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IN THE WAKE OF *SCHOONER PEGGY*: DECONSTRUCTING LEGISLATIVE RETROACTIVITY ANALYSIS

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INTRODUCTION

Relatively few recent commentators have focused on retroactive civil legislation;[1] commentators have instead tended to discuss retroactivity

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1. Difficulties with retroactivity doctrine begin from the outset, with its very definition. Courts and commentators have struggled in attempting to define "retroactive legislation." *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994) (defining a retroactive law as one that "attaches new legal consequences to events completed before its enactment"); Miller v. Florida, 482 U.S. 423, 430 (1987) ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'"); Union Pac. R.R. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913) (noting a retroactive statute gives "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed"); Society for Propagating the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (stating a law is retroactive if "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"); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 692 (1960) ("A retroactive statute is one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute."). For example, some commentators have attempted to distinguish between "primary" and "secondary" retroactivity. *See* Jan G. Laitos, *Legislative Retroactivity*, 52 WASH. U. J. URB. & CONTEMP. L. 81, 84-85 (1997) (defining "primary" retroactivity as laws that alter past legal consequences of past private actions and "secondary" retroactivity as laws that alter the legal consequences of past private actions only in the future, and concluding laws operating with "primary" retroactivity are usually invalid, while laws operating with "secondary" retroactivity are usually valid); *accord* John K. McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 CAL. L. REV. 12, 58-60 (1967) (distinguishing between primary and secondary retroactivity). *But see* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1069 (1997) ("This Article does not accept a definitional distinction between primary and secondary retroactivity. In addition to constituting an improper reading of the work of early retroactivity scholars, the distinction is analytically incoherent."); William V. Luneberg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 156-58 (analyzing distinction between primary and secondary retroactivity and concluding "courts will be hard-pressed to invent principled distinctions between types of retroactivity"). Another attempted distinction is between "method" retroactivity and "vested rights" retroactivity. *See* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1312 n.324 (1970) (contrasting method retroactivity, meaning "the attaching of detrimental consequences to activities terminated prior to the passage of the law, as opposed to 'vested rights retroactivity,' the disturbing of existing patterns of conduct which involve some investment"); *accord* W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216, 217-18 (1960). Still other attempts at definitional distinctions include a distinction between "retroactive" and "retrospective" laws. *See* DANIEL E. TROY, RETROACTIVE LEGISLATION 6, 7 n.26 (1998) (defining "retroactive" laws as those "that explicitly refer to, and change the

doctrine in the context of its applicability to criminal statutes, administrative regulations, or judicial decisions.[2] Retroactivity is widely acknowledged as a difficult legal doctrine,[3] and apparent inconsistencies in United States Supreme Court decisions have contributed to this perception.[4] Although the Court's 1994 *Landgraf* decision[5] has been portrayed as reconciling the Court's prior decisions and as providing a framework for retroactivity analysis,[6] neither of these characterizations is entirely accurate; *Landgraf* did not persuasively reconcile the Court's retroactivity jurisprudence and its purported framework is incomplete.

The United States Supreme Court's recent decision in *Martin v. Hadix*[7] exposes *Landgraf*'s shortcomings, and thus provides the opportunity to review the doctrine pertaining to the retroactivity of civil legislation. A careful analysis of the Court's decisions reveals a consistent approach to retroactive legislation—an approach ultimately based in fundamental principles of fairness, but which has been masked by the Court's terminology.[8] This review of retroactivity doctrine is both timely and

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past legal consequences of, past behavior," while "retrospective" laws are "[l]aws affecting past events, which is to say almost all laws"); Gregory J. DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered*, 10 OHIO N.U. L. REV. 253, 254-57 (1983) (distinguishing retroactivity from retrospectivity, and arguing that treating these terms as synonymous "obfuscates differences which may hinder the accomplishment of important legislative and societal goals"). *But see* Hochman, *supra*, at 692 n.1 ("Throughout this article, the terms 'retroactive' and 'retrospective' will be used interchangeably, as they have been in the opinions of the Supreme Court."); 2 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 41.01, at 337 (5th rev. ed. 1993) ("The terms 'retroactive' and 'retrospective' are synonymous in judicial usage and may be employed interchangeably."). In at least one instance, a commentator has expressly declined to offer a specific definition of "retroactivity." *See* Fisch, *supra*, at 1072 ("[F]ormulating a precise definition of retroactivity is a difficult enterprise—one that is beyond the scope of this Article."). One of the problems is that the effort to provide an effective definition is often, in effect, an effort to provide a solution to retroactivity issues. However, retroactivity is not susceptible to a definitional approach. *See* Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301, 336 (1996) ("Circular question begging is exactly the problem with . . . a definitional approach."); *see also infra* notes 281-92 and accompanying text.

2. *See* Laitos, *supra* note 1, at 83-84. *See generally* Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075 (1999); Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143 (1996); Abner S. Greene, *Adjudicative Retroactivity in Administrative Law*, 1991 SUP. CT. REV. 261 (1992); Luneberg, *supra* note 1.

3. *See* Fisch, *supra* note 1, at 1056-75 ("Courts, legislators, and commentators have repeatedly debated the appropriate parameters for retroactivity analysis, and the debate shows few signs of abating.") (footnotes omitted). *See generally* Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373, 374-81 (1977) (discussing strengths and faults of various theories of retroactive law).

4. *See infra* notes 112-50 and accompanying text.

5. Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

6. *See infra* note 292 and accompanying text.

7. 527 U.S. 343 (1999).

8. *See infra* notes 280-91 and accompanying text. Accordingly, this Article's approach differs significantly from that of prior commentators. *See, e.g.*, Fisch, *supra* note 1 (emphasizing context in which change occurs; if area of the law is at a settled, stable equilibrium, then reliance interests are at their peak and retroactivity should be disfavored); Michael J. Graetz, *Retroactivity Revisited*, 98 HARV. L. REV. 1820,

necessary because some troublesome issues lie ahead. In particular, the Court likely will soon be asked to address retroactivity in a particularly important—and highly political—context implicating liberty interests: Whether recent changes to the immigration law can be applied retroactively to deport long-term lawful residents on the basis of events that occurred before these changes were enacted. Retroactivity concerns obviously are important to parties who are litigating about the economic effects of the retrospective application of a civil statute. However, such monetary concerns pale when compared to the retroactive application of a deportation statute.

Deportation[9] is the process by which a noncitizen[10] is compelled, by

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1826 (1985) (asserting all changes in economic laws are inherently retroactive; "identifying those transactions that merit some protection from transitional gains and losses should depend primarily on the magnitude of the gains or losses"); Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 479-80 (1982) (analyzing expectations and entrenchment as factors determining when retroactive legislation is justifiable); Hochman, *supra* note 1, at 697 (asserting the constitutionality of retroactive statute is determined by three factors: "the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right which the statute alters"); Slawson, *supra* note 1, at 216 ("[Q]uestions of retroactive law are essentially questions of substantive due process, and . . . any attempt to treat retroactivity as a special category to which special rules are to be applied is wasted effort."); Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 781 (1936) (asserting the purpose of retroactivity is to protect vested rights). In particular, commentators have tended to focus specifically on reliance interests rather than broader fairness-based concerns. *See, e.g.*, Fisch, *supra* note 1, at 1105 ("The existence of a stable equilibrium justifies the protection of reliance-based interests."); Ricciardi & Sinclair, *supra* note 1, at 341, 345 (noting criteria include reliance and notice; "where there is no reliance on the law of the moment, a retroactive change will do no harm"); Edward S. Stimson, *Retroactive Application of Law—A Problem in Constitutional Law*, 38 MICH. L. REV. 30, 37-38 (1939) (stating the "element of surprise" determines whether a statute will be applied retroactively; "A person who has changed his position, omitted to change it, or made commitments in reliance upon the law in force at the time is suddenly confronted with a change in the law applicable to his prior conduct, resulting in a liability or loss of investment which he has no opportunity to anticipate and avoid.").

9. Under the Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), deportation proceedings are now called "removal" proceedings. 8 U.S.C. § 1229, 1229a(e)(2) (Supp. III 1997) (defining "removable" as a term that applies to both deportable and inadmissible immigrants). This Article will use the terms "deportation" and "removal" interchangeably.

10. Commentators have commonly used the term "noncitizen" to refer to an individual who is not a United States citizen, observing the negative connotations associated with the term "alien." *See generally* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 264 (1997); *see also* Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1428 (1995) ("It is no coincidence that we still refer to noncitizens as 'aliens,' a term that calls attention to their 'otherness,' and even associates them with nonhuman invaders from outer space."); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 n.4 (1990) (noting the "term 'alien' is standard usage, but . . . [has a] distancing effect and somewhat pejorative connotation"). The focus of this Article is on lawful permanent residents (green card holders), although a "noncitizen" conceivably could also include a lawful nonimmigrant (one with a valid temporary visa), an undocumented individual illegally present in the United States, or a refugee granted political asylum due to feared persecution in the country from which he or she fled.

court order, to leave the country.[11] There is no statute of limitations for deportation proceedings,[12] and it has long been held that deportation is civil, rather than criminal, in nature.[13]

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11. *See* Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 99 n.14 (1998). Noncitizens who have gained admission into the United States have traditionally been designated "deportable" aliens. 8 U.S.C. § 1251 (1994). Before Congress enacted the IIRIRA, individuals who were not eligible for admission into the United States were designated "excludable" aliens. 8 U.S.C. § 1182 (1994). Under IIRIRA, these individuals now are called "inadmissible" aliens. 8 U.S.C. § 1182 (Supp. III 1997). Our country has long distinguished between "deportable" aliens, who are entitled to due process rights, and "excludable" or "inadmissible" aliens, who are not. Leng May Ma v. Barber, 357 U.S. 185, 187 (1958) ("[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.'") (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953)); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212-13 (1953) (holding excludable alien could be held indefinitely on Ellis Island; "[i]t is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. . . . But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'") (quoting Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)). Thus, recognizing this distinction has been crucial to understanding immigration detention issues.

Disturbingly, two recent circuit court decisions have diverged from this perspective, erroneously concluding that in the areas of detention and deportation, there is no categorical distinction between excludable and deportable aliens. *See* Ho v. Greene, 204 F.3d 1045, 1059-60 (10th Cir. 2000); Zadvydas v. Underdown, 185 F.3d 279, 297 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297 (2000).

12. Congress eliminated the statute of limitations for deportation in 1952. *See* Immigration and Nationality Act of 1952, ch. 477, Pub. L. No. 82-414, § 241, 66 Stat. 163, 204-08 (codified as amended at 8 U.S.C. § 1227 (Supp. III 1997)).

13. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry . . . . The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws."); Galvan v. Press, 347 U.S. 522, 531 (1954) (reaffirming cases holding Ex Post Facto Clause not applicable to deportation); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (stating that deportation is not "a punishment; it is simply a refusal by the Government to harbor persons whom it does not want"); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend."). However, the ramifications of deportation are significant. *See Galvan*, 347 U.S. at 530-31 (noting deportation may "deprive a man 'of all that makes life worth living,'" "is a drastic measure and at times the equivalent of banishment or exile," and "since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation," but concluding Congress' power to regulate aliens was supported by "'not merely a page of history', . . . but a whole volume"); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("We [construe the statute narrowly] because deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.") (citation omitted). The characterization of deportation as a mere civil action has been criticized by the courts. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting) ("The right to be immune from arbitrary decrees of banishment certainly may be more important to 'liberty' than the civil rights which all aliens enjoy when they reside here. Unless they are free from arbitrary

Deportation's devastating consequences—despite its civil designation—take on special significance in light of two 1996 amendments to the Immigration and Nationality Act:[14] the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[15] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[16]

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banishment, the 'liberty' they enjoy while they live here is indeed illusory. Banishment is punishment in the practical sense. It may deprive a man and his family of all that makes life worth while. Those who have their roots here have an important stake in this country. Their plans for themselves and their hopes for their children all depend on their right to stay. If they are uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people condemned to bitterness and despair."); Jordan v. De George, 341 U.S. 223, 232, 243 (1951) (Jackson, J., dissenting) (arguing deportation is a "savage penalty"; deportee is "punished with a life sentence of banishment in addition to the punishment which a citizen would suffer for the identical acts"); *Fong Yue Ting*, 149 U.S. at 739-40 (Brewer, J., dissenting) ("[Deportation] deprives of 'life, liberty, and property without due process of law.' It imposes punishment without a trial, and punishment cruel and severe. It places the liberty of one individual subject to the unrestrained control of another.... Deportation is punishment. It involves first an arrest, a deprival of liberty; and, second, a removal from home, from family, from business, from property.... Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that oftentimes most severe and cruel."); Scheidemann v. INS, 83 F.3d 1517, 1527, 1531 (3d Cir. 1996) (Sarokin, J., concurring) ("The legal fiction that deportation following a criminal conviction is not punishment is difficult to reconcile with reality, especially in the context of this case. Mr. Scheidemann entered this country at age twelve; he has lived here for thirty-six years; he has been married to an American citizen for twenty-four years; he has raised three children all of whom are American citizens; his elderly parents are naturalized citizens; two of his four siblings are naturalized American citizens, and all four of them reside permanently in the United States; he has no ties to Colombia, the country to which he is to be deported; and he has fully served the sentence imposed on him. If deportation under such circumstances is not punishment, it is difficult to envision what is.... I suggest that now is the time to wipe the slate clean and admit to the long evident reality that deportation is punishment."); Di Pasquale v. Karnuth, 158 F.2d 878, 879 (2d Cir. 1947) (Hand, J.) ("[N]othing can be more disingenuous than to say that deportation in these circumstances is not punishment."). The scholarly literature has also criticized the notion that deportation is not punishment. *See generally* Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 305-07 (2000); *see also* Morawetz, *supra* note 11, at 102 (characterizing as a "legal fiction [the idea] that deportation following a criminal conviction is not punishment") (quoting Scheidemann v. INS, 83 F.3d 1517, 1527 (3d Cir. 1996) (Sarokin, J., concurring)); Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 104-06 (1989) ("The Court... engages in fictionalizing when it suggests that deportation... is not to punish an unlawful entry, but to determine eligibility to remain in the country.... [D]eportation is based on past conduct, and like traditional criminal punishment, is partly designed to send messages to society, particularly aliens, about the utility of compliance with the immigration laws.... To reach the euphemistic conclusion that deportation is not punishment, the Court has to ignore reality and it does so by simply refusing to examine the people involved and their individual circumstances—length of time in the country, family situation, or ownership of property."); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 24-27 (1984) (observing "[t]his distinction possesses little logical power... it is a legal fiction with nothing, other than considerations of cost and perhaps administrative convenience, to recommend it").

14. Immigration and Nationality Act of 1952, ch. 477, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (Supp. II 1996)).

15. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8 and 50 U.S.C.) (AEDPA).

16. Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.) (IIRIRA).

Through these amendments, Congress has changed, among other things, the rules under which immigrants may be deported[17] and the rules regarding when immigrants may obtain relief from deportation.[18]

One of the changes resulting from these amendments pertains to mandatory detention pending deportation.[19] Using a hypothetical example, in 1973, at age two, Kim Nguyen and her family left Vietnam and came to the United States. Like many other immigrants, Kim became a lawful permanent resident—living here, attending school here, marrying here, working here. The United States is her home: She remembers no other and has ties to no other. In 1995, when she was in her mid-twenties, Kim was arrested for possession of methamphetamine, convicted, and sentenced to one year in prison.[20] The INS instituted removal proceedings and placed Kim in mandatory detention at the time of her release from prison. Kim's conviction was her first and only criminal offense. She is married to a United States citizen, has a young child who is a United States citizen, and her extended family lives in the area. Vietnam does not have a repatriation agreement with the United States, and therefore will not permit Kim to return.[21]

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17. For example, AEDPA added additional crimes to the list of those constituting an "aggravated felony." AEDPA § 440(e) (amending 8 U.S.C. § 1101(a)(43) (1994 & Supp. III 1997) (adding crimes)). IIRIRA added crimes and lowered the sentencing threshold from five years to one year for certain offenses. IIRIRA § 321(10)-(11) (amending 8 U.S.C. § 1101(a)(43)(R)-(S) (Supp. III 1997) (adding crimes and lowering sentencing threshold for certain offenses)).

18. For example, section 440(d) of AEDPA restricts the availability of deportation waivers that previously had been available under section 212(c) of the Immigration and Nationality Act of 1952. Immigration and Nationality Act § 212(c) (codified as amended at 8 U.S.C. § 1182(c) (1994)), *repealed by* IIRIRA § 304(b), 110 Stat. at 3009-597 (Supp. III 1997). By restricting such waivers, AEDPA increases the number of immigrants with criminal convictions who may be automatically deported, without the opportunity to bring their case before an immigration judge.

19. The changes to immigration law created by AEDPA and IIRIRA have generated substantial commentary, particularly with respect to the modification of the "aggravated felony" definition to include additional crimes, the restrictions on the availability of deportation waivers, and the limitations on judicial review of removal orders. *See* Morawetz, *supra* note 11, at 108-09 (addressing AEDPA § 440(d)); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998); Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997); Elwin Griffith, *The Road Between the Section 212(C) Waiver and Cancellation of Removal Under Section 240A of the Immigration and Nationality Act—The Impact of the 1996 Reform Legislation*, 12 GEO. IMMIGR. L.J. 65 (1997); Note, *The Constitutional Requirement of Judicial Review for Administrative Deportation Decisions*, 110 HARV. L. REV. 1850 (1997). A comprehensive review of the retroactivity of all of the provisions implicated by AEDPA and IIRIRA is beyond the scope of this (or any) Article. This Article will address only the retroactive application of AEDPA and IIRIRA's mandatory detention provisions; it does not address retroactive application of changes in the law creating the underlying grounds for deportation.

20. A noncitizen is deportable if convicted of an aggravated felony or any controlled substance violation other than possession of less than thirty grams of marijuana for personal use. *See* 8 U.S.C. § 1227(a)(2)(A)(iii), (B)(i) (Supp. II 1996); Wallace v. Reno, 194 F.3d 279, 281 (1st Cir. 1999).

21. A number of countries do not have repatriation agreements with the United States, including Vietnam, Cambodia, Laos, and Cuba. *See* Ma v. Reno, 208 F.3d 815, 818 & n.1 (9th Cir. 2000) (Cambodia, Laos, Vietnam), *cert. granted sub nom.* Zadvydas v. Underdown, 121 S. Ct. 297 (2000); United

Under pre-1996 law and interim custody rules imposed before the IIRIRA provisions became effective, a detainee could be released on parole pending deportation if she could prove that she is not a danger to the community or a flight risk. However, AEDPA and IIRIRA require mandatory detention of all aliens awaiting deportation, regardless of danger or flight risk. Which rule applies? May the INS detain Kim indefinitely?

The mandatory detention provisions have a complicated, somewhat confusing, history. Under the Immigration and Nationality Act of 1952, the Attorney General had the discretion to release a noncitizen pending a final determination of deportability.[22] In 1988, in response to concerns about criminal activity by noncitizens,[23] Congress passed the Anti-Drug Abuse Act, an omnibus drug enforcement bill. This Act amended the Immigration and Nationality Act, adding a broadly-worded mandatory detention provision for noncitizens who had committed certain crimes, which provided for no discretionary relief.[24] However, a number of lower courts found this mandatory detention provision constituted an unconstitutional violation of due process.[25] Congress subsequently amended the statute in 1990 and 1991 to permit the release of aggravated felons lawfully admitted to the United States who could demonstrate they were neither a threat to the community nor a flight risk.[26]

States v. Gonzalez, 202 F.3d 20, 21 (1st Cir. 2000) (Cuba). In addition, sometimes an individual's citizenship in another country cannot be documented, which prevents deportation even when the country to which the noncitizen likely would be returned is a country having a repatriation agreement with the United States. *See* Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297 (2000).

22. *See* 8 U.S.C. § 1252(a) (1970) ("Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole.").

23. *See* Zgombic v. Farquharson, 89 F. Supp. 2d 220, 224 (D. Conn. 2000) (ADAA passed "in response to concerns about increased criminal activity by aliens").

24. *See* 8 U.S.C. § 1252(a)(2) (1988) ("The Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction. . . . [T]he Attorney General shall not release such felon from custody.").

25. *See, e.g.*, Paxton v. United States, 745 F. Supp. 1261, 1265-66 (E.D. Mich. 1990), *vacated*, 925 F.2d 1465 (6th Cir. 1991); Leader v. Blackman, 744 F. Supp. 500, 507-09 (S.D.N.Y. 1990); Agunobi v. Thornburgh, 745 F. Supp. 533, 538 (N.D. Ill. 1990). *But see* Davis v. Weiss, 749 F. Supp. 47, 50, 52 (D. Conn. 1990); Morrobel v. Thornburgh, 744 F. Supp. 725, 728 (E.D. Va. 1990).

26. *See* 8 U.S.C. § 1252(a)(2)(B) (1994) ("The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.").

Thus, prior to 1996, the Attorney General was authorized, but not required, to take into custody any noncitizen charged with deportability. Following the issuance of a deportation order, a noncitizen generally could not be detained pending deportation for more than six months.[27] When the six-month period expired, the statute required the noncitizen's release, subject to the Attorney General's supervision.[28] The rules were different for noncitizens who had committed an aggravated felony: The statute required the Attorney General to take the noncitizen into custody initially, but permitted release upon a determination that the noncitizen did not present a flight risk or pose a danger to the community.[29] This restriction upon the release of an aggravated felon applied to both pre- and post-deportation order detention.[30]

In April 1996, Congress enacted AEDPA.[31] In AEDPA, Congress reverted back and again eliminated these discretionary exceptions.[32] AEDPA thus again eliminated the Attorney General's discretion to release noncitizens convicted of certain crimes, but left the six-month detention rule intact for other noncitizens.[33]

Five months later, in September 1996, Congress enacted IIRIRA. IIRIRA also contained a mandatory detention provision, which replaced the AEDPA provision. IIRIRA requires the Attorney General to take into custody, upon their release from prison, noncitizens deportable for having committed an aggravated felony, a controlled substance violation, a firearms offense, two crimes of moral turpitude,

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27. *See id.* § 1252(c) ("When a final order of deportation . . . is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States.").

28. *See id.* § 1252(d).

29. *See id.* § 1252(a)(2).

30. *See id.* § 1252(a)(2)(A).

31. AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8 and 50 U.S.C.).

32. AEDPA § 440(c), 8 U.S.C. § 1252(a)(2) (Supp. II 1996) (Amendments). As amended by AEDPA, the statute read:

> The Attorney General shall take into custody any alien convicted of any criminal offense covered in section 1251(a)(2)(A)(iii) [aggravated felony], (B) [possession of controlled substances], (C) [certain firearm offenses], (D) [miscellaneous crimes, e.g., espionage, sabotage, sedition, selective service violations] of this title, or any offense covered by section 1252(a)(2)(A)(ii) of this title [conviction of two or more crimes involving moral turpitude] for which both predicate offenses are covered by section 1251(a)(2)(A)(i) of this title [classifying crimes of moral turpitude committed within certain time periods after the date of entry as deportable offenses], upon release of the alien from incarceration, [and] shall deport the alien as expeditiously as possible. Notwithstanding [other provisions of section 1252], the Attorney General shall not release such felon from custody.

Zgombic v. Farquharson, 89 F. Supp. 2d 220, 224 (D. Conn. 2000).

33. AEDPA § 440(c), 8 U.S.C. § 1252(a)(2) (Supp. II 1996) (Amendments).

or certain other offenses.[34] The Attorney General generally has no discretion to release such noncitizens,[35] resulting in mandatory detention from the time of their release from prison until their actual deportation. Thus, like the AEDPA provision, the IIRIRA provision contains no discretionary relief from detention. Accordingly, noncitizens convicted of certain criminal offenses cannot obtain a bail review hearing and must remain in custody throughout the duration of their removal proceedings and until they are actually deported.[36] If these provisions apply to individuals such as the hypothetical Kim Nguyen, who cannot be deported, this raises the spectre of permanent detention.

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34. IIRIRA, 8 U.S.C. § 1226(c)(1) (Supp. III 1997) ("The Attorney General shall take into custody any alien who—(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title [including crimes involving controlled substances and controlled substance trafficking] . . . when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.").

35. The statute provides a single exception for participants in a witness protection program. *See id.* § 1226(c)(2) ("The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.").

36. *See id.* §§ 1226(c), 1226(c)(1)(B), 1227(a)(2)(C). Some courts have made much of IIRIRA's "ninety-day" provision to justify mandatory detention. Under this provision, in general, after an individual is found removable, the Attorney General is required to deport that individual within ninety days after the removal order becomes final. *See id.* § 1231(a)(1)(A)-(B). Some courts have upheld mandatory detention based on the existence of this provision. *See, e.g.*, Zadvydas v. Underdown, 185 F.3d 279, 287 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297 (2000). However, other courts have noted many noncitizens cannot be removed within the ninety-day period for various reasons, and as to those individuals, there are two groups.

> Those in the first group must be released subject to supervisory regulations that require them, among other things, to appear regularly before an immigration officer, provide information to that official, notify INS of any change in their employment or residence within 48 hours, submit to medical and psychiatric testing, and comply with substantial restrictions on their travel. Those in the second group "*may be detained beyond the removal period*" and, if released, shall be subject to the same supervisory provisions applicable to aliens in the first group. Aliens in the second group include, among others, persons removable because of criminal convictions (such as drug offenses, certain crimes of moral turpitude, 'aggravated felonies,' firearms offenses, and various other crimes).

