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# Turning Back the Clock: The California Supreme Court's Decision in McClung v. Employment Development Department and the Difficulty of Determining Legislative Intent in Retroactive Rulemaking

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# Turning Back the Clock – The California Supreme Court's Decision in *McClung v. Employment Development Department* and the Difficulty of Determining Legislative Intent in Retroactive Rulemaking

**By Jeffrey R. Groendal***

## I. INTRODUCTION

A male worker approaches a female co-worker on her first day of work. Both the man and woman are non-supervisory employees in the company. He makes casual conversation with her and, over time, the two become friends. One day, however, the man makes a pass at the woman, telling her she looks nice and that he would like to take her out to dinner over the weekend. The woman, uncomfortable dating a co-worker, declines. The man persists with more forceful advances, knowing that California law holds only supervisors liable for sexually harassing an employee. The next week, he sends the woman an e-mail with sexually explicit content. While passing in the halls, he consistently makes inappropriate comments to the woman. She feels so uncomfortable that she tells her supervisor, but the supervisor does not immediately act, realizing that the man is working on a big sale to a lucrative client and the deal is still a week away from closing. The woman is frustrated at the slow response and instead sues the man under the Fair Employment and Housing Act ("FEHA"). But the woman loses. At the time she sues, California law does not permit employees to sue other co-workers for

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sexual harassment under the FEHA and the man's conduct was not so severe as to be tortious battery or intentional infliction of emotional distress. A state agency then amends the law to provide for non-supervisory employee liability. The woman's case is pending at the time. Can she take advantage of the amendment? Is the man suddenly responsible for behavior that was not actionable before the amendment?

A similar dilemma faced the California Supreme Court in *McClung v. Employment Development Department.*[1] The court in *McClung* held that an amendment to the FEHA holding non-supervisory employees liable for sexual harassment of a co-worker did not apply retroactively to cases pending at the time of its passage.[2] The court found insufficient indicia of legislative intent to apply the amendment retroactively.[3]

Against the backdrop of *McClung*, this note will explore the principle of retroactivity, tracing its development at the national level in the U.S. Supreme Court and at the state level with respect to California courts. Retroactivity is generally disfavored in the law due to a reluctance to alter the legal consequences of past actions. But if legislatures and administrative bodies express their intent clearly enough, the presumption against retroactivity disappears. If, on the other hand, legislative intent is ambiguous, courts might interpret the law in a manner with which the Legislature disagrees. The Legislature will then pass another law purporting to clarify the meaning of the original law. The result is a delayed resolution to the matter which, unfortunately, penalizes both plaintiffs and defendants in the process.

Part II of this note addresses the history and development of jurisprudence on retroactivity, focusing on the traditional roles of the Judicial and Legislative Branches and the major cases of both the U.S. Supreme Court and California courts on retroactivity.[4] Part III sets out the facts of *McClung*.[5] Part IV analyzes and critiques the court's opinions in *McClung*, with a separate analysis of the history

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1. McClung v. Employment Dev. Dep't, 99 P.3d 1015 (Cal. 2004).
2. *Id.* at 1022.
3. *Id.*
4. *See infra* notes 8-141 and accompanying text.
5. *See infra* notes 142-154 and accompanying text.

of the amendment at issue.[6] Part V addresses the legal and social impact of *McClung*[7] and Part VI briefly concludes the note.

## II. HISTORY

### *A. Traditional Roles of the Judicial and Legislative Branches*

American jurisprudence has long adhered to the principle that the Legislature makes the law and the judiciary interprets it. This concept stands on firm footing. In the epic 1803 U.S. Supreme Court decision *Marbury v. Madison*, Chief Justice Marshall clearly and simply proscribed a role for the judicial branch, stating that "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[8] The California Supreme Court has been similarly forthright in expressing the role it plays in the legal process: "[I]t is the duty of this court, when a question of law is properly presented, to state the true meaning of the statute finally and conclusively . . . . The ultimate interpretation of a statute is an exercise of the judicial power"[9] Because statutory interpretation is a purely judicial function, courts acknowledge that a legislature may enact laws only for the future, not for the past.[10] As a result, a legislature may not enact an amendment that changes existing law with the intent to affect past transactions.[11] In addition, legislation passed to clarify a prior statute "merely supplies an indication of the legislative intent which may be considered together with other factors

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6. *See infra* notes 155-221 and accompanying text.

7. *See infra* notes 222-227 and accompanying text.

8. Marbury v. Madison, 5 U.S. 137, 177 (1803).

9. Bodinson Mfg. Co. v. Cal. Employment Comm'n, 109 P.2d 935, 939 (Cal. 1941).

10. *See, e.g.*, People v. Cuevas, 168 Cal. Rptr. 519, 524 (Ct. App. 1980). Here, the court states that "[i]n line with the well-established rule that statutory interpretation is a judicial function, the courts have consistently held that 'declaratory or defining statutes are to be upheld . . . as an exercise of the legislative power to enact a law for the future.'" *Id.* (quoting *In re* Coburn, 131 P. 352, 355 (Cal. 1913)).

11. Cal. Employment Stabilization Comm'n v. Chichester Transp. Co., 172 P.2d 100, 102 (Cal. Ct. App. 1946).

in arriving at the true intent existing at the time the legislation was enacted."[12]

### *B. U.S. Supreme Court on Retroactivity*

The presumption against retroactive application of statutes is a well-settled legal principle.[13] Universally, courts have long maintained an aversion toward holding individuals accountable for the violation of laws that were non-existent at the time of their misconduct. The U.S. Supreme Court has been notably emphatic in its espousal of the presumption against retroactivity. Perhaps the most powerful quote from the Court's cases on retroactivity is the following:

> It is contrary to fundamental notions of justice, and thus contrary to realistic assessment of probable legislative intent. The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. It was recognized by the Greeks . . . by the Romans . . . by [the] English common law . . . and by the Code Napoleon . . . It has long been a solid foundation of American law.[14]

Indeed, courts at all levels maintain a general disfavor for retroactive legislation. But until the Court's decision in *Landgraf v. USI Film Products*,[15] there existed no definitive U.S. Supreme Court framework for addressing retroactivity. Before *Landgraf*, conflicting precedents in *Bradley v. Richmond School Board*[16] and *Bowen v.*

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12. Stockton Sav. & Loan Bank v. Massanet, 114 P.2d 592, 595 (Cal. 1941).

13. *See* Dash v. Van Kleeck, 7 Johns. 477, 503 (N.Y. 1811) (noting that "[i]t is a principle in the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect"); *see also* Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.").

14. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990).

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

16. Bradley v. Richmond Sch. Bd., 416 U.S. 696 (1974).

*Georgetown University Hospital*[17] provided lower courts with little guidance.[18]

1. Pre-*Landgraf* Disaccord in Precedents

*Bradley* was decided by the Court in 1974. In that case, the original suit was filed by African-American parents and guardians against the School Board in Richmond, Virginia with the aim of desegregating public schools.[19] The suit was based on the Civil Rights Act of 1871.[20] After winning a protracted suit, the parents requested attorney's fees and expenses, which the district court awarded.[21] At the time of the award, however, there was an absence of express statutory authority for the district court's action.[22] In spite of this, the court justified the award through equitable principles.[23] More specifically, the court felt that the defendants' conduct in delaying resolution to the matter caused the plaintiffs unreasonable time and expense to protect their constitutional rights.[24] After defendants filed an appeal, but before a final decision by the court of appeals, Congress passed § 718 of the Education Amendments of 1972 ("§ 718").[25] This legislation expressly provided federal courts with authority to award attorney's fees to a prevailing party in a school desegregation case.[26] Yet even with authority from § 718, the court of appeals reversed.[27] Essentially, the court of appeals refused to apply § 718 to services rendered before Congress passed it "on the ground that 'legislation is not to be given retrospective effect to prior events unless Congress has clearly indicated an intention to have the

17. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).

