, 413 (1806) (holding that unless no other meaning can be attached to the statutes' words, they will not be taken to have retroactive application) and Murray v. Gibson, 56 U.S. 421, 423 (1853). The case law subsequent to *White v. United States* also supported the first canon of construction. *See* Miller v. United States, 294 U.S. 435 (1935); Shwab v. Doyle, 258 U.S. 529 (1922); Union Pacific R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190 (1913); United States Fidelity & Guaranty Co. v. United States *ex rel.* Struthers Wells Co., 209 U.S. 306 (1908). This canon is also briefly mentioned earlier in this Note. *See supra* notes 40-41 and accompanying text.

68. This is an example of the Court utilizing its dislike of retroactive application of legislation to create the first canon of construction.

However, *Thorpe v. Housing Authority of Durham* challenged this first canon.[69] The new canon requires a court to apply the law in effect at the time it renders its decision.[70] This canon is not easily reconciled with the previous Supreme Court canon presuming only prospective application of laws.[71] In *Thorpe*, the Court stated that the new HUD regulation, when applied retroactively to Thorpe's case, would give additional constitutional protections to the evicted tenant. Further, requiring a simple explanation of reasons before eviction would place no hardship on the local housing authority.[72] The Court cited other cases in support of its holding,[73] including *United States v. Schooner Peggy*.[74] In *Thorpe*, the Court expanded its holding in *Schooner Peggy*, holding that appellate courts should apply the law in effect at the time they render their decision.[75] The Court's decision in *Bradley v. Richmond School Board* further supported this new canon.[76]

In *Schooner Peggy*,[77] the United States captured a French ship, the Peggy, during hostilities with France.[78] The issue before the Court was whether a new treaty should apply even though the capture occurred and the adjudication began before the new law was in effect.[79] The Court decided

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69. 393 U.S. 268 (1969). Thorpe, a low-income housing tenant, was evicted from her federally-assisted housing shortly after she was elected president of the tenants' association. *See id.* at 270-71. The housing authority refused to give any reasons for Thorpe's eviction. *See id.* at 271. The housing authority won the suit for summary eviction. *See id.* at 271-72. While the Supreme Court was considering Thorpe's claim, the Department of Housing and Urban Development created a regulation that prohibited local authorities from evicting tenants without first providing reasons for the eviction and giving tenants an opportunity to respond. *See id.* at 268, 272. After the North Carolina court refused to apply the new advisory retroactively, the Supreme Court reversed, holding that the new regulation must be applied because it was in effect at the time of the state court's decision. In so holding, the Court created a new canon of construction. *See id.* at 273-74.

70. *See Thorpe*, 393 U.S. at 281.

71. Under the first canon, if the law is changed directly after an individual commits a crime but just prior to trial, the new law would not apply. Because the crime took place before the passage of the new law, there is a presumption against retroactive application. The second canon, on the other hand, would apply the new law because it was in effect at the time of the trial. Clearly, the two are irreconcilable.

72. *See Thorpe*, 393 U.S. at 283.

73. *See, e.g.*, Ziffrin, Inc. v. United States, 318 U.S. 73 (1943); Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941); Carpenter v. Wabash Ry. Co., 309 U.S. 23 (1940); United States v. Chambers, 291 U.S. 217 (1934); United States v. Schooner Peggy, 5 U.S. 103 (1801).

74. For a detailed explanation of this case, see *infra* notes 77-82 and accompanying text.

75. *See Thorpe*, 393 U.S. at 281.

76. 416 U.S. 696 (1974). For a detailed explanation of this case, see *infra* notes 83-89 and accompanying text.

77. 5 U.S. 103 (1801).

78. The circuit court overruled the district court and found that the Peggy, upon capture, was the lawful prize of the United States. *See Schooner Peggy*, 5 U.S. at 104-07. While the case was pending on appeal, the two countries entered into a treaty that required the U.S. to return to France any French property that had not yet been definitively condemned. *See id.* at 107-08.

79. *See id.* at 107-08.

that the Peggy should be returned to France, holding that when a law changes before an appellate court disposes of an appeal, the appellate court should apply the new law retroactively to the case.[80] The Court recognized the special constitutional status of treaties, and that this status allowed treaties to supersede the vested rights of citizens.[81] The actual holding of *Schooner Peggy* appears ambiguous and has been explained in various ways by commentators.[82]

In *Bradley v. Richmond School Board,*[83] the Supreme Court added a new element to the newest canon of construction concerning retroactively applied legislation: the law in effect at the time the court renders its decision is used *only as long as doing so will not result in manifest injustice.*[84] However, an express statutory direction from Congress will also determine the applicable law.[85] The Court rationalized that in *Thorpe*, it applied the law in effect at the time of the suit to prevent a manifest injustice.[86] In addition, the *Bradley* Court enumerated three factors that courts should consider when deciding whether a statute will have a retroactive effect that results in a manifest injustice.[87] Applying these factors, the Court decided that the new section of

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80. *See id.* at 110.

81. *See Schooner Peggy*, 5 U.S. at 109-10.

82. Some commentators suggest that the Court has continually adopted a broadened interpretation of *Schooner Peggy*, increasing its scope. Kristine N. McAlister, Recent Development, *Retroactive Application of the Civil Rights Act of 1991*, 45 VAND. L. REV. 1319, 1327-31 (1992). For more information and opinions concerning the Court's expansion of the decision in *Schooner Peggy*, see Pearson, *supra* note 32, at 494-95.

83. 416 U.S. 696 (1974). The plaintiffs sought attorney's fees and litigation expenses incurred during a drawn-out school desegregation class action suit. *See id.* at 705-06. The district court awarded the fees even though there was no statute in effect explicitly authorizing them to do so. *See id.* at 708-09. The court of appeals reversed because there was no congressional provision awarding such fees. While this case was pending, Congress enacted section 718 of Title VII of the Emergency School Aid Act that explicitly authorized the award of attorney's fees and expenses. The court of appeals would not apply the new section to the pending case. *See id.* at 710. The Supreme Court overruled this decision and applied the new section of the Act to the pending case. *See* Bradley v. Richmond School Board, 416 U.S. 696, 715-16 (1973).

84. The *Bradley* Court quoted to *Schooner Peggy*, stating "'It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws. . . .'" 416 U.S. at 712 (citing *Schooner Peggy*, 5 U.S. at 110 n.16).

85. "Where Congress has expressly provided ... that legislation was to be given only prospective effect, the courts, in the absence of any attendant constitutional problem, generally have followed that lead." *Bradley*, 416 U.S. at 716 n.21.

86. *See Bradley*, 416 U.S. at 716-17 (citing Greene v. U.S., 376 U.S. 149 (1964)).