Ma v. Reno, 208 F.3d 815, 821 (9th Cir. 2000) (citations and footnote omitted), *cert. granted sub nom.* Zadvydas v. Underdown, 121 S. Ct. 297 (2000). Accordingly, the statute expressly provides for continued, and potentially indefinite, detention. In addition, any discretion authorized by the statute has no meaning if in practice the INS is declining to review each individual matter on its merits. *See* Zgombic v. Farquharson, 89 F. Supp. 2d 220, 236 (D. Conn. 2000) ("[T]he INS appears to be conducting 'cookie cutter' parole adjudication and applying what amounts to an irrebuttable presumption that all aggravated felons are a risk to abscond. . . . [P]olitical and community pressure, combined with the fact that permanent resident aliens cannot vote, creates a powerful potential for bias against aliens in the INS's parole determinations.") (internal quotation marks omitted).

Adding to the complexity and confusion, the Attorney General deferred implementation of the IIRIRA provisions for two years.[37] During this two-year period, the "Transition Period Custody Rules" were effective, which differed from both the AEDPA and IIRIRA provisions.[38] In particular, the Transition Period Custody Rules provided for discretionary relief from mandatory detention by authorizing bond hearings under certain circumstances. The transitional rules gave the immigration court the discretion to set bond if a lawfully admitted alien did not present a danger to persons or property and was likely to appear at future removal proceedings.[39] The Transition Period Custody Rules expired, and the IIRIRA provision became effective, on October 9, 1998.[40]

Due to the number of changes to the mandatory detention provisions over a short period of time, questions have arisen regarding which mandatory detention rule applies in a given situation.[41] In addition, indefinite detention issues have arisen in situations where an individual has been ordered deported, but the INS cannot execute the deportation order due to diplomatic difficulties[42] or the lack of a repatriation agreement.[43]

Like the hypothetical Kim Nguyen, many of the individuals affected by the new mandatory detention provisions are lawful permanent residents of the United States and know no other home. They arrived here as children, were educated here, married and had children here, and are employed here.[44] Many cannot be deported, either because

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37. *See* IIRIRA § 303(b)(2) (providing Attorney General with power to request deferment of implementation of IIRIRA mandatory detention provision for up to two years if insufficient detention space and INS personnel to implement).

38. *See id.* § 303(b)(3).

39. The transitional rules apply to deportation proceedings commenced before April 1, 1997, where the deportation order became administratively final after October 30, 1996. *See id.* § 309(c)(4). The transitional provisions are not codified in the United States Code. *See* Mojica v. Reno, 970 F. Supp. 130, 158-59 (E.D.N.Y. 1997). However, the text of the temporary rules is found in the historical notes following 8 U.S.C. § 1226 (Supp. IV 1998). The transitional rules authorize the release of a lawfully admitted alien who was deportable for a criminal offense after considering the nature of the offense, the likelihood the person would appear for further proceedings, and whether the individual posed any danger to the community. However, these rules do not apply to individuals who committed certain criminal offenses.

40. *See* Zgombic v. Farquharson, 89 F. Supp. 2d 220, 225 (D. Conn. 2000).

41. *See, e.g.*, Sivongxay v. Reno, 56 F. Supp. 2d 1167, 1170-71 (W.D. Wash. 1999).

42. *See, e.g.*, Hermanowski v. Farquharson, 39 F. Supp. 2d 148, 149 (D.R.I. 1999) (involving a former lawful permanent resident held in mandatory detention twenty-eight months because INS was unable to execute deportation order due to diplomatic difficulties with Poland).

43. *See, e.g.*, Ma v. Reno, 208 F.3d 815, 819 (9th Cir. 2000) (involving a former lawful permanent resident who was held in mandatory detention nearly three years because Cambodia does not have a repatriation agreement with United States), *cert. granted sub nom.* Zadvydas v. Underdown, 121 S. Ct. 297 (2000); Sok v. INS, 67 F. Supp. 2d 1166, 1170 (E.D. Cal. 1999) (same).

44. *See* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMM. 9, 23 (1990).

they are stateless or because the United States has no repatriation agreement with the countries to which they would be returned.[45] They have nowhere to go.

Although a number of federal district and circuit courts have employed retroactivity analysis in reviewing other AEDPA and IIRIRA provisions,[46] this generally has not been true for mandatory detention. Although some district courts have evaluated mandatory detention using retroactivity doctrine,[47] none of the circuit courts has yet done so, despite the existence of an apparent retroactivity issue. Instead, these circuit court decisions have leapfrogged over the retroactivity issue to address due process concerns, with mixed results.[48] In light of the gravity of the impact upon noncitizens if these provisions are applied retroactively, potentially subjecting some noncitizens to indefinite detention, courts must analyze the use of AEDPA and IIRIRA's mandatory detention provisions in each individual instance for

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45. *See supra* note 21 and accompanying text.

46. *See, e.g.*, St. Cyr v. INS, 229 F.3d 406, 410-20 (2d Cir. 2000) (reviewing retroactive application of AEDPA § 440(d) using *Landgraf*); Mattis v. Reno, 212 F.3d 31, 35-40 (1st Cir. 2000) (same); Tasios v. Reno, 204 F.3d 544 (4th Cir. 2000) (same); Requena-Rodriguez v. Pasquarell, 190 F.3d 299, 306-07 (5th Cir. 1999) (same).

47. *See* Santos-Gonzalez v. Reno, 93 F. Supp. 2d 286, 293-95 (E.D.N.Y. 2000) (reviewing retroactive application of AEDPA § 440(c) using *Landgraf*); Alikhani v. Fasano, 70 F. Supp. 2d 1124, 1130 (S.D. Cal. 1999) (reviewing retroactive application of IIRIRA § 1226(c) using *Landgraf*); Sivongxay v. Reno, 56 F. Supp. 2d 1167, 1171 (W.D. Wash. 1999) (applying *Landgraf* in context of mandatory detention); Velasquez v. Reno, 37 F. Supp. 2d 663, 670-72 (D.N.J. 1999) (reviewing retroactive application of IIRIRA's mandatory detention provision applying *Landgraf*); Montero v. Cobb, 937 F. Supp. 88, 92-95 (D. Mass. 1996) (reviewing retroactive application of AEDPA § 440(c) using *Landgraf*).

48. *Compare Ma*, 208 F.3d at 822 (finding indefinite detention violates due process), *with* Ho v. Greene, 204 F.3d 1045, 1057-60 (10th Cir. 2000) (finding indefinite detention does not violate due process), *and* Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999) (finding no violation of due process), *cert. granted*, 121 S. Ct. 297 (2000). None of these cases addressed retroactivity as a separate issue. *Ma* concerned a lawful permanent resident convicted in 1996, released from prison after April 1, 1997, and whose order of removal became final on October 26, 1998. The INS could not effect the deportation order because Cambodia has no repatriation agreement with the United States. The Ninth Circuit noted Ma's case was "governed by the permanent custody rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996," *Ma*, 208 F.3d at 819, and found "where it is reasonably likely that an alien who has entered the United States cannot be removed in the reasonably foreseeable future, detention beyond the [ninety-day] removal period is not justified," *id.* at 830-31. *Ho* concerned two noncitizens, one an excludable alien and the other a lawful permanent resident, ordered deported to Vietnam. In both instances, deportation proceedings commenced before IIRIRA's effective date, but the court declined to decide whether the permanent, transitional, or pre-IIRIRA provisions applied. Instead, the Tenth Circuit found indefinite detention did not violate due process, holding that "once a removal order has become final and the only act remaining to be carried out is the actual expulsion of the alien, no distinction exists between the constitutional rights of former resident aliens and those of excludable aliens." *Ho*, 204 F.3d at 1059. *Zadvydas* concerned a lawful permanent resident who was convicted in 1992 and who was ordered deported to Germany in 1994. However, Germany declared Zadvydas was not a German citizen and would not accept him. The Fifth Circuit found his indefinite detention was "within the core area of the government's plenary immigration power" and thus did not violate due process. *Zadvydas*, 185 F.3d at 294.

compliance with retroactivity analysis before reaching due process arguments.

Part I of this Article provides a brief overview of retroactivity as a concept in American jurisprudence.[49] Part II traces the Supreme Court's major decisions dealing with retroactive legislation and sets forth the Court's proffered explanations for reaching its conclusions regarding retroactive application.[50] Part III analyzes and reconfigures the Court's decisions to provide a comprehensive framework for analyzing retroactive legislation issues.[51] Part IV uses this framework to analyze the mandatory detention provisions contained in the 1996 amendments to the Immigration and Nationality Act.[52]

I. RETROACTIVE CIVIL LEGISLATION: A HISTORICAL PERSPECTIVE

Our country has exhibited a longstanding hostility toward retroactive legislation.[53] This hostility is embodied most prominently in our Constitution's Ex Post Facto Clause.[54] However, the Ex Post Facto Clause has been held to apply only to retroactive criminal legislation, not to civil legislation.[55]

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49. *See infra* Part I.

50. *See infra* Part II.

51. *See infra* Part III.

52. *See infra* Part IV.

53. *See* United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) ("[I]n 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 . . . ."); United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806) ("Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied."); Billings v. United States, 232 U.S. 261, 282 (1914) ("[S]tatutes should be so construed as to prevent them from operating retroactively . . . ."); Reynolds v. McArthur, 27 U.S. (2 Pet.) 417, 434 (1829) ("It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively unless the language of the act shall render such construction indispensable."); Dash v. VanKleeck, 7 Johns. 477, 502 (N.Y. Sup. Ct. 1811) ("The very essence of a new law is a rule for future cases. . . . A statute ought never to receive such a construction, if it be susceptible of any other . . . ."); *see also* BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 3 (1924) ("Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable."); LON L. FULLER, THE MORALITY OF LAW 53 (1964) ("[A] retroactive law is truly a monstrosity. Law has to do with the governance of human conduct by rules. To speak of governing . . . today by rules that will be enacted tomorrow is to talk in blank prose."); *accord* Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 237 (1927) (discussing history of hostility toward retroactive statutes).

54. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *see also id.* § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . . ."). Bills of attainder are "[s]uch special acts of the legislature as inflict capital punishments upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings." BLACK'S LAW DICTIONARY 127 (6th ed. 1990).

55. The United States Supreme Court has held the Ex Post Facto Clauses bar the adoption of retrospective criminal laws; they do not apply to retroactive civil legislation. *See* Calder v. Bull, 3 U.S. (3

Deciding whether to apply legislation retrospectively invokes several considerations, including notions of fairness,[56] a concept that, although downplayed in some of the Supreme Court's more recent decisions,[57] has traditionally been a determining factor in retroactivity analysis.[58] It is not "fair" to upset expectations by changing the rules after the game has been played,[59] and the Supreme Court's retroactivity decisions have been widely perceived as providing inconsistent guidelines for predicting whether legislation will be applied retroactively or prospectively. The apparent inconsistency, however, has been caused by the Court's manner of *describing* its approach rather than the approach itself.

The law has distinguished between retroactive legislation[60] and

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Dall.) 386, 399-400 (1798); Hochman, *supra* note 1, at 694; Oliver P. Field, *Ex Post Facto in the Constitution*, 20 MICH. L. REV. 315, 315 (1922) ("This doctrine of *Calder v. Bull* is so well settled as to have become one of the commonplaces of American constitutional law."); *see also* Ricciardi & Sinclair, *supra* note 1, at 302-12 (setting forth excerpts from the 1787 Constitutional Convention and noting although "the ban on *ex post facto* legislation has come to be interpreted as reaching criminal law only, it is a legitimate question whether or not that was the interpretation intended by the Framers"); Field, *supra*, at 327 (describing the legislative debates during consideration of the ex post facto provision and concluding "[o]ne can hardly feel that the term *ex post facto* was intended to be limited to criminal cases when it was embodied in the text of the Constitution").

56. *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly . . . [and] must provide explicit standards for those who apply them."); TROY, *supra* note 1, at 17 ("The rules generated by a legal system have legitimacy only if that system is just. Retroactive laws are generally perceived by our society as unjust."); *see also* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 163 (Dover Publications, Inc. 1991) (1881) ("But while the law is thus continually adding to its specific rules, it does not adopt the coarse and impolitic principle that a man acts always at his peril. On the contrary, its concrete rules, as well as the general questions addressed to the jury, show that the defendant must have had at least a fair chance of avoiding the infliction of harm before he becomes answerable for such a consequence of his conduct."); Hochman, *supra* note 1, at 693 ("Perhaps the most fundamental reason why retroactive legislation is suspect stems from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences.").

57. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 267 (1994) ("Absent a violation of [a] specific [constitutional provision], the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope."); *see also* Fisch, *supra* note 1, at 1063 ("Despite general acceptance of the principle that 'retrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact,' the modern Court has been consistently deferential to legislative retroactivity.") (omissions in original) (footnote omitted).

58. *See infra* notes 315-35 and accompanying text.

59. *See* TROY, *supra* note 1, at 1 ("Not changing the rules after the game has been played is considered an element of fundamental fairness.").

60. *See* U.S. CONST. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed."); *see also* White v. United States, 191 U.S. 545, 552 (1903) ("Where it is claimed that a law is to have a retrospective 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."); United States Fidelity & Guar. Co. v. United States *ex rel.* Struthers Wells Co., 209 U.S. 306, 314 (1908) ("There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction

retroactive adjudication by the courts.[61] It is well-settled that judicial decisions are applied retroactively.[62] However, statutes are presumed to operate prospectively.[63] Despite this black letter law characterization,[64] in practice, the assumption of statutory prospectivity has often given way to retroactive application.[65]

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if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied."); Union Pac. R.R. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913) ("[A] retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.") (internal quotations omitted); Miller v. United States, 294 U.S. 435, 439 (1935) ("[A] statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears.").

61. *See Harper*, 509 U.S. at 97 (holding judicial decisions are to be applied retroactively); *see also* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 97 (1909) ("[T]he courts, with the consent of the State, have been constantly in the practice of applying in the decision of controversies, rules which were not in existence . . . when the causes of controversy occurred. . . . [C]ourts are constantly making *ex post facto* Law."); Fisch, *supra* note 1, at 1059-66 (discussing adjudicative and legislative retroactivity).

62. *See* Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule."); *see also* Paul J. Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 58-60 (1965) (explaining that Blackstone's "declaratory theory" of common law proposes courts apply their rules retroactively); *see id.* at 60-61 ("When a new rule of law is given purely prospective effect, [i.e., the decision does not even apply to the immediate parties before the court] it of course does not determine the judgment awarded in the case in which it is announced. It follows that if parties anticipate such a prospective limitation, they will have no stimulus to argue for change in the law.").

63. *See* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 847 (1990) (Scalia, J., concurring) (noting "the normal rule of presumptive nonretroactivity of statutes"); *United States Fidelity & Guar. Co.*, 209 U.S. at 314 ("There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other."); Ricciardi & Sinclair, *supra* note 1, at 337 (noting retroactivity maxim "instructs courts to begin their analyses with the understanding that a statute applies from its date of enactment prospectively only unless it expressly states otherwise"); *see also* FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION 162-63 n.9 (1875) ("The American authorities are quite uniform on the retroactive effect of statutes. The general rule is, that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action or suits, and especially vested rights, unless the intention that it shall so operate is expressly declared, and courts will apply new statutes only to future cases, unless there is something in the very nature of the case, or in the language of the new provision, which shows that they were intended to have a retroactive operation."). *But see* Welch v. Henry, 305 U.S. 134, 146-47 (1938) (finding income taxes are retroactive but do not offend due process).

64. *See* Rivers v. Roadway Express, Inc., 511 U.S. 298, 311-12 (1994) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.") (footnote omitted); Fisch, *supra* note 1, at 1057 (noting the "general principle that statutes operate prospectively and judicial decisions apply retroactively is a matter of black letter law") (footnote omitted).

65. *See, e.g.*, United States v. Carlton, 512 U.S. 26, 32-33 (1994) (upholding retroactive elimination of tax deduction even though taxpayer had structured transaction in reliance on deduction); Bradley v.

One of the factors complicating retroactivity analysis is the simple truth that almost all legislation has the potential to disrupt expectations.[66] Any time an individual makes a decision in reliance on existing laws, legislation changing those laws may defeat that individual's expectations. Even when laws expressly state that they are to be applied prospectively, it is virtually certain that they will affect expectations and prior transactions. For example, when a state legislature increases property taxes prospectively, this legislation raises the taxes on homes already purchased. Thus the tax increase, although prospective, disrupts existing homeowners' expectations by increasing their expected tax amount and by reducing their homes' value.[67] Accordingly, even expressly prospective legislation often has a retroactive effect.

In light of the difficult issues that legislative retroactivity poses, in terms of both definition and application, it is not surprising that the Supreme Court has had difficulty in formulating a crisp test applying to all potential scenarios.[68] Indeed, on the surface, a review of the Supreme Court's retroactive legislation decisions suggests that, much like Justice Stewart's "I know it when I see it" pornography standard,[69] the Court relies more on its own sense of whether a particular piece of legislation *should* be applied retroactively than upon a fully articulated, consistently-applied set of standards.[70] Although the Court suggested it had reconciled its decisions in *Landgraf*, its attempt does not withstand scrutiny. However, although unacknowledged by the Court, another approach to congruity exists: A consistent theme of fairness ties the Court's retroactivity decisions into a cogent whole. Part II reviews the

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School Bd. of Richmond, 416 U.S. 696, 724 (1974) (retroactively applying federal statute authorizing attorney fee awards in school desegregation cases); McNair v. Knott, 302 U.S. 369, 372 (1937) (retroactively applying federal statute authorizing security for public funds deposited in a banking institution).

66. *See* Ricciardi & Sinclair, *supra* note 1, at 334 ("[A]lmost all legislation disturbs some legal rights settled under prior law."); Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 528 (1987) ("Almost all laws operate retrospectively in that they must defeat the subjective expectations of those who planned their conduct according to the existing law."); Smith, *supra* note 53, at 233 ("[I]f . . . a law is retrospective which extinguishes rights acquired under previously existing laws, then . . . all laws of any kind whatsoever, are retrospective. There is no such thing as a law that does not extinguish rights, powers, privileges, or immunities acquired under previously existing laws. That is what laws are for.").

67. *See* TROY, *supra* note 1, at 2; *see also* Fisch, *supra* note 1, at 1067 & n.77 (using same examples); *id.* at 1067 (stating that prospective laws "in fact affect prior transactions").

68. *See infra* notes 279-92 and accompanying text.

69. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of 'hard-core pornography']; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

70. *See infra* notes 112-50 and accompanying text.

history of the Supreme Court's retroactivity jurisprudence by examining the Court's major decisions in this area.

II. THE SUPREME COURT'S MAJOR RETROACTIVE CIVIL LEGISLATION DECISIONS

This Part sets forth ten of the Supreme Court's major legislative retroactivity decisions together with the Court's articulated justifications for reaching its conclusions. Although seemingly divergent, in Part III the Article will show how these decisions can be consistently explained and actually constitute a consistent body of law.

A. The Launching of Retroactivity Doctrine: The Schooner Peggy and Heth

The history of statutory retroactivity in the United States Supreme Court began with *United States v. The Schooner Peggy*.[71] *The Schooner Peggy* involved a treaty, signed during the pendency of the appeal, which had changed the applicable law.

The United States captured the French schooner Peggy on April 24, 1800, and brought it to Connecticut.[72] The Peggy's owners sued in district court to recover the vessel and prevailed. The district court found the vessel was within French territorial waters at the time of its seizure and thus was not a lawful prize.[73] Accordingly, the district court ordered the Peggy and its cargo restored.[74] The captors of the vessel then appealed to the circuit court, which reversed the district court. The circuit court held the vessel was, in fact, on the high seas at the time of its seizure, and thus condemned the Peggy and its cargo as prize.[75] The Peggy's owners appealed to the United States Supreme Court. On September 30, 1801, during the pendency of the appeal to the Supreme Court, the United States and France entered into a treaty which provided, in part, that captured property "not yet definitively condemned" must be restored.[76]

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71. 5 U.S. (1 Cranch) 103 (1801).

72. *See id.* at 103.

73. *See* Bradley v. School Bd. of Richmond, 416 U.S. 696, 712 n.16 (1974) (describing the background of *The Schooner Peggy*).

74. *See The Schooner Peggy*, 5 U.S. (1 Cranch) at 103.

75. *See id.* at 103; *see also Bradley*, 416 U.S. at 712 n.16.

76. *The Schooner Peggy*, 5 U.S. (1 Cranch) at 103. The treaty provided, in pertinent part:

> Property captured, and not yet *definitively* condemned, or which may be captured before the exchange of ratifications, (contraband goods destined to an enemy's port excepted) shall be mutually restored. This article shall take effect from the date of the signature of the present convention. And if, from the date of the said signature, any property shall be condemned

The captors first argued the circuit court's decision rendered the Peggy "definitively condemned" within the language of the treaty. The Supreme Court made short shrift of this contention, noting,

> The terms used in the treaty seem to apply to the actual condition of the property and to direct a restoration of that which is still in controversy between the parties. . . . In this case the sentence of condemnation was appealed from, it might have been reversed, and therefore was not such a sentence as in the contemplation of the contracting parties, on a fair and honest construction of the contract, was designated as a definitive condemnation.[77]

The captors next argued the Court could only review whether the circuit court's decision, when rendered, was erroneous, and thus judicial notice could not be accorded to the new treaty.[78] Noting that the United States Constitution decrees a treaty to be the supreme law of the land, the Supreme Court rejected the captors' argument and ordered the Peggy restored. The Court distinguished the matter before it, which involved "great national concerns," from matters between individuals, stating that courts should "struggle hard against" a retroactive application that would affect the rights of individual parties:

> 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 where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.[79]

In reaching its conclusion, the Supreme Court offered little analysis. The intent to reach retroactively was set forth expressly in the treaty: The treaty provided that captured property "not yet definitively condemned" must be restored, and therefore the treaty obviously was intended to extend to pending litigation. After noting a treaty is the

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> contrary to the intent of the said convention, before the knowledge of this stipulation shall be obtained; the property so considered shall without delay be restored or paid for.

Id. at 107 (internal quotation marks omitted).

77. *Id.* at 108-09.

78. *See id.* at 109.

79. *Id.* at 110.

supreme law of the land,[80] the Court declared that when a law intervenes and changes a governing rule, the law must be obeyed absent some constitutional impairment.[81]

> [W]here a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress; and although restoration may be an executive, when viewed as a substantive, act independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and of consequence, improper.[82]

The parties here did not challenge the treaty's constitutionality, and thus the treaty had to be followed.[83]

The Schooner Peggy's most long-lasting contribution to retroactivity is its recognition of a presumption against retroactive legislation, to which the Court merely created an exception for treaties due to their unique stature. The Supreme Court expressly stated 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."[84] The Court then held this presumption had to give way in this instance for the greater good of the nation.[85] *The Schooner Peggy* found the treaty was constitutional, and by virtue of its "law of the land" status, gave it retroactive application without mention of any other considerations. Indeed, the true significance of *The Schooner Peggy* stems not from its creation of a special exception for treaties, but from its articulated assumption that ordinarily a retroactive application affecting the rights of individual parties is disfavored.

Underlying the Court's presumption against retroactivity was an articulated concern for the rights of the parties. This concern was not limited to vested rights. The Court stated a retroactive construction was disfavored where it would "affect the rights of parties," and then noted that if vested rights were at stake, the propriety of awarding compensation was a decision for the government rather than the courts.[86]

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80. *See id.* at 109.
81. *See id.* at 110.
82. *Id.*
83. *See id.*
84. *Id.*
85. *See id.*
86. *Id.*

Unfortunately, some subsequent Supreme Court decisions focused on language from *The Schooner Peggy* declaring that when a new law intervenes and changes a governing rule, the law must be obeyed absent some constitutional impairment.[87] This statement was consistent with the facts and result in *The Schooner Peggy*.[88] In general, however, to focus on upholding the current law, regardless of whether the current law has changed the governing rules since the lawsuit was instituted, not only alters the burdens but works against the traditional presumption against retroactive legislation. A presumption that legislation acts prospectively must inevitably clash with the presumption that changes to the law enacted after institution of the lawsuit should be applied to a pending case.

The Supreme Court's next occasion to address retroactive legislation arose in *United States v. Heth*.[89] *Heth* involved an amendment to a federal statute which decreased the commission received by customs collectors from three percent to two and one-half percent of the duties collected on "goods, wares, and merchandise, imported into the United States, and on the tonnage of ships and vessels."[90]

The statute at issue took effect on June 30, 1800.[91] Before that time, the collector of the customs for the district of Petersburgh, Virginia, had secured duties by bonds.[92] The customs collector contended that he was entitled to retain three percent on the bonds for duties taken before the June 30, 1800 effective date.[93] The Attorney General argued monies due, by bond, did not constitute monies collected and received.[94] Since the collector was only entitled to his commission upon actual collection and receipt of the money, the Attorney General argued it was the date of this actual collection and receipt that determined whether the

87. *Id.* ("[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.").

88. The Supreme Court later classified this concept as a "canon[ ] of statutory construction." Landgraf v. USI Film Prods., 511 U.S. 244, 263 (1994); *see also id.* at 263-64 ("[F]ederal courts have labored to reconcile two seemingly contradictory statements found in our decisions concerning the effect of intervening changes in the law. . . . The first is the rule that 'a court is to apply the law in effect at the time it renders its decision.' . . . The second is the axiom that '[r]etroactivity is not favored in the law,' and its interpretive corollary that 'congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.'") (alteration in original) (citation omitted).

89. 7 U.S. (3 Cranch) 399 (1806).

90. *Id.* at 399.

91. *See id.*

92. *See id.* at 407.