18. *See* Michael S. Rafford, Note, *The Private Securities Litigation Reform Act of 1995: Retroactive Application of the RICO Amendment*, 23 J. LEGIS. 283, 288 (1997).

19. *Bradley*, 416 U.S. at 698.

20. *Id.* at 699.

21. *Id.* at 705-06.

22. *Id.*

23. *Id.* at 706-07.

24. *Id.*

25. *Id.* at 696.

26. *Id.*

27. *Id.* at 716.

statute applied in that manner.'"[28] Since Congress did not provide for retroactive application, § 718 could not apply to a case pending on appeal at the time of its enactment.[29]

The Supreme Court undertook review to determine whether § 718 should apply to a situation where the appropriateness of a fee award was pending on appeal when Congress passed § 718. In the end, the Court reversed the court of appeals' decision and awarded the fees to the parents.[30] Paramount to the Court's holding was its conclusion in *Thorpe v. Housing Authority of City of Durham*:[31] "[A]n appellate court must apply the law in effect at the time it renders its decision."[32] The *Bradley* court further emphasized that the *Thorpe* holding applied to § 718; in other words, a law passed while a case is pending still controls even if the law does not convey its intent to apply to pending cases.[33] But this holding was qualified by the Court in *Thorpe*.[34] A reviewing court cannot apply current law to pending cases if the result would be manifestly unjust.[35] In *Bradley*, however, the Court found no such injustice.[36] The school district, in remitting attorney's fees, did not face an additional burden because similar awards were granted before the passage of § 718.[37] In addition,

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28. *Id.* at 715 n.20 (quoting Thompson v. Sch. Bd. of Newport News, 472 F.2d 177, 178 (4th Cir. 1972)).

29. *Id.* at 709. Further, the court emphasized that the district court's decision to award fees was based on public policy reasons and "if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts." *Id.*

30. *Id.* at 724.

31. Thorpe v. Housing Auth. of City of Durham, 393 U.S. 268, 281 (1969).

32. *Bradley*, 416 U.S. at 714 (citing *Thorpe*, 393 U.S. at 281). Note also the Court's reference to United States v. Schooner Peggy, 1 Cranch 103 (1801). The Court summarizes the age-old precept from *Schooner Peggy* which directs that a court is to apply the law that exists at the time the court arrives at its decision, "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley*, 416 U.S. at 711.

33. *Id.* at 715.

34. *Id.* at 716.

35. *Id.*

36. *Id.* at 721.

37. *Id.* at 720-21.

applying § 718 did not alter the district's constitutional obligation to offer nondiscriminatory education.[38]

By green-lighting retroactive application of a statute in the absence of clear legislative intent, did the Court's decision in *Bradley* undermine the presumption against retroactivity? *Bradley*'s holding is especially peculiar in light of the Court's strong stance against retroactivity in *Bowen*, a decision handed down 14 years later. In *Bowen*, at issue was the authority of the Secretary of Health and Human Services ("Secretary") to promulgate retroactive regulations.[39] Under Medicare, the Government reimburses health care providers for the cost of providing medical services to Medicare policy-holders.[40] The Medicare Act authorizes the Secretary to make rules limiting the amount that health care providers can receive in return.[41] In 1981, the Secretary issued a "cost-limit schedule" for services provided to Medicare patients, one which contained changes to the previous calculation method.[42] This schedule, however, was invalidated because the Secretary did not provide notice and a forum for public comment, as mandated by the Administrative Procedure Act.[43] But in 1984, the Secretary (this time after public comment) re-issued the 1981 cost-limit schedule, "the net result [being that it] was as if the original rule had never been set aside."[44] The Court held that the Secretary's attempt at retroactive rulemaking was improper because there was nothing in the Medicare Act expressly authorizing such a process.[45] Furthermore, legislative history indicated that the

38. *Id.* at 720-21.

39. *Bowen*, 488 U.S. at 206.

40. *Id.* at 205.

41. *Id.* at 206.

42. *Id.*

43. *Id.*

44. *Id.* at 207.

45. *Id.* at 213. Note that the Secretary maintained authority to implement retroactive corrective adjustments to the aggregate amounts of reimbursement produced under the calculation methods. *Id.* at 211. But, as the majority opinion indicates, "nothing in [this clause] suggests that it permits changes in the methods used to compute costs...[w]e cannot find in the language of [this clause] an independent grant of authority to promulgate regulations establishing the methods of determining costs." *Id.*

House and Senate frowned upon retroactive cost-limit rules.[46] Ultimately, the *Bowen* decision illustrates the Court's traditional disfavor for retroactive application: "[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[47]

2. *Landgraf*: Resolving Retroactivity

In *Bradley*, the Court approved retroactive application without legislative intent whereas in *Bowen*, the Court found the lack of intent fatal to the rule's retroactivity.[48] The Court set out to clear the air on retroactivity in *Landgraf* by distinguishing *Bradley* and giving lower courts a structure in which to operate.

In *Landgraf*, a female employee was allegedly sexually harassed by a male co-worker.[49] The woman quit her job because of this incident.[50] The district court held that she was in fact sexually harassed, but that the harassment was not so serious as to warrant her

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46. *Id.* at 214.

47. *Id.* at 208. Justice Scalia's concurring opinion in Bowen is valuable because of its focus on the responsibility of administrative agencies to avoid retroactive rulemaking. Justice Scalia interpreted the Administrative Procedure Act's (APA) definition of "rule." *Id.* at 216 (Scalia, J., concurring). There can be no confusion, according to Justice Scalia, "that a rule is a statement that has legal consequences only for the future." *Id.* at 217 (Scalia, J., concurring). This principle has its roots in the Attorney General's Manual on the Administrative Procedure Act (1947), which states that "'rule' includes agency statements not only of general applicability but also those of particular applicability applying either to a class or to a single person." Attorney General's Manual on the Administrative Procedure Act 13-14 (1947). "In either case, [the statements] must be of future effect, implementing or prescribing future law." *Bowen*, 488 U.S. at 218 (Scalia, J., concurring). Importantly, Justice Scalia also noted the differences between retroactive legislation and retroactive rulemaking. *Id.* at 223-24 (Scalia, J., concurring). The latter is governed by the APA, which only permits prospective rulemaking unless Congress authorizes an agency to give a rule retroactive effect. *Id.* at 224 (Scalia, J., concurring). In fact, an agency, if it believes that retroactive application is necessary, must only persuade Congress of that fact to receive authorization. *Id.* (Scalia, J., concurring). Justice Scalia noted that perhaps even existing congressional legislation implicitly authorizes retroactive rulemaking. *Id.* (Scalia, J., concurring).

48. *See supra* notes 16-47 and accompanying text.