87. *See Bradley*, 416 U.S. at 717. The first factor was the nature and identity of the parties. *See id.* Private disputes between private parties require more thought before applying a new statute to the pending case. The second factor was the nature of the parties' rights. *See id.* at 720. The court should not apply a new statute to a pending case if its application will deprive a person of a right that had matured or become unconditional. *See id.* The final factor was the impact the change in the law had upon the aforementioned rights. *See id.* Thus, if the new statute would impose a new or unanticipated

the act at issue would not burden the school board and that the school board would not incur new constitutional duties; thus the new section would apply to the pending case.[88] Accordingly, if applying the law in effect would result in manifest injustice, the law in effect should not be applied.[89]

Over fifteen years later, the first canon reappeared in *Bowen v. Georgetown University Hospital*.[90] This case addressed an administrative agency's power to promulgate retroactive cost limiting regulations after Congress gave the agency the power to make such regulations.[91] The Court found that while the Act authorized the agency to promulgate regulations, it did not expressly delegate the authority to apply these regulations retroactively.[92] Because there was no express grant of authority, the Court held that the regulations could not be applied to existing cases.[93] In its reasoning, the Court recognized the presumption against retroactivity absent express congressional intent, thus reemphasizing the original canon.[94]

One year later, in *Kaiser v. Bonjorno*, the Court supported the *Bowen* decision and its presumption against retroactivity.[95] In *Kaiser*, the Court

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obligation upon a party without notice or opportunity to be heard, the statute should not be applied to the pending case. *See id.*

88. *See id.* at 724.

89. *See id.* at 716-17. The Court also cited to cases holding similarly that if manifest injustice would result from the change in the law, the new law will not be applied. *See id.* at 720. *See, e.g.*, Greene v. United States, 376 U.S. 149, 160 (1964); Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 164 (1944); Union Pacific R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913). Although this premise may have existed prior to *Bradley v. Richmond School Board*, Bradley did clarify the previous holdings, building upon the canon developed in Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969). *See, e.g.* Kaiser Aluminum Chemical Corp. v. Bonjorno, 494 U.S. 827, 840-41 (1990) (Scalia, J., concurring).

90. 488 U.S. 204 (1988).

91. The Secretary of Health and Human Services gained the power to promulgate regulations that established the amount that the government would reimburse health care providers for providing Medicare services. *See id.* at 205-06. The Secretary then issued regulations revising the method for computing these expenses. *See id.* at 206. These new regulations were invalidated by the district court only to be reinstituted three years later through the proper channels. *See id.* at 206-07. The Secretary then applied these regulations retroactively to all cases arising after the date of their original release. *See id.* at 207. The issue is this case was whether the Secretary had the ability to apply these regulations retroactively. The Court held that the regulations could not be applied retroactively. *See id.* at 213-14.

92. *See id.* at 213.

93. *See id.* at 213-14. The *Bowen* Court reasoned that retroactivity was not favored in the law. *See id.* at 208. The Court stated that rules will not be applied retroactively unless the express language of the Act so requires. *See id.* In addition, the Act's legislative history addressed retroactive application. *See id.* at 214. The Court interpreted these discussions as disfavoring retroactivity.

94. *See id.* at 208.

95. 494 U.S. 827 (1990). In this suit, the plaintiffs were granted judgment against the defendant based on defendant's monopolization of the market for aluminum pipe fabrications. *See id.* at 829. The district court entered a judgment on August 22, 1979. *See id.* at 830. The district court then reconsidered the damages and, on retrial, awarded the plaintiffs a lower amount. *See id.* While the case

stated that it did not need to consider the retroactivity issue in-depth because Congress had expressly addressed this issue in the Act.[96] However, the Court observed that previous courts had digressed because they discontinued the presumption against retroactive application of legislation.[97] The *Kaiser* Court cited other cases supporting its return to the original canon of statutory construction governing retroactive application.[98] In addition, the Court found fault with the *Thorpe* and *Bradley* decisions.[99] The concurring opinion stated that in order to eliminate past confusion and conform with longstanding precedent, the original canon should be adopted.[100] Subsequent cases have maintained the uncertainty surrounding retroactivity because numerous courts support each canon and collectively are unable to choose one canon over the other.[101]

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was pending, Congress enacted a bill that altered the date on which damages should be calculated. *See id.* at 831-32. The issue was whether the new provision applied to the pending case for calculation of damages. *See id.* at 834.

96. The Court realized that the damages could not be calculated from the original entry of judgment because the district court found those damages unsupported. *See id.* at 836. In addition, both versions of the statute refer to the date judgment was entered, which was not until the district court finalized its decision. *See id.* at 838-40.

97. *See id.* at 841 (Scalia, J., concurring). In this case, the majority based its holding on other grounds without addressing the conflicting canons of statutory construction. *See id.* In his concurring opinion, however, Justice Scalia delineates the two canons and explains that the original is the correct canon to apply. *See id.*

98. *See* Miller v. United States, 294 U.S. 435 (1935); Union Pacific R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190 (1913); United States v. Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co., 209 U.S. 306 (1908); White v. United States, 191 U.S. 545 (1903).

99. In his concurring opinion, Justice Scalia explained that the *Thorpe* Court misapplied the *Schooner Peggy* decision. *See Kaiser*, 494 U.S. at 845-48. He also explained that the *Bradley* Court amplified the confusion of *Thorpe*. *See id.* at 848-51.

100. *See Kaiser*, 494 U.S. at 858.

101. Courts that have applied the *Bradley-Thorpe* canon include: F.D.I.C. v. Wright, 942 F.2d 1089 (7th Cir. 1991); United States v. Peppertree Apartments, 942 F.2d 1555 (11th Cir. 1991); Scarboro v. First American Nat'l Bank of Nashville, 619 F.2d 621 (6th Cir. 1980); Leake v. Long Island Jewish Medical Center, 695 F. Supp. 1414 (E.D.N.Y. 1988). Courts that have applied the *Bowen* canon include: Wagner Seed Co. v. Bush, 946 F.2d 918 (D.C. Cir. 1991); DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377 (10th Cir. 1990); Nelson v. Ada, 878 F.2d 277 (9th Cir. 1989) (citing Bruner v. United States, 343 U.S. 112 (1952)). The Court in *Bennett v. New Jersey* did not specifically adopt *Bowen*, but did refuse to apply the *Bradley* holding. 470 U.S. 632, 638 (1985). For other opinions on how to resolve the *Bradley-Bowen* split, see Riza De Jesus, Comment, *Retroactive Application of the Torture Victim Protection Act to Redress Philippine Human Rights Violations*, 2 PAC. RIM L. & POL'Y J. 319, 336-38 (1993); Michelle A. Estrin, Note, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 MICH. L. REV. 2035, 2041-42 (1992); Linda Urbanik, Comment, *Executive Veto, Congressional Compromise, and Judicial Confusion: The 1991 Civil Rights Act—Does It Apply Retroactively?*, 24 LOY. U. CHI. L.J. 109, 137-38 (1992).

III. THE SUPREME COURT ATTEMPTS TO RESOLVE THE CONFLICTING CANONS OF CONSTRUCTION

When the Supreme Court decided *Landgraf v. USI Film Products*,[102] it appeared that the dichotomy had been resolved because the Court promulgated a test for determining whether or not to apply a new law to pending cases.[103] In *Landgraf*, the Court held that the new damage provisions in the Civil Rights Amendments of 1991 did not apply retroactively to a pending case.[104]

After describing the legislative history of the 1991 Amendments[105] and addressing the plain language arguments raised by Landgraf,[106] the Court

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102. 114 S. Ct. 1483 (1994).