93. *See id.*

94. *See id.* at 406-07.

percentage of his commission was three percent (collected before June 30, 1800) or two and one-half percent (collected after June 30, 1800).[95]

The Supreme Court held for the customs collector, finding the reduction in the commission percentage did not extend to the monies due by bond. The Court noted customs duties arise upon the importation of goods.[96] Nothing remained to be done but to receive the money. "When the former duties were secured by bond, the laws . . . consider them, as far as regards the collector's allowance, as collected and received; the principal services being already done by securing the duties by bond."[97] Accordingly, the Court refused to "deprive an officer of a compensation previously allowed by law, for services admitted by the legislature to deserve compensation."[98]

In reaching its conclusion, the Supreme Court noted the ambiguity of the statutory language and the general presumption against the retrospective operation of a statute.[99] However, each of the Justices[100] clearly was most persuaded by principles of fairness, without actually using the "fairness" term. The Court's fairness concerns were expressed in terms of "justice,"[101] the reluctance to defeat "reasonable expectation[s],"[102] "vindicat[ing] the justice of the government[ ] by restricting the words of the law to a future operation,"[103] unwillingness to "divest vested rights,"[104] refusing to "deprive an officer of a

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95. *See id.*

96. *See id.* at 410 (Washington, J.) ("[D]uties arise either immediately upon the importation of the goods, or upon the performance of some acts which, in contemplation of law, are immediately to follow the importation.").

97. *Id.* at 414 (Cushing, J.).

98. *Id.* at 412 (Washington, J.).

99. *See id.* at 407 ("The whole difficulty results from the vague signification of some of the expressions made use of in the latter act."); *id.* at 413 (Paterson, J.) ("Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.").

100. Justices Johnson, Washington, Paterson, and Cushing each wrote a separate opinion; Chief Justice Marshall did not participate. *See id.* at 407, 410, 412, 413, 414.

101. *Id.* at 408 (Johnson, J.).

102. *Id.* (Johnson, J.) ("The rights of the collectors of duties, as to their compensation, are certainly submitted to the justice and honour of the country that employs them, until consummated by the actual receipt of the sums bonded in their respective offices; but where an individual has performed certain services, under the influence of a prospect of a certain emolument, that confidence which it is the interest of every government to cherish in the minds of her citizens, a confidence which experience leaves no room to distrust in our own, would lead to a conclusion, that it could not have been the intention of the legislature to defeat a reasonable expectation of her officer, suggested by her own laws.").

103. *Id.* (Johnson, J.).

104. *Id.* at 414 (Cushing, J.) ("[T]he general and true intent of the latter law was to make a new allowance in lieu of the former only on duties arising on goods imported after the last law came into operation, and not to have a retrospective effect, to divest vested rights of the collector.").

compensation previously allowed by law,"[105] and seeking to avoid a construction that was "unreasonable . . . and . . . unjust,"[106] or which would "alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services, and remuneration."[107]

The consistency of the fairness theme in each Justice's opinion is striking for two reasons. First, it confirms that fairness is the primary policy motivation underlying the presumption against retroactivity. Second, the language used to describe the Court's concept of fairness is notably broad. As was true in *The Schooner Peggy*,[108] the Court did not restrict its consideration of fairness only to vested rights. Instead, the Court encompassed "reasonable expectation[s]," "alter[ing]" the parties' "pre-existing situation," and "affect[ing]" or "interfer[ing]" with the parties' pre-existing "rights, services, and remuneration."

A close examination of *Heth* reveals the importance of both the presumption against retroactivity and the fairness factor to the Court's result. The statutory language referred to duties "on monies collected and received after the 30th of June."[109] One obvious interpretation of this statutory language is that the new provision was intended to apply to all monies collected and received after that date, regardless of when the goods were imported. As the Attorney General argued,

> *Monies due*, by bond, are not *monies collected and received*. The actual collection, and receipt of the money, was the only act which could entitle the collector to his commission, . . . and if collected and received after the 30th of June, only two and a half per cent could be demanded.[110]

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105. *Id.* at 412 (Washington, J.) ("I cannot, therefore, consent to such an interpretation of this law, as to give it a retrospective operation, so as to deprive an officer of a compensation previously allowed by law, for services admitted by the legislature to deserve compensation, and to be in their nature severable, from the ultimate act of the money being received or collected, provided those acts are in reality performed.").

106. *Id.* at 411-12 (Washington, J.) (noting that to accept the Attorney General's construction "would have the effect of raising the compensation of some collectors, and depressing that of others, for services partly performed at the same time, and in some instances, where those which remained to be done, in order to consummate the right to the commissions, were transferred from the collectors to the banks. This would, I think, be unreasonable, and, in the instances of diminished commissions, would be unjust"); *see also id.* at 414 (Cushing, J.) (characterizing retroactive construction as "unreasonable" unless the legislation "contained express words to that purpose").

107. *Id.* at 413 (Paterson, J.) (presumption against retroactivity "ought especially to be adhered to, when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services, and remuneration").

108. *See supra* note 86 and accompanying text.

109. *Heth*, 7 U.S. (3 Cranch) at 406 (emphasis omitted).

110. *Id.* at 406-07.

If the Court, as it did in some of its subsequent decisions, had applied the law in effect at the time of its decision rather than applying the presumption against retroactivity, the Court would have reached the opposite result. Similarly, if the Court had disregarded fairness concerns, it might well have concluded this statutory language indicated that any retroactive effect was intended by the legislature. The Court's analysis indicates both factors were important to its conclusion, but suggests that fairness was, in fact, ultimately the controlling factor in its decision.

This theme of fairness was, until very recently, a recurring theme in the Supreme Court's retroactivity jurisprudence. For more than one hundred years, the Supreme Court held firm to its presumption against retroactivity.[111]

B. Taking the Wrong Tack: Thorpe and Bradley

In *Thorpe v. Housing Authority of Durham*,[112] the Supreme Court addressed retroactivity in the context of rules promulgated by the Department of Housing and Urban Development (HUD).[113] Thus began the Court's brief detour—more appropriately described as an about-face—that temporarily changed governing doctrine from a presumption *against* retroactivity to a presumption in *favor* of retroactivity. However, despite this turnabout in the Court's denominated prevailing doctrine, a consistent underlying consideration—fairness—motivated the result.

Thorpe involved a summary ejectment proceeding to evict a tenant from a federally-assisted low-rent housing project in Durham, North Carolina.[114] After the housing authority had initiated and prevailed in

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111. *See, e.g.*, United States v. Magnolia Petroleum Co., 276 U.S. 160, 162-63 (1928) ("Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."); United States v. American Sugar Ref. Co., 202 U.S. 563, 577 (1906) ("[T]here is a presumption against retrospective operation, and we have said that words in a statute ought not to have such operation unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislator cannot be otherwise satisfied. On the other hand, it must be admitted that there are words in the act of Congress which, if not of themselves, yet in connection with events, may be said to look to a retrospective operation. It is not, however, an unusual judicial problem to have to seek the meaning of a law expressed in words not doubtful of themselves, but made so by circumstances or the objects to which they come to be applied.") (internal quotation marks and citation omitted).

112. 393 U.S. 268 (1969).

113. *Id.* at 269-70. Although *Thorpe* involved administrative rulemaking rather than a legislative enactment, it is included because the Supreme Court subsequently applied *Thorpe*'s reasoning to a statutory enactment in *Bradley v. School Board of Richmond*, 416 U.S. 696, 714-16 (1974). *See infra* notes 137-38 and accompanying text.

114. *Thorpe*, 393 U.S. at 270-72.

the eviction proceedings, after the two state appellate courts had affirmed the conviction, and while the case was pending in the United States Supreme Court, HUD issued a circular containing a new procedural requirement.[115] This new requirement mandated that housing authorities provide tenants with notice of the reasons for eviction and provide an opportunity to respond to those reasons before the housing authority evicted the tenant.[116] The tenant was still residing in the housing project, and the Supreme Court remanded the case for further proceedings "as may be appropriate in the light of the February 7 circular of the Department of Housing and Urban Development."[117]

On remand, the North Carolina Supreme Court refused to apply the HUD circular and affirmed its prior decision upholding the eviction, holding that under the terms of the lease, the housing authority's reasons for terminating the tenancy were immaterial.[118] The United States Supreme Court again granted certiorari. On appeal to the Supreme Court, the housing authority argued, among other things,[119] that HUD's circular, containing the enhanced notice requirement, did "not apply to eviction proceedings commenced prior to the date the circular was issued."[120]

The Supreme Court rejected each of the housing authority's contentions. With respect to the retroactivity issue, the Court relied on *The Schooner Peggy*, noting the new requirement was constitutional and stating the "general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision."[121] The Court observed that "[t]he circular impose[d] only one requirement: that the [housing authority] comply with a very simple notification procedure before evicting its tenants."[122] Accordingly, the Court directed the housing

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115. *See id.* at 272.

116. *See id.*

117. *Id.* at 273.

118. *See id.* The lease provided, in pertinent part:

> This lease may be terminated by the Tenant by giving to Management notice in writing of such termination 15 days prior to the last day of the [month to month] term. The Management may terminate this lease by giving to the Tenant notice in writing of such termination fifteen (15) days prior to the last day of the term. Provided, however, that this paragraph shall not be construed to prevent the termination of this lease by Management in any other method or for any other cause set forth in this lease.

Id. at 270 n.2.

119. The housing authority also argued the circular was intended to be advisory rather than mandatory, and if mandatory, constituted an "unauthorized and unconstitutional impairment of both the Authority's annual contributions contract with HUD and the lease agreement between the Authority and [tenant]." *Id.* at 274.

120. *Id.*

121. *Id.* at 281.

122. *Id.* at 278.

authority to apply the notice provisions set forth in the circular "to all tenants still residing in [the housing complex], including petitioner, not only because it is designed to insure a fairer eviction procedure in general, but also because the prescribed notification is essential to remove a serious impediment to the successful protection of constitutional rights."[123] Thus, the Court directed the state to extend to the tenants the due process rights set out in the HUD circular.

The Supreme Court's analysis was truncated due to its reliance on *The Schooner Peggy* as authority for the proposition that an appellate court must apply the current law that is in effect at the time of rendering its decision.[124] By using this approach, the Court avoided providing a detailed analysis. Even so, the Court's decision expressly reflected concern with fairness as well as due process constitutional rights. The Court noted the circular's provisions should apply "because it is designed to insure a fairer eviction procedure in general," in addition to the constitutional implications.[125] This express recognition of fairness is an important acknowledgement of the fairness factor to the Court's analysis.

It is obvious that the Court reached the result that it believed proper under the circumstances. In addition, *Thorpe* arguably is consistent with the Court's prior retroactivity jurisprudence due to the constitutional due process basis for the new rule in *Thorpe*. However, reliance on an alternative to traditional retroactivity analysis was unnecessary to reach this result. In light of the equitable and due process considerations favoring the tenant,[126] the Court could have reached the same result by a different means, such as by addressing the constitutional due process issue directly.[127] Whatever the Court's concerns and motivations, *Thorpe*

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123. *Id.* at 283.

124. *See id.* at 281-82.

125. *Id.* at 283.

126. As the Court observed,

> [R]equiring the Authority to apply the circular before evicting petitioner not only does not infringe upon any of its rights, but also does not even constitute an imposition. The Authority admitted during oral argument that it has already begun complying with the circular. It refuses to apply it to petitioner simply because it decided to evict her before the circular was issued. Since petitioner has not yet vacated, we fail to see the significance of this distinction. We conclude, therefore, that the circular should be applied to all tenants still residing in [the housing complex], including petitioner, not only because it is designed to insure a fairer eviction procedure in general, but also because the prescribed notification is essential to remove a serious impediment to the successful protection of constitutional rights.

Id.

127. *See* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 852-54 (1990) (Scalia, J., concurring) (noting that a presumption of retroactivity versus a presumption against retroactivity produced no difference in outcome in *Thorpe*).

seemingly created a dichotomy in retroactivity jurisprudence. *Thorpe* left the Court's retroactivity analysis in disarray, eliminating the "presumption" against retroactivity and simply posing the "presumption" as one of two possibilities.

The Supreme Court's next major retroactivity decision was *Bradley v. School Board of Richmond.*[128] In *Bradley*, the Court created massive confusion in retroactivity jurisprudence by entrenching a presumption in favor of, rather than against, retroactivity.

Bradley was a "protracted" school desegregation class action brought by eleven black parents and guardians against the school board of the city of Richmond, Virginia, to desegregate the public schools.[129] The plaintiffs prevailed, and the district court awarded plaintiffs' counsel attorney fees and expenses totaling $56,419.65.[130] At the time, no express statutory authorization existed for a fees award in school desegregation actions.[131] Accordingly, the district court awarded fees based on its general equitable powers.[132]

While the matter was pending on appeal before the United States Court of Appeals for the Fourth Circuit, a new statute became effective which expressly granted authority to the federal courts to award a reasonable attorney fee when appropriate in school desegregation cases.[133] The Fourth Circuit reversed the fees award because there was no express statutory authority at the time of the district court's order,

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128. 416 U.S. 696 (1974).

129. *Id.* at 698-99.

130. *See id.* at 705-06.

131. *See id.* at 706.

132. *See id.* at 706-07. The district court relied on two alternative grounds. "First, the court observed that prior desegregation decisions demonstrated the propriety of awarding counsel fees when the evidence revealed obstinate noncompliance with the law or the use of the judicial process for purposes of harassment or delay in affording rights clearly owed." *Id.* at 706. "[T]he actions taken and the defenses asserted by the Board . . . caused an unreasonable delay in the desegregation of the schools and, as a result, . . . caused the plaintiffs to incur substantial expenditures of time and money to secure their constitutional rights." *Id.* at 707. As an alternative basis for the award, the district court held that "plaintiffs in actions of this kind were acting as private attorneys general in leading school boards into compliance with the law, thereby effectuating the constitutional guarantee of nondiscrimination and rendering appropriate the award of counsel fees." *Id.* at 708.

133. *See id.* at 709. This statute provided:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

20 U.S.C. § 1617 (1970 & Supp. II 1972); *see Bradley*, 416 U.S. at 709.

and declined to apply the new statute retroactively.[134] The Supreme Court reversed the Fourth Circuit's ruling, holding the Court of Appeals should apply the new attorney fees statute.[135]

As it had done five years earlier in *Thorpe*, the United States Supreme Court dodged traditional retroactivity analysis by instead "anchor[ing] our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[136] In doing so, the Court expressly relied on *The Schooner Peggy* and *Thorpe*.[137] The Court used these two prior decisions to entrench its departure from its previous presumption against retroactivity to a new presumption in *favor* of retroactive application.[138]

The Court offered more analysis in *Bradley* than in its previous decision in *Thorpe*, and much of this analysis was aimed at distinguishing *The Schooner Peggy*. The Court observed:

> In the wake of *Schooner Peggy*, . . . it remained unclear whether a change in the law occurring while a case was pending on appeal was to be given effect only where, by its terms, the law was to apply to pending cases, as was true of the convention under consideration in *Schooner Peggy*, or, conversely, whether such a change in the law must be given effect *unless* there was clear indication that it was *not* to apply in pending cases. For a very long time the Court's decisions did little to clarify this issue.
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> Ultimately, in *Thorpe* . . ., the broader reading of *Schooner Peggy* was adopted, and this Court ruled that "an appellate court must apply the law in effect at the time it renders its decision." . . . *Thorpe* . . . stands for the proposition that even where the intervening law does not

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134. *See Bradley*, 416 U.S. at 708-09.

135. *See id.* at 724.

136. *Id.* at 711.

137. *See id.* at 711-14, 716-18.

138. *See id.* at 715 ("*Thorpe* . . . stands for the proposition that even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect. . . . Accordingly, we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature."). The Court instead stated that a new statute should be applied retroactively unless it would cause "manifest injustice." *Id.* at 716. The Court then identified three factors to consider in assessing possible manifest injustice: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Id.* at 717. The Court analyzed these three factors and concluded

> it cannot be said that the application of the statute to an award of fees for services rendered prior to its effective date, in an action pending on that date, would cause 'manifest injustice,' as that term is used in *Thorpe*, so as to compel an exception of the case from the rule of *Schooner Peggy*.

Id. at 721.

> explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect.
>
> Accordingly, we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature.[139]

Thus, the Court reinterpreted *The Schooner Peggy* to stand for the proposition that courts must apply the law in effect at the time of rendering a decision, irrespective of retroactivity concerns, unless doing so would result in "manifest injustice."[140]

The *Bradley* Court was clearly swayed by considerations of fairness. The Court noted the class action plaintiffs had "rendered substantial service both to the Board itself, by bringing it into compliance with its constitutional mandate, and to the community at large by securing for it the benefits assumed to flow from a nondiscriminatory educational system."[141] The Court also noted the "disproportionate" resources between the parties, and, correspondingly, the burden under which the plaintiffs had struggled.[142] Finally, the Court noted the availability of other legal theories supporting a fees award, which eliminated any potential inequities in applying the new statute to the Board.[143]

Bradley has the appearance of a result-oriented decision by the Court. Surely the Court must have realized that while retrospective application was desirable in this instance—awarding fees to a lawyer pursuing a desegregation remedy at the high water mark of judicial desegregation activity—this would not be the case for every congressional enactment. However, the Court likely could not see another avenue for achieving the same result.[144] As had been true in *Thorpe*, there was no express indication of retroactive intent, and the parties could not offer contentions of reliance or reasonable expectations. However, unlike *Thorpe*, in which the legislation created stronger due process protections, the statute in *Bradley* did not involve constitutional issues potentially justifying a different result.

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139. *Id.* at 712-15.

140. *Id.* at 716-17 ("The Court in *Thorpe*... observed that exceptions to the general rule that a court is to apply a law in effect at the time it renders its decision 'had been made to prevent manifest injustice,' .... We perceive no such threat of manifest injustice present in this case. We decline, accordingly, to categorize it as an exception to *Thorpe*'s general rule.").

141. *Id.* at 718.

142. *Id.* at 718 n.25.

143. *See id.* at 721.

144. *See* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 853-54 (1990) (Scalia, J., concurring) (*Thorpe*'s new presumption of retroactivity, deviating from the presumption against retroactivity, probably produced a difference in outcome in the *Bradley* case).

Bradley is a difficult case and is not easily reconcilable with the Court's other retroactivity decisions. The Court understandably wanted to award fees, but apparently did not see how it could do so under its existing retroactivity jurisprudence. At this point, the Court had not yet refined the definitional option that it employed in one of its subsequent cases.[145] Such a "definitional" option arises when potential choices exist as to which operative event to use in determining whether the statute operates retroactively. In *Bradley*, the options for the operative event determining retroactivity included, among other things, the commencement of litigation, the determination of the prevailing party, or the final judgment awarding fees.[146] Particularly in the context of fees, which commonly are awarded in a collateral proceeding, the Court could have defined the operative event as the final judgment awarding fees.

Although the Court has employed this definitional option in an effort to avoid confronting especially burdensome retroactive effects of new statutes, the very nature of changes in the law makes dealing with retroactive effects inevitable. Although choosing a "better" defining date can minimize the effects, they cannot be eliminated.[147] Similarly, in *Bradley*, even if the final judgment awarding fees had been used as the operative event, the statute would still have had a retroactive effect: This basis for recovering attorney fees did not exist at the time the Board declined to desegregate the public schools nor at the time the lawsuit was instituted. Accordingly, the losing party did not fully realize what was at stake in the litigation, and the prevailing party obtained a windfall.

Other than redefinition, a better course jurisprudentially would have been to use the district court's approach, rooting the fee award in the general equity power of the courts.[148] It appears the Supreme Court

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145. A subsequent Supreme Court decision, *Martin v. Hadix*, 527 U.S. 343 (1999), dodged the presumption against retroactivity by declining to define a statute as having a retrospective effect. *See infra* notes 274-78 and accompanying text.

146. *Bradley*, 416 U.S. at 709 n.12 (noting the statute authorized fee award "[u]pon the entry of a final order by a court of the United States"). No such final order had been entered in the *Bradley* case prior to the statute's enactment.

147. *See infra* notes 299-300 and accompanying text.

148. *See Bradley*, 416 U.S. at 706-08 ("Noting the absence at that time of any explicit statutory authorization for an award of fees in school desegregation actions, the [district] court based the award on two alternative grounds rooted in its general equity power. First, the court observed that prior desegregation decisions demonstrated the propriety of awarding counsel fees when the evidence revealed obstinate noncompliance with the law or the use of the judicial process for purposes of harassment or delay in affording rights clearly owed. Applying the test enunciated by the Fourth Circuit . . ., the court sought to determine whether 'the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy.' Examining the history of the litigation, the court found that at least since 1968 the Board clearly had been in default in its constitutional duty as enunciated in

may have been reluctant to affirm on that basis in light of the Court of Appeals' observation that such awards should be authorized by Congress rather than the courts, together with the prevailing "American Rule" presumption that each party must shoulder its own attorney fees.[149] However, the Court expressly acknowledged the Board "could have been required to pay attorneys' fees" under pre-existing theories and noted "the common-law availability of an [attorney fee] award."[150] This makes the Court's unnecessary venture into retroactive legislation all the more perplexing. Using the concept of general equitable powers would have reduced the mischief caused by *Bradley*'s retreat from traditional retroactivity doctrine.

C. Back on Course: Bennett, Bonjorno, and Landgraf

The Supreme Court's next major retroactivity decision was *Bennett v. New Jersey*.[151] In *Bennett*, the Court abandoned its previous detour into

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Green. While reluctant to characterize the litigation engendered by that default as unnecessary in view of the ongoing development of relevant legal standards, the court observed that the actions taken and the defenses asserted by the Board had caused an unreasonable delay in the desegregation of the schools and, as a result, had caused the plaintiffs to incur substantial expenditures of time and money to secure their constitutional rights. As an alternative basis for the award, the District Court observed that the circumstances that persuaded Congress to authorize by statute the payment of counsel fees under certain sections of the Civil Rights Act of 1964 were present in even greater degree in school desegregation litigation. In 1970-1971, cases of this kind were characterized by complex issues pressed on behalf of large classes and thus involved substantial expenditures of lawyers' time with little likelihood of compensation or award of monetary damages. If forced to bear the burden of attorneys' fees, few aggrieved persons would be in a position to secure their and the public's interests in a nondiscriminatory public school system. Reasoning from this Court's *per curiam* decision in *Newman v. Piggie Park Enterprises, Inc.*, the District Judge held that plaintiffs in actions of this kind were acting as private attorneys general in leading school boards into compliance with the law, thereby effectuating the constitutional guarantee of nondiscrimination and rendering appropriate the award of counsel fees.") (citations and footnotes omitted).

149. *See id.* at 708-09. Under the "American Rule," each party is only obligated to pay his or her own attorney fees, regardless of the outcome of the litigation. Accordingly, a prevailing party cannot recover attorney fees unless specifically authorized by a separate agreement or by a legislatively created or judicially recognized exception. *See generally* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 548 (2000); John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993).

150. *Bradley*, 416 U.S. at 721.

151. 470 U.S. 632 (1985). In the interim, the Court decided *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). However, *Usery* presented retroactivity concerns of a different sort. In *Usery*, the Court upheld an expressly retroactive federal statute which, in part, rendered coal mine owners liable for benefits to former employees who had contracted black lung disease. Due to the legislation's express retroactivity provision, *Usery* obviously did not present the problem inherent in *Thorpe* and *Bradley* regarding retroactive intent. Aside from the constitutional requirement of due process raised by the coal mine operators, *Usery* does not discuss potential prohibitions upon retroactive legislation; *Usery* seemingly granted legislatures plenary authority to adopt retroactive legislation. This raises the suggestion that if the legislature makes a law retroactive by express provision, the judiciary will review the legislation only for its constitutionality.

presumed retroactivity, and instead resumed its more traditional retroactivity analysis.

Bennett involved federal grants, under Title I of the Elementary and Secondary Education Act, to support compensatory education for disadvantaged children in low-income areas.[152] Title I allocated funds to local school districts based on the number of impoverished children in the district and the state's average "per-pupil" expenditures.[153] Within each school district, Title I funds were then directed to those schools with high concentrations of children from low-income families.[154] The federal restrictions on the use of the Title I funds required only that the school districts used the funds "to provide specific types of children in specific areas with special services above and beyond those normally provided as part of the district's regular educational program."[155]

In 1978 amendments, Congress modified Title I school attendance area eligibility requirements, thus relaxing the eligibility requirements for local schools to receive Title I funds.[156] The Supreme Court had previously held that the federal government could recover misused funds from states that had provided assurances that the Title I funds would be spent only on eligible programs.[157] However, in that previous decision, the Court had expressly declined to address the retroactive effect of the 1978 amendments.[158]

The *Bennett* lawsuit resulted when the Department of Education demanded New Jersey repay $1,031,304 in Title I funds improperly spent by the Newark school district during 1970-72.[159] Although the funds were used for compensatory education programs, the government claimed the funds were not directed to the proper schools within the Newark school district.[160]

New Jersey argued the 1978 amendments should apply in determining whether the funds were misused during the years in question.[161] The United States Court of Appeals for the Third Circuit

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As discussed in Part III, limiting review in this manner, without considering potential fairness concerns, is both unnecessarily and inappropriately deferential and inconsistent with the Court's previous decisions.

152. *Bennett*, 470 U.S. at 634.

153. *Id.*

154. *See id.* at 634-35.

155. *Id.* at 635 (quoting H.R. REP. NO. 95-1137, at 4 (1978)).

156. *See id.* at 644.

157. *See id.* at 634; Bell v. New Jersey, 461 U.S. 773 (1983), *overruled by* Bennett v. New Jersey, 470 U.S. 632 (1985).

158. *See Bell*, 461 U.S. at 781 n.6, 782 & n.7.

159. *Bennett*, 470 U.S. at 636.