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

50. *Id.*

decision to resign her position; therefore, her employment was not terminated under Title VII of the 1964 Civil Rights Act (relating to sexual harassment's creation of a hostile work environment) and she was denied equitable relief.[51] Since Title VII did not authorize a damages remedy in addition to one in equity, the court dismissed the woman's complaint.[52] While she appealed, Congress enacted § 102 of the 1991 Civil Rights Act ("1991 Act"), which contained provisions creating a right to recover compensatory and punitive damages for discrimination in violation of Title VII.[53] The Court granted certiorari to determine whether § 102 should be applied retroactively to cases pending when the 1991 Act was passed.[54] Holding that § 102 did not apply to a case pending on appeal, the Court resolved the issue by focusing on general anti-retroactivity principles, the legislative history of the 1991 Act and its actual text, and the *Bowen* and *Bradley* precedents.[55]

In his majority opinion, Justice Stevens reiterated the Court's basic antipathy toward retroactivity, a sentiment also coloring the Court's opinions in *Bradley* and *Bowen*.[56] Justice Stevens noted that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."[57] As a result, Justice Stevens continued, "the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'"[58] Justice Stevens noted early signs of the Founders' support for the anti-retroactivity principle in various

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51. *Id.* at 248-49.
52. *Id.* at 249.
53. *Id.*
54. *Id.* at 249-50.
55. *Id.* at 265-286
56. *Id.* at 264.
57. *Id.* at 265.
58. *Id.* (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). Justice Stevens offered additional (albeit philosophical) justification for the Court's stance against retroactivity: "In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Id.* at 265-66.

provisions of the Constitution.[59] Such provisions include the *Ex Post Facto* Clause, the Fifth Amendment's Takings Clause, the prohibition on "Bills of Attainder," and the Due Process Clause of the Fourteenth Amendment.[60] With respect to the *Ex Post Facto* clause, Article I restrains Congress and the States from retroactively applying penal legislation.[61] The Takings Clause of the Fifth Amendment precludes the Legislature from passing laws to deprive private persons of their preexisting and vested property rights without just compensation.[62] In its prohibitions on Bills of Attainder, the Constitution bans lawmakers from "singling out disfavored persons and meting out summary punishment for past conduct."[63] Lastly, the Due Process Clause provides that an individual's interest in fair notice of what the law requires of him might be "compromised" by retroactive legislation.[64]

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59. *Id.*

60. *Id.* at 266.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* Retroactive application of statutes, however, is not completely taboo. Absent a violation of one of the above constitutional precepts, "retroactivity provisions often serve entirely benign and legitimate purposes," such as the following: "[T]o respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary." *Id.* at 267-68. Furthermore, there is a line of cases referred by Justice Stevens which may be deemed "procedural cases." *Id.* at 275. These particular cases represent the proposition that changes in procedural rules may be appropriately applied in suits brought before the enactment of the rule without raising retroactivity concerns. *Id.* The Court's rationale, originating in *Ex Parte* Collett, 337 U.S. 55 (1949), is that there are weak reliance interests in procedural matters. Rules of procedure tend to regulate only secondary, and not primary conduct. *Id.* Therefore, "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." *Id.* The Court has also granted retroactive application in the event of an intervening law (meaning one passed after the conduct spawning the lawsuit, but before a court ruling on the matter) that "authorizes or affects" the appropriateness of prospective relief. For instance, in American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 202 (1921), the Court allowed retroactive application of § 20 of the Clayton Act because the particular section governed the "propriety" of injunctive relief against labor picketing.

As illustrated, the task of determining *if* retroactivity is accepted or not by the Court is uncomplicated; the weight of the case law indicates that the Court's aversion to retroactivity is incontrovertible. A more difficult inquiry, however, is identifying *when* a statute operates retroactively. The general rule is that the Court will not apply a statute retroactively unless Congress (or the administrative body enacting the rule) evinced clear intent to do so.[65] But since its early days, the Court has set a high bar for proving legislative intent. For instance, Justice Stevens in *Landgraf* referred to an 1806 case, *United States v. Heth*,[66] in which the Court refused to apply a federal statute reducing commissions of customs collectors to those collections commenced prior to the passage of the statute because of a lack of "'clear, strong, and imperative' language requiring retroactive application."[67] According to Justice Stevens, requiring an "unambiguous directive" or "express command . . . 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."[68]

In *Landgraf*, Justice Stevens suggested a framework for analyzing legislative intent.[69] The probable context for such an examination is when a case involves a federal statute enacted after the events at issue took place.[70] In this instance, according to *Landgraf*, a court's initial task is to determine whether Congress

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65. *Landgraf*, 511 U.S. at 265.

66. United States v. Heth, 7 U.S. 399 (1806).

67. *Landgraf*, 511 U.S. at 270 (quoting *Heth*, 7 U.S. at 413). The principle exhorted by the Court in *Heth* is again repeated in United States v. Sec. Indus. Bank, 459 U.S. 70 (1982), a more modern case. There, the Court conveyed the importance of unmistakable intent thusly: "[A] retrospective operation will not be given to a statute which interferes with antecedent rights...unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the [L]egislature.'" *Sec. Indus. Bank*, 459 U.S. at 79 (quoting Union Pac. R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913)).

68. *Landgraf*, 511 U.S. at 263, 272-74, 280. Justice Stevens' prefatory comment to this point is that a presumption against retroactivity "accords with widely held intuitions about how statutes ordinarily operate" and as such, "coincide[s] with legislative and public expectations." *Id.* at 272.

69. *Id.* at 270.

70. *Id.* at 280.

expressly prescribed the temporal reach of the statute.[71] The Court completes this task by examining the ambiguity, or lack thereof, in the language of the statute.[72] If, for instance, Congress or the administrative body passing the law affirmatively provides for the law's application to matters currently pending in court, then the statute will be given retroactive effect (even if the conduct at issue occurred before the passage of the law).[73] But if the statute is ambiguous in this regard, the second step for the Court is to evaluate whether or not the newly passed 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."[74] If the Court determines that the statute has such an effect, "our traditional presumption teaches that it does not govern *absent clear congressional intent* favoring such a result."[75]

Applying the above to the particulars of *Landgraf* and the 1991 Act, Justice Stevens found no clear intent to apply the Act's provisions retroactively.[76] With regard to legislative history, two bits

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71. *Id.*

72. *Id.* at 273. At this point, Justice Stevens referred to the Court's decision in United States v. Schooner Peggy, 1 Cranch 103 (1801). *Id.* In that case, a treaty signed while the case was pending on appeal clearly provided for the "restoration of captured property 'not yet definitively condemned.'" *Id.* at 273 (quoting *Schooner Peggy*, 1 Cranch at 107). Since this language was unambiguous, Justice Stevens notes that the Court in *Schooner Peggy* reversed a decree entered before the signing of the treaty that condemned a French vessel that was seized in American waters. *Id.* In response to the language of the decree, the Court applied "the law in effect" at the time of its decision. *Schooner Peggy*, 1 Cranch at 109. *Cf.* I.N.S. v. St. Cyr, 533 U.S. 289, 320-21 n.45 (2001) (holding that "a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective") (citing *Landgraf*, 511 U.S. at 264).

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

74. *Id.*

75. *Id.* (emphasis added). On the issue of legislative intent in Landgraf, the Court held that the new Title VII provision to the 1991 Civil Rights Act does not apply retroactively because of a lack of clear intent. Justice Stevens remarked that had Congress intended to apply the provision, it should have inserted the following language: "[T]he new provisions 'shall apply to all proceedings pending on or commenced after the date of enactment of this Act.'" *Id.* at 260 (quoting S. 2104, 101st Cong. § 15(a)(4) (1990)).