103. *See* George Clemon Freeman, Jr., *A Public Policy Essay: Superfund Retroactivity Revisited*, 50 BUS. LAW. 663 (1995) *and* Leonard Charles Presberg, *The Civil Rights Act of 1991, Retroactivity, and Continuing Violations: The Effect of* Landgraf v. USI Film Products *and* Rivers v. Roadway Express, 28 U. RICH. L. REV. 1363 (1994). These articles assume that the *Landgraf* decision resolved the conflict between the two canons concerning retroactivity of statutes.

104. Barbara Landgraf worked at USI Film Products. During her employment, a fellow employee subjected Landgraf to repeated "inappropriate remarks and physical contact." *Landgraf*, 114 S. Ct. at 1488. However, her supervisor ignored Landgraf's complaints. Although the personnel manager initiated remedial action, Landgraf resigned. *See id.* Landgraf brought suit on July 21, 1989, after the EEOC determined that she had been the victim of sexual harassment that created a hostile work environment. *See id.* The district court found that there was harassment, but Landgraf was not constructively discharged. *See id.* While her case was pending on appeal, Congress passed the Civil Rights Act of 1991. *See id.* This Act significantly expanded the monetary relief available to plaintiffs who previously would only be entitled to backpay. Under the Act, the plaintiff could now recover compensatory and punitive damages, in addition to backpay. *See id.* at 1488-91. Landgraf argued on appeal that the new damage and jury trial provisions should apply to her case. *See id.* at 1488. The Fifth Circuit refused to apply the Act retroactively. Agreeing with the district court, the Fifth Circuit concluded that "it would be unjust to apply this kind of additional and unforeseeable obligation to conduct occurring before the effective date of the Act." *Id.* at 1439.

105. The Court noted that the legislation previously had been vetoed by the President partly because of unfair retroactivity rules. *See id.* at 1492. In 1990, Congress passed a comprehensive civil rights bill that expressly mandated the application of many provisions, including sections pertaining to damages in cases of intentional employment discrimination, to cases arising before the bill's enactment. *See id.* Yet, the new act did not expressly provide for retroactive application, which the Court interpreted as a sign that Congress did not intend to include retroactivity in the 1991 version. "The absence of comparable language in the 1991 Act cannot realistically be attributed to oversight or to unawareness of the retroactivity issue." *Id.* The Court further noted that this was not dispositive because there was no way to determine exactly where the congressional compromise between retroactivity and prospectivity occurred. *See id.* The Court reasoned that the legislators merely agreed to disagree on the issue of retroactive application and therefore omitted any references to it in the 1991 version of the Act. *See id.* at 1496. However, Justice Scalia, in his concurring opinion, stated that "[n]o legislative history can do that, [give a clear congressional statement of intent] but only the text of the statute itself." *Id.* at 1522 (Scalia, J., concurring).

106. Landgraf argued that the introductory language from one section of the Act, which states that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment" referred to two sections that provide for prospective relief. *See id.* at 1493. All other sections then, were to be applied retroactively. *See id.* The Court reasoned that Congress most

turned to the issue of retroactivity and the conflicting canons of construction.[107] The Court began its analysis by noting that there was no tension between the holdings in *Bradley* and *Bowen*.[108] The Court discussed the history of the canons of construction[109] and the various constitutional provisions against retroactive application of legislation.[110] Additionally, the

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likely did not write such a detailed introductory statement if it only applied to two small sections of the Act. *See id.* at 1494. The Court noted that Landgraf "places extraordinary weight on two comparatively minor and narrow provisions in a long and complex statute." *Id.* at 1493. The Court decided that the language did not express Congress' true intent concerning retroactive application of the statute. *See id.* at 1494. Landgraf's argument would "require us to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message concerning the Act's effect on pending cases." *Id.* at 1495. The Court noted that the legislative history supported its conclusion concerning the plain language of the Act. *See id. Landgraf* "gives new insights into how ambiguities in statutory language are to be resolved and what inferences may or may not be drawn from statements as to retroactive effect or prospective effect in other provisions of the act in question." Freeman, *supra* note 103, at 667.

107. The Court acknowledged both the presumption against statutory retroactivity and the canon that a court should apply the law in effect at the time it renders its decision, even if the law was enacted after the events giving rise to the suit occurred. *See Landgraf*, 114 S. Ct. at 1501.

108. The Court recognized that while they previously noted an 'apparent tension' between the two canons, "[o]ur opinion in *Bowen* did not purport to overrule *Bradley* or to limit its reach." *Id.* at 1496-97. The Court explained that in *Thorpe*, the new pre-eviction hearing procedures were procedural rules that did not affect either party's obligations under the lease agreement. *See id.* at 1502-03. The new procedures were seen as "essential to remove a serious impediment to the successful protection of constitutional rights.'" *Id.* at 1503. Further, the Court noted that *Bradley* is compatible with other decisions that disfavor retroactive application of new statutes. *See id.* at 1503. When the *Bradley* majority stated that a court is to apply the law in effect at the time it renders its decision unless to do so would result in manifest injustice, it did not overrule the presumption against retroactivity. *See id.* The issue in *Bradley* concerned attorney's fees, which the Court reasoned are "uniquely separable from the cause of action to be proved at trial." *Id.* Because there was no new or unforeseeable obligation imposed upon the parties, the new attorney's fees could apply.

109. Most of the history discussed by the majority opinion referred to the presumption against retroactive legislation. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 1497. The presumption against retroactivity ensures that individuals know what the law is, and that only the law in effect at the time of the individual's conduct is applied to the case. *See id.* According to the Court this is the only way people know the true consequences of their actions before acting. *See id.* Justice Stevens continued by pointing out that the Supreme Court has continually refused to give retroactive effect to a statute that effects or burdens private rights unless Congress had expressly required the retroactive application. *See id.* Stevens concluded that retroactive application was not mandated because Congress did not express its intent to apply the legislation retroactively. *See id.* at 1499-1500. The Court noted that the presumption against retroactivity is often applied in those cases that concern contractual or property rights. However, the presumption is not limited to these cases. *See id.* at 1500.

110. The Court mentioned the Ex Post Facto Clause, Article I, § 10, cl. 1, which directly prohibits retroactive application of penal legislation. *See id.* at 1497. This Clause prevents Congress from enacting vindictive legislation. The Court also noted the Fifth Amendment's Takings Clause, which prevents the government from confiscating vested property rights from private persons, except for "public use" and upon payment of "just compensation." *See id.* In addition, the Bills of Attainder, Article 1, §§ 9-10, "prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct." *Id.* Finally, the Due Process Clause protects interests in fair notice that would be compromised by retroactive legislation. *See id.*

Court explained the apprehension toward retroactivity,[111] while also noting some of the positive aspects of retroactively applied legislation.[112]

Before setting out the new test, the Court cited other decisions that defined retroactivity.[113] Justice Story's early definition was one cited explanation.[114] According to the Court, the most important question to be asked when determining whether a statute should operate retroactively is whether the new provision attaches new legal consequences to events completed before its enactment.[115] In conjunction with this determination of the effect of retroactive application on vested rights, the Court noted that "[b]ecause rules of procedure regulate secondary conduct rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive."[116]

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111. Much of the opposition to retroactively applied legislation stems from the fear of vindictive and personalized legislation designed to dole out retribution upon specific individuals or groups. The Court explained that the constitutional provisions that protect against such vindictive legislation clearly depict the apprehension against vindictive legislation. *See id.* at 1497. The Court continued by mentioning other cases where this apprehension is evident, such as Richmond v. J.A. Croson Co., 488 U.S. 469, 513-14 (1989) and James v. United States, 366 U.S. 213, 247 n.3 (1961). *See Landgraf*, 114 S. Ct. at 1498, n.20.