160. *See id.*

161. *See id.* at 637.

agreed. Relying on *Bradley*, the Third Circuit concluded it must "'apply the law in effect at the time [of] render[ing] its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.'"[162] Accordingly, the Court of Appeals remanded the matter to the Secretary of Education to determine whether the disputed expenditures conformed to the 1978 amendments.[163]

The Supreme Court reversed, holding the substantive standards of the 1978 amendments did not affect obligations under previously made grants, and making the observation—which was mildly incredible given its prior recent decisions—that "changes in substantive requirements for federal grants should not be presumed to operate retroactively."[164]

Employing traditional retroactivity analysis, the Court noted neither the statutory language nor the legislative history indicated Congress had intended the substantive standards of the 1978 amendments would apply retroactively.[165] The Court noted "practical considerations" and reasonable expectations also pointed toward prospective rather than retrospective application.[166] Finally, although urged to affirm the Third Circuit on the ground that the Court of Appeals had reached an equitable result, the Court declined, noting Congress had already accommodated equitable concerns within the statutory provisions governing the recovery of misused funds.[167]

In *Bennett*, the Court reverted to retroactivity analysis after its recent opinions had consistently moved away from such analysis. The

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162. *Id.* at 638.

163. *See id.* at 637.

164. *Id.* at 637, 638.

165. *See id.* at 641.

166. *Id.* at 640 ("Practical considerations related to the enforcement of the requirements of grant-in-aid programs also suggest that expenditures must presumptively be evaluated by the law in effect when the grants were made. The federal auditors who completed their review of the disputed expenditures in 1975 could scarcely base their findings on the substantive standards adopted in the 1978 Amendments. Similarly, New Jersey when it applied for and received Title I funds for the years 1970-1972 had no basis to believe that the propriety of the expenditures would be judged by any standards other than the ones in effect at the time. Retroactive application of changes in the substantive requirements of a federal grant program would deny both federal auditors and grant recipients fixed, predictable standards for determining if expenditures are proper. Requiring audits to be redetermined in response to every statutory change that occurs while review is pending would be unworkable and would unfairly make obligations depend on the fortuitous timing of completion of the review process.") (footnote and citation omitted).

167. *See id.* at 645-46. These statutory provisions

> limit liability for repayment to funds received during the five years preceding the final written notice of liability, and authorize the Secretary, under certain conditions, to return to the State up to 75% of any amount recovered. Of course, if Congress believes that the equities so warrant, it may relax the requirements applicable to prior grants or forgive liability entirely.

Id. at 646 (citations omitted).

decision's impact upon fairness concerns is less clear. The Court stated that "a reviewing court has no independent authority to excuse repayment based on its view of what would be the most equitable outcome,"[168] which suggests the Court would have preferred to apply the subsequent amendments relaxing the eligibility requirements. On the other hand, from a fairness perspective, it hardly seems unjust to hold the recipient of a federal grant to the terms agreed upon at the time of the award.

Bennett was a turning point in the Supreme Court's retroactivity jurisprudence. After essentially abandoning the presumption against applying legislation retroactively, the Court changed course and reinstated the presumption once more.

Bennett was followed by *Kaiser Aluminum and Chemical Corp. v. Bonjorno*,[169] in which the Supreme Court finally acknowledged the "tension" inherent in its conflicting retroactivity decisions. *Bonjorno* involved a federal antitrust action against Kaiser Aluminum and Chemical Corporation for monopolizing the aluminum drainage pipe market in the Mid-Atlantic region of the United States.[170] On December 2, 1981, the jury awarded Bonjorno trebled damages of $9,567,939; the judgment was entered December 4, 1981.[171] On January 17, 1983, the district court granted Kaiser's motion for judgment notwithstanding the verdict as to a portion of the damages awarded by the jury.[172] The Third Circuit reversed, reinstating and affirming the judgment entered on December 4, 1981.[173]

After the December 1981 entry of judgment, but before the district court's January 1983 judgment notwithstanding the verdict and subsequent appeal, Congress amended the federal statute governing awards of postjudgment interest.[174] Bonjorno argued that under *Bradley* the amended statute should apply for the purpose of determining the applicable interest rate.[175] The Third Circuit agreed. The Court of Appeals concluded the legislative history was unclear and that applying the amended statute would not result in manifest injustice. Accordingly, the Third Circuit found *Bradley* controlling.[176]

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168. *Id.* at 646.
169. 494 U.S. 827 (1990).
170. *Id.* at 829.
171. *See id.* at 830.
172. *See id.*
173. *See id.*
174. *See id.* at 831-32.
175. *See id.* at 832.
176. *See id.* at 833.

The Supreme Court acknowledged an "apparent tension with the rule articulated in *Bradley*" and "the generally accepted axiom that retroactivity is not favored in the law."[177] However, the Court expressly declined to reconcile the two lines of precedent, stating, "under either view, where the congressional intent is clear, it governs."[178]

The Court concluded "the most logical reading of the statute is that the interest rate for any particular judgment is to be determined as of the date of the judgment, and that is the single rate applicable for the duration of the interest accrual period."[179] The legislative history indicated Congress amended the interest rate to reduce the economic incentive for a losing defendant to pursue a frivolous appeal while continuing to earn interest at the commercial rate.[180] Although this would appear to urge retroactive application of the amended statute, the Court found both versions of the statute fixed the rate of interest as of the date of the entry of judgment and, therefore, the amended statute could not apply retroactively.[181]

Bonjorno is probably most often cited for the concurring opinion of Justice Scalia,[182] in which he argues the Court should have addressed the "irreconcilable contradiction" between *Thorpe-Bradley* and "the many cases, old and new, which have said that unless there is specific indication to the contrary a new statute should be applied only prospectively."[183] However, of far greater interest is the result reached in *Bonjorno*—a result from which four Justices dissented. Justices White, Brennan, Marshall, and Blackmun observed the majority's decision "den[ied] effect to an important ameliorative federal statute in precisely the kind of situation demonstrating the need for the amendment."[184]

> It is difficult to see how manifest injustice could be worked except by refusing to apply amended § 1961 to this case. As a result of the Court's decision today, Bonjorno is remitted to a postjudgment interest rate greatly lower than its cost of money during the pendency of the litigation, while Kaiser, an adjudicated violator of the antitrust laws, is permitted to escape the consequences of protracting litigation. This was precisely the result that Congress intended to prevent by amending § 1961.[185]

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177. *Id.* at 837 (brackets and internal quotation marks omitted).
178. *Id.*
179. *Id.* at 838-39.
180. *See id.* at 839.
181. *See id.* at 840.
182. *See, e.g.*, TROY, *supra* note 1, at 40.
183. *Bonjorno*, 494 U.S. at 841 (Scalia, J., concurring) (citation omitted).
184. *Id.* at 859 (White, J., dissenting).
185. *Id.* at 869 (White, J., dissenting).

Noting "[p]ostjudgment interest 'rests solely upon statutory provision,'"[186] the dissent argued Kaiser was not entitled to make any assumptions about its interest rate.[187] Until the end of litigation,

> a defendant must always evaluate the possibility that a judgment against it, and concomitantly the postjudgment interest that it must pay, may be vacated, decreased, *or increased* on appeal, in postjudgment proceedings before the District Court, or by a legislated change in the substantive law. . . . So whereas application of new § 1961 might have interfered with Kaiser's vested rights had Kaiser already paid the judgment and interest calculated under the old version of the statute, its expectations were not nearly so fixed before the case came to an end.[188]

As the dissent also notes, the Supreme Court had previously held that "the Contract Clause and Due Process Clause do not prevent legislatures from altering the statutory rate of postjudgment interest applicable to judgments that have not been satisfied."[189]

The foregoing would suggest that fairness did not play a role in the majority's decision—but it did. In *Bonjorno*, the Court's majority and dissenting opinions illustrate that the Justices had differing views of "fairness." The majority observed that "on the date of judgment expectations with respect to interest liability were fixed, so that the parties could make informed decisions about the cost and potential benefits of paying the judgment or seeking appeal."[190] The dissent acknowledged that the majority "fears it would be unfair to apply new

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186. *Id.* at 868 (White, J., dissenting) (citing Pierce v. United States, 255 U.S. 398, 406 (1921)).

187. *See id.* (White, J., dissenting).

188. *Id.* at 861 (White, J., dissenting). The dissent notes the majority feared

> it would be unfair to apply new § 1961 to a defendant that had already begun the process of challenging a money judgment because an important element defining the risk of appeal, the rate of postjudgment interest, changed upon the amendment of § 1961. But putting aside for the moment whether expectations about interest liability can ever settle before the end of litigation, I still do not understand why we should not apply new § 1961 to litigation in progress when we know that the principal reason for Congress' amendment of § 1961 was to change the risk of postjudgment litigation. The decision to appeal is not irrevocable. When new § 1961 took effect, Kaiser's motion for judgment notwithstanding the verdict was outstanding, and it was certainly within Kaiser's power then to offer a settlement based on its new perception of the risk in further proceedings. Kaiser also must have understood that Bonjorno would have contemplated an appeal if the District Court overturned or reduced the jury verdict. Nor was Kaiser unable to calculate the risk of protracting litigation under new § 1961 when it decided to seek certiorari.

Id. at 860-61 (White, J., dissenting).

189. *Id.* at 861 n.2 (White, J., dissenting) (citing Missouri & Arkansas Lumber & Mining Co. v. Greenwood Dist. of Sebastian County, Ark., 249 U.S. 170 (1919); Morley v. Lake Shore & Michigan & S. R.R., 146 U.S. 162 (1892)).

190. *Id.* at 839-40.

§ 1961 to a defendant that had already begun the process of challenging a money judgment because an important element defining the risk of appeal, the rate of postjudgment interest, changed upon the amendment of § 1961."[191] The dissent noted the majority had, in effect, concluded that Kaiser had a vested interest in the rate set forth in the earlier provision:

> Though the majority never uses the dreaded word, it clearly wants to say that Kaiser's right to a particular rate of postjudgment interest "vested" at the date of entry of judgment. Only the concept of "vestedness" fully explains the link that the majority makes between Kaiser's "fixed" expectations and its ability to make "informed" decisions.[192]

To the dissent, however, Kaiser's expectation in a particular interest rate was unreasonable because Kaiser's liability for postjudgment interest could not be settled until the judgment against Kaiser became final.[193] The dissent also noted Congress's principal reason for amending the statute "was to change the risk of postjudgment litigation."[194] Accordingly, the majority viewed fairness in the context of expectations and vested rights; the dissent viewed fairness in the context of equity and justice.

Retroactivity in the context of postjudgment attorney fees raises competing concerns, which was the cause of the fractured result in *Bonjorno*. As this Article will explain in Part III, reconciling these concerns is important to achieving an integrated framework for retroactivity analysis. Although *Bonjorno* is reconcilable with the Court's other retroactivity decisions, a principled application of this framework indicates that it, and *Martin v. Hadix*,[195] the Court's most recent decision, were wrongly decided.

The most prominent of the Court's recent retroactivity decisions is *Landgraf v. USI Film Products*.[196] In *Landgraf*, the Court, rather than dodging the issue as it had done in *Bonjorno*, expressly revived the strong presumption against retroactivity. *Landgraf* is widely—and mistakenly—cast as reconciling the Court's previous retroactivity decisions and as presenting a framework within which to analyze future cases.[197]

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191. *Id.* at 860 (White, J., dissenting).
192. *Id.* at 861 (White, J., dissenting).
193. *See id.* (White, J., dissenting).
194. *Id.* at 860 (White, J., dissenting).
195. 527 U.S. 343 (1999).
196. 511 U.S. 244 (1994).
197. *See infra* note 292 and accompanying text.

Landgraf concerned the potential retroactivity of the Civil Rights Act of 1991. In 1989, Barbara Landgraf sued her former employer, USI Film Products, for constructive discharge on the basis of sexual harassment causing a hostile work environment.[198] The district court found one of Landgraf's co-workers had sexually harassed Landgraf to a degree sufficient to establish a hostile work environment.[199] However, the district court concluded Landgraf was not constructively discharged, despite the demonstrated sexual harassment, because the harassment "was not so severe that a reasonable person would have felt compelled to resign.... Landgraf voluntarily resigned from her employment with USI for reasons unrelated to the sexual harassment in question."[200] Under the law at that time, in order to recover monetary damages a plaintiff was required to establish both that she was the victim of unlawful discrimination, and that this discrimination resulted in some concrete effect on the plaintiff's employment status, such as a differential in compensation, a denied promotion, or termination.[201] Accordingly, there was no basis for relief under existing employment discrimination law,[202] and the district court dismissed Landgraf's complaint.[203]

The Civil Rights Act of 1991 became effective while Landgraf's appeal was pending in the United States Court of Appeals for the Fifth Circuit.[204] Among other things, this new legislation significantly expanded the monetary relief potentially available to plaintiffs who were entitled to backpay.[205] It also authorized monetary relief for some forms of workplace discrimination that would not previously have been covered by Title VII, and provided for jury trial. The new legislation now permitted a plaintiff to recover where there had been unlawful discrimination in the "'terms, conditions, or privileges of employment,' even though the discrimination did not involve a discharge or a loss of

198. *Landgraf*, 511 U.S. at 248.

199. *See id.* at 248.

200. *Id.* at 248-49.

201. *See id.* at 254.

202. The existing employment discrimination law was Title VII of the Civil Rights Act of 1964. *See id.* at 248; 42 U.S.C. § 2000e—2000e-17. "Before the enactment of the 1991 Act, Title VII afforded only 'equitable' remedies. The primary form of monetary relief available was backpay." *Landgraf*, 511 U.S. at 252. "[E]ven if unlawful discrimination was proved, under prior law a Title VII plaintiff could not recover monetary relief unless the discrimination was also found to have some concrete effect on the plaintiff's employment status, such as a denied promotion, a differential in compensation, or termination." *Id.* at 254. Due to the district court's finding that Landgraf was not constructively discharged, she did not suffer the requisite effect on her employment status. Accordingly, she was not entitled to backpay and therefore had no remedy.

203. *See Landgraf*, 511 U.S. at 249.

204. *See id.*

205. *See id.* at 253.

pay."[206] Accordingly, on appeal, Landgraf sought to have her case remanded for a determination of damages under the new provisions in order to recover for the demonstrated sexual harassment.

The Fifth Circuit, citing *Bradley*, rejected Landgraf's argument that her case should be remanded for a trial on damages pursuant to the 1991 Act.[207] The Supreme Court affirmed, finding the 1991 Act did not apply retroactively, and thus denying Landgraf any recovery for the sexual harassment she had suffered.

On appeal to the Supreme Court, Landgraf noted Congress expressly provided for prospectivity in two sections, and argued the Court should therefore infer Congress intended the other sections to be applied retroactively. The Court rejected this argument, and the legislative history of the 1991 Act clearly had some impact on its decision.[208] A year earlier, a similar civil rights bill had passed both houses of Congress. The prior bill, which contained similar substantive provisions, also expressly provided for retroactive application of many of the Act's provisions to cases arising before the legislation's enactment. The President vetoed the prior bill, citing its "unfair retroactivity rules" as one reason for the veto.[209] When the bill was reintroduced in the House in 1991, it again contained explicit retroactivity provisions. However, the Senate version ultimately approved omitted those retroactivity provisions.[210] Accordingly, as the *Landgraf* Court observed:

> [t]he absence of comparable language in the 1991 Act cannot realistically be attributed to oversight or to unawareness of the retroactivity issue. Rather, it seems likely that one of the compromises that made it possible to enact the 1991 version was an agreement *not* to include the kind of explicit retroactivity command found in the 1990 bill.[211]

The Court acknowledged its "precedents on retroactivity left doubts about what default rule would apply in the absence of congressional guidance, and suggested that some provisions might apply to cases arising before enactment while others might not."[212] In *Landgraf*, the

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206. *Id.* at 254 (citation omitted).

207. *See id.* at 249.

208. *See id.* at 256. In his dissent, Justice Blackmun noted the presumption against retroactivity "is grounded in a respect for vested rights." *Id.* at 296 (Blackmun, J., dissenting). He observed that "[a]t no time within the last generation has an employer had a vested right to engage in or to permit sexual harassment . . . . There is nothing unjust about holding an employer responsible for injuries caused by conduct that has been illegal for almost 30 years." *Id.* at 297 (Blackmun, J., dissenting).

209. *Id.* at 255-56.

210. *See id.* at 262.

211. *Id.* at 256.

212. *Id.* at 261; *see also* Bennett v. New Jersey, 470 U.S. 632, 632 (1985).

Court took the opportunity, declined in *Bonjorno*, to expressly state that prospectivity was the appropriate default rule.[213]

Landgraf noted a statute "does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment."[214]

Landgraf set out a two-part structure for initial retroactivity analysis.[215] The first step is to determine if Congress has expressly stated whether the statute applies retroactively or prospectively.[216] If Congress has done so, judicial default rules are unnecessary.[217] If Congress has not provided express direction, the court must determine whether the new statute would have a retroactive effect. If the statute would operate retroactively, "our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."[218] However, the Court noted jurisdictional and procedural rules may apply retroactively without an express congressional command because they regulate "secondary" rather than "primary" conduct.[219]

The Court made a valiant, but unsuccessful, effort to reconcile its retroactivity jurisprudence. The Court characterized its *Thorpe* decision as essentially a "procedural" case, which constitutes an exception to the presumption against retroactivity.[220] Yet *Landgraf* also states

> the mere fact that a new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of complaints would not govern an action in which the complaint had

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213. *Landgraf*, 511 U.S. at 272 (observing "a presumption against retroactivity will generally coincide with legislative and public expectations").

214. *Id.* at 269-70 (citation and footnote omitted).

215. As explained in Part III, this two-step structure is incomplete. *See infra* notes 293-349 and accompanying text.

216. *See Landgraf*, 511 U.S. at 280.

217. *See id.*

218. *Id.*

219. *See id.* at 274-75 ("Because rules of procedure regulate secondary 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."). The Court also specially noted two other types of intervening statutes—new statutes providing for prospective relief and new remedial statutes. *See id.* at 273, 285 n.37. With respect to new statutes providing for prospective relief, rather than characterizing these statutes as exceptions to the presumption against retroactivity, the Court defined them as nonretroactive. "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive. . . . '[R]elief by injunction operates *in futuro*,' . . . ." *Id.* at 273-74. With respect to remedial statutes, the Court noted it had "sometimes said that new 'remedial' statutes, like new 'procedural' ones, should presumptively apply to pending cases." *Id.* at 285 n.37. However, the Court left the reach of this exception open, noting it would "hold[ ] true for some kinds of remedies" but not for a statute introducing damages liability. *Id.*

220. *Id.* at 276.

> already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial.... Nor do we suggest that concerns about retroactivity have no application to procedural rules.[221]

In *Thorpe*, of course, the eviction proceedings had already been initiated at the time that HUD issued its circular containing the new notice provisions. Indeed, the tenant had been ordered evicted nearly a year and a half before HUD issued the circular; the housing authority brought the summary eviction action and the court ordered the tenant removed from her apartment in September 1965. Two appellate courts had affirmed the eviction order and the matter was pending in the United States Supreme Court before HUD issued the circular in February 1967.[222] The *Thorpe* situation thus closely resembles the Court's proffered examples of a previously-filed complaint or completed trial, in which the Court stated a new procedural rule would not be given effect. Accordingly, the *Landgraf* Court's attempt to reconcile *Thorpe* is unconvincing.

Similarly, the Court stated *Bradley* "did not resemble the cases in which we have invoked the presumption against statutory retroactivity" because it concerned attorney fees. Attorney fee determinations, explained the Court, are "'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.'"[223] However, this purported distinction is unconvincing in light of the Court's *Bonjorno* decision, in which the Court declined to apply retroactively an amended federal statute governing awards of postjudgment interest.[224] Postjudgment interest is a creature of statutory provision, and it, too, is "collateral to the main cause of action" and "uniquely separable from the cause of action to be proved at trial." Accordingly, this attempted distinction for the Court's *Bradley* decision also fails.

With respect to the fairness of the result in *Landgraf* itself, the Justices differed in their perceptions of fairness, as happened in *Bonjorno*. The majority noted, "[i]n cases like this one, in which prior law afforded no relief, § 102 can be seen as creating a new cause of action, and its impact on parties' rights is especially pronounced."[225] The majority further observed that "[a]ssessing damages against respondents on a theory of

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221. *Id.* at 275 n.29.

222. *See* Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 271-72 (1969).

223. *Landgraf*, 511 U.S. at 277 (quoting White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445, 451-52 (1982)).

224. *See* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 827 (1990).

225. *Landgraf*, 511 U.S. at 283.

respondeat superior would thus entail an element of surprise. Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past."[226] The dissent, arguing that the presumption against retroactivity is grounded on protecting vested rights, asserted the employer had no vested right to engage in or permit sexual harassment, and thus "[t]here is nothing unjust about holding an employer responsible for injuries caused by conduct that has been illegal for almost 30 years."[227] The dissent is unpersuasive, both due to its erroneous reliance on vested rights as the sole basis for the presumption against retroactivity, and due to its characterization of the statutory provision as a mere expansion of the available remedies. Recovery was not possible under prior law, and thus permitting retroactive application would have resulted in a new, previously-unavailable cause of action being applied to actions occurring before the statute's enactment.

In addition to the Court's failure to reconcile its decisions in *Thorpe* and *Bradley*, the *Landgraf* Court also failed to integrate fully all of the concepts in its existing retroactivity jurisprudence—most notably, the importance that fairness has played in the Court's retroactivity decisions.[228] *Landgraf* did not ignore fairness; indeed, fairness again played a large role in the Court's result. However, the Court offered no specific guidance for incorporating fairness concerns into retroactivity analysis.

Landgraf's initial two-part inquiry also modified existing law: The absence of express retroactive intent had not always prevented the Court from applying a statutory provision retroactively. Some of *Landgraf*'s flaws have become apparent in subsequent decisions, which has caused the Court to make some modifications to its approach. *Landgraf* did, however, succeed in reinstating the presumption against retroactivity, as illustrated in the remaining major retroactivity cases.

D. Making Headway: Hughes, Lindh, and Hadix

In *Hughes Aircraft Co. v. United States ex rel. Schumer*,[229] the Supreme Court held that an amendment to a jurisdictional provision of the False Claims Act did not apply retroactively.

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226. *Id.* at 282-83 n.35.
227. *Id.* at 297 (Blackmun, J., dissenting).
228. *See infra* notes 315-35 and accompanying text.
229. 520 U.S. 939 (1997).

Northrup Corporation contracted with the United States Air Force to construct the B-2 bomber. In 1981, Northrup awarded Hughes Aircraft Company a subcontract to design and develop a radar system for the bomber.[230] Several months later, Hughes Aircraft subcontracted with another company, the McDonnell-Douglas Corporation, to design and develop an upgraded radar system for the F-15 fighter aircraft.[231] Northrup later sued Hughes Aircraft under the qui tam provision[232] of the False Claims Act.[233] Northrup alleged Hughes Aircraft knowingly overcharged Northrup—and through it the United States—for $50 million in radar development costs between 1982 and 1984 that Hughes should have allocated to its F-15 subcontract with McDonnell-Douglas.[234] Northrup sought treble damages of $150 million.[235]

After costs in the B-2 program escalated, Northrup requested a government audit of Hughes Aircraft's accounting practices to determine whether Hughes had shifted costs from the F-15 subcontract to the B-2 subcontract.[236] The government initially concluded Hughes had improperly billed the B-2 program for costs attributable to the F-15 program, and directed Northrup to withhold $15.4 million in B-2 contract payments.[237] However, the government subsequently withdrew its finding of noncompliance and directed Northrup to pay Hughes the $15.4 million previously withheld.[238]

Prior to 1986, qui tam suits under the False Claims Act were barred if the information on which the lawsuit was based was already in the

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230. *See id.* at 942.

231. *See id.*

232. "Qui tam" is an abbreviation of the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means "who pursues this action on our Lord the King's behalf as well as his own." Vermont Agency of Natural Resources v. United States *ex rel.* Stevens, 529 U.S. 765, 843 n.1 (2000). A qui tam relator is, in effect, suing as a partial assignee of the United States. *See id.* at 846 n.4.

> Qui Tam actions appear to have originated around the end of the 13th century, when private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf. . . .
>
> [In the 14th century,] Parliament began enacting statutes that explicitly provided for qui tam suits. These were of two types: those that allowed injured parties to sue in vindication of their own interests (as well as the Crown's), and . . . those that allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves.

Id. at 846-47 (citations omitted).

233. The qui tam provision of the False Claims Act permits, under certain circumstances, lawsuits by private parties on behalf of the United States against anyone submitting a false claim to the federal government. 31 U.S.C. § 3730(b) (1994).

234. *See Hughes*, 520 U.S. at 943, 945.

235. *See id.* at 943.

236. *See id.* at 942.

237. *See id.* at 942-43.

238. *See id.* at 943 n.1.

federal government's possession.[239] Congress's 1986 amendments to the Act partially removed that bar.[240] Northrup did not dispute that the government was aware of these allegations before the filing of the lawsuit, and thus the 1982 provision of the False Claims Act would bar the claim if applicable.[241] However, Northrup contended that the 1986 amendment became effective before the lawsuit was commenced, and thus the 1986 amendment was controlling.[242]

The Supreme Court rejected Northrup's contention. As an initial matter, the Court observed that nothing in the 1986 amendment indicated Congress had intended the amendment to apply retroactively.[243] In response to Northrup's argument that the 1986 amendment was jurisdictional, and thus an exception to the presumption against retroactivity, the Court narrowed this potential distinction. The Court characterized jurisdictional provisions as subject to the same retroactivity determinations as other types of provisions, rather than as exceptions to the presumption against retroactivity. "The fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself."[244]

The Court also relied on fairness concerns in reaching its result. The Court noted that applying the 1986 amendment would deprive Hughes Aircraft of an affirmative defense: Pre-1986 law provided that a district court was required to dismiss a qui tam action if it was "based on evidence or information the Government had when the action was brought."[245] In addition, under pre-1986 law, only the government

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239. *See id.* at 945. Before the 1986 amendments, the False Claims Act required a district court to "dismiss [a qui tam] action . . . based on evidence or information the Government had when the action was brought." *Id.* (alteration and omission in original).