76. *Id.* at 262.

of evidence support the finding of a lack of intent.[77] First, the House version originally contained an express grant of retroactive application, but the Senate later eliminated that provision.[78] Next, the President vetoed the 1990 Civil Rights Act partly on the basis of "unfair retroactivity rules."[79] The Court pointed out that the omission of retroactivity language in the 1991 version was not accidental; rather, the omission was one of the compromises which paved the way for the passage of the 1991 Act.[80]

But legislative history was not enough, the Court stated, and an examination of the text of the 1991 Act was necessary.[81] In particular, the Court evaluated Landgraf's position that, because the 1991 Act expressly provided for prospective application in two provisions, the Court should presuppose that the opposite was intended for the remainder of the provisions.[82] Yet, the Court did not take the bait: "[g]iven the high stakes of the retroactivity question, the broad coverage of the statute, and the prominent and specific retroactivity provisions in the 1990 bill, it would be surprising for Congress to have chosen to resolve that question through negative inferences drawn from two provisions of quite limited effect."[83] Even if Congress had intended to provide for retroactive application via such inferences, Justice Stevens remarked that this would be a notably indirect route to convey a basic message.[84] In fact, Justice Stevens maintained that Congress could have easily inserted the following language: "the new provisions 'shall apply to all proceedings pending on or commenced after the date of enactment of this Act.'"[85] Due to the lack of such language and the evidence gleaned from examining legislative history, the Court failed to identify express intent to apply the 1991 Act to cases pending on appeal.[86]

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77. *Id.*
78. *Id.* at 262.
79. *Id.* at 255-56.
80. *Id.* at 256.
81. *Id.* at 257.
82. *Id.* at 259.
83. *Id.*
84. *Id.* at 262.
85. *Id.* at 260 (quoting S. 2104 101st Cong. §15(a)(4) (1990)).
86. *Id.* at 293.

After arriving at a conclusion on legislative intent, the Court proceeded to rectify its holdings in *Bradley* and *Bowen*. Regarding *Bradley*, which "suggests a categorical presumption in favor of application of *all* new rules of law," the Court sought to clarify that *Bradley* did not subvert the principles of anti-retroactivity.[87] Instead, the Court will apply *Bradley* provided that: "1) no vested right of a party has been substantially affected; 2) the statute granted or removed jurisdiction from a particular judicial body; and 3) procedural rules are involved."[88] According to the *Landgraf* opinion, *Bradley* represented a narrow exception to anti-retroactivity, one that is particular to attorney's fees.[89] The Court noted that a determination of attorney's fees is "collateral to the main cause of action," and separate from the main cause of action at trial.[90] Also, existing legislation at the time already provided for attorney's fees, so retroactively awarding them did not impose an unforeseeable burden on the school board.[91] Equitable considerations played an additional role in the appropriateness of retroactive awarding of fees, as Justice Stevens wrote that "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."[92]

At last, in *Landgraf*, the Court's willingness to clarify and guide produced solid ground for lower courts to stand on in matters of retroactivity. The jurisprudence in California has proved fertile for testing the strength of the Court's retroactivity principles.

### *D. California Courts on Retroactivity*

#### 1. In general

Indeed, California courts are bound by the standards set forth in the previously discussed decisions of the United States Supreme

87. *Id.* at 277.

88. *Rafford, supra* note 18, at 292.

89. *Landgraf*, 511 U.S. at 277.

90. *Id.* (quoting White v. New Hampshire Dept. of Employment Sec. 455 U.S. 445, 451-52 (1978)).

91. *Id.*

92. *Id.*

Court. It is instructive, however, to similarly trace the development of the anti-retroactivity principle in California. Furthermore, the decisions in this state contain a variety of fact patterns that are germane to an analysis of *McClung*.

The seminal case on retroactivity is *Aetna Casualty Insurance Company v. Industrial Accident Committee*.[93] In *Aetna*, the California Supreme Court stated that "[i]t is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent."[94] A statute has retrospective effect when it substantially alters the legal consequences of events occurring in the past.[95] In this case, an employee was injured and filed for a compensation award with the Industrial Accident Commission ("Commission").[96] At the time the employee was injured, the Labor Code provided that, where an injury causes both temporary and permanent disability, the employee is not entitled to both a temporary and permanent award; rather, she can only receive the greater of the two.[97] The statute was subsequently amended to allow an injured employee to receive portions of both awards, if certain requirements were met.[98] Therefore, when the Commission issued its award, it did

93. Aetna Cas. Ins. Co. v. Indust. Accident Comm., 182 P.2d 159 (Cal. 1947).

94. *Id.* at 161. *See also* DuBois v. Wokers' Comp. Appeals Bd., 853 P.2d 978, 980-81 (Cal. 1993) (discussing the standard for statutory interpretation in California). In *DuBois*, the California Supreme Court succinctly stated the method of interpreting statutes in California. *Id.* Essentially, *DuBois* related that "[a] fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." *Id.* at 980. First, according to the court, a court should examine the language of the statute itself. *Id.* Then, when the language is unambiguous and there is no confusion as to legislative intent, the inquiry ends. *Id.* If the words are unclear, they must be interpreted in their context, "keeping in mind the nature and obvious purpose of the statute where they appear." *Id.* at 981. Additionally, "the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." *Id.* In turn, the courts use rules of construction or legislative history and practice to assist in determining the intent of the Legislature. *Id.*

95. *Aetna*, 182 P.2d at 162.

96. *Id.* at 160.

97. *Id.*

98. *Id.*

so pursuant to the amended statute.[99] The court examined the language of the amended statute and held that the Legislature did not intend to apply it in cases where the injury occurred prior to the effective date of the enactment.[100] In particular, the court noted that the Legislature "would have expressly provided for retrospective operation of the amendment if it had so intended."[101]

Over time, California courts have steadfastly adhered to the principles from *Aetna*. At issue in *Evangelatos v. Superior Court*[102] was the applicability of the Fair Responsibility Act (commonly known as Proposition 51), which was a provision of the California Civil Code. The authors of the *Evangelatos* opinion point to California Civil Code section 3, which (although only applicable to provisions in the Civil Code) embodies the basic rule on retroactivity – "[n]o part of [this Code] is retroactive, unless expressly so declared."[103] According to *Evangelatos*, this section of the Civil Code "reflects the common understanding that legislative provisions are presumed to operate prospectively, and that they should be so interpreted 'unless express language or clear and unavoidable implication negatives the presumption.'"[104] In this case, voters passed Proposition 51, which limited an individual tortfeasor's responsibility for non-economic damages to the percentage of his fault.[105] Shortly after the proposition took effect, the plaintiff's pending personal injury action was assigned for trial and the parties requested the court to decide if the proposition would apply retroactively.[106] Ultimately, the California Supreme Court held that the Act did not apply retroactively.[107] The court was unable to find any language in the proposition that clearly conveyed legislative

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99. *Id.*

100. *Id.* at 163.

101. *Id.*

102. Evangelatos v. Super. Ct., 753 P.2d 585 (Cal. 1988).

103. *Id.* at 597.

104. *Id.* (quoting Glavinich v. Commonwealth Land Title Ins. Co., 209 Cal. Rptr. 266, 271 (Ct. App. 1984)). The court in *Evangelatos* held that the Act (Proposition 51) did not contain sufficient indicia of legislative intent to apply the provision retroactively.

105. *Id.* at 586.