112. "Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary." *Id.* at 1498. Therefore, the Court reasoned that a clear expression of Congress' intent is necessary to determine how a new statute ought to be applied. *See id. See* Krent, *supra* note 29, at 2156 for specific examples of retroactive enactments upheld by the courts.

113. The Court began by mentioning Justice Story's definition of retroactivity. *See supra* note 43 and accompanying text. The *Landgraf* Court explained, "A statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment." *Landgraf*, 114 S. Ct. at 1499 (citing Republic National Bank of Miami v. United States, 113 S. Ct. 554, 556-57 (1992)).

114. "'[E]very statute, 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, in respect to transactions or considerations already past, must be deemed retrospective. . . .'" *Landgraf*, 114 S. Ct. at 1499 (citing Calder v. Bull, 3 Dall. 386 (1798) and Dash v. Van Kleek, 7 Johns. 477 (N.Y. 1811)).

115. The Court further explained that the judgment concerning whether the new provision attaches new legal consequences must be made by examining the nature and extent of the change in the law, and the connection between the operation of the new rule and the past events. *See Landgraf*, 114 S. Ct. at 1499. However, the Court also noted that even prospective statutes may "unsettle expectations and impose burdens on past conduct. . . ." *Id.* For example, new property taxes or laws banning gambling may affect the expectations of those who previously acquired the land, or began to construct a gambling casino. *See id.* at 1499, n.24.

116. *Id.* at 1502. The Court further noted that a rule does not automatically apply to pending cases merely because it is procedural. The Court provides examples, including new rules of evidence, that would not require an appellate court to remand for a new trial. *See id.* at 1502, n.29. Concerns about retroactivity still apply to procedural rules. *See id.* According to Leonard Presberg, this premise renders the Courts' statement concerning procedural rules of primary conduct unclear. *See* Presberg, *supra* note 103, at 1387. In her article, Riza De Jesus defines procedural and substantive rules more by their effect than by their appearance. De Jesus, *supra* note 101, at 329. Substantive laws are those that

Having explained the definition of retroactivity, the Court then set out its new test to determine if legislation should be applied retroactively.[117] First, a court must determine whether Congress expressly prescribed the reach of the legislation.[118] If so, the express provision is considered determinative and the inquiry ends.[119] However, if Congress does not make an express statement,[120] then a court, using Justice Story's explanation of retroactivity, must determine whether the new statute would have a retroactive effect.[121] If the statute impairs the rights a party possessed when he acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed, the statue operates retroactively.[122] Absent clear congressional intent, a statute will not be applied retroactively.[123] The Court went on to conclude that if the new damage provisions would operate retroactively, the parties' planning would be impacted.[124] Therefore, the

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"'introduc[e] a new policy and quite radically chang[e] the existing law.'" *Id.* (citing Winfree v. Northern Pac. Ry., 227 U.S. 296, 302 (1913)). A procedural, or non-substantive statute is one that "neither enlarges nor impairs substantive rights but relates to the means and procedures for enforcement of those rights." *Id.* at 330 (citing United States v. Kairys, 782 F.2d 1374, 1381 (7th Cir. 1986)).

117. *See Landgraf*, 114 S. Ct. at 1505.

118. The Court explained the importance of clear congressional intent, a premise that had been reiterated in a long line of cases. *See id.* at 1499 n.24. "[O]ur search for clear congressional intent authorizing retroactivity was consistent with the approach taken in decisions spanning two centuries." *Id.* at 1500. A clear demonstration of congressional intent indicates that Congress considered the issues surrounding retroactive application of a new statute and has come to a definitive conclusion concerning the possible unfairness of retroactive application. *See id.* Also, such clear intent gives "legislators a predictable background rule against which to legislate." *Id. See id.* at 1505, where the Court explained this part of the *Landgraf* test concerning the clear congressional intent. "*Landgraf*, therefore, leaves open the question of whether Congress must offer a clear statement as to a statute's retroactivity or if the Court may find retroactivity using other methods of statutory interpretation." Presberg, *supra* note 103, at 1371.

119. *Landgraf*, 114 S. Ct. at 1501.

120. Leonard Charles Presberg interprets the clear expression of congressional intent requirement as another test, which he termed the Clear Statement Test. This test involves a court's analysis of the statute's plain language. Even though it used a Clear Statement Test, the Court still evaluated the legislative history of the Act. Yet, as Presberg points out, the Court did not address the issue of deference to the agency's interpretation of the statute. *See* Presberg, *supra* note 103, at 1372-77. In his article, Scott Pearson pointed out the positive and negative aspects of the Clear Statement Test. Pearson, *supra* note 32, at 514-18. On the one hand, the Clear Statement Test leaves little room to question congressional intent. *See id.* at 515. Moreover, this test promotes legislative and judicial efficiency. *See id.* On the other hand, this test has been criticized because it requires all of the existing decisions to be remanded while Congress attempts to reconsider its intent in enacting numerous pieces of legislation. This is obviously not a realistic possibility. *See id.* at 517-18.

121. Justice Story's definition of retroactivity states that "every statute, 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, in respect to transactions or considerations already past, must be deemed retrospective. . . ." *Landgraf*, 114 S. Ct. at 1499. *See supra* note 43 and accompanying text.

122. *See id.* at 1505.

123. *See id.*

124. The Court first noted that there was no express statement of congressional intent in the Act.

Court held that the 1991 Act would not be applied to cases pending at the time of the enactment.[125]

In *Landgraf*, the Supreme Court appeared to reconcile the conflicting decisions in *Bowen*, *Bradley*, and *Thorpe*.[126] However, the lower courts' attempts to apply *Landgraf* to the issue concerning the retroactive application of the Anti-Terrorism and Effective Death Penalty Act had merely perpetuated the circuit split on retroactivity and the application of new statutes to pending cases.