240. *See id.* at 946 ("Congress amended the FCA [False Claims Act] in 1986, however, to permit qui tam suits based on information in the Government's possession, except where the suit was based on information that had been publicly disclosed and was not brought by an original source of the information.").

241. *See id.* at 945.

242. *See id.* at 946.

243. *See id.*

244. *Id.* at 951 ("Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all. The 1986 amendment, however, does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other.") (citation omitted).

245. *Id.* at 945; *id.* at 948 ("[T]he 1986 amendment eliminates a defense to a qui tam suit—prior disclosure to the Government—and therefore changes the substance of the existing cause of action for qui

could assert its rights under the False Claims Act; the 1986 amendment authorized such actions by a private relator on behalf of the United States.[246] "In permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued."[247]

Accordingly, in *Hughes*, the Supreme Court continued to review legislation for an expression of retroactive intent. The decision's particular significance is the refining of the "exception" articulated in *Landgraf* for legislation addressing jurisdictional provisions, suggesting the Court will not dodge retroactivity analysis by characterizing a statute as jurisdictional.

Later the same year, the Supreme Court decided *Lindh v. Murphy*,[248] a case involving the retroactivity of amendments to the habeas corpus statute.[249] Thus, similar to *Hughes*, the *Lindh* decision involved amendments to statutory provisions that appeared procedural in nature, which, under *Landgraf*, were not subject to the presumption against retroactivity. Again, however, the Court declined to authorize retrospective application.

Lindh concerned amendments to the habeas corpus statute pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[250] Among other things, the amendments addressed standards of proof and persuasion,[251] and authorized the expedited filing and adjudication of habeas applications when the State satisfied certain conditions.[252] The amendments took effect while Lindh's petition for habeas corpus was pending in the United States Court of Appeals for the Seventh Circuit, and the Court of Appeals, applying *Landgraf*'s articulated exception from the presumption against retroactivity for procedural provisions, held the amendments applied to Lindh's case.[253] The Supreme Court reversed.[254]

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tam defendants by 'attach[ing] a new disability, in respect to transactions or considerations already past.'") (alteration in original) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 269 (1994)).

246. *See id.* at 948-49.

247. *Id.* at 950.

248. 521 U.S. 320 (1997).

249. *See* 28 U.S.C. § 2254(d) (Supp. III 1997).

250. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8 and 50 U.S.C.).

251. *See Lindh*, 521 U.S. at 327 ("[I]n its revisions of prior law to change standards of proof and persuasion in a way favorable to a State, the statute goes beyond 'mere' procedure to affect substantive entitlement to relief.").

252. *See id.* at 330-31.

253. *See id.* at 323-24.

254. *See id.* at 336-37.

The Supreme Court observed that *Landgraf*'s judicial default rule did not apply to the complete exclusion of all other standards of statutory interpretation.[255]

> Although *Landgraf*'s default rule would deny application when a retroactive effect would otherwise result, other construction rules may apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case), as Lindh argues the recognition of a negative implication would do here.[256]

Of particular interest in *Lindh* is the Court's revisiting of the notion of the retroactivity of legislation that merely results in "procedural changes." The Court narrowed the language from *Landgraf*, stating that if a statute was "merely procedural in a strict sense (say, setting deadlines for filing and disposition), the natural expectation would be that it would apply to pending cases."[257] The Court distinguished the habeas amendments, notably the changes to the standards of proof, as going beyond "mere" procedure and instead affecting substantive entitlement to relief.[258] In addition, the Court stated that a statute authorizing a "truly retroactive effect" must be supported by unmistakable language to that effect.[259]

Lindh discussed fairness only by implication, and in a more limited manner than any of the Court's prior decisions. The Court's implied consideration of fairness arose only in the context of noting the amendments affected substantive entitlement to relief.[260] The Court observed that changing standards of proof and persuasion in a manner that was favorable to the state affected a petitioner's substantive entitlement to relief, and thus, the Court implied, applying the amendments retroactively would be unfair to the petitioner.[261]

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255. *See id.* at 326.

256. *Id.* at 326. The Court continued,

> In sum, if the application of a term would be retroactive as to Lindh, the term will not be applied, even if, in the absence of retroactive effect, we might find the term applicable; if it would be prospective, the particular degree of prospectivity intended in the Act will be identified in the normal course in order to determine whether the term does apply to Lindh.

Id.

257. *Id.* at 327 (citation omitted). The Court also noted *Landgraf*'s observation that procedural changes "may often be applied in suits arising before their enactment without raising concerns about retroactivity." *Id.*

258. *Id.*

259. *Id.* at 328 n.4 ("[C]ases where this Court has found truly 'retroactive' effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation.").

260. *See id.* at 327.

261. *See id.*

Taken together, *Hughes* and *Lindh* served effectively to eliminate the exceptions for jurisdictional and procedural legislation that had been described in *Landgraf*. Rather than treating such provisions as exceptions to the presumption against retroactivity, the Court instead evaluated such matters in the same manner as any other legislation. These decisions undercut *Landgraf*'s claim that it provides a purported framework for retroactivity analysis—a point made even more clearly by the Court's most recent retroactivity decision.

The most recent major Supreme Court decision concerning retroactive civil legislation is *Martin v. Hadix*.[262] *Hadix* involved the retroactivity of portions of the Prison Litigation Reform Act.

Hadix concerned two class actions challenging conditions in the Michigan prison system.[263] The parties to the class actions entered into a consent decree, which included postjudgment monitoring of the defendants' compliance with the decree.[264] The plaintiffs submitted semiannual attorney fee requests for this postjudgment monitoring, which was set at the market rate.[265] By 1995, the market rate for lead counsel was $150 per hour.[266]

The Prison Litigation Reform Act became effective April 26, 1996.[267] Among other things, the Act capped attorney fee awards in prison litigation lawsuits.[268]

When counsel submitted subsequent postjudgment monitoring fee requests, those requests were challenged as exceeding the Act's cap on attorney fees. The district court held the Act did not limit fees for work performed before April 26, 1996, but did cap fees for services performed after the effective date.[269] On appeal, the United States Court of Appeals for the Sixth Circuit concluded the fee cap did not apply to

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262. 527 U.S. 343 (1999).

263. *Id.* at 348-49. One class action, involving female prisoners, was filed in 1977; the other, involving male prisoners, was filed in 1980. The district court entered remedial orders in 1981 and 1985 respectively.

264. *See id.* at 349.

265. *See id.*

266. *See id.*

267. *See id.*

268. *See id.* at 350 ("'(d) Attorney's fees '(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under [42 U. S. C. § 1988], such fees shall not be awarded, except to the extent [authorized here]. '(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under [18 U. S. C. § 3006A (1994 ed. and Supp. III)], for payment of court-appointed counsel.' § 803(d), 42 U.S.C. § 1997e(d) (1994 ed., Supp. III). Court-appointed attorneys in the Eastern District of Michigan are compensated at a maximum rate of $75 per hour, and thus, under § 803(d)(3), the PLRA fee cap for attorneys working on prison litigation suits translates into a maximum hourly rate of $112.50.").

269. *See id.* at 350-51.

cases pending on the date of enactment because that would constitute "an impermissible retroactive effect, regardless of when the work was performed."[270]

In evaluating the Act's provisions, the Supreme Court first noted the Act contained no express directive that the statute should apply retroactively.[271] The Court continued that it next:

> must determine whether application of this section in this case would have retroactive effects inconsistent with the usual rule that legislation is deemed to be prospective. The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about "whether the new provision attaches new legal consequences to events completed before its enactment." This judgment should be informed and guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations."[272]

The Court noted the Act was not passed "until well after respondents had been declared prevailing parties and thus entitled to attorney's fees. To impose the new standards now, for work performed before the PLRA became effective, would upset the reasonable expectations of the parties."[273]

The Court reached a different conclusion, however, with respect to work performed after the Act's effective date. The Court—erroneously—concluded that the Act did not have a retroactive effect on postjudgment monitoring performed after the Act's effective date.

> With respect to postjudgment monitoring performed after the effective date of the PLRA, by contrast, there is no retroactivity problem. On April 26, 1996, through the PLRA, the plaintiffs' attorneys were on notice that their hourly rate had been adjusted. From that point forward, they would be paid at a rate consistent with the dictates of the law. After April 26, 1996, any expectation of compensation at the pre-PLRA rates was unreasonable. There is no manifest injustice in telling an attorney performing postjudgment monitoring services that, going forward, she will earn a lower hourly rate than she had earned in the past. If the attorney does not wish to perform services at this new, lower pay rate, she can choose not to work. In other words, as applied to work performed after the effective date of the PLRA, the PLRA has future effect on future work; this does not raise retroactivity concerns.[274]

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270. *Id.* at 351.
271. *See id.* at 353.
272. *Id.* at 357-58 (citation omitted).
273. *Id.* at 360.
274. *Id.*

The Court's approach constituted a definitional ploy to dodge the presumption against retroactivity and reach the result the Court believed proper. As in *Bradley*, several different events could constitute the event relevant to implementing the statutory provision.[275] In *Hadix*, *any* application of the fee limitation provision had some retroactive effect. The judgment had already been entered; the prevailing parties had already been determined; the attorneys had already begun—and been paid for—postjudgment monitoring services. To change the attorneys' rate of pay at this point constituted a retroactive application of the statute.

The Court used the definitional option to avoid retroactivity analysis: By defining the subsequent monitoring as not having a retroactive effect, the Court was not required to apply the presumption against retroactivity. Interestingly, it appears that, in part, a perception of fairness may have motivated this approach. By using a definitional approach, the Court could balance the competing expectations of the parties. However, *Hadix*, like the Court's *Bonjorno* decision, reached the wrong result—a result caused by shortcomings in *Landgraf*'s approach to retroactivity analysis.[276]

Hadix also dealt yet another blow to *Landgraf*'s claim to resolve the retroactivity problem by refusing to apply the attorney fees exception mentioned in *Landgraf*. In attempting to reconcile its retroactivity decisions, the *Landgraf* Court had characterized its *Bradley* decision as consistent with retroactivity doctrine because it was an attorney fees case, and thus an exception to the presumption against retroactivity. *Landgraf* described attorney fee determinations as "'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.'"[277] However, in *Hadix*, the Court stated that "[a]ttaching the label 'collateral' to attorney's fees questions does not advance the retroactivity inquiry," instead "we must ask whether the statute operates retroactively."[278] Thus, just as the Court abandoned *Landgraf*'s jurisdiction and procedural "exceptions" in *Hughes* and *Lindh*, the Court abandoned the attorney fee exception in *Hadix*.

The Supreme Court's retroactivity jurisprudence, when taken collectively, appears to pull in several directions simultaneously. However, careful scrutiny reveals that the Court has actually applied retroactivity doctrine quite consistently. The apparent contradictions

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275. *See supra* note 146 and accompanying text.

276. *See infra* note 347 and accompanying text.

277. Landgraf v. USI Film Prods., 511 U.S. 244, 277 (1994) (quoting White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445, 451-52 (1982)).

278. *Hadix*, 527 U.S. at 359.

and confusion have resulted from the Court's characterization of its guiding principles rather than the principles themselves. The next section of this Article reconsiders and reconstructs a retroactivity analysis consistent with the way the Court has resolved these cases in fact as opposed to relying on the Court's rhetorical claims.

III. LEGISLATIVE INTENT, CONSTITUTIONALITY, AND FAIRNESS: RECONFIGURING THE SUPREME COURT'S RETROACTIVE LEGISLATION DECISIONS

Reconciling the Supreme Court's retroactive legislation cases is no easy task. This Article is not the first to attempt this reconciliation, only the most recent.[279] It is this Article's contention that the Court's cases are not reconcilable when analyzed using the Court's own descriptions of its guiding principles. However, in looking beyond the Court's own descriptors, it becomes clear that principles of fundamental fairness ultimately have driven the Court's decisionmaking process, and that these principles can be understood and applied coherently.

A. The Failure of Categorization as Analysis

The Supreme Court caused widespread confusion in retroactivity jurisprudence by reaching results in several decisions that seemingly were at odds with the Court's articulated retroactivity principles. In large part, the Court itself caused this confusion by relying on competing maxims of statutory construction throughout its retroactivity decisions – the maxim that "retroactivity is not favored in the law"[280] versus the maxim that "a court is to apply the law in effect at the time it renders its decision."[281]

Each maxim is perfectly fine on its own, but the two maxims hopelessly conflict in determining whether new legislation affects parties' rights and interests: That is, any time retroactivity creates the very conflict that causes parties to dispute the effect of new legislation. When legislation creates or changes rights, liabilities, or remedies after the occurrence giving rise to litigation, these two maxims will clash: Applying the law in effect at the time of the court's decision will result

279. *See, e.g.*, Fisch, *supra* note 1; Ricciardi & Sinclair, *supra* note 1; Hochman, *supra* note 1.

280. *See, e.g.*, Bennett v. New Jersey, 470 U.S. 632, 639 (1985); United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806) (Paterson, J.).

281. *See, e.g.*, Bradley v. School Bd. of Richmond, 416 U.S. 696, 711 (1974); Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 281-82 (1969).

in a disfavored retroactive application.[282] By electing to use these contradictory maxims to set forth its analysis, the Court unnecessarily highlighted the differences—and thereby increased the tensions—in the outcomes.

In retrospect, the Court recognized the problems inherent in using these maxims. In *Landgraf*, the Court observed that "[i]t is not uncommon to find 'apparent tension' between different canons of statutory construction."[283] The Court then attempted to reconcile its use of these maxims and its retroactivity jurisprudence.[284] However, the Court did not succeed in fully bringing together the existing law. As explained in Part II, *Landgraf*'s attempt to reconcile the Court's apparent aberrations in *Thorpe* and *Bradley* was unpersuasive.[285] In *Landgraf*, the Court characterized *Thorpe* as a "procedural" case and thus an exception to retroactivity doctrine. However, the provision at issue involved additional notice before the institution of eviction proceedings—and at the time the new provision came into effect, the tenant had already been ordered evicted more than a year earlier. Thus, *Thorpe* more closely resembled the Court's examples of the impact of a new rule concerning the filing of complaints after the complaint had already been filed, or a new rule of evidence after a completed trial—instances in which the Court had stated the new rules would not apply.[286] With respect to *Bradley*, the Court characterized the attorney fees provision as "'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.'"[287] However, the Court provided no principled basis for declaring the nature of the attorney fees statute in *Bradley* "collateral," while denying this label to the postjudgment interest statute in *Bonjorno*—which the Court declined to apply retroactively.

Courts and commentators have repeatedly attempted to force the square pegs of retroactivity into the round holes of various labels or definitions.[288] Retroactivity doctrine does not fit. The individualized

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282. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 402 (1950) (noting apparent conflict between the canon that "[a] statute imposing a new penalty or forfeiture, or a new liability or disability, or creating a new right of action will not be construed as having a retroactive effect" and the countervailing rule that "[r]emedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such construction") (footnotes omitted).

283. Landgraf v. USI Film Prods., 511 U.S. 244, 263 (1994).

284. *See id.* at 273-80.

285. *See supra* notes 220-24 and accompanying text.

286. *See Landgraf*, 511 U.S. at 275 n.29.

287. *Id.* at 277 (quoting White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445, 451-52 (1982)).

288. *See supra* note 1 and accompanying text.

nature of the inquiry, and the number of factors considered in undertaking this inquiry, doom a definitional approach.

Similarly, the Court's reconciliation effort in *Landgraf* fell short because, in part, the Court again insisted on using a "labeling" approach. The Court characterized *Thorpe* and *Bradley* as involving "procedural" and "attorney fees" statutes, respectively, and thus—along with jurisdictional statutes—as constituting exceptions to retroactivity doctrine. Not only did this effort fail on its face, but moreover, the Court has been forced to abandon these articulated "exceptions" in its subsequent decisions: In *Hughes*, the Court abandoned the "jurisdiction" exception; in *Lindh*, the Court abandoned the "procedure" exception, and in *Hadix*, the Court abandoned the "attorney fee" exception.

In *Hughes*, the Court noted the new statute eliminated a prior affirmative defense and refused to apply the amendment retroactively.[289] The Court also declined to apply retroactively procedural amendments to the habeas corpus statute in *Lindh*, concluding the amendments had "substantive as well as purely procedural effects."[290] In *Hadix*, the Court noted the litigation had been concluded and postjudgment monitoring services performed. Despite having characterized attorney fees as an exception in *Landgraf*, the Court declined to apply the statute retroactively with respect to services already performed.[291] These cases are significant additions to the Court's post-*Landgraf* jurisprudence, indicating—contrary to *Landgraf*'s suggestion—that the Court does not intend to blindly categorize cases as involving "jurisdictional," "procedural," or "attorney fees" matters and thereby dodge retroactivity analysis.

In addition, although the Court in *Landgraf* purported to set forth a framework, its test does not fully capture all of the core factors from the Court's retroactivity jurisprudence and leaves some disturbing gaps. Rather than merely reconciling retroactivity jurisprudence, *Landgraf* created one entirely new rule and limited one of the Court's consistent previous considerations. Thus, *Landgraf*'s contribution to retroactivity jurisprudence is its reaffirmation of the presumption against statutory retroactivity, not in seriously providing a comprehensive framework.[292]

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289. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 939 (1997).

290. Lindh v. Murphy, 521 U.S. 320, 327 (1997).

291. *See* Martin v. Hadix, 527 U.S. 343, 360 (1999).

292. *Landgraf* has been cited as providing a "test" or "framework" for future retroactivity decisions. *See, e.g.*, Scott v. Boos, 215 F.3d 940, 949 (9th Cir. 2000) (referring to "the *Landgraf* framework"); Turkhan v. Perryman, 188 F.3d 814, 825 (7th Cir. 1999) ("In *Landgraf*, the Supreme Court provided the framework for determining whether a provision . . . should apply to cases pending at the time of the provision's enactment."); Brown v. Angelone, 150 F.3d 370, 372 (4th Cir. 1998) ("[W]e employ the analytical framework established in *Landgraf*."); LaFontant v. INS, 135 F.3d 158, 161 (D.C. Cir. 1998) ("The

B. The Shortcomings of the Landgraf Test

Landgraf acknowledges that a statute may operate retroactively in one of two ways: It may operate retroactively due to legislative intent for retroactive application that is expressly stated in the statutory language, or it may operate retroactively due to the statute's effect or impact when applied to certain situations. In either instance, a court should not accord the statute retroactive effect absent clear congressional intent favoring such a result.[293]

According to *Landgraf*, this is the first step: In order to apply a civil statute retroactively, the statute must clearly state that it was intended to apply retroactively. However, this guideline is not as clear as it sounds on a first reading. On closer analysis, two concerns arise. First, in attempting to formulate a "bright line" rule, the Court failed to reconcile its prior decisions to clarify whether the requisite "clear expression of congressional intent" must be evident from the statutory language or whether such intent may be ascertained from reviewing the legislative history.[294] Although the Court stated its requirement of a clear expression of retroactive intent from the legislature "helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness,"[295] the Court has sojourned regularly into legislative history in its retroactivity decisions—including in *Landgraf* itself.[296] Accordingly, while requiring

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Supreme Court established the framework for evaluating retroactivity in *Landgraf* . . . ."); Zgombic v. Farquharson, 89 F. Supp. 2d 220, 231 (D. Conn. 2000) ("*Landgraf* . . . set forth the basic framework for addressing whether a statute applies retroactively."). *Landgraf*'s language provided:

> When 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 statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 280. If this language provides a "framework," it is a circular one. The quoted language simply states (1) the court should first look to the express statutory language to determine if Congress intended the statute to be applied retroactively, and (2) if there is no such express language, yet the statute would have a retroactive effect, the statute is not to be applied to have such a retroactive effect because there is no express language authorizing retroactive application.

293. *See Landgraf*, 511 U.S. at 280.

294. *Id.* at 257-63 (finding no statutory language indicating Congress had intended retroactive application of the Civil Rights Act of 1991, and going on to examine the Act's legislative history).

295. *Id.* at 268.

296. *Id.* at 262-63 (discussing legislative history); Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494

"clear intent,"[297] *Landgraf* leaves wide open the disquieting possibility that a court may search legislative history and attempt to create an expression of "clear intent" from committee reports, hearings, testimony, or other statements.[298]

The second concern is more invidious: How does a court determine whether a statute has a retroactive "effect?" As the Supreme Court's cases illustrate, the impact of a statute's retroactive effect can be subject to differing interpretations.[299] Any change in the law has retroactive effect in the sense that it disturbs existing legal relationships and expectations. This is what it means to legislate.[300] Laws that change nothing mean nothing. Thus there is no escaping retroactivity analysis.

Most recently, in addressing the application of a statute limiting attorney fees in *Hadix*, the Court faced a situation in which *any* application of the statute to the pending case could be deemed to have a retroactive effect. Although the Court declined to apply the statute's fee limitation to services performed before the effective date—instead applying the statute only to services performed after the statute's effective date—the decision nevertheless had a retroactive effect. At the time the attorneys had undertaken the case, prevailed, and begun postmonitoring services, the fees awarded were at one level. The statute subsequently changed the fees to a different, lower, level for continuing to provide the same services in the same case. The Court cavalierly observed that:

> [t]here is no manifest injustice in telling an attorney performing postjudgment monitoring services that, going forward, she will earn a lower hourly rate than she had earned in the past. If the attorney does not wish to perform services at this new, lower pay rate, she can choose not to work. In other words, as applied to work performed after the effective date of the PLRA, the PLRA has future effect on future work; this does not raise retroactivity concerns.[301]

U.S. 827, 839 (1990) (examining legislative history but finding statutory language controlling); Bennett v. New Jersey, 470 U.S. 632, 641 (1985) (noting neither statutory language nor legislative history intended retroactive intent).

297. *Landgraf*, 511 U.S. at 272.

298. However, some courts and commentators have asserted that ascertaining the plain meaning of a statute requires a review of the legislative history to provide the relevant context. *See infra* note 304.

299. *See Landgraf*, 511 U.S. at 268 ("While statutory retroactivity has long been disfavored, deciding when a statute operates 'retroactively' is not always a simple or mechanical task."); *Bonjorno*, 494 U.S. at 857 & n.3 (Scalia, J., concurring) (noting even with a clear reaffirmation of the presumption against retroactivity, it will remain difficult in many cases "to decide whether a particular application is retroactive" because " [i]t depends upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated").

300. *See* Smith, *supra* note 53, at 233.

301. Martin v. Hadix, 527 U.S. 343, 360 (1999).

However, the Court's characterization of the lawyers' choices were misleading—the lawyers were not in a position to quit under the ethical rules,[302] nor do courts simply allow lawyers to quit a case in which they are involved. Thus the lawyers were committed to continuing the representation, and yet, long into the case, the rules were changed and their compensation reduced. Moreover, the lawyers took the case initially in light of all the existing arrangements, including the possible fee recovery. To some unspecified, but absolutely certain extent, the new law changed those arrangements. Despite *Landgraf*'s instruction that a statute will not be given retroactive application absent an indication of clear congressional intent, obviously this safeguard dissipates if a court declines to define a statute as having a retrospective effect in the first instance. *Hadix* indeed involves the retroactive application of a nonretroactive statute.

Landgraf took a first step in unraveling the mystery of the Court's retroactivity jurisprudence by setting out its two-part inquiry.[303] A court should first look at the statute itself to see if it states the extent of retroactive application: This sets the outer limits for the court's retroactivity consideration. However, in addition to the ambiguities noted above, and the subsequently-eliminated "exceptions" used by *Landgraf*, its test also is incomplete. The Supreme Court's jurisprudence has considered several factors in analyzing the retroactivity of civil legislation. Failing to acknowledge the full panoply of considerations resulted in the Court's inability to reconcile its retroactivity decisions convincingly in *Landgraf*. Perhaps more importantly, failing to acknowledge all of the considerations leaves courts at risk for reaching an erroneous result in future decisions, particularly in difficult cases.

The determination of retroactive effect is just one of the two ambiguities in retroactivity jurisprudence; the other is the determination of fairness. Properly applied, fairness is a critical limiting factor in retroactivity. The Court's discussion of fairness concerns has arisen in two ways: The Court has sometimes discussed fairness in evaluating whether questionable retroactive effect exists in the first instance, and the Court has also used fairness as a determining factor in deciding whether a retroactive statutory application is impermissible and cannot be implemented.

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302. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 3 (1983) ("[A] lawyer should carry through to conclusion all matters undertaken for a client."); *id.* Rule 1.16 ("[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client . . . .").

303. *Landgraf*, 511 U.S. at 280.