106. *Id.*

107. *Id.* at 587.

intent to overcome the presumption against retroactivity.[108] Furthermore, the court emphasized the importance of the Civil Code's anti-retroactivity principle to Proposition 51; since the proposition once voted on became part of the Civil Code, it could not apply retroactively in the absence of express legislative intent.[109] Significantly, the *Evangelatos* standard has carried the day for later opinions from the California Supreme Court. An example is the 2002 decision of *Myers v. Philip Morris Companies*.[110] In that case, the court noted that although there is "no talismanic word or phrase . . . required to establish retroactivity," in order for extrinsic evidence to overcome the presumption, there must be an "unequivocal and inflexible statement of retroactivity that *Evangelatos* requires."[111]

2. Clarifying or declaring existing law

Both *Aetna* and *Evangelatos* are examples of a clear absence of intent to apply legislation retroactively. Often, however, the situation is hazier. For instance, an amended statute may aim to "clarify" the earlier statute or "declare" existing law. In spite of such specific language, "courts will not infer that the Legislature intended only to clarify the law unless the nature of the amendment clearly

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108. *Id.* at 598.

109. *Id.* Defendants in this case sought to counter plaintiff's argument here by citing to broad language in the statute, viz. that the statute is to apply "[i]n any action . . . ." *Id.* at 591 n.4. The court rejected the contention that this language evinces strong intent to apply the provision to pending claims involving torts committed before the passing of the proposition. *Id.* at 598. Defendants also argued in the alternative – even if there was no express legislative intent, then there was implied intent based on legislative history or the context surrounding the enactment of the proposition. *Id.* at 598-99. With respect to legislative intent, the court remarked that there was a dearth of evidence to indicate that retroactivity was discussed in legislative debates or during any aspect of the enactment process. *Id.* at 599. Concerning the claim for surrounding context, the court acknowledged that it has previously allowed retroactive application for this reason, but only in a criminal context with regard to ameliorative penal statutes. *Id.* at 599 n.15. Indeed, the court noted, it has never been inclined (nor have other jurisdictions been so inclined) to apply the special rule concerning implied retroactivity of special mitigating penalty provisions to general tort reform measures such as Proposition 51. *Id.*

110. Myers v. Philip Morris Cos., 50 P.3d 751 (Cal. 2002).

111. *Id.* at 760.

demonstrates that this is the case or the Legislature itself states in a particular amendment that its intent was to be declaratory of the existing law."[112] Therefore, California courts *still* evaluate whether the amendment changes the law or merely clarifies or is declaratory of existing law.[113] To resolve this issue, state courts examine whether the language of the statute is materially altered by the amendment.[114] If the original statute is in fact altered, this indicates legislative intent to change the statute's meaning.[115] But on the other hand, mere passage of an amendment does not automatically signal a change in meaning. A court's assessment of surrounding circumstances "can indicate that the Legislature made material changes in statutory language in an effort *only to clarify* a statute's true meaning."[116] As a result, the act of clarifying a statute does not violate anti-retroactivity principles even if the clarification is applied to transactions predating the amendment's enactment; the initial statute, at its core, is not changed if its true meaning remains intact.[117]

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112. Verreos v. City & County of San Francisco, 133 Cal. Rptr. 649, 657 (Ct. App. 1976).

113. *See* People v. Cruz, 919 P.2d 731, 742 (Cal. 1996) (holding that "[b]ecause the determination of the meaning of statutes is a judicial function, a court, faced with the question of determining the scope of the earlier version, still must ascertain from all the pertinent circumstances . . . whether the subsequent amendment . . . constitutes a modification or instead a clarification of the preexisting provision").

114. *Verreos*, 133 Cal. Rptr. at 657.

115. *Id.* (asserting that "[i]t is a settled principle of statutory construction that a material change in the language of a legislative enactment is ordinarily viewed as showing an intent on the part of the Legislature to change the meaning of the statute"). *Verreos* also notes that in the event that the amendment follows a court decision interpreting the law in its original form, this is also considered an espousal of a legislature's intent to change the meaning of the statute. *Id.*

116. W. Sec. Bank v. Super. Ct., 933 P.2d 507, 514 (Cal. 1997) (emphasis added).

117. *Id.* Significantly, the court noted that while a legislative declaration on the meaning of an existing statute is not binding on a court in interpreting the statute's meaning, such a pronouncement is entitled to great consideration. *Id.* (stating that "'a subsequent expression of the Legislature as to the intent of the prior statute, although not binding on the court, may properly be used in determining the effect of a prior act'") (quoting Cal. Employment Stabilization Comm'n v. Payne, 187 P.2d 702, 704 (Cal. 1948) (en banc)).

Courts are particularly inclined to accept a legislature's attempt to clarify a statute's meaning when the legislature timely responds to a controversy over a statute's interpretation.[118] An example of this proclivity appears in the California Supreme Court's opinion in *Western Security Bank v. Superior Court.* In *Western*, a partnership obtained a loan secured by real property and supported by letters of credit.[119] After the partnership defaulted, the bank presented the letters to the issuer in an attempt to cover the unpaid balance.[120] The issuer, however, brought a declaratory relief action seeking to establish that it was not obligated to honor the bank's tender of the letters of credit.[121] Eventually, the court of appeal ruled that the issuer may decline to honor the letters.[122] Immediately thereafter, the Legislature passed "urgency legislation" in response, intending to immediately clarify that the issuer in this instance does not have a basis for refusing to honor such a draw on letters of credit.[123] The California Supreme Court remanded the matter to the court of appeal for reconsideration as a result of the urgency legislation, after which the appeals court held that the legislation marked a change in existing law and therefore could not apply retroactively.[124] The California Supreme Court, however, reversed the court of appeal.[125] The court was heavily swayed by the timeliness of the passage of the legislation: "[i]f the Legislature acts promptly to correct a perceived problem with a judicial construction of a statute, the courts generally give the Legislature's action its intended effect."[126] The court recognized that the urgency legislation explicitly conveyed the Legislature's intent to apply the provision to existing loan transactions at issue in this case.[127] Note that even after evaluating legislative intent, the court *still* proceeded to analyze whether the

118. *Id.* at 514.
119. *Id.* at 510-11.
120. *Id.* at 512.
121. *Id.*
122. *Id.*
123. *Id.* at 513.
124. *Id.*
125. *Id.* at 516.
126. *Id.* at 515.
127. *Id.*

Legislature's action effected a change in law.[128] But through an assessment of actual statutory language, the court found that the legislative action did not change the law; rather, it "simply clarified and confirmed the state of the law prior to the Court of Appeal's first opinion."[129] Indeed, this case presents a formula for avoiding judicial scrutiny for retroactivity: clear legislative intent to clarify a prior enactment coupled with language which avoids changing the operation of that enactment.[130]

In addition to timely response to a controversy, another factor deserving of mention is when a court *invites* a legislature to clarify its legislative intent. Typically, when courts invite the Legislature to clarify certain unsettled issues of law, they do so explicitly.[131] A prime example from the California Supreme Court is its decision in *Renee v. Superior Court*.[132] In *Renee*, the court was faced with the task of interpreting a section of the Welfare and Institutions Code.[133] The matter concerned the circumstances under which reunification services are to be provided in child dependency proceedings.[134] The court, in concluding that the statute was ambiguous and interpreting it using legislative history, invited the Legislature to clarify: "[i]f we have failed to discern correctly the Legislature's intent in enacting the statute, that body may clarify the statute accordingly."[135] Significantly, however, there is a difference between requests to clarify and requests to take corrective action. The former would likely permit an amendment which clarifies existing law to apply retroactively, whereas the latter would involve a change in law and,

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128. *Id.* at 516.