IV. THE CIRCUITS ATTEMPT TO APPLY THE SUPREME COURT TEST TO THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT AND CONFUSION ENSUES

Applying the *Landgraf* test articulated by the Supreme Court, the United States District Court for the District of Idaho held in *Leavitt v. Arave*[127] that the Act applied to pending cases.[128] In *Leavitt*, the court evaluated the plain language,[129] the structure,[130] and the legislative history of the Act.[131] From

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See id. at 1505. Concerns with retroactive application of the compensatory damage provisions include the risk of unfair surprise to the defendant. In addition, one of the purposes of the compensatory damage provision, creating an incentive for managers to take precautionary measures to prevent a violation of the employment discrimination statues, would not be served by applying this new Act to actions already taken. *See id.* at 1506 n.35. The Court also noted that the jury trial requirement, a simple procedural change, would apply to pending cases if the section introducing jury trials did only that. But, because of the inclusion of compensatory damages in the provisions, they would not apply to pending cases. *See id.* at 1505. Justice Blackmun's dissent pointed out a flaw in the vested rights test used by the majority in concluding that the compensatory damages provision should not be applied to pending cases. "'There is no such thing as a vested right to do wrong,'" therefore no expectations will be unsettled by this new provision. *Id.* at 1510 (quoting Freeborn v. Smith, 2 Wall. 160, 175 (1865)).

125. The Court stated that the presumption against retroactivity applied here. *See Landgraf*, 114 S. Ct. at 1508. Further, the Court concluded that "[b]ecause we have found no clear evidence of congressional intent that § 102 of the Civil Rights Act of 1991 should apply to cases arising before its enactment, we conclude that the judgment of the Court of Appeals must be affirmed." *Id.*

126. *See supra* notes 69-75, 83-89, 90-94 and accompanying text for explanation of these precedent cases. For more information on the interpretation of the Court's decision in *Landgraf*, see Freeman, *supra* note 103.

127. 927 F. Supp. 394 (D. Idaho 1996).

128. *See id.* at 396 (restating the *Landgraf* test).

129. Petitioner argued that the inclusion in the new Chapter 154, applicable only to capital cases, specifically those pending at the time of enactment of the Act, demonstrated Congress' intent that the other sections at issue in this case should only apply prospectively. *See id.* at 396. The court found this argument unpersuasive. *See id.* Instead, the court looked at the structure of the Act and its legislative history to determine whether Congress expressed any intentions concerning the retroactive application of the statute. *See id.* at 396-97.

130. The court explained that the structure of the Act was designed to work to achieve Congress's purpose. *See id.* at 397. The court provided examples of statutory interaction between Chapter 154, which specifically applies to pending cases, and the other provisions of the Act. *See id.* Further, the amended statutes, as 'remedial' statutes, would apply to pending cases because that is the norm. *See id.*

this evaluation, the court concluded that Congress had not expressly stated its intent regarding retroactive application.[132]

Applying the second part of the *Landgraf* test, the court reasoned that there is no common law doctrine that creates a vested right for a state prisoner to obtain habeas corpus review under the habeas laws in effect at the time of trial and sentencing.[133] Therefore, according to the court, the Act only addressed the court's powers and did not affect parties' vested rights.[134] The court defined the Act as remedial in nature,[135] giving prospective-type relief,[136] and not operating retroactively as defined by the second part of the *Landgraf* test.[137] Because the relief is prospective in nature and does not impair the vested rights of a party, courts should apply the law in effect at the time they render their decision.[138] Therefore, the court held that the Act does apply to cases that were pending when the Act was ratified.[139]

Other courts also addressing the issue of whether the Act applies to pending cases have concluded similarly.[140] In *Zuern v. Tate*,[141] the United

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at 398. Therefore, the decision to explicitly apply Chapter 154 to pending cases was merely an attempt by Congress to explain that the new chapter was intended to take effect similarly to the amended provisions. *See id.* The court concluded that these "examples of statutory interaction strongly suggest that Congress meant for the Act to take effect as a whole." *Id.* at 397.

131. The court cited to congressional reports in which the representatives portray the provisions as working in tandem with each other to eliminate habeas abuse. In addition, the report did not differentiate between Chapter 154 and the other provisions at issue. *See id.* at 397.

132. The court considers the legislative history and the structure of the Act as merely providing insight into Congress' intent rather then being determinative, therefore the court moves onto the second part of the *Landgraf* test. *See id.* at 398.

133. *See* Leavitt v. Arave, 927 F. Supp. 394, 398-99 (D. Idaho 1996). "[T]he legislative provisions defining the writ's operation have never guaranteed a fixed statutory framework." *Id.* at 398.

134. The court concluded this after noting that there was no statutory or common law right at stake. *See id.* at 399.

135. "The remedial nature of the writ of habeas corpus is well established. *See, e.g.*, Peyton v. Rowe, 391 U.S. 54, 56 (1968)." *Id.* at 398.

136. *See id.*

137. *See id.* at 399. See *supra* notes 121-24 and accompanying text for the second part of the *Landgraf* test.

138. The court cites language from the *Landgraf* decision addressing prospective-relief legislation. "[T]he application of an intervening statute that affects the 'propriety of prospective relief . . . is not retroactive.'" *Id.* at 398. The court interpreted this statement to mean that "a party to a pending case has no vested right in a statutory scheme that defines the scope of the party's prospective relief or the court's jurisdiction." *Id.*

139.

> Because the court concludes that application of [the Act] to cases pending . . would not have retroactive effect, and because the purpose, structure, and legislative history of the Act indicates Congress intended for the new legislation to govern existing cases, the court will apply the law now in effect to the petitioner's pending habeas action.

Id. at 399.

140. *See, e.g.*, Lennox v. Evans, 87 F.3d 431 (10th Cir. 1996) (holding that because the new amended provision requires the same showing for a certificate of appealability as for obtaining a certificate of probable cause, application of the Act would not impair defendant's rights and may be

Stated District Court for the District Court of Ohio noted a distinction between primary conduct and secondary conduct.[142] The court reasoned that applying new procedural rules at trials for acts occurring before the rule was enacted do not raise retroactivity concerns.[143] The court held that the changes in habeas procedures do not regulate primary conduct and do not operate retroactively when applied to pending cases.[144] Therefore, the Act was applied to the pending case.[145]

On the other hand, some courts applying the *Landgraf* test have determined that the Act does not apply to pending cases. Some of these cases use only the first prong of the *Landgraf* test to reach their conclusion.[146] In *Warner v. United States,*[147] a district court in Arkansas refused to consider whether the Act applied to the case pending when the Act was signed into law.[148] The court instead used the *Landgraf* test to conclude that because Congress did not expressly state that the statute applied retroactively, it does not apply to pending cases.[149]

A district court in Illinois reached a similar decision in *United States v. Trevino.*[150] The court held that because Congress specifically mandated that the new Chapter 154,[151] which concerned only capital cases, applied to

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applied to pending cases).

141. 938 F. Supp. 468 (S.D. Ohio 1996).

142.

> The changes in habeas procedure made by the Act are in no way regulatory of primary conduct. That is, they in no way impair any primary rights Mr. Zuern possessed when he killed Philip Pence, increase his liability for that conduct, or impose new duties on him for that conduct.

Id. at 474. Although petitioner argued that the only consideration was whether the new legislation affected any acts committed before its enactment, the court placed more emphasis on the *Landgraf* distinction between primary and secondary conduct, concluding that this legislation only affects secondary conduct and thus applies to pending cases. *See id.*

143. The court decided that the conduct affected is only secondary and therefore no retroactivity concerns were raised. *See id.*

144. *See id.* at 474-75. The court also recognized that "[i]f every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." FULLER, *supra* note 23, at 60, *cited in* Landgraf v. USI Film Products, 114 S. Ct. 1483, 1499 n.24 (1994)).