C. The Three Factors of Retroactivity Jurisprudence: A Reconfigured Analysis

When the Supreme Court's retroactivity jurisprudence is reviewed in its entirety, it becomes clear that the Court generally has considered three factors in determining whether it will give civil legislation retroactive effect. The first factor is a traditional statutory interpretation issue, where the Court examines the legislation's plain meaning for Congressional intent.[304] The Court has then traditionally examined two further factors: (1) whether the legislation is subject to constitutional constraints set forth in the Contracts,[305]

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304. *See* United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806) (Paterson, J.) (requiring a "clear, strong, and imperative" expression of intent by the legislature to give the statute retroactive application); *see also* Union Pac. R.R. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913) ("[A] retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'") (quoting *Heth*, 7 U.S. (3 Cranch) at 413); Miller v. United States, 294 U.S. 435, 439 (1935) ("[A] statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears."). However, a provision's "plain meaning" does not always reflect legislative intent. *See* Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring) ("There is no surer way to misread any document than to read it literally . . . ."). Thus the Supreme Court traditionally has reviewed the legislative history to ensure that "its confidence in the clear [statutory] text did not misread the legislature's intent." William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 627 (1990). Justice Scalia has been a vocal opponent of this use of legislative history, criticizing the Court for relying on legislative history to confirm or rebut the apparent plain meaning of a statute. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421 452 (1987) (Scalia, J., concurring) ("Although it is true that the Court in recent times has expressed approval of this doctrine [that legislative history can sometimes trump plain meaning], that is to my mind an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity."); *see also* William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1302 (1998) (noting "the new textualists, particularly Justice Scalia, refuse to consider the debating history of statutes as relevant context but do consider such history of the Constitution and its amendments, sometimes in great detail"); William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992) (criticizing Justice Scalia's text and rule-based approach to decision making). *But see* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (defending the use of legislative history in statutory interpretation). As a result, the Court has turned increasingly to evaluating "plain meaning" without the aid of legislative history in statutory interpretation cases. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 227 (1994); Mary L. Heen, *Plain Meaning, The Tax Code, and Doctrinal Incoherence*, 48 HASTINGS L.J. 771, 771 (1997). *But see* T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning,* West Virginia University Hospitals, Inc. v. Casey, *and Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687, 689 (1992) ("[T]he Court's reliance on 'plain meaning' [in *West Virginia University Hospitals, Inc. v. Casey*] left it wholly uninterested in the legal context in which the statute must operate. The result, at least in this case, is a Court-imposed incoherence, blind both to the manifest congressional purpose and to the real-world consequences of the literalistic reading.").

305. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."); Piqua Branch of the State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369, 392 (1853) (invalidating statute revoking tax exemption received by earlier legislation); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 652 (1819) (striking down statute that attempted to change provisions of charter granted to private college); New Jersey v. Wilson, 11 U.S. (7 Cranch) 164, 167 (1812) (invalidating statute repealing tax exemption granted by legislature years earlier); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810) (striking down Georgia statute rescinding earlier statutory grant of land).

Takings,[306] and Due Process Clauses,[307] and (2) principles of fairness encompassing a wide range of considerations, including equity, justice, and reliance.[308]

Applying these three factors, there are six potential scenarios involving retroactivity: (1) the statute expressly indicates its retroactive intent and there are no constitutional or fairness constraints to implementing the statute retroactively, which results in retroactive application; (2) the statute expressly indicates its retroactive intent, but that intent cannot be implemented due to constitutional or fairness constraints, which results in only prospective application; (3) the statute has an identifiable retroactive effect, the statute indicates a clear intent favoring that result, and there are no constitutional or fairness constraints to implementing the statute retroactively, which results in retroactive application; (4) the statute has an identifiable retroactive effect, the statute indicates a clear intent favoring that result, but that intent cannot be implemented due to constitutional or fairness constraints, which results in only prospective application; (5) the statute has an identifiable retroactive effect but the statute does not indicate a clear intent favoring that result, which according to *Landgraf* results in only prospective application, but, as will be explained below, has not always been the case; and (6) the statute has an identifiable retroactive effect but the court declines to recognize that effect, which results in a de facto retroactive application.

Landgraf's principal contribution was to clarify the limitation on retroactivity in the fifth scenario. *Landgraf* created a bright-line rule: To apply a statute retroactively, clear congressional intent must exist in favor of such retrospective application. Before *Landgraf*, only half of this equation was demonstrable from the Supreme Court's jurisprudence: If the statute was expressly retroactive, the Court would apply its

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306. *See* U.S. CONST. amend. V (stating that private property shall not "be taken for public use, without just compensation"); *id.* amend. XIV; Eastern Enters. v. Apfel, 524 U.S. 498, 537 (1998) (invalidating retroactive economic statute on takings grounds); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028-30 (1992) (recognizing that if state regulations burdening land use are not proscribed by existing state rules, then affected landowner may make takings claim for compensation); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 602 (1935) (dictum); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (holding that if a regulation goes too far it will be recognized as a taking for which compensation must be paid).

307. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."). The Due Process Clause does not prohibit retroactive legislation unless that legislation is harsh and oppressive. *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n.13 (1977) ("The Due Process Clause of the Fourteenth Amendment generally does not prohibit retrospective civil legislation, unless the consequences are particularly 'harsh and oppressive.'") (quoting Welch v. Henry, 305 U.S. 134, 147 (1938)).

308. *See infra* notes 315-49 and accompanying text.

provisions retroactively absent constitutional or fairness concerns. However, the other half was not always true: Sometimes the Court applied a statute retroactively without any clear indication of congressional intent. Accordingly, *Landgraf* is not merely a reconciliation of the Supreme Court's prior decisions; it also created a new rule. Had the Court employed this rule in its prior retroactivity decisions, *Thorpe* and *Bradley* would have been decided differently because, although applied retroactively, neither of the provisions in those cases contained an express indication of retroactive intent.

However, *Landgraf*'s analysis is incomplete with regard to constitutional and fairness concerns, which leaves the application unsatisfying in scenario four, and can cause serious mischief in scenario six. *Landgraf* properly noted the constitutional restraints upon retroactive legislation, mentioning the Ex Post Facto,[309] Bill of Attainder,[310] Contracts,[311] Takings,[312] and Due Process Clauses,[313] consistent with the Court's previous decisions.[314] But *Landgraf* sends mixed messages with respect to considerations of fairness, and it is this area that most seriously undermines *Landgraf*'s purported framework.

In setting out a framework for retroactivity analysis, the *Landgraf* Court unfortunately limited the role that fairness has played in its prior decisions. Themes of fairness reverberate throughout the Court's retroactivity jurisprudence. Moreover, the Court has not merely reviewed one form of fairness, such as whether the legislation would

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309. The Ex Post Facto Clause prohibits retroactive penal legislation. *See* U.S. CONST. art. I, § 10, cl. 1.

310. The Bill of Attainder Clause prohibits Congress from singling out individuals and punishing them summarily for past conduct. *See* U.S. CONST. art. I, §§ 9-10.

311. The Contracts Clause prohibits state legislatures from passing laws interfering with preexisting contractual obligations. *See* U.S. CONST. art. I, § 10, cl. 1; *see, e.g.*, General Motors Corp. v. Romein, 503 U.S. 181, 186-91 (1992) (concluding retroactive legislation could violate Contracts Clause but did not in this instance because Michigan statute did not impair any preexisting contractual obligation); *see also supra* note 305.

312. The Takings Clause prohibits the taking of vested property rights without just compensation. *See* U.S. CONST. amend. V; *see, e.g.*, Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 641-42 (1993) (noting that although retroactive statute conceivably could violate Takings Clause, such a violation would be "surprising" in this instance because statute did not violate Due Process Clause). *See generally* GERALD GUNTHER, CONSTITUTIONAL LAW 465-90 (12th ed. 1991) (observing the Takings and Contracts Clauses have not served as restraints on retroactive legislation when there is a sufficiently overriding public interest); *see also supra* note 306.

313. The Due Process Clause prohibits both the federal and state governments from depriving an individual of life, liberty, or property without due process of law. *See* U.S. CONST. amend. V; *id.* amend. XIV, § 1; Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994). *But see* United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n.13 (1977) ("The Due Process Clause of the Fourteenth Amendment generally does not prohibit retrospective civil legislation, unless the consequences are particularly 'harsh and oppressive.'") (quoting Welch v. Henry, 305 U.S. 134, 147 (1938)); *see also supra* note 307.

314. *See supra* notes 305-07 and accompanying text.

impair vested rights. Instead, the Court has considered a wide range of fairness factors. In *The Schooner Peggy*, the Court noted that courts should "struggle hard against a construction which will, by a retrospective operation, affect the rights of parties."[315] In *Heth*, the Court noted a number of fairness considerations, including "reasonable expectation[s],"[316] "vindicat[ing] the justice of the government[ ] by restricting the words of the law to a future operation,"[317] unwillingness to "divest vested rights,"[318] refusing to "deprive an officer of a compensation previously allowed by law,"[319] and seeking to avoid a construction that was "unreasonable . . . and . . . unjust,"[320] or which would "alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services, and remuneration."[321]

In *Thorpe*, the Court noted two elements of fairness. First, the Court observed that requiring the housing authority to apply the HUD circular's notice provisions did not infringe on the housing authority's rights, nor "even constitute an imposition. The Authority admitted during oral argument that it has already begun complying with the circular."[322] The Court also took express notice of the underlying substantive fairness of providing an enhanced notice procedure, noting

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315. United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

316. United States v. Heth, 7 U.S. (3 Cranch) 399, 408 (1806) (Johnson, J.) ("The rights of the collectors of duties, as to their compensation, are certainly submitted to the justice and honour of the country that employs them, until consummated by the actual receipt of the sums bonded in their respective offices; but where an individual has performed certain services, under the influence of a prospect of a certain emolument, that confidence which it is the interest of every government to cherish in the minds of her citizens, a confidence which experience leaves no room to distrust in our own, would lead to a conclusion, that it could not have been the intention of the legislature to defeat a reasonable expectation of her officer, suggested by her own laws.").

317. *Id.* (Johnson, J.).

318. *Id.* at 414 (Cushing, J.) ("[T]he general and true intent of the latter law was to make a new allowance in lieu of the former only on duties arising on goods imported after the last law came into operation, and not to have a retrospective effect, to divest vested rights of the collector.").

319. *Id.* at 412 (Washington, J.) ("I cannot, therefore, consent to such an interpretation of this law, as to give it a retrospective operation, so as to deprive an officer of a compensation previously allowed by law, for services admitted by the legislature to deserve compensation, and to be in their nature severable, from the ultimate act of the money being received or collected, provided those acts are in reality performed.").

320. *Id.* at 411-12 (Washington, J.) (noting that to accept the Attorney General's construction "would have the effect of raising the compensation of some collectors, and depressing that of others, for services partly performed at the same time, and in some instances, where those which remained to be done, in order to consummate the right to the commissions, were transferred from the collectors to the banks. This would, I think, be unreasonable, and, in the instances of diminished commissions, would be unjust"); *see also id.* at 414 (Cushing, J.) (characterizing retroactive construction as "unreasonable" unless the legislation "contained express words to that purpose").

321. *Id.* at 413 (Paterson, J.) (stating the presumption against retroactivity "ought especially to be adhered to, when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services, and remuneration").

322. Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 283 (1969).

the circular's provisions were "designed to insure a fairer eviction procedure in general."[323]

In *Bradley*, the Court made several observations relating to fairness considerations. The Court noted the class action plaintiffs had "rendered substantial service both to the Board itself, by bringing it into compliance with its constitutional mandate, and to the community at large by securing for it the benefits assumed to flow from a nondiscriminatory educational system."[324] The Court also noted the burden under which the plaintiffs had struggled:

> [F]rom the beginning the resources of opposing parties have been disproportionate. Ranged against the plaintiffs have been the legal staff of the City Attorney's office and retained counsel highly experienced in trial work. . . . Few litigants—even the wealthiest—come into court with resources at once so formidable and so suited to the litigation task at hand. . . .
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> Moreover, this sort of case is an enterprise on which any private individual should shudder to embark. . . . To secure counsel willing to undertake the job of trial . . . necessarily means that someone—plaintiff or lawyer—must make a great sacrifice unless equity intervenes.[325]

The *Bradley* Court further examined potential inequities to the Board, noting that other theories supported a fee award so there was no indication the Board would otherwise have avoided these costs.[326] Thus, the new statute "merely serves to create an additional basis or source for the Board's potential obligation to pay attorneys' fees. It does not impose an additional or unforeseeable obligation upon it."[327]

In *Bennett*, the Court examined fairness in the context of reliance interests;[328] *Bonjorno* looked at the fairness of changing a particular rate of postjudgment interest in the context of vested rights.[329]

Landgraf partially acknowledged these fairness principles, noting retroactivity doctrine itself has its underlying basis in "[e]lementary

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323. *Id.*

324. Bradley v. School Bd. of Richmond, 416 U.S. 696, 718 (1974).

325. *Id.* at 718 n.25.

326. *Id.* at 721.

327. *Id.*

328. Bennett v. New Jersey, 470 U.S. 632, 640 (1985) (stating that retroactive application "would deny both federal auditors and grant recipients fixed, predictable standards for determining if expenditures are proper").

329. *See* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 860-61 (1990) (White, J., dissenting) ("Though the majority never uses the dreaded word, it clearly wants to say that Kaiser's right to a particular rate of postjudgment interest 'vested' at the date of entry of judgment. Only the concept of 'vestedness' fully explains the link that the majority makes between Kaiser's 'fixed' expectations and its ability to make 'informed' decisions.").

considerations of fairness."[330] The Court also noted "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" in evaluating retroactivity.[331] In addition, in the context of attempting to reconcile the *Bradley* decision, the Court noted the equitable considerations in *Bradley*, stating "it would be difficult to imagine a stronger equitable case for an attorney's fee award than a lawsuit in which the plaintiff parents would otherwise have to bear the costs of desegregating their children's public schools."[332]

However, despite noting these fairness principles, the *Landgraf* Court declared that "[a]bsent a violation of [a constitutional restriction], the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope."[333] Thus, in addition to limiting the broad concepts of fairness found in its earlier jurisprudence, *Landgraf* downplayed the importance of fairness as a determining factor in retroactivity analysis, despite its decisive significance to *Heth*, *Thorpe*, *Bradley*, *Bennett*, and *Bonjorno*. After *Landgraf*, the Court again mentioned these same limited fairness concepts in *Hadix*, taking note of "fair notice, reasonable reliance, and settled expectations," and observed that imposing the new statute retroactively "would upset the reasonable expectations of the parties."[334]

Given the consistency with which the Court has invoked various notions of fairness in its retroactivity decisions, the limited consideration of fairness as an articulated factor in *Landgraf*'s suggested retroactivity analysis is striking. Indeed, it is the fairness factor that renders the Court's retroactivity jurisprudence a cohesive whole. The two seeming "aberrations" to retroactivity doctrine—*Thorpe* and *Bradley*—fit more readily when fairness is added into the calculus. When we permit ourselves to examine *Thorpe* and *Bradley* using a broad, *noneconomic*, definition of fairness,[335] we can see the result clearly: The Court achieved an equitable and just result under the circumstances presented, and did so without imposing any genuine burden on the nonprevailing party.

Why, then, did the Court undercut the fairness factor in *Landgraf*? The answer can be traced to Justice Scalia's concurrence in *Bonjorno*: The perception that the potential vagaries of "fairness" raise the spectre of judicial activism.

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330. Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").

331. *Id.* at 270.

332. *Id.* at 277.

333. *Id.* at 267.

334. Martin v. Hadix, 527 U.S. 343, 358-60 (1999).

335. *See infra* notes 344-47 and accompanying text.

> Once one begins from the premise of *Thorpe* and *Bradley* that, contrary to the wisdom of the ages, it is not in and of itself unjust to judge action on the basis of a legal rule that was not even in effect when the action was taken, then one is not really talking about "justice" at all, but about mercy, or compassion, or social utility, or whatever other policy motivation might make one favor a particular result. A rule of law, designed to give statutes the effect Congress intended, has thus been transformed to a rule of discretion, giving judges power to expand or contract the effect of legislative action. We should turn this frog back to a prince as soon as possible.[336]

The *Landgraf* Court's solution to this perceived problem was to leave potential fairness issues to Congress. The *Landgraf* Court noted the legislature's "unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."[337] Perplexingly, however, after observing these potential dangers, the Court concluded that expressly retroactive legislation could be limited only by constitutional violations, not by considerations of fairness.[338] Thus, the Court clearly indicated that it was leaving the fairness factor to Congress.[339] Although the representative nature of Congress may often render a congressional determination reasonable, Congress is also susceptible to political pressures, arrogance, prejudice, and plain error. In short, Congress is composed of individuals—all of whom have human shortcomings.

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336. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 857 (Scalia, J., concurring); *see also* Burnham v. Superior Court, 495 U.S. 604, 623 (1990) (criticizing the concurrence's proposed standard of "contemporary notions of due process" as measuring "state-court jurisdiction not only against traditional doctrines in this country, including current state-court practice, but also against each Justice's subjective assessment of what is fair and just," rendering the proposed standard "subjectiv[e], and hence inadequa[te]").

337. *Landgraf*, 511 U.S. at 266.

338. *See id.* at 267 ("The Constitution's restrictions, of course, are of limited scope. Absent a violation of one of those specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope.").

339. *See id.* at 268 ("[A] requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness."). The Court thereafter observed "[a]ny test of retroactivity will leave room for disagreement in hard cases," *id.* at 270, and noted "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance," *id.* Yet the Court ultimately abdicated any responsibility for examining considerations of fairness, leaving that to Congress. *See id.* at 272-73 ("Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate.").

Fairness is the concept that gives rules legitimacy.[340] Our country was founded on a system whereby the judiciary serves as the check on the legislative and executive branches.[341] Deferring to a congressional desire to impose a new rule retroactively, without scrutinizing whether the new rule violates principles of fairness, is expedient—but it is a process by which courts abdicate their constitutional responsibilities.

As history has demonstrated, legislators are not immune from prejudice.[342] Particularly when legislation is aimed at, or may

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340. *See* Fisch, *supra* note 1, at 1084 ("If the Constitution does not provide adequate tools to determine the temporal limits of judicial and legislative lawmaking—either because it does not speak to the question or because constitutional analysis requires threshold determinations about the nature of lawmaking and institutional roles—further development of retroactivity doctrine must look to prudential considerations. . . . Fairness arguments about retroactivity are based on principles of equity and justice.").

341. *See* Charles Pinckney, *Observations on the Plan of the Government Submitted to the Federal Convention*, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 106, 108 (Max Farrand ed., 1966) ("In a government, where the liberties of the people are to be preserved, and the laws well administered, the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check upon each other."); *see also* Bowsher v. Synar, 478 U.S. 714, 722 (1986) (stating the declared purpose of dividing government powers into legislative, executive, and judicial branches was to preserve liberty by providing "avenues for the operation of checks on the exercise of governmental power"); *accord* INS v. Chadha, 462 U.S. 919, 960-62 (1983) (Powell, J., concurring).

342. Our country's laws regarding slavery and racial segregation provide the two most prominent historical examples. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 393-94 (1978) ("In the wake of *Plessy* [*v. Ferguson*], many States expanded their Jim Crow laws . . . . The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts. . . . In many of the Northern States, the Negro was denied the right to vote, prevented from serving on juries, and excluded from theaters, restaurants, hotels, and inns. Under President Wilson, the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated. . . . In both World Wars, Negroes were for the most part confined to separate military units . . . . And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here."); Loving v. Virginia, 388 U.S. 1, 7 (1967) (finding Virginia's law prohibiting racial intermarriage was "obviously an endorsement of the doctrine of White Supremacy"). Legislative enactments have also reflected racial prejudice against citizens of Chinese and Japanese descent. *See* Oyama v. California, 332 U.S. 633, 650 (1948) (Murphy, J., concurring) (stating that California's Alien Land Law "is nothing more than an outright racial discrimination" against Japanese); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (finding municipal ordinance a covert attempt on the part of the municipality to arbitrarily and unjustly discriminate against the Chinese race). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 152-60 (1980) (legislators are driven to serve those most like themselves and therefore are naturally prone to prejudice and discrimination; legislation should be suspect, and thus subject to searching judicial scrutiny, when it burdens groups unable fully to participate in the political process due to some prejudice against them); Rebecca E. Zietlow, *Exploring a Substantive Approach to Equal Justice Under Law*, 28 N.M. L. REV. 411, 423 (1998) ("Legislators may be motivated to cut governmental benefits programs and restrict eligibility for those programs by prejudice against those recipients based on their race, class and gender when they equate poverty with those other immutable characteristics."); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3 (1994) ("[T]he law serves not only to reflect but to solidify social prejudice, making law a prime instrument in the construction and reinforcement of racial

disproportionately impact, disenfranchised groups, judicial review of the fairness of retroactive application is crucial to maintaining the integrity of our system of justice. Thus, in accordance with our system of checks and balances, it is fundamentally inappropriate—as well as inconsistent with the Court's prior decisions—to leave fairness solely to congressional determination.[343]

Furthermore, following *Landgraf*, the Court compounded its default by limiting fairness issues to economic terms alone. The current Court has acknowledged potential fairness concerns—but only those that can be cast in economic terms: In its most recent retroactivity decision, the Court noted concepts of "reliance" and "settled expectations."[344] The Court apparently views economic terms as more objective, and less susceptible to potential judicial activism, than a definition of fairness that would permit broader policy considerations. This approach is fundamentally flawed.

The use of economic terms may initially seem unremarkable in light of the specifically civil context in which they appear. However, the Court has previously noted traditional notions of fairness do not typically apply to economic legislation.[345] Moreover, it is counterintuitive to consider economic "reliance" or "expectational" interests in the context of "adjustments" to areas already legislated. If Congress creates economic rights or liabilities in an area, certainly it can be expected that Congress might one day tinker with those rights or liabilities. Accordingly, this reality would seem to eliminate any potential "reliance" or "expectation" in a particular economic statutory provision.

In addition, the use of economic considerations of fairness (which in application invariably are modified by the word "reasonable," as in "reasonable reliance" or "reasonable expectations") inevitably results in

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subordination. Judges and legislators, in their role as arbiters and violent creators of the social order, continue to concentrate and magnify the power of race . . . .") (footnote omitted); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 15 ("Subject only to their oath to uphold the Constitution, they [legislators] are free to reflect majority prejudices, to respond to the squeakiest wheel among minorities, to trade votes and make compromises, and to ignore problems that have no votes in them."); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 443 (1985) (noting legislators, both federal and state, have addressed the plight of the mentally retarded "in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary").

343. The circuit courts have continued to consider fairness in evaluating retroactivity. *See, e.g.*, Gross v. Weber, 186 F.3d 1089, 1091 (8th Cir. 1999) ("[F]airness [is] important in considering retroactivity issues.") (quoting Viacom Inc. v. Ingram Enters., Inc., 141 F.3d 886, 889 (8th Cir. 1998)); Aiken v. City of Memphis, 37 F.3d 1155, 1177 (6th Cir. 1994).

344. Martin v. Hadix, 527 U.S. 343, 360 (1999).

345. *See* Usery v. Turner Elkhorn Mining, 428 U.S. 1, 44 (1976) (Powell, J., concurring) ("Nor does the Constitution require that legislation on economic matters be compatible with sound economics or even with normal fairness.").

precisely the same kind of policy determinations as noneconomic considerations of equity and justice.[346]

The use of economic terms imposes an unnecessarily rigid structure in reviewing retroactive civil legislation for fairness, simply because "fairness" is not always synonymous with "reliance."[347] The "fairness" of applying a civil statute retroactively may instead encompass, among other things, notions of disproportionate burden, disproportionate impact, discrimination, arbitrariness, and unreasonableness. In other words, "fairness" should equate with equity and justice, as well as reliance.

Thus, there are two concerns regarding the *Landgraf* Court's approach to fairness. One concern is the Court's articulated deference to Congress; the other is a definitional concern. In criticizing the Court's deference to Congress, I do not mean to suggest that the judiciary should act as a "'superlegislature to weigh the wisdom of legislation.'"[348] However, in determining retroactivity, "reliance" and "settled expectations" will sometimes impermissibly narrow the court's inquiry. Retroactive application of a statute may be unfair absent reliance. Accordingly, when reviewing noneconomic legislation, such as immigration law, "fairness" may require a broader definition, consistent with the Court's pre-*Landgraf* decisions.[349]

Accordingly, current retroactivity analysis looks first for express retroactivity or a retroactive effect. The court next looks for a clear expression of congressional intent to apply the statute retroactively. If retroactive intent is evident, constitutional constraints and fairness concerns may operate to prevent retroactive application.

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346. *Compare* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 840 (1990) (refusing to apply amended postjudgment interest statute because rights became fixed at the date of entry of judgment), *with Hadix*, 527 U.S. at 360 (applying amended attorney fee statute to case in which judgment already entered and postjudgment monitoring ongoing).

347. Indeed, it was the Court's rigid adherence to a "fairness equals reliance" equation that caused its erroneous results in *Bonjorno* and *Hadix*. In *Bonjorno*, the Court focused upon Kaiser's reliance on an existing postjudgment interest statute—to the exclusion of other potential fairness considerations—and thus wrongly concluded an amended statute could not apply. In *Hadix*, the Court concluded the attorneys could not have relied upon an existing fees provision with respect to work not yet performed, and thus wrongly concluded that an amended statute should apply.

348. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124 (1978) (quoting Ferguson v. Skrupa, 372 U.S. 726, 731 (1963)).

349. *See supra* notes 315-29 and accompanying text.

IV. APPLYING CURRENT RETROACTIVITY ANALYSIS TO THE MANDATORY DETENTION PROVISIONS OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 AND THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

As discussed at the beginning of this Article, the 1996 amendments to the Immigration and Nationality Act changed provisions pertaining to mandatory detention.[350] Before applying retroactivity doctrine to these amendments, there is a potentially distracting, although ultimately inapplicable, concept to address first: the plenary power doctrine.