129. *Id.* at 520.

130. *Id.*

131. *See, e.g.*, People v. Simon, 886 P.2d 1271, 1282 n.13 (Cal. 1995) ("We encourage the Legislature to clarify which of the criminal violations of the Corporate Securities Law of 1968 that are punishable under either subdivision (a) or (b) of Section 25540 are strict liability offenses and what mental states are elements of those which require scienter."); International Longshoremen's and Warehouseman's Union v. L.A. Export Terminal, Inc., 81 Cal. Rptr. 2d 456, 467 n.6 (Ct. App. 1999) ("If our interpretation of various aspects of the Brown Act is not what the Legislature intended, the statutory scheme could use clarification.").

132. Renee J. v. Super. Ct., 28 P.3d 876 (Cal. 2001).

133. *Id.* at 878.

134. *Id.*

135. *Id.* at 884.

as such, could not apply retroactively. For instance, in *Cory v. Shierloh*, the California Supreme Court addressed the matter of the civil liability of social hosts for providing alcohol to intoxicated guests.[136] Under California law, social hosts were immunized from such liability, and the court mused that through narrowing liability, the Legislature might be creating problems rather than solving them.[137] While the court refused to change this provision (due to concerns for separation of powers), it invited the Legislature to act: "[t]he forum for the correction of ill-considered legislation is a responsive legislature."[138] Subsequent to *Cory*, the Legislature amended the law to enlarge liability to any provider of alcohol to obviously intoxicated minors. In *Baker v. Sudo*, the Court of Appeals addressed the timing and substance of the amendment, noting that "[t]he *Cory* court clearly invited the Legislature to take corrective action back then . . . ."[139] The *Baker* decision, then, is a fine illustration of the factors in deciding whether legislative response to a court decision is a clarification or a change in law: 1) whether the invitation was to correct or clarify; 2) whether the Legislature acted timely; and 3) whether there was legislative intent to apply the amendment retroactively.[140] The court in *Baker* held that the amendment was a change in law because the court in *Cory* invited only corrective action, the amendment was passed five years after the decision in *Cory*, and there was no urgency clause or any other language indicating intent to apply retroactively.[141]

## III. FACTS

In *Carrisales v. Department of Corrections*,[142] the California Supreme Court interpreted § 12940 of the California Fair Employment and Housing Act relating to a non-supervisory employee's liability for harassing a co-worker. The court in

136. Cory v. Shierloh, 629 P.2d 8 (Cal. 1981).
137. *Id.* at 12.
138. *Id.* (citation omitted).
139. Baker v. Sudo, 240 Cal. Rptr. 38, 44 (Ct. App. 1987).
140. *Id.* at 40-44.
141. *Id.*
142. Carrisales v. Dep't of Corrs., 988 P.2d 1083 (Cal. 1999).

*Carrisales* concluded that the FEHA does not hold non-supervisors personally liable for harassment.[143] Subsequent to *Carrisales* the Legislature amended the FEHA, adding subdivision (j)(3) which imposed liability on co-workers.[144]

Plaintiff Lesli Ann McClung was an auditor for the California Employment Development Department (EDD).[145] She initiated a complaint against the EDD and Manuel Lopez, the lead auditor, alleging a hostile work environment and failure to remedy a hostile work environment under the FEHA.[146] Ms. McClung filed her claim before the passage of the above amendment.[147] Initially, the superior court granted summary judgment in favor of the defendants, EDD and Mr. Lopez, and Ms. McClung appealed.[148] The court of appeal, while affirming summary judgment for EDD, reversed as to Mr. Lopez, holding that he was responsible for the harassment of Ms. McClung as her co-worker.[149] This ruling was contrary to the court's interpretation of the FEHA in *Carrisales*.[150] Yet the court of appeal justified its position by referencing the amendment.[151] The court noted that the subdivision preceding the amendment, (j)(2), stated that its provisions "are declaratory of existing law."[152] As a result,

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143. *Id.* at 1088.

144. *See* McClung v. Employment Dev. Dep't, 99 P.3d 1015, 1017 (Cal. 2004). Subdivision (j)(2) reads: "The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment." Cal. Gov't Code § 12940 (j)(2) (West 2004). Subdivision (j)(3) reads:

> An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

§ 12940 (j)(3).

145. *McClung*, 99 P.3d at 1018.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

the court reasoned, this statement "supports the conclusion that [the amendment] merely clarifies the meaning of the prior statute;" more specifically, the statement indicated legislative intent to apply the subsequent personal liability amendment to all pending cases, including Ms. McClung's against Mr. Lopez.[153]

The California Supreme Court granted review to decide whether the amendment, subdivision (j)(3), was operative in this case.[154]

## IV. ANALYSIS AND CRITIQUE

### *A. Majority Opinion*

The Court's majority opinion contains discussion on each of the following categories: a review of *Carrisales* and the importance of the role of the judiciary in interpreting statutory language; an analysis on whether the amendment appearing in subdivision (j)(3) changed the law; and an analysis on whether the amendment applies retroactively. These categories are very interrelated.

Initially, the Court reemphasized, in a matter-of-fact fashion, the holding of *Carrisales*: the FEHA, as interpreted, did not impose personal liability on coworkers (or non-supervisory employees) for harassment of other employees.[155] The power of statutory interpretation is only reserved for the judiciary and the Court in *McClung* was very protective of this power, noting that "the Legislature has no authority to interpret a statute. That is a judicial task."[156] The Court related that while the Legislature may, by a present enactment, define prior statutory language for the purposes of retroactive application, it lacks any authority "simply to say what it *did* mean."[157] So according to the Court, after it conclusively interpreted *Carrisales*, the Legislature had no authority to decide that the subsequent amendment was declaratory of the law that existed before *Carrisales*.[158] The Court conceded that a legislature *can*

153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 1020 (citation omitted).
157. *Id.* (citation omitted).
158. *Id.*

overrule an interpretive decision – but it cannot pass a new law intending to establish what the law always was, in a manner inconsistent with a previous interpretation of the court.[159] This, as the Court holds, is beyond the power of the Legislature.[160] Once a court finally and conclusively interpreted the statute in *Carrisales*, "a legislative clarification in the amended statute may not be used to overrule this exercise of the judicial function of statutory construction and interpretation. The amended statute defines the law for the future, but it cannot define the law for the past."[161]

More importantly, the Court pointed out that when the Legislature enacts such a new law, the result is a change in the law regardless of the Legislature's attempt to claim that it only intended a clarification.[162] If a court found that the amendment was limited to clarifying existing law, there would be no issue of retroactive application because the original meaning of the statute remained intact. In such a scenario, "personal liability would have existed at the time of the actions, and the amendment would not have changed anything."[163] Conversely, if the amendment effected a change in law, actions occurring before it would now have different legal consequences.[164] On this issue, the Court's stance was unmistakable:

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159. *Id.*

160. *Id.* The Court here used *People v. Harvey*, 602 P.2d 396 (Cal. 1979) as an illustration. In that case, as *McClung* explains, the California Supreme court interpreted a section of the Penal Code as not permitting a type of "consecutive sentence enhancement." *Id.* In response, the Legislature promptly amended the statute to allow such enhancement and additionally, declared that its intent was to clarify the legislative intent since before the passage of the amendment. *Id.* As the opinion noted, "[t]he judicial response was swift and emphatic." *Id.* According to the majority opinion in *McClung*, the court in *Harvey* held that even though the Legislature can amend to overrule a judicial decision, "doing so changes the law." *Id.* Consequently, the court in *Harvey* refused retroactive application of the amendment. *Id.*

161. *Id.* (quoting *Cuevas*, 168 Cal. Rptr. at 519).