145. *See Zuern*, 938 F. Supp. at 475.

146. *See supra* notes 118-19 and accompanying text regarding the first prong of the *Landgraf* test.

147. 926 F. Supp. 1387 (E.D. Ark. 1996).

148. "[T]he court need not consider what effect, if any, the amendments to Section 105 might have in this case." *Id.* at 1390 n.4.

149. "[D]efendant's motion was filed prior to the enactment of that legislation, and that legislation does not state that the revisions in section 105 (as opposed to those of section 107) are to be applied either retroactively or to cases pending at the time of its enactment." *Id.* The court then decided that the precedent case, Bailey v. United States, 116 S. Ct. 501 (1995), affecting the application of the Act, may be applied to the pending case.

150. No. 96 C 828, 1996 WL 252570 (N.D. Ill. May 10, 1996).

151. *See supra* note 5 and accompanying text.

pending cases, the remainder of the Act applied only prospectively.[152] Again, the court utilized the first prong of the *Landgraf* test,[153] holding that Congress clearly stated that the Act would not apply to pending cases.[154] However, the court then went on to say that even if the expression was not clear, application to pending cases would operate retroactively.[155] But, the court did not explain this statement concerning the second prong of the *Landgraf* test, supporting its holding by finding that Congress expressed its clear intent against application of the Act to pending cases.

One other group of cases applies the second prong of the *Landgraf* test[156] to reach the conclusion that the Act does not apply to pending cases.[157] In *United States v. Barnett*,[158] a district court in Illinois held that the Act did not apply to pending cases.[159] The court reasoned that because the standard of review by which federal courts analyze habeas petitions is narrowed by one of the amended sections of the Act, the Act affects the quantum of protection courts give the rights of the defendant.[160] According to the second part of the *Landgraf* test, application of the Act to pending cases operates retroactively.[161] Therefore, the court decided that the Act cannot be applied to pending cases.[162]

The *Landgraf* decision and the test it promulgated for determining whether a new act should apply to pending cases apparently did not resolve the conflict between the canons of construction. The courts applying the *Landgraf* test still could not agree on whether the Anti-Terrorism and Effective Death Penalty Act should apply to cases pending when the Act was enacted.

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152. *See Trevino*, No. 96 C 828, 1996 WL 252570, at *3, n.1. Because Congress did not include the same statement in the amended provisions as it did in the new provision of Chapter 154, the court inferred that Congress intended the amended provision to apply only prospectively. *See id.*

153. *See supra* notes 118-19 and accompanying text.

154. *See Trevino*, 1996 WL 252570, at *3 n.1.

155. "[W]e believe the Act would have a truly retroactive effect. . . ." *Id.*

156. *See supra* notes 121-24 and accompanying text.

157. *See* Boria v. Keane, 90 F.3d 36 (2d Cir. 1996) (reasoning that because the new Act, if applied, would require a different outcome, the application would operate retroactively); United States v. Gilmore, No. 95 C 1296, 1996 WL 446888 (N.D. Ill. July 25, 1996); United States v. Page, No. 96 C 2339, 1996 WL 467237 (N.D. Ill. Aug. 13, 1996) (holding that given Congress' silence on this issue, there was no direct expression of congressional intent to apply the act to pending case).

158. No. 96 C 1274, 1996 WL 400016 (N.D. Ill. July 15, 1996).

159. *See id.* 1996 WL 400016, at *2.

160. "[T]he amendment to § 2254 does not merely change the manner in which a federal court analyzes the habeas petition. The amendment narrows the standard of review courts can give to questions of law and fact decided by state courts." *Id.*

161. *See supra* notes 121-24 and accompanying text.

162. *See Barnett*, 1996 WL 400016, at *2.

V. THE SUPREME COURT'S DECISION

In the midst of the confusion among the circuit courts regarding how to apply the amended provisions of the Act, the Supreme Court agreed to hear a case concerning the retroactive application of the non-capital provisions of the Act.[163] The Supreme Court agreed that the *Landgraf* test should be applied.[164] The Court began and ended with the first prong of the *Landgraf* test,[165] holding that the amended provisions did not apply to pending cases because Congress had clearly expressed its intent that the provisions not apply.[166] Thus, the Court did not need to determine whether these provisions should apply retroactively under the second prong of *Landgraf*.[167]

Most important than the Court's decision and rationale is the fact that the Court was unable to resolve the ambiguities that its decision created.[168] The Court acknowledged not only that the ambiguities existed, but also that it could not clear up these ambiguities with its decision.[169] Instead, the Court explained thee ambiguities by stating that the Act was not Congress' best

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163. *See* Lindh v. Murphy, 117 S. Ct. 2059 (1997). The defendant's case was originally decided before the Act went into effect. *See id.* His appeal to the Seventh Circuit was pending when the Act was signed into effect. *See id.* The Seventh Circuit held that, in general, the amended provisions did apply to pending cases. *See id.* at 2062. Yet, Congress did not express any clear intent as to whether to apply these provisions to pending cases. Moreover, there would be no retroactive effect under the *Landgraf* test if the provisions were to be applied to pending cases. *See id.* For more information concerning the Circuit court case, see Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996).

164. *See Lindh*, 117 S. Ct. at 2062. The court explained the *Landgraf* test before giving its decision.

> [w]hen a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. if Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the new statute contains no such express command, the court must determine whether the new statute would have retroactive effect....

Id. at 2062.

165. *See supra* notes 118-19 and accompanying text.

166. *See Lindh*, 117 S. Ct. at 2063. The Supreme Court based its decision on the enactment date for new Chapter 154, stating that this section "'shall apply to cases pending on or after the date of enactment of this Act.'" *Id.* at 2063 (quoting, 110 Stat. 1226). The Court found tht this implicitly meant that the other added provisions did not apply to pending cases. "We read this provision of § 107(c), expressly applying chapter 154 to all cases pending at enactment, as indicating implictly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act." *Id.*

167. The Supreme Court sides with the first group in the circuit split. *See supra* notes 146-55 and accompanying text.

168. The Court explained its decision in plain terms. The amended provisions and the new provisions were added at the same time, therefore Congress must have understood that only the new provisions would apply to pending cases, not the amended provisions. *See id.* at 2065-66. "Both chapters, therefore, had to have been in mind when § 107(c) was added." *Id.* at 2065.

169. *See id.* at 2067-68. "Why did § 2264(b) make an express provision for applying it to chapter 154 cases? No answer leaps out at us." *Id.* at 2068.

work.[170]

The Supreme Court resolved the circuit split and chose to follow the line of cases holding that Congress had expressed its clear intent, using only step one of the *Landgraf* test.[171]

VI. PROPOSAL

In *Landgraf*, the Supreme Court developed the definitive test for determining whether to apply a new statute to pending cases.[172] However, the application of this test has proved problematic.[173] In an attempt to determine which circuit decision best comports with the *Landgraf* test, the Supreme Court decided *Lindh*.[174] Did the Supreme Court make the right choice?