A. The Plenary Power Doctrine

A much-discussed distinction between immigration law[351] and other areas of the law is the plenary power doctrine.[352] Theoretically, the plenary power doctrine provides that immigration matters are wholly outside the judiciary's scope of inquiry and that the authority of the legislative and executive branches over immigration matters is absolute.[353] Commentators have roundly criticized the plenary power

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350. A comprehensive discussion of the impact of AEDPA and IIRIRA's mandatory detention provisions peripherally implicates other provisions within those Acts. For example, AEDPA amended the definition of crimes constituting "aggravated felonies," which has expanded the number of noncitizens subject to deportation. *See* AEDPA § 440(e), 110 Stat. at 1277-78 (repealed by IIRIRA 1996). These individuals, many of whom served their sentences years ago and then returned to their jobs and families believing they had paid their debt to society, are now subject to mandatory detention and deportation upon being brought to the government's attention by events as innocuous as returning from a trip abroad. *See* Zgombic v. Farquharson, 89 F. Supp. 2d 220, 222-23 (D. Conn. 2000). Another example is the elimination of waiver applications, which had provided the possibility of discretionary relief from deportation. *See* AEDPA § 440(d) (amending Immigration and Nationality Act § 212(c) (codified at 8 U.S.C. § 1182(c))); *Zgombic*, 89 F. Supp. 2d at 223-24. *See generally* Morawetz, *supra* note 11; Griffith, *supra* note 19, at 65. However, as explained *supra* at note 19, this Article addresses only the retroactive application of the mandatory detention provisions.

351. I use the term "immigration law" to connote the body of law governing the admission to and expulsion from the United States of individuals who are not U.S. citizens. *See* Motomura, *supra* note 10, at 547 (distinguishing "immigration law" from "the more general law of aliens' rights and obligations, which includes, for example, their tax status, military obligations, and eligibility for government benefits and certain types of employment"); *see also* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256 (same).

352. *See* U.S. CONST. art. I, § 8, cl. 4; Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to* Is There a Plenary Power Doctrine?, 14 GEO. IMMIGR. L.J. 289, 305 (2000) (noting plenary power doctrine "is perhaps the most heavily analyzed doctrine in contemporary immigration law scholarship").

353. *See* Motomura, *supra* note 10, at 547 ("Congress and the executive branch have broad and often exclusive authority over immigration decisions. Accordingly, courts should only rarely, if ever, and in limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled."); *see also* Morawetz, *supra* note 11, at 123 ("[T]he 'plenary power' doctrine [is] understood as

doctrine,[354] and it is widely regarded as a declining concept.[355]

Taken to its limit, the plenary power doctrine would eliminate any judicial review of an immigration statute's constitutionality, creating complete deference to Congress in this arena and rendering the synthesis in Part III useless for immigration issues.[356] Fortunately, after initially applying the doctrine liberally,[357] the courts subsequently

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shielding immigration statutes from any meaningful judicial review . . . ."). The Supreme Court, in its classic statement of plenary power in immigration law, observed, "[If Congress] considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, . . . its determination is conclusive upon the judiciary." Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889). The Supreme Court extended this reasoning to the deportation context four years later. *See* Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."). "The theory underlying the bar to judicial review was that, because Congress and the Executive Branch possess 'plenary power' over immigration matters, which implicate foreign relations, there is no room for the courts to interfere." Kevin R. Johnson, *Judicial Acquiesence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers*, 7 GEO. IMMIGR. L.J. 1, 28 (1993).

354. *See, e.g.*, GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 118-38 (1996); Note, *supra* note 19, at 1852 ("Scholars have long argued that the plenary power doctrine is misguided . . . ."); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1627, 1631 (1992) (noting "plenary power doctrine has eroded significantly in the past few decades"); Aleinikoff, *supra* note 44, at 10-20; Motomura, *supra* note 10, at 547 (noting the gradual demise of plenary power doctrine); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 853-54 (1987); Legomsky, *supra* note 351, at 255 (asserting Supreme Court should abandon special deference given to Congress in immigration matters); Schuck, *supra* note 13, at 34-53; Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1389-96 (1953).

355. *See* Morawetz, *supra* note 11, at 124-25 ("[D]espite the longevity of the case law proclaiming that the courts should abstain from reviewing cases involving immigration matters, there is little current logic to the doctrine. Whatever its merits when it was first announced . . . the doctrine cannot be squared with contemporary notions of the role of the courts in checking the arbitrary exercise of governmental power."); Motomura, *supra* note 10, at 610-11 ("[T]he plenary power doctrine has lost much of its force. From this broader perspective, the practical demise of the plenary power doctrine seems closer in time."); Legomsky, *supra* note 351, at 305 (predicting plenary power doctrine "will be frankly disavowed" when judges recognize that the doctrinal theories cannot be defended); *see also* Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1, 3 (concluding plenary power doctrine is inappropriate in immigration and nationality law).

356. *See* Pauw, *supra* note 13, at 312 ("Under the plenary power doctrine, there is no (or very little) role for courts to play in reviewing an immigration statute for its constitutionality. Accordingly, constitutional limitations that may apply in other contexts have little force in the immigration context.") (footnote omitted).

357. *See* Motomura, *supra* note 10, at 550-60 (tracing development of plenary power doctrine and classic immigration law).

reduced their use of the plenary power.[358] Although still invoked,[359] more often the courts have reached the merits of the issues raised in immigration cases rather than dodging those issues by invoking the plenary power doctrine.[360] As one commentator has noted, "despite the rhetoric of absolute congressional power over immigration matters, there is doctrinal room for consideration of specific challenges to laws governing deportation."[361]

This has been particularly true in cases involving mandatory detention, which threatens the deprivation of a fundamental liberty interest.[362] In asking whether the plenary power doctrine prohibits judicial review of this issue, the answer is a particularly emphatic "no," for two reasons. First, although the plenary power doctrine requires judicial deference to substantive immigration matters, mandatory detention goes to the procedures used to effectuate policy, not immigration policy itself.[363] Thus, judicial deference is not mandated in

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358. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 940-41 (1983) ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (holding Congress may not disregard constitutional rights of aliens to life, liberty, and property without due process of law).

359. *See, e.g.*, Zadvydas v. Underdown, 185 F.3d 279, 294 (5th Cir. 1999) ("Zadvydas' detention is currently within the core area of the government's plenary immigration power and thus does not violate substantive due process."), *cert. granted*, 121 S. Ct. 297 (2000).

360. *See, e.g.*, *Chadha*, 462 U.S. at 956-59 (noting plenary power of Congress over immigration must be implemented by constitutionally permissible means); Fiallo Jordan v. De George, 341 U.S. 223 (1951) (recognizing Congress' broad power over immigration but holding severity of consequences of deportation warranted review of void-for-vagueness challenge to deportation statute); Ma v. Reno, 208 F.3d 815, 826-27 n.24 (9th Cir. 2000) ("[T]he Supreme Court's cases make clear that the plenary power doctrine does not apply in the same way to each case to which it is relevant, and that its exercise is subject to constitutional restraints."), *cert. granted sub nom.* Zadvydas v. Underdown, 121 S. Ct. 297 (2000); *see also* Motomura, supra note 10, at 608 ("Signs of change now appear on the horizon, in the form of expressly constitutional lower court decisions that have refused to accept the plenary power doctrine as controlling.").

361. Morawetz, *supra* note 11, at 131.

362. *See, e.g.*, *In re* Indefinite Detention Cases, 82 F. Supp. 2d 1098, 1100-01 (C.D. Cal. 2000) ("[D]etention . . . clearly triggers 'heightened, substantive due process scrutiny,' not judicial deference.") (quoting Reno v. Flores, 507 U.S. 292, 316 (1993) (O'Connor, J., concurring)); Sok v. INS, 67 F. Supp. 2d 1166, 1166 (E.D. Cal. 1999) (evaluating due process implications of mandatory detention without any mention of plenary power doctrine).

363. *See* Phan v. Reno, 56 F. Supp. 2d 1149, 1155 (W.D. Wash. 1999) ("While the plenary power doctrine supports judicial deference to the legislative and executive branches on substantive immigration matters, such deference does not extend to post-deportation order detention."); *see also Chadha*, 462 U.S. at 940-41 ("The plenary authority of Congress over aliens . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."); Rogowski v. Reno, 94 F. Supp. 2d 177, 183 (D. Conn. 1999) ("Petitioner's objection to his detention under § 236 challeng[es] the method by which the immigration statutes are implemented. Because petitioner raises a procedural, rather than policy, issue, he does not challenge Congress's plenary authority over immigration.") (alteration in original) (citation and internal quotation marks omitted); Danh v. Demore, 59 F. Supp. 2d 994, 999-1000 (N.D. Cal. 1999) ("[The mandatory detention provision] triggers heightened review because it does not reflect a substantive decision over immigration policy, but rather a

this area, and exercising deference would inappropriately shield procedures from review. Second, even aside from this Article's earlier observations about the decline of the doctrine,[364] AEDPA and IIRIRA expressly provide for judicial review of certain deportation decisions if they raise a "substantial constitutional question."[365] A recent Supreme Court decision clarified this standard,[366] concluding that the reference to a "substantial constitutional question" is merely a codification of the "substantial federal question" standard set forth in *Barefoot v. Estelle*.[367] Mandatory detention implicates the deprivation of a fundamental liberty interest, which triggers substantive due process scrutiny and thus satisfies the standard under any interpretation. Therefore, the plenary power doctrine does not preclude judicial review of the mandatory detention provisions of these amendments.[368]

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means for effectuating such a decision. Although Congress has broad authority to decide what classes of aliens should be deported, the same is not true of *how* those aliens are treated pending deportation."); Martinez v. Greene, 28 F. Supp. 2d 1275, 1281 (D. Colo. 1998) (finding plenary power did not preclude review because "[p]etitioners do not dispute Congress' plenary authority over *substantive* immigration decisions . . . . Rather, Petitioners challenge the *method* by which the immigration statutes are implemented").

364. *See supra* notes 358-61 and accompanying text.

365. *See, e.g.*, 28 U.S.C. § 2253(c)(2) (Supp. III 1997) ("A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.").

366. *See* Slack v. McDaniel, 529 U.S. 473 (2000). *Slack* involved a petition for habeas corpus which both the district and circuit courts denied on procedural grounds. Before the Supreme Court, the State contended that "no appeal can be taken if the District Court relies on procedural grounds to dismiss the petition. According to the State, only constitutional rulings may be appealed." *Id.* at 554. The Court rejected the State's position, noting, "[u]nder this view, a state prisoner who can demonstrate he was convicted in violation of the Constitution and who can demonstrate that the district court was wrong to dismiss the petition on procedural grounds would be denied relief." *Id.* Instead, the Court held the applicable standard "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* at 554-55 (quoting Barefoot v. Estelle, 436 U.S 880, 893 & n.4 (1983)). The Court explained,

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Id. at 604.

367. 463 U.S. 880 (1983).

368. The federal courts have borne out this conclusion. AEDPA and IIRIRA have generated numerous lawsuits challenging their provisions. However, the courts generally have not found the plenary power doctrine to preclude review of those challenges. *See, e.g.*, Ma v.Reno, 208 F.3d 815, 821 n.13 (9th Cir. 2000), *cert. granted sub nom.* Zadvydas v. Underdown, 121 S. Ct. 297 (2000); *id.* at 826 n.24; Zgombic

Accordingly, retroactivity principles apply to the 1996 amendments to the mandatory detention provisions.[369]

The first step in retroactivity analysis is to determine which statute applies and if that statute is retroactive or would have a retroactive effect.[370]

B. Step One: Mandatory Detention, Retroactive Intent, and Retroactive Effect

AEDPA's effective date was April 24, 1996.[371] IIRIRA was enacted September 30, 1996, and became effective April 1, 1997.[372] Although AEDPA and IIRIRA have different impacts in other areas, they have a

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v. Farquharson, 89 F. Supp. 2d 220, 228 (D. Conn. 2000); *In re* Indefinite Detention Cases, 82 F. Supp. 2d 1098, 1101 (C.D. Cal. 2000); Hermanowski v. Farquharson, 39 F. Supp. 2d 148, 155-63 (D.R.I. 1999); Mojica v. Reno, 970 F. Supp. 130, 157 (E.D.N.Y. 1997).

369. Discretionary policy questions arising from ambiguous legislation are subject to administrative interpretation. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-45 (1984). However, questions of statutory construction are for the judiciary. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction . . . ."). Retroactive application of ambiguous statutory provisions is not within the scope of *Chevron*'s deference to administrative interpretation. *See* Bell v. Reno, 218 F.3d 86, 93 (2d Cir. 2000) (noting agency's interpretation "is not sustainable because it runs afoul of the longstanding presumption against the retroactive application of ambiguous statutory provisions" and applying *Landgraf*), *cert. denied*, 121 S. Ct. 784 (2001). The question of a statute's effective date is generally considered a pure question of law for courts to decide. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (stating that retroactivity and temporal scope of statutes are considered "pure question[s] of statutory construction for the courts to decide"); Sandoval v. Reno, 166 F.3d 225, 239-40 (3d Cir. 1999) ("[T]he question of a statute's effective date appears to present 'a pure question of statutory construction for the courts to decide.'") (quoting *Cardoza-Fonseca*, 480 U.S. at 446); Goncalves v. Reno, 144 F.3d 110, 113 (1st Cir. 1998) ("That pure issue of law, of whether Congress intended to make a particular provision of a statute retroactive, is of a type traditionally resolved by the courts."), *cert. denied*, 526 U.S. 1004 (1999). Accordingly, the determination of retroactivity may be made "without affording any deference to the Attorney General." Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1148 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1539 (2000).

370. Various provisions of AEDPA and IIRIRA have different effective dates. Some provisions are expressly retroactive. *See, e.g.*, IIRIRA § 321(b), 110 Stat. at 3009-628 (codified at 8 U.S.C. § 1101 note (Supp. II 1996)) (changing "aggravated felony" definition to apply to convictions entered before, on or after IIRIRA's enactment date). Some provisions are explicitly limited to convictions suffered after the statute's effective date. *See, e.g.*, AEDPA § 440(f), 110 Stat. at 1278 (codified at 8 U.S.C. § 1101 note (Supp. II 1996)) (limiting application of new "aggravated felony" definition to offenses committed on or after enactment date). Some provisions apply to individuals in deportation proceedings after the statute's effective date. *See, e.g.*, AEDPA § 435(b), 110 Stat. at 1275 (codified at 8 U.S.C. § 1227 note (Supp. II 1996)) (limiting application of new "moral turpitude" definition prospectively to individuals not yet in deportation proceedings). Some apply to individuals in deportation proceedings six months after the statute's effective date. *See, e.g.*, IIRIRA § 309(a), 110 Stat. at 3009-625 (codified at 8 U.S.C. § 1101 note (Supp. II 1996)) (setting forth IIRIRA's general effective date). Still other provisions say nothing about when they are to take effect. *See, e.g.*, AEDPA § 440(d), 110 Stat. at 1277, *repealed by* IIRIRA 1996.

371. *See* AEDPA § 435(b), 110 Stat. at 1275 (codified at 8 U.S.C. § 1227 note (Supp. II 1996)); *see also Mojica*, 970 F. Supp. at 158 (E.D.N.Y. 1997) ("On April 24, 1996, the AEDPA became law.").

372. *See* IIRIRA § 309(a), 110 Stat. at 3009-625 (codified at 8 U.S.C. § 1101 note (Supp. II 1996)) (setting forth general effective date of IIRIRA).

similar effect with respect to detention in that both require mandatory detention without regard to flight risk or danger to the community.[373] If applied retroactively, both potentially change an individual's eligibility for discretionary relief because both were immediately preceded by rules (the pre-1996 law and the Transition Period Custody Rules, respectively) permitting the release of individuals who could demonstrate they would not pose a danger to the community and were not a flight risk.

Neither AEDPA nor IIRIRA's mandatory detention provisions contains language indicating an intent that they should apply retroactively.[374] Absent a clear legislative expression of retroactive intent, the next step is to examine whether these provisions have a retroactive effect.

However, this raises a preliminary question: Exactly what constitutes "retroactivity"?[375] Is the result determined by the provision in effect (1) when the noncitizen committed the criminal offense,[376] (2) when the noncitizen was convicted,[377] (3) when the INS instituted deportation proceedings,[378] (4) when the deportation order became administratively

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373. As of February 1999, the INS was detaining approximately 16,400 immigrants. *See Hearing on Criminals* [sic] *Aliens and Border Patrol Funding Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 3 (1999) (statement of Doris Meissner, Commissioner, Department of Justice, Immigration and Naturalization Service), available at <http://www.house.gov/judiciary/106-10.htm> (visited July 21, 2000).

374. *See* AEDPA, § 440(c), 8 U.S.C. § 1252(a)(2) (Supp. II 1996) (Amendments); IIRIRA, 8 U.S.C. § 1226(c)(1) (Supp. III 1997); *see also* IIRIRA § 309(c)(1) (barring application of IIRIRA provisions "in the case of an alien who is in exclusion or deportation proceedings" before its effective date). One court has noted this latter retroactivity provision "is not a model of clarity," observing, "The natural reading of the clause would thus seem to be that it applies only to proceedings that are pending as of the effective date," but that a "problem is created by the statute's usage of 'before,' which might be read to imply that the statute only affects those that were free of any involvement in deportation proceedings prior to the effective date." Zadvydas v. Underdown, 185 F.3d 279, 286 n.7 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297 (2000). The court characterized Zadvydas as "not in deportation proceedings—the order regarding his deportation was issued and became final long before IIRIRA's effective date, and only the physical act of deportation remains undone." *Id.* at 286. The court applied IIRIRA's provisions to Zadvydas. *See id.* at 286-87.

375. *See supra* notes 299-302 and accompanying text.

376. *See* Zgombic v. Farquharson, 89 F. Supp. 2d 220, 233 (D. Conn. 2000) ("[T]he operative event for determining whether the 1996 amendments should apply is the actual commission of the crime for which Zgombic now faces removal."); *Mojica*, 970 F. Supp. at 175 ("Retroactivity depends on when the crime is committed . . . .").

377. *See* Mattis v. Reno, 212 F.3d 37 (1st Cir. 2000) ("[A]n alien's decisions and actions during his deportation proceedings, and not his underlying criminal act, [is] the 'relevant past event' for purposes of the retroactivity analysis."). *But see Mojica*, 970 F. Supp. at 175 ("Even if retroactivity is measured from conviction rather than from commission of the crime it is suspect. Once the individual is accused of a crime and has to make choices during criminal proceedings, he or she begins actual reliance on expectations of the law. In criminal proceedings the accused faces a number of choices. . . . Those consequences include whether the plea will lead to deportation.").

378. *See* Ho v. Greene, 204 F.3d 1045, 1055 n.8 (10th Cir. 2000) (noting "[a]rguably, . . . the statute in effect at the time deportation proceedings were commenced . . . may govern . . . continued detention").

final,[379] or (5) when the matter comes before a court, *i.e.* does the provision apply to pending cases?[380]

Due to the number of recent changes to the mandatory detention provisions, a noncitizen may be subject to different results depending on which event is deemed determinative. Accordingly, the determination of the operative event assumes critical importance.

In light of the significant changes wrought by AEDPA and IIRIRA, and the fundamental liberty interest at stake, most courts have concluded the appropriate operative event is the commission of the criminal offense.[381] The touchstone for "retroactive effect" is whether the new provision attaches new legal consequences to events completed before its enactment.[382] "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event."[383]

Do AEDPA and IIRIRA's mandatory detention provisions "attach[ ] new legal consequences to events completed before its enactment"? Yes.[384] The impact of retroactivity stems from the two pri-mary changes

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379. *See* Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999) (using finality of deportation order as operative event), *cert. granted*, 121 S. Ct. 297 (2000).

380. *See In re* Noble, No. 3301, 1997 WL 61453 (BIA Jan. 16, 1997) (interim decision) (holding that section 1226(c) applies to noncitizens released both before and after the statute's effective date).

381. *See Mojica*, 970 F. Supp. at 175 ("Retroactivity depends on when the crime is committed, and not on any later date. In a system of law people have a right to know the possible consequences of their actions and to know that these consequences will not lightly be changed."); *see id.* ("Even if retroactivity is measured from conviction rather than from commission of the crime it is suspect. Once the individual is accused of a crime and has to make choices during criminal proceedings, he or she begins actual reliance on expectations of the law. In criminal proceedings the accused faces a number of choices. . . . Those consequences include whether the plea will lead to deportation."). Occasionally courts have declined to find retroactive effect by noting the noncitizen likely did not commit the underlying offense in reliance on the availability of discretionary relief. *See* Tasios v. Reno, 204 F.3d 544, 549 (4th Cir. 2000) ("[N]o one could reasonably rely 'on the availability of a discretionary waiver of deportation when choosing to engage in illegal drug activity.'") (quoting De Osorio v. INS, 10 F.3d 1034, 1042 (1993)); LaGuerre v. Reno, 164 F.3d 1035, 1041 (7th Cir. 1998) ("It would border on the absurd to argue that these aliens might have decided not to commit drug crimes, or might have resisted convictions more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation."), *cert. denied*, 120 S. Ct. 1157 (2000). However, actual reliance is not the determining factor. *See* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 947-48 (1997) (evaluating the retroactive effect of amendment to the False Claims Act, and focusing on the consequence to the company once a claim was brought); Zgombic v. Farquharson, 89 F. Supp. 2d 220, 232 n.10 (D. Conn. 2000) (noting "[i]ndividuals are presumed to act against a backdrop of legal obligations. Whether or not the operative conduct might have been different, the immigrant has a presumptive right to the imposition of only those consequences which could have attached at the time he committed his act.") (alteration in original) (citations and internal quotation marks omitted).

382. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 269-70 (1994).

383. *Id.* at 270.

384. *See Zgombic*, 89 F. Supp. 2d at 233 ("Prior to enactment of the 1996 amendments, commission of certain crimes meant only the possibility of deportation. Afterwards, it means the certainty of

implemented by the AEDPA and IIRIRA amendments. First, applying either of the new provisions eliminates the possibility of posting bond to obtain release from detention.[385] Second, both amend-ments authorize potentially indefinite detention. Accordingly, both changes are significant because both impact upon a noncitizen's liberty.

The new amendments deprive noncitizens of the ability to bring equitable considerations to bear in their respective cases. Discretionary relief is no longer available from the courts. In addition, noncitizens now potentially face indefinite detention—permanent incarceration. A liberty restriction of potentially permanent duration is obviously a new "legal consequence" for behavior already committed.[386]

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deportation. The replacement of a discretionary regime with a mandatory one is of momentous formal and practical significance. New legal consequences (automatic as opposed to possible deportation) have clearly been attached to events completed before the statutory enactments.") (citations omitted); *see also* Pottinger v. Reno, 51 F. Supp. 2d 349, 362 (E.D.N.Y. 1999) ("A legal change that would have an impact on private parties' planning triggers the presumption against retroactivity, even if the change is only the attachment of additional civil liability to conduct that was already deemed morally reprehensible or illegal."); *Mojica*, 970 F. Supp. at 174 ("Any change from a discretionary system to a system of mandatory penalties for prior crimes is retroactive. That is because the individual is being deprived of the ability to bring equitable circumstances to bear on his case.").

385. *See* Welch v. Reno, 101 F. Supp. 2d 347, 353 (D. Md. 2000) ("[S]ection 236(c) requires the Attorney General to take into custody aliens who have committed certain offenses . . . without granting the alien a bail review hearing."); Martinez v. Greene, 28 F. Supp. 2d 1275, 1282 (D. Colo. 1998) ("§ 236(c) removes all discretion from the Attorney General with respect to detention versus bond."); *see also Zgombic*, 89 F. Supp. 2d at 235 (D. Conn. 2000) (noting "even a short-term separation from family members is a deprivation which the Supreme Court has repeatedly rank[ed] high among the interests of the individual") (alteration in original) (internal quotation marks omitted).

386. The mandatory detention provisions cannot be classified as "procedural" or as the equivalent of a prospective "injunction" to escape the presumption against retroactivity. *See supra* notes 257-58 and accompanying text; *see also Mojica*, 970 F. Supp. at 179 (rejecting government's contention that mandatory detention provision "should be viewed as a prospective injunction [under *Landgraf*] that is properly governed by the law in effect at the time the injunction is issued"). Procedural changes can have substantive effects. *See supra* note 258 and accompanying text; *see also* LaGuerre v. Reno, 164 F.3d 1035, 1041 (7th Cir. 1998) ("The relevant rule is that statutes which change primary (out of court) duties, for example statutes that impose new tort liabilities, are applied prospectively, while statutes that change merely procedures are applied retroactively. The reasoning behind this distinction is that people are much more likely to rely on substantive than procedural law. But this implies that when it is the kind of procedural change that does disturb reasonable expectations, the presumption in favor of retroactive application is reversed. Suppose a person facing deportation conceded deportability in reliance on having a good shot at a waiver of deportability. In that event, to abolish such waiver for his class of deportees after he had relied by forgoing a challenge to deportability would pull the rug out from under him. And in that case we have held that the abolition would not apply to him, would be prospective only.") (citations omitted), *cert. denied*, 120 S. Ct. 1157 (2000). In addition, the Supreme Court has backed away from any suggestion of "exceptions" to the presumption against retroactivity. *See* Martin v. Hadix, 527 U.S. 343, 359 (1999) ("When determining whether a new statute operates retroactively, it is not enough to attach a label (*e.g.*, 'procedural,' 'collateral') to the statute; we must ask whether the statute operates retroactively."). As the Court has noted, "[T]he only 'presumption' . . . is a general presumption *against* retroactivity." Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 950 (1997).