162. *Id.* The Court significantly noted the following: "A declaration that a statutory amendment merely clarified the law 'cannot be given an obviously absurd effect, and the court cannot accept the Legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms.'" *Id.* (quoting *Payne*, 187 P.2d at 704).

163. *McClung*, 99 P.3d at 1019.

164. *Id.* (holding that "[i]n this case, applying the amendment to impose liability that did not otherwise exist would be a retroactive application because it

"[i]t seems clear, and no one disputes, that [the amendment] imposes on [non-supervisory co-workers] the personal liability that *Carrisales* said the FEHA had not imposed."[165]

But the Court's decision that the amendment changed, rather than clarified, the law did not end the inquiry for the Court. The Court's finding of a change in law eliminated the possibility of retroactive application of the amendment, but only if there was similarly a lack of intent to apply the amendment retroactively. On this issue, the Court found "nothing here to overcome the strong [constitutional] presumption against retroactivity."[166] In particular, the Court stated that subdivision (j)(2), which conveys that the provisions of the subdivision are declaratory of existing law, "long predate[d] the Legislature's overruling of *Carrisales*."[167] Since, in the amendment, the Legislature did not include such language in subdivision (j)(3), the Court held this omission to severely weaken the potential claim that the Legislature intended (j)(3) to apply retroactively.[168] Indeed, in the court's observation, there was a total absence of legislative intent to apply the amendment retroactively: "[s]pecifically, we see no clear and unavoidable intent to have the statute retroactively impose liability for actions not subject to liability" prior to the passage of the amendment.[169]

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would 'attach new legal consequences to events completed before its enactment'") (citing *Landgraf*, 511 U.S. at 270).

165. *Id.* at 1018. The Court admitted that the *Carrisales* decision came down after Ms. McClung initiated her action against the EDD and Mr. Lopez. *Id.* at 1020. But, as the Court stated, judicial interpretation of a statute provides the meaning of the statute both before and after a decision on the case that spawns the court's interpretation. *Id.* at 1020.

166. *Id.* at 1021. The Court cited to the court of appeal's reliance on *Western Security* and *Payne* for the proposition that a legislature's clarification indicates that the amendment apply to all causes of action existing at the time of the passage of the amendment. *Id.* at 1022. But the Court dismissed this reliance because, it noted, neither case "holds that an erroneous statement that an amendment merely declares existing law is sufficient to overcome the strong presumption against retroactively applying a statute that responds to a judicial interpretation." *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

### *B. Concurring and Dissenting Opinions*

The concurring and dissenting opinion, whose author and sole supporter is Justice Moreno, conceded that the Legislature could not clarify the meaning of the statute in a way that was inconsistent with the court's interpretation in *Carrisales*.[170] But this is the only point on which the two sides agree. Justice Moreno then concluded that by attempting to clarify its original intent, the Legislature evinced clear intent to apply the amendment retroactively.[171] Thus, he asserted, California courts have resolved to give retroactive effect to legislative efforts to clarify existing law "unless there is some constitutional objection thereto."[172]

Primarily, Justice Moreno sought to preserve and give effect to what he perceived as clear legislative intent to apply the amended provisions retroactively. Justice Moreno cited to the California Constitution, which states that "[a] statute that is amended is 're-enacted as amended.'"[173] Therefore, the amendment of a statute ordinarily has the legal effect of re-enacting the statute in its amended form and this includes the unamended portions.[174] Justice Moreno emphasized that the mere fact that the statement in subdivision (j)(2) preceded the amendment did not diminish the plain meaning of the statute that *all* provisions of (j) were declaratory of existing law.[175] Justice Moreno characterized this attempt by the Legislature as a clear intent to apply the amendment retroactively.[176] Recalling *Western Security*, Justice Moreno asserted that while the court might not accept a legislature's attempt to clarify or declare law, courts should still accept such a statement as indicative of legislative intent.[177] In turn, if a statute attempts to clarify or declare existing law, "[i]t is obvious that such a provision is indicative of a

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170. *Id.* at 1023 (Moreno, J., concurring and dissenting).

171. *Id.* at 1024 (Moreno, J., concurring and dissenting).

172. *Id.* (Moreno, J., concurring and dissenting) (quoting Cal. Employment Stabilization Comm'n v. Payne, 187 P.2d 702, 704 (Cal. 1948) (en banc)).

173. *Id.* (Moreno, J., concurring and dissenting) (quoting Cal. Const. art. IV, § 9).

174. *Id.* (Moreno, J., concurring and dissenting).

175. *Id.* (Moreno, J., concurring and dissenting).

176. *Id.* at 1023 (Moreno, J., concurring and dissenting).

177. *Id.* (Moreno, J., concurring and dissenting).

legislative intent that the amendment apply to all existing causes of action from the date of its enactment."[178]

Arriving at the conclusion that the Legislature intended to apply the statute retroactively with its attempt to declare existing law, Justice Moreno insisted that such intent be honored unless there is a constitutional objection.[179] According to Justice Moreno, the constitutional impediments here are "modest."[180] He reasoned that the majority only stated that the retroactive application of the amendment would "raise constitutional implications;" it did not allude to any particular constitutional violation from applying (j)(3) retroactively.[181] In fact, Justice Moreno noted that neither the U.S. Supreme Court nor the California Supreme Court has expressly held that "retroactively creating liability for past conduct might violate the Constitution."[182] Relying on the U.S. Supreme Court's decision in *Landgraf*, Justice Moreno emphasized that, in the absence of constitutional violations, retroactive legislation often serves wholesome purposes. In particular, Justice Moreno referred to a passage in *Landgraf* which stated that merely "the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope."[183] Instead, where there is sufficient legislative intent and no constitutional violation, retroactivity provisions are acceptable forms of legislation.[184]

Also, Justice Moreno noted that although non-supervisors were not liable for harassment until the passage of the amendment, they were previously liable in tort for their individual actions.[185]

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178. *Id.* (Moreno, J., concurring and dissenting) (quoting W. Sec. Bank v. Super. Ct., 933 P.2d 507, 515 (Cal. 1997) (citation omitted)).

179. *Id.* at 1024 (Moreno, J., concurring and dissenting).

180. *Id.* at 1025 (Moreno, J., concurring and dissenting).

181. *Id.* (Moreno, J., concurring and dissenting).

182. *Id.* at 1022 (Moreno, J., concurring and dissenting).

183. *Id.* at 1024 (Moreno, J., concurring and dissenting) (quoting *Landgraf*, 511 U.S. at 267-68).

184. *Id.* (Moreno, J., concurring and dissenting). Justice Moreno recalled from *Landgraf* that retroactive legislation is helpful in the following situations: responding to a need for urgent legislation, assuring that a wrongdoer does not avoid the strictures of a new law in the interval preceding its passage, and giving effect to a new law which Congress believes is "salutary." *Id.* (quoting *Landgraf*, 511 U.S. at 268).

185. *Id.* (Moreno, J., concurring and dissenting).