A. Evaluation of the Supreme Court's Decision Using the Landgraf Test

The first prong of the *Landgraf* test requires a court to consider whether Congress expressly stated its intentions concerning retroactive application of a statute.[175] If Congress clearly expressed its intentions, then this statement controls the statute's application, and the court's inquiry ends.[176] This was the Supreme Court's position in *Lindh*.[177] The court at this stage evaluates the language, structure, and legislative history of the statute.[178]

The plain language of the Act is not dispositive of Congress' intent. For instance, Congress expressly states in the introduction to the new Chapter 154, which is not at issue, that the new chapter applies to pending cases.[179] However, there is no similar statement in the introductions to any of the amended sections of the Act at issue, specifically sections 2244, 2253, and 2254. The Supreme Court states that the express inclusion of this statement in the introduction of Chapter 154 means that Congress expressly excluded this from any section in which a similar statement does not appear.[180] Therefore, Congress did not intend to apply the sections at issue to pending cases. However, this reasoning is flawed because it interprets Congress'

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170. *See id.* "All we can say is that in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting." *Id.*

171. *See supra* notes 146-55 and accompanying text.

172. *See supra* note 102 and accompanying text.

173. *See supra* notes 127-62 and accompanying text.

174. *See supra* notes 163-71 and accompanying text.

175. *See supra* notes 118-19 and accompanying text.

176. *See supra* note 119 and accompanying text.

177. *See supra* notes 165-67 and accompanying text.

178. *See supra* notes 129-31 and accompanying text.

179. *See supra* note 14 and accompanying text.

180. *See supra* notes 147-49, 153-54 and accompanying text.

silence as an express statement of intent. Although silence may lead the court in one direction or another, silence is not dispositive of the Congress' intent. The only clear statement of congressional intent regarding the sections of the Act at issue would be a statement similar to the one at the beginning of Chapter 154. The same clear meaning cannot be derived from the lack of such a statement. Therefore, the plain language of the Act does not demonstrate Congress' intent regarding the application of the Act to pending cases.

The Act's structure may be evaluated in conjunction with its plain language to determine if Congress expressed its intent.[181] Through this evaluation, it appears that Congress intended that the legislation would work together with the other sections in order to achieve the congressional purpose.[182] Many of the provisions in the new Chapter 154, not at issue, depend upon the application of the amended sections at issue.[183]

This statutory interaction suggests that Congress intended the whole Act to take effect on the same date. It would be difficult to apply Chapter 154 to pending cases while not applying the other amended sections to these same pending cases. If Congress intended the amended sections of 2244 and 2254 to apply only to those cases that fall under Chapter 154, it would have written the Act differently.[184] On the other hand, this evaluation of the Act's

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181. The structure of the Act can also be evaluated by looking to the general effect of the language of the new Chapter 154. Section 2261(b) of the Act states that Chapter 154 is only applicable if the state has established a mechanism for the appointment of competent counsel in the state's post-conviction hearings. *See supra* note 5 and accompanying text. This means that the section only applies to those states that agree to and do create a system for appointment of counsel that conforms to the Act's standards. By implication, Chapter 154 would seem to apply prospectively because these adequate systems would not be in existence yet. Later, when they are in existence, Chapter 154 would apply. Because of this implication that the new chapter 154 only applies prospectively, Congress had to include the statement about application to pending cases to combat that implication and make their intent more clear. At the same time, the amended provisions did not need a similar statement of application to pending cases. These sections do not depend upon the creation of a system based on the Act's standards. There was no implication that the provisions applied prospectively, after the creation of a specified system. Therefore, there was no inference for Congress to overcome by including the statement regarding application to pending cases. Because this could be interpreted as a remedial statute, fixing existing problems, and not future ones, Congress could have presumed that the sections would understandably apply to pending cases. In *Lindh v. Murphy*, the Supreme Court correctly points out that this ambiguity could have been solved by a few words on either side of the issue. 117 S. Ct. 2059, 2065 (1997). Neither of the arguments are strong under this theory for determining whether to apply the Act to pending cases.

182. *See supra* notes 130-31 and accompanying text.

183. In order for a habeas petitioner in a capital case, which was pending on the date the Act was signed into law, to renew a stay of execution under Chapter 154, the court of appeals must approve the filing of a second or successive application under amended § 2244. Also, another section of Chapter 154 requires the habeas court to review the merits of the petitioner's claims under the guidelines of amended § 2254.

184. See *supra* text accompanying note 182 for an explanation of this statutory interaction. It

structure merely leads to an unsubstantiated inference as to Congress' intent when writing the Act. This is by no means a clear statement of congressional intent. Therefore, because the statutory structure does not provide it, there is no clear expression of congressional intent.

The Supreme Court found that it could rationalize most of the interaction by creating different functions for the problematic sections,[185] which would allow the Court to eliminate almost all of the interaction ambiguities except for one.[186] Therefore, the Supreme Court blames the poorly written statute.[187] It appears that because the Supreme Court had to make these assumptions in order to rationalize the ambiguities, it cannot then say that the congressional intent was clear. Thus far it appears that neither the structure of the Act nor its language clearly states any congressional intent regarding application of the amended sections to pending cases.

The remaining factor to consider in the first prong of the *Landgraf* test is the legislative history of the Act. Most of the arguments concerning the Act centered around the habeas corpus provisions.[188] However, these arguments focused on whether or not the habeas corpus provisions should even be included in the Act.[189] The arguments did not address the application of the provisions to pending cases. The legislative history does support the concept of structural interaction. Congress viewed the amendments and Chapter 154 as a consolidated approach to the goal of habeas reform.[190] Most of the discussion about the habeas corpus portion of the Act debates the consequences of habeas corpus reform and does not distinguish between the amended provisions and Chapter 154. This suggests that the two cannot be separated into provisions that do and do not apply to pending cases. This is merely an implication and cannot be adopted as a clear expression of congressional intent.

When analyzing the Act under the first prong of the *Landgraf* test, it appears that Congress failed to make a clear statement of intent in either the plain language, the structure, or the legislative history of the Act.[191] Thus, it

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would have been much easier for Congress to merely state in the text of the amended sections that they only apply to the capital cases. However, there is no language to this effect within the amended sections.

185. *See Lindh*, 117 S. Ct. at 2067.

186. *See id.* at 2068.

187. *See id.*

188. *See supra* note 3.

189. *See supra* note 3.

190. *See supra* note 131 and accompanying text.

191. In addition, the civil Rights Act of 1991 had similar plain language and more influential legislative history that included the refusal by the President to sign the Act into law because of retroactive sections of the Act. *See* Landgraf v. USI Film products, 114 S. Ct. 1483, 1491-92 (1994).

appears that the Supreme Court either made the wrong choice or was forced into making an unlikely choice by the poorly written statute.

B. Rewriting the "Pig's Ear" of Statutory Drafting

The Supreme Court states that the Act as written is not like a silk purse but more like a pig's ear.[192] Congress must rewrite the Act so that it is more understandable.[193] The rewrite should take into consideration the *Landgraf* test that would be applied to determine the Act's application.[194]

1. The Problems and the Rewrite Under Landgraf *Step One*

Congress' error in drafting this Act is that it did not clearly in express any intent as to the Act's application to pending cases.[195] Prong one of the *Landgraf* test evaluates and follows the clear intent of Congress. The easiest way for Congress to remedy this poorly written Act is to state its intent clearly so that courts will need only the first prong of the *Landgraf* test to determine the Act's application to pending cases.