If legislation has a retroactive effect, it cannot be applied, absent clear congressional intent favoring retroactive application, due to the presumption against retroactivity.[387] Accordingly, due to the retroactive effect of the mandatory detention provisions and the absence of express retroactive intent, the amended detention provisions should not apply if the offense subjecting the noncitizen to deportation occurred before Congress enacted the 1996 amendments.[388] Thus the hypothetical Kim Nguyen, who committed her offense in 1995, should not be subject to the mandatory detention provisions in AEDPA and IIRIRA.[389]

C. Step Two: Constitutional Constraints

There is ample Supreme Court authority for concluding the analysis here without examining the second and third factors. However, the Court has sometimes gone on, even after determining retroactive effect, to address constitutional constraints and fairness concerns. And at least one court has erroneously concluded that Congress authorized retroactive application,[390] which then would require this next stage of review. If a court has found clear legislative intent to apply the statute retroactively, the court must evaluate whether such application is unconstitutional or unfair.

Moreover, even if a court evades a finding of retroactive effect, such as through a definitional construction as used in *Hadix*, constitutional constraints and fairness concerns preclude application of the mandatory detention provisions.[391] If a court finds no clear legislative intent for

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387. *See supra* note 293 and accompanying text; *Landgraf*, 511 U.S. at 280; *cf. Zgombic*, 89 F. Supp. 2d at 231 (noting "AEDPA section 440(d)'s silence as to temporal reach stands in stark contrast to the finely calibrated retroactivity language of other AEDPA sections," which "counsels strongly against applying the amendments retroactively").

388. With respect to retroactive application, two points stand out. First, to the extent that harsher penalties may have a deterrent effect, retroactive application does not further this goal because the harsher penalty was not known to the noncitizen at the time of his or her action. Second, and more importantly, a review of AEDPA and IIRIRA demonstrates that when Congress intended a provision to apply retroactively, it used language clearly indicating that intent. *See, e.g.*, AEDPA § 413(g) ("The amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to applications *filed before, on, or after such date* if final action has not been taken on them before such date.") (emphasis added); AEDPA § 421(b) ("The amendment made by subsection (a) shall take effect on the date of the enactment of this Act and apply to asylum determinations *made on or after such date*.") (emphasis added); AEDPA § 441(b) ("The amendment made by subsection (a) shall apply to criminal proceedings *initiated after the date of enactment* of this Act.") (emphasis added). The absence of clear retroactive intent precludes retrospective application of the mandatory detention provisions.

389. *See supra* note 20 and accompanying text.

390. *See* Zadvydas v. Underdown, 185 F.3d 279, 286 n.7 (5th Cir. 1999) (reading IIRIRA's retroactivity clause to permit retroactive application), *cert. granted*, 121 S. Ct. 297 (2000).

391. *See also Mojica*, 970 F. Supp. at 168-71 (applying *Landgraf* analysis to AEDPA § 440(d) and finding

retroactive application, and concludes the statute does not operate retroactively, the court must still evaluate the provision's constitutionality and fairness due to the liberty interest at stake in mandatory detention.

1. Substantive Due Process

Due process concerns clearly apply to mandatory detention.[392] Commentators have engaged in spirited debates about the continuing vitality of due process arguments in the retroactivity arena.[393] However, the Court has recently affirmed the validity of due process considerations in retroactivity analysis.[394]

Substantive due process precludes the government from engaging in conduct that "shocks the conscience" or interferes with rights "implicit in the concept of ordered liberty."[395] The government may not infringe upon certain fundamental liberty interests, no matter the process

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no express language and no clear intent favoring retroactivity; acknowledging "[t]his analysis leads to a conclusion against retroactivity" but proceeding to due process considerations).

392. *See* Reno v. Flores, 507 U.S. 292, 306 (1993) (noting the Fifth Amendment entitles aliens to due process of law in deportation proceedings); Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.") (citations omitted); *see also* Wong Wing v. United States, 163 U.S. 228, 238 (1896) (finding an illegal resident alien could not be sentenced to hard labor without due process of law); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (stating that Due Process Clause refers to "persons," not "citizens").

393. *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000) ("Perhaps part of the courts' motivation here [for requiring Congress to make retroactive intent clear] is ambivalence about judicial refusal to apply the Ex Post Facto Clause, or the Due Process Clause, so as to call into constitutional question some retroactive applications of civil law."); Morawetz, *supra* note 11, at 140-41 (noting "no retroactive statutes have been struck down on substantive due process grounds for more than sixty years" and thus "some commentators have questioned whether the doctrine has any ongoing vitality," but arguing AEDPA and IIRIRA provisions should be subject to substantive due process analysis); Fisch, *supra* note 1, at 1063-64 ("The principle of legislative nonretroactivity found early support in the substantive due process and contract rights enforced by the Court prior to the New Deal, but the subsequent erosion of the doctrine of substantive due process curtailed any judicial inclination to subject retroactive legislation to intensive scrutiny."); Andrew C. Weiler, Note, *Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws*, 42 DUKE L.J. 1069, 1073-75 (1993) (criticizing courts for failing adequately to scrutinize retroactive economic laws for due process violations).

394. *See* Martin v. Hadix, 527 U.S. 343, 358 (1999) (noting considerations of "fair notice, reasonable reliance, and settled expectations"); *id.* at 360 (noting statute's impact upon parties' reasonable expectations).

395. United States v. Salerno, 481 U.S. 739, 746 (1987) (quoting Rochin v. California, 342 U.S. 165, 172 (1952); Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

provided, unless the infringement is narrowly tailored to serve a compelling state interest.[396]

Detention is a deprivation of liberty, and freedom from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."[397] However, the government's interest in community safety may outweigh an individual's liberty interest under some circumstances.[398] Accordingly, the constitutionality of detention rests in large part on its purpose.

Due to the liberty deprivation inherent in detention matters,[399] a court must examine whether detention is imposed for the purpose of punishment or in furtherance of regulatory goals, and if in furtherance of regulatory goals, whether the deprivation is excessive in relation to the purpose for the deprivation.[400]

The rationales for detention pending deportation include: (1) ensuring the removal of noncitizens ordered deported, (2) preventing noncitizens from absconding before deportation, (3) protecting the community from exposure to further criminal acts by the noncitizen, and (4) restoring public faith in the immigration system.[401]

Crediting these justifications as legitimate legislative purposes, the two questions remaining are (1) whether the mandatory detention provisions are excessive in relation to these goals, and (2) whether an independent rationale exists for applying the provisions retroactively. The answers to these questions demonstrate that the mandatory detention provisions generally,[402] and the retroactive application of these provisions in particular, do not survive substantive due process scrutiny.

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396. *See Flores*, 507 U.S. at 301-02; *Salerno*, 481 U.S. at 749.

397. Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

398. *See Salerno*, 481 U.S. at 748.

399. Generally, in matters not involving a fundamental liberty interest, substantive due process analysis of retroactive legislation requires that the legislation generally is supported by (1) "a legitimate legislative purpose furthered by rational means," as well as (2) an independent rationale for retroactivity. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729-30 (1984).

400. *See Salerno*, 481 U.S. at 747.

401. *See* S. REP. NO. 104-48, at 1-4, 6-10, 28-30 (1995), *reprinted in* 1995 WL 170285 (Leg. Hist.), at 1-9, 14-17, 46-51; Rogowski v. Reno, 94 F. Supp. 2d 177, 184 (D. Conn. 1999); Nguyen v. Fasano, 84 F. Supp. 2d 1099, 1110 (S.D. Cal. 2000); Phan v. Reno, 56 F. Supp. 2d 1149, 1155-56 (W.D. Wash. 1999); Hermanowski v. Farquharson, 39 F. Supp. 2d 148, 159-63 (D.R.I. 1999).

402. There is a split of authority among the district courts as to whether indefinite detention violates substantive due process. *Compare* Le v. Greene, 84 F. Supp. 2d 1168, 1175 (D. Colo. 2000) (holding mandatory detention provision violates due process), *and Phan*, 56 F. Supp. 2d at 1157-58 (holding mandatory detention violates due process), *with* Zgombic v. Farquharson, 89 F. Supp. 2d 220, 236 (D. Conn. 2000) (holding mandatory detention survives substantive due process scrutiny), *and* Diaz-Zaldierna v. Fasano, 43 F. Supp. 2d 1114, 1121 (S.D. Cal. 1999) (holding mandatory detention provision did not violate due process).

The first articulated justification for mandatory detention is the primary objective of the Immigration and Nationalization Service: ensuring the removal of noncitizens ordered deported.[403] In the situation where deportation will be effected within a reasonable time, detention is not excessive in relation to that purpose. However, as the probability that the government can actually deport a noncitizen decreases, the government's interest in detaining that noncitizen becomes less compelling and the invasion into the noncitizen's liberty more severe. Detention pending deportation is lawful only in aid of deportation. Accordingly, it is excessive to detain a noncitizen indefinitely if deportation will never occur.[404] Even if the indeterminacy of the detention cannot be ascertained with certainty, it is excessive to detain a noncitizen if deportation cannot be achieved within a reasonable time.[405]

The second purpose is to prevent noncitizens from absconding before deportation. The legislative history notes twenty percent of the noncitizens released on bond did not report for deportation hearings.[406] However, if twenty percent absconded, this means eighty percent did not abscond. To detain one hundred percent, when only twenty percent are failing to follow the rules, is excessive in relation to the statute's purpose.[407] Moreover, this purpose is undercut when the deportation is unlikely to occur, due to lack of a repatriation agreement or the existence of some other impediment to removal. When noncitizens cannot be deported, detaining them does not further this goal.[408] An

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403. *See Phan*, 56 F. Supp. 2d at 1156.

404. *See* Vo v. Greene, 63 F. Supp. 2d 1278, 1285 (D. Colo. 1999); *Phan*, 56 F. Supp. 2d at 1156; Tam v. INS, 14 F. Supp. 2d 1184, 1192 (E.D. Cal. 1998) ("[O]nce it becomes evident that deportation is not realizable in the future, the continued detention of the alien loses its raison d'etre. If there is nowhere to send the alien, then indefinite detention is no longer a temporary measure in the process of deportation; it is permanent confinement . . . .") (alteration in original) (quoting Zadvydas v. U.S., 986 F. Supp. 1011, 1026-27 (E.D. La. 1997)).

405. *See* Nguyen v. Fasano, 84 F. Supp. 2d 1099, 1111 (S.D. Cal. 2000) ("When there is no realistic chance that a deportable alien will be deported in the foreseeable future, the burden should shift to the INS to demonstrate such a compelling interest in detention that detention is not excessive in relation to the alien's liberty interest.").

406. *See* S. REP. NO. 104-48, at 2, 23, *reprinted in* 1995 WL 170285 (Leg. Hist), at 5, 43 ("Over 20 percent of nondetained criminal aliens fail to appear for deportation proceedings.").

407. *See* Rogowski v. Reno, 94 F. Supp. 2d 177, 184 (D. Conn. 1999).

408. *See In re* Indefinite Detention Cases, 82 F. Supp. 2d 1098, 1101 (C.D. Cal. 2000) ("Dangerousness and flight risk are permissible considerations and may, in certain situations, warrant continued detention, but only if there is a realistic chance that an alien will be deported. Therefore, it would be a violation of substantive due process to detain an alien indefinitely if deportation will never occur."); Hermanowski v. Farquharson, 39 F. Supp. 2d 148, 161 (D.R.I. 1999) ("[G]iven Poland's unequivocal rejection of Hermanowski's return to that country, there is little reason to believe that there will ever be a deportation to execute. Thus, this governmental objective loses much, if not all, of its force since its underlying purpose has vanished.").

obvious less restrictive alternative is to conduct a hearing to ascertain the noncitizen's flight risk.

The third articulated purpose of mandatory detention is protecting the community from exposure to further criminal acts by the noncitizen. However, the mandatory detention provisions as implemented fail to distinguish between the noncitizen who committed homicide and the noncitizen who committed a single drug-related offense.[409] The provisions also fail to consider the noncitizen's age, family support systems, work history, military service, and any other evidence of rehabilitation, extenuating circumstances, and value to family and community. Life imprisonment constitutes a harsh and oppressive penalty for a single instance of minor, nonviolent, criminal activity. Mandatory detention does not comport with due process when no mechanism exists for individual review and discretionary relief.[410]

The fourth articulated purpose of mandatory detention is restoring public faith in the immigration system. However, because the mandatory detention provisions are overinclusive and do not offer discretionary review of individual circumstances,[411] this mechanism has evoked public outcry rather than public faith.[412]

As applied to Kim Nguyen, the lack of a repatriation agreement with Vietnam means she cannot be deported. Thus, her detention cannot serve the purposes of ensuring her removal or preventing her from absconding pending deportation. She is relatively young; she has a strong family support system; she has no prior record; she is married

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409. *See Hermanowski*, 39 F. Supp. 2d at 161 ("Hermanowski has not made a career of committing violent felonies. Rather, his convictions are in the league of purse-snatching and low-level narcotics violations. While this Court does not make light of the seriousness of the crimes that Hermanowski has committed, his criminal career is typical of the petty thief who causes some consternation in his neighborhood, not of the more dangerous violent offender who we fear may wreak havoc in the community if set at large. Furthermore, the government's determination that an individual is a danger to the community is, by itself, an insufficient basis for detaining that individual indefinitely. The Supreme Court is hesitant to sanction civil detention based upon a finding of dangerousness alone, without an attendant justification that strengthens the case for such detention, such as a limited duration of detention, or a finding that the detainee is dangerous and unable to control himself.") (citations omitted).

410. *See* United States v. Salerno, 481 U.S. 739, 747 (1987) (finding government permitted to hold arrestees charged with certain felonies without bond if safety risk established at adversary hearing); *see also In re* Indefinite Detention Cases, 82 F. Supp. 2d at 1101-02 (setting forth basic protections in determining whether alien is dangerous or flight risk, and possible conditions upon release).

411. *See* Welch v. Reno, 101 F. Supp. 2d 347, 355-56 (D. Md. 2000) ("Section 236(c) simply does not offer safeguards designed to protect detainees against indefinite, or at least prolonged, detention. Given the liberty interest involved and the lack of safeguards, this Court finds section 236(c) excessive in relation to its purpose and, therefore, violative of . . . substantive due process rights.").

412. *See, e.g.*, Thomas E. Moseley, *Mandatory Detention of Aliens Under 1996 Law*, N.Y. L.J., June 14, 1999, at 10; Frank Trejo, *FW Woman Trying to Fight Husband's Deportation to Mexico*, DALLAS MORNING NEWS, Dec. 13, 1997, at 39A.

with a young child. Life imprisonment under these circumstances does not comport with due process.

2. Procedural Due Process

Mandatory detention also raises procedural due process concerns.[413] AEDPA and IIRIRA fail to provide any type of bond hearing to noncitizens detained pending removal.[414] Accordingly, the issue is whether a noncitizen has a procedural due process right to be free from detention without an individualized hearing.

The fundamental requirement of procedural due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."[415] Three factors must be reviewed in considering a procedural due process claim:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[416]

With respect to the first factor, the "private interest" at stake is the noncitizen's freedom. Liberty is a fundamental right, and thus this interest is substantial.[417] Second, the risk of an erroneous deprivation of liberty is substantial.[418] The 1996 amendments provide no procedure

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413. *See* Zgombic v. Farquharson, 89 F. Supp. 2d 220, 236 (D. Conn. 2000) (mandatory detention of noncitizen pending removal violated noncitizen's procedural due process rights); Phan v. Reno, 56 F. Supp. 2d 1149, 1157-58 (W.D. Wash. 1999) (holding an absence of individualized assessment in mandatory detention provision violates procedural due process); Martinez v. Greene, 28 F. Supp. 2d 1275, 1284 (D. Colo. 1998) (holding mandatory detention provision violates procedural due process). *But see* Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999) (holding noncitizen's continued and indefinite detention did not violate his due process rights), *cert. granted*, 121 S. Ct. 297 (2000).

414. *See* IIRIRA § 236(c) (requiring Attorney General to detain all persons in deportation proceedings charged with being aggravated felons until final determination of deportability).

415. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

416. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

417. *See Zgombic*, 89 F. Supp. 2d at 235 ("Even a short period of parole before final resolution of her removal proceeding would be significant, because even a short-term separation from family members is a deprivation which the Supreme Court has repeatedly rank[ed] high among the interests of the individual.") (internal quotation marks omitted). *See generally* Addington v. Texas, 441 U.S. 418, 425 (1979) ("This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.").

418. *See Zgombic*, 89 F. Supp. 2d at 236 (noting INS "appear[ed] to be conducting cookie cutter parole adjudication and applying what amounts to an irrebuttable presumption that all aggravated felons are a risk to abscond") (internal quotation marks omitted). In at least one instance, the court concluded a "very

whatsoever for determining whether an individual warrants release on bond. Finally, the addition of traditional bail procedural requirements would impose minimal fiscal and administrative burdens. A hearing is already necessary to determine if the noncitizen is an "aggravated felon" under IIRIRA.[419] Thus, incorporating traditional bail considerations regarding dangerousness and flight risk would impose only a minimal burden, and does not outweigh the risk of an erroneous deprivation of liberty.[420]

Procedural due process requires an individualized review of whether the noncitizen presents a flight risk or a threat to the community's safety. The 1996 amendments to the mandatory detention provisions eliminated this individualized review, and accordingly, the current mandatory detention provisions should not survive due process scrutiny in either retrospective or prospective application. The hypothetical Kim Nguyen does not present a flight risk; her husband, child, and other family all reside in the area. Nor does Kim present a threat to the community's safety: Her conviction involved a single, nonviolent, drug-related offense.

D. Step Three: Fairness Concerns

As explained in Part III,[421] the Supreme Court's decisions have also traditionally considered notions of fairness in reviewing legislative retroactivity. These notions of fairness have included equity, justice, and reliance.[422] These fairness considerations apply to the retroactive application of immigration statutes generally,[423] and mandatory detention provisions in particular. The potential retroactive scope of AEDPA and IIRIRA is inconsistent with fairness interests.

Equity, justice, and reliance do not support mandatory detention in the first instance, even aside from retroactivity concerns. Our

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real risk" existed that the government was wrongfully attempting to deport a United States citizen. Fierro v. INS, 81 F. Supp. 2d 167, 169 (D. Mass. 1999).

419. IIRIRA § 236(c); Martinez v. Greene, 28 F. Supp. 2d 1275 (D. Colo. 1998).

420. *See Eldridge*, 424 U.S. at 335.

421. *See supra* notes 315-35 and accompanying text.

422. *See supra* notes 315-47 and accompanying text.

423. *See* Mojica v. Reno, 970 F. Supp. 130, 174 (E.D.N.Y. 1997) (stating, in context of AEDPA amendments, "[c]ourts determining the potential retroactive effect of new legislation must review the totality of the circumstances with a solid sense of traditional American notions of fairness and justice"); *id.* at 181 ("Where the issue is retroactivity, the fundamental principle is that Congress should not be seen as having acted against our deeply-rooted understanding of justice and human rights unless it has clearly indicated its intent to do so. It is not for the Attorney General to usurp Congress's obligation to think seriously about whether any national interest is served in the upsetting of past law including the past bargains that underlie the criminal justice system and international concerns.").

government is built on a system of individualized justice, as illustrated by notions of discretion in charging decisions, probation, parole, clemency, and pardon in the criminal justice context.[424] Although deportation is considered civil rather than criminal in nature, mandatory detention is, in short, imprisonment. Imprisonment has few corollaries in civil law aside from civil commitment for mental illness and contempt of court proceedings. In the former, courts will authorize commitment, even in instances of serious mental illness, only after a hearing determining the individual poses a danger to self or to others.[425] In contempt proceedings, the individual may obtain release by complying with the court's order.[426]

Mandatory detention occurs when noncitizens are convicted of particular criminal offenses found on Congress's list of objectionable crimes. Noncitizens proceed through the criminal justice system, through plea bargaining or trial, through conviction and sentencing. They serve whatever sentence is imposed. Ordinarily, this is considered "paying one's debt to society." For noncitizens, however, the nightmare has only just begun. Now that the noncitizen has served the sentence required by the criminal justice system, the next step is—immediate incarceration. Under the new provisions, there is no room to consider whether this was the noncitizen's first offense, the precise nature and circumstances of the offense, the likelihood of recidivism, the availability of a strong family support system, rehabilitation, or other relevant factors. To apply this new result retroactively and impose mandatory detention without individualized review when the noncitizen was

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424. *See* Lux v. Commonwealth, 484 S.E.2d 145, 148 (Va. 1997) ("Prosecuting attorneys have broad discretionary power over criminal defendants at several stages of the criminal process. Within limits, prosecutors decide whether or not to prosecute an individual, determine the exact charges for which an individual will be tried, and, if the individual is convicted, recommend the magnitude and nature of the individual's sentence.") (citation omitted).

425. *See* Addington v. Texas, 441 U.S. 418, 423-31 (1979) (holding that due process does not permit continuation of a challenged involuntary civil commitment without a hearing); *id.* at 425 ("This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."); *accord* Goetz v. Crosson, 967 F.2d 29, 31 (2d Cir. 1992); *see also* O'Connor v. Donaldson, 422 U.S. 563, 575-76 (1975) ("A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. . . . [A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."). *See generally* United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

426. *See* Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973) (noting civil contempt model "whereby the defendant 'keeps the keys to the jail in his own pocket' and may be released whenever he complies with his legal obligations"); *accord In re* Crededio, 759 F.2d 589, 590 (7th Cir. 1985) ("The rationale underlying civil contempt is simply that contemnors hold 'the key of their prison in their own pocket.'"); Wolfe v. Coleman, 681 F.2d 1302, 1306 (11th Cir. 1982) ("The contemnor always has the ability to purge himself of contempt by obeying the court order.").

unaware of this consequence at the time of committing the offense—and perhaps still unaware at the time of conviction and sentencing—is unfair, unconstitutional, and unjustifiable.

Another fairness issue involves the composition of the targeted group. The noncitizens subject to mandatory detention belong simultaneously to two unpopular groups—they are immigrants and they have been convicted of crimes.[427] As such, they are the disenfranchised victims of notorious prejudice and scapegoating.[428] The Supreme Court has noted the necessity of judicial action to prevent the unfair targeting of unpopular groups through retroactive legislation.[429]

The mandatory detention provisions, like retroactive application of AEDPA and IIRIRA's other provisions, mirror nothing so clearly as prejudice.[430] There is, simply, no other explanation for Congress's irrational incarceration and evacuation of lawful permanent residents on the basis of such a broadly-defined variety of offenses, and its ill-disguised eagerness to eliminate any potential delay by abolishing all procedural protections.[431] How can the retroactive application of a statute possibly be justified when its result is indefinite detention? The answer is really quite simple: It cannot.

Kim Nguyen's situation involves these same concerns. Her status as an immigrant and an individual convicted of a criminal offense places

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427. *See* S. REP. NO. 104-48, at 1 (1995), *reprinted in* 1995 WL 170285 (Leg. Hist.), at 2 ("Criminal aliens occupy the intersection of two areas of great concern to the American people: crime and the control of our borders.").

428. *See Mojica*, 970 F. Supp. at 174 ("A court must have an eye toward the particularly harsh consequences for 'unpopular groups or individuals' unlucky enough to be the targets of fleeting politically-motivated passionate outbursts.... There are few groups of adults and children so routinely ostracized and so voiceless in our democracy as non-enfranchised, non-citizen immigrants even though they form a vibrant and integral part of American society. The cruelty of retroactivity is obvious."); Morawetz, *supra* note 11, at 146 ("[T]he deportation cases present retroactivity in a context in which the targeted group suffers the dual political disability of being made up of immigrants and persons convicted of crimes."). *See generally* Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998); Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79 (1998); *see also* Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 877 (1997) ("The cure-all of blaming the 'foreigner' for domestic troubles has been available to, and acted upon by, generation after generation in the United States.").

429. *See* Romer v. Evans, 517 U.S. 620, 635-36 (1996) (holding a law discriminating against homosexuals unconstitutional); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435 (1985) (holding a law discriminating against mentally retarded individuals unconstitutional); Plyler v. Doe, 457 U.S. 202, 230 (1982) (invalidating denial of state funds for educating undocumented alien children).

430. *See generally* Johnson, *supra* note 352, at 291 (noting "facially neutral immigration laws have unmistakable racial impacts, including some that arguably are intentional"); *see also id.* (noting racial impact of removal grounds under IIRIRA).

431. *See* Fierro v. INS, 81 F. Supp. 2d 167, 168 (D. Mass. 1999) ("In recent years, Congress has been busily 'cutting down' the procedural protections of our laws as they may relate to resident aliens, the better swiftly to deport those whom it considers undesirable due to certain prior criminal convictions.").

her within two unpopular groups. Retroactive application of the AEDPA or IIRIRA provisions would subject her to indefinite detention without any kind of individual review. Such a result does not comport with procedural due process.

Retroactive application of the AEDPA and IIRIRA's mandatory detention provisions to acts occurring before their enactment does not survive scrutiny. To the extent these statutes have been applied to circumstances occurring after the commission of the crime, this constitutes retroactive application that does not withstand retroactivity analysis. Even when applied prospectively, mandatory detention is an unconstitutional denial of due process and fundamentally unfair when the noncitizen receives no individualized review of his or her circumstances or is subject to indefinite detention.

CONCLUSION

In deconstructing the Supreme Court's legislative retroactivity decisions, this Article has demonstrated the Court's consistency in its approach. However, the Court's recent trend in defining "fairness" solely in economic terms is a disturbing departure from its established jurisprudence, and ignores the reality that "fairness" in civil cases cannot always be measured by economic concepts. One such example is the mandatory detention provisions of AEDPA and IIRIRA. When evaluated pursuant to the Court's consistent approach to retroactive legislation, the amended mandatory detention provisions do not apply retroactively and are unconstitutional in any event. Hopefully the courts will pursue this analysis boldly, with the conviction that the strength and character of a nation are reflected in how it treats those who are its most powerless.