Therefore, Justice Moreno reasoned, defendants such as Mr. Lopez were indeed liable even before the amendment – just not under the FEHA.[186] Justice Moreno essentially noted that the legal consequence of these workers' actions was, in general, not altered by the passage of the amendment.

### *C. Senate Judiciary Committee's Bill Analysis*

The majority and concurrence/dissent disagree on one main issue: whether the statement that the provisions of subdivision (j) were declaratory of existing law provided sufficient legislative intent to apply the amendment to actions pre-dating its passage. Curiously, neither the majority nor the concurrence/dissent thoroughly analyzed the legislative history of the amendment to glean further information on legislative intent. In *Landgraf*, the U.S. Supreme Court's most recent pronouncement on retroactivity, the Court examined both the text of the statute *and* its legislative history to elucidate the context in which the bill was passed.[187] While legislative history was not dispositive in *Landgraf* (the Court was mainly swayed by the lack of express language in the 1991 Act to apply its provisions retroactively), it was a significant factor.[188]

To that end, the most helpful document is the Senate Judiciary Committee's Analysis of Assembly Bill 1856 ("Analysis").[189] Assembly Bill 1856 ("AB 1856") was the name of the bill before it was passed and integrated into the FEHA. The Analysis was the last of its kind produced by the Judiciary Committee before the bill's passage in September 2000. While also not dispositive in this case, the Analysis contains information that would have been helpful to both opinions in *McClung*.

First, the Analysis offered a brief background on the *Carrisales* case, the court decision which paved the way for the Legislature's attempt to amend the FEHA. While *Carrisales* unequivocally interpreted section 12940 as imposing liability for sexual harassment

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186. *Id.* (Moreno, J., concurring and dissenting).

187. *See Landgraf*, 511 U.S. at 255-56, 262.

188. *Id.* at 262 (noting that legislative history serves to "reinforce" the Court's conclusion).

189. Cal. Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1856 (1999-2000 Reg. Sess.) (Aug. 8, 2000).

only on supervisory employees, the court invited the Legislature to consider whether non-supervisory employees should assume liability as well.[190] In response to this, the Analysis conveyed, the author of the bill sought to take "the next logical step by clarifying that errant employees face the same threat of legal sanctions. By making certain that harassers are not let off the hook merely because of a job title, this bill will help stamp out harassment in the workplace."[191] The author further intimated that AB 1856 did not purport to change existing law as to what constituted sexual harassment under the FEHA.[192] The FEHA required that, before bringing a claim, the harassment must have been "so severe that it produces an abusive working environment."[193] The bill was designed only to hold the person doing the harassing responsible for his or her actions, regardless of status in the company.[194]

The Analysis proceeded to address instances where the court's interpretation in *Carrisales* conflicted with decisions by other authorities. For instance, the Fair Employment and Housing Commission ("FEHC") is the agency responsible for enforcing the FEHA.[195] On two separate occasions, the Analysis noted, the FEHC interpreted the same language that the *Carrisales* court interpreted – but arrived at different conclusions.[196] In both cases, the FEHC elected to hold non-supervisory co-workers liable for harassment under section 12940.[197] Similarly, according to the Analysis, a treatise on employment law entitled California Employment Law held that section 12940 (even before its amendment) might hold employees liable for sexual harassment.[198] The treatise emphasized the importance of the language of section 12940: in addition to

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190. *See* Carrisales v. Dep't of Corrs., 988 P.2d 1083, 1088 (Cal. 1999) ("If the Legislature believes it necessary or desirable to impose individual liability on coworkers, it can do so. But we believe that had it already intended to do so, it would have used clearer language than that found in [s]ection 12940(h)(1).").

191. Cal. Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1856 at 2.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 3.

196. *Id.*

197. *Id.* at 3.

198. *Id.*

employers, "any other person" was prohibited from harassing conduct and as defined by California Government Code section 12925(d), a person means "one or more individuals."[199] Consequently, it appeared that individuals *including* non-supervisory employees could be liable for sexual harassment.[200]

Just as the Court in *Landgraf* assessed the contents of past proposed bills, the Analysis does the same with respect to sexual harassment liability for employees and employers.[201] In 1995, Senate Bill 953 ("SB 953") would have rendered employees personally liable for harassment of another employee.[202] This bill, however, was quashed in the Senate.[203] At the time, however, a Senate Judiciary Committee Analysis on that particular bill maintained that the provision assigning personal liability to employees was declaratory of then-existing law.[204] The Analysis of SB 953 took the lead from *Matthews v. Superior Court*, a Court of Appeal case which reviewed then-subdivision (h)(1) of section 12940.[205] In *Matthews*, the court noted that, under the FEHA, it was unlawful employment practice "for *any person* to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under [section 12940] or attempt to do so."[206] Furthermore, California Government Code section 12965(b) authorized a civil lawsuit under the FEHA against "the *person*, employer, labor organization or employment agency" responsible for the harassment.[207] In sum, *Matthews* seemed to support SB 953's position that individuals, not just employers, were similarly responsible for sexual harassment under the FEHA: "[o]ur holding that the responsibility for such acts must be borne both by the offender as well as the employer who tolerates the offense is consistent with the Legislature's intent to provide 'effective remedies which will eliminate such discriminatory practices.'"[208]

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199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 4.
203. *Id.*
204. *Id.*
205. Matthews v. Super. Ct., 40 Cal. Rptr. 2d 350, 353-54 (Ct. App. 1995).
206. *Id.* at 354 (quoting Cal. Gov't Code § 12940(g) (West 2004)).
207. *Id.* (quoting Cal. Gov't Code § 12965(b) (West 2004)).
208. *Id.* at 355-56.

A closer reading of *Matthews*, however, reveals that existing law in 1995 was not as SB 953 proclaimed. *Matthews* primarily supported the proposition that only employers and certain individuals with supervisory responsibilities were responsible under the FEHA; average employees were not included in this category.[209] Specifically, *Matthews* identifies the following individuals as subject to liability under the FEHA:

> [W]ith authority to hire and fire or to control the conditions of employment, who either participate in the unlawful conduct, tacitly approve of the improper action, fail to take action upon learning of the discriminatory conduct, or participate in the decision-making process which is the basis of the discriminatory condition . . . .[210]

Further, according to *Matthews*, the FEHC (the body charged with enforcing the FEHA) has held personally liable, as agents of the employer, "individuals *having supervisory status* who either themselves did the wrongful act or participated in the decision-making process which formed the basis of the discriminatory condition."[211] Armed with a full reading of *Matthews*, existing law at the time of SB 953 indeed subjected individuals to liability; but only those individuals holding supervisory status. The majority opinion in *McClung* could have pointed to the fact that even before *Carrisales*, existing law cut in favor of holding only supervisory employees liable. Furthermore, as in *Landgraf*, the majority opinion could have cited to the fact that a bill purporting to hold mere employees liable was rejected (SB 953).[212] This action, while not completely dispositive of legislative intent, could have served as a compelling factor in the court's holding that the amendment to the FEHA was a

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209. *Id.* at 354.

210. *Id.*

211. *Id.* (emphasis added) (quoting DFEH v. Right Way Homes, Inc., No. 90-16, FEHC Precedential Decs. 1990-1991, CEB 5.1, p. 15).

212. *See Landgraf*, 511 U.S. at 256. The 1990 version of the Civil Rights Act contained language regarding the retroactivity of the Act's provisions. *Id.* The 1990 Act was vetoed by the President in part because of its retroactive characteristics. *Id.* The final version of the Act was passed without such retroactive language. *Id.