Another problem with the Act is the interaction between its sections.[196] Stating an effective date for one set of provisions that interact with another set of provisions with no effective date adds to the statutory confusion. A rewrite of the Act would have to explain the interaction more exactly.

The new act would have the same Chapter 154 and amended Chapter 153 provisions. The effective date provision for Chapter 154 would be removed as it is written now, to be inserted later. After the Chapter 153 and Chapter 154 provisions are explained, a new section should be added. This section should explain in detail the interaction between Chapter 153 and Chapter 154. The explanation should include examples of situations where both Chapters would be used. After this detailed explanation of how these

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In *Landgraf*, the court still concluded that this was not a clear statement of congressional intent. It seems difficult for that same Supreme Court to now find that the language and less influential legislative history of the Anti-Terrorism and Effective Death Penalty Act are conclusive of congressional intent to apply the amended sections only prospectively.

192. *See Lindh*, 117 S. Ct. at 2068.

193. In addition to the Supreme Court's trouble with the Act, the three-way circuit split also indicates that the Act is too unclear.

194. The *Landgraf* test is used to determine whether application of an existing statute to a pending case would have a retroactive effect. However, the first step is merely to follow any clear directives given by Congress.

195. Although Congress may have thought they were clear when they wrote an effective date for Chapter 154, the problems that have been caused by the writing in this Act demonstrate that the addition of the effective date provision made the Act even less understandable.

196. *See supra* note 183 and accompanying text.

provisions interact, the Act should have another section dealing with application to pending cases.

In this new section, Congress should clearly state how both of the Chapters should be applied, including their interaction. Congress could say that for all capital cases using this system under either Chapter 154 itself, or in conjunction with Chapter 153, the Act does apply to pending cases. In another paragraph of this new section, the Act could explain that for all non-capital cases using this whole system whether or not there is any interaction between Chapters, the Act does not apply to pending cases.

This simple rewrite assures that the congressional intent is clear and therefore only prong one of the *Landgraf* test needs to be applied. Congress clearly states when the chapters are to be applied. This remedies the largest problem with the Act as it is written now.[197] In addition, the rewrite explains the interaction between provisions and includes this in the effective date provisions, thus remedying Congress' second largest problem with the Act as it is written now.[198]

2. *Why Avoid Step Two of the* Landgraf *Test?*

Under prong two of the *Landgraf* test, it must be determined whether applying the Act to pending cases would have a retroactive effect.[199] That is, would application of the Act 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. If the Act would do any of these things, it will not be applied to pending cases. In *Lindh*, the Supreme Court avoided this issue by deciding that Congress had expressed its clear intent that the amended provisions did not apply to pending cases.[200] The Court was prudent in avoiding the problems with the second part of the *Landgraf* test.

There are various interpretations on how to use step two of the *Landgraf* test to determine whether the application of a statute will have a retroactive effect. For example, the *Landgraf* Court makes significant use of the substantive/procedural theory.[201] Under this theory, those laws that only effect procedural rights or secondary conduct do not have a retroactive effect. They do not impair vested rights or primary conduct nor do they add unexpected liability for already completed acts.

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197. *See supra* note 195 and accompanying text.
198. *See supra* note 196 and accompanying text.
199. *See supra* notes 121-24 and accompanying text.
200. *See supra* notes 118-19 and accompanying text.
201. *See supra* note 116 and accompanying text.

Using this test, application of the Act to pending cases would appear to have no retroactive effect. The changes in the habeas corpus proceedings are mostly procedural, concerning statute of limitations on filing deadlines,[202] the procedures for allowing a habeas corpus petition into the Supreme Court through the three-judge panel,[203] and the situations in which a court may grant a writ of habeas corpus.[204]

Another approach under the second prong of the *Landgraf* test and the determination of a statute's retroactive effect is to evaluate the general category of rights affected. Under this theory, criminal changes are allowed less often than civil because applying criminal changes to pending cases more often results in the loss or alteration of a vested right.[205] As support, this theory uses reliance, interest in liberty, and interest group protection.[206]

Under this theory, the criminal procedural changes would likely be found to operate retroactively. One could argue that the prisoners relied on the fact that they did not have a statute of limitations period for their claims and therefore waited to file them. By relying on this belief, these prisoners may have lost their ability to file their claims. If a prisoner may be released on a writ of habeas corpus, but is not given the opportunity to initiate habeas proceedings due to the application of the statute of limitations or the three-judge panel to his pending case, his liberty interest is violated. In addition, there are probably not many interest groups protecting the rights of the incarcerated, while many are protecting the rights of civil litigants.[207] These criminal changes would appear to operate retroactively more so than civil changes. Under this theory, the amended criminal provisions would not be applied to the pending cases.

These various theories lead to different outcomes depending upon whether, under the second prong of the *Landgraf* test, the Act would operate retroactively if applied to pending cases. Not only do the theories lead to different results, but the circuit courts could not uniformly choose one way to apply prong two of this test.[208] These difficulties illustrate that step two of the *Landgraf* test is not only awkward to apply, but its application should be avoided. Any rewrite must remove step two of the *Landgraf* test from the analysis of the Act. Thus, as explained earlier, a congressional rewrite must only use prong one of *Landgraf*, thereby expressing a clear intent as to

202. *See supra* note 9 and accompanying text.
203. *See supra* notes 10-11 and accompanying text.
204. *See supra* note 12 and accompanying text.
205. *See supra* notes 52-56 and accompanying text.
206. *See supra* notes 56-62 and accompanying text.
207. *See supra* note 62 and accompanying text.
208. *See supra* notes 127-62 and accompanying text.

application of the Act to pending cases.

VI. CONCLUSION

The courts are constantly divided over when a new statute can be applied to pending cases. The Supreme Court contributed to this confusion by developing two opposing canons of construction used to decide this issue. After creating the confusion, the Court attempted to rectify the situation by presenting the lower courts with the *Landgraf* test, ostensibly the definitive answer to the question of whether to apply a new statute to pending cases. However, when the lower courts tried to apply the *Landgraf* test, confusion ensued. The result was a three-way circuit split concerning the application of the Anti-Terrorism and Effective Death Penalty Act to pending cases. The Supreme Court's attempt to resolve the confusion failed because of the poorly written statute.

The Anti-Terrorism and Effective Death Penalty Act must be rewritten to avoid further confusion. The second prong of the *Landgraf* test has proven too difficult for circuit courts to apply, therefore any rewrite must avoid this prong in any statutory analysis. Prong one of the test is a simple, easy-to-use test that looks only to congressional intent. Congress failed to state any clear intent in the Act. The problems with both the circuit courts' application of the *Landgraf* test and the Supreme Court's interpretation of the effective date of the Act in conjunction with the interaction of the statute would be solved if Congress rewrote the Act to state its clear intent.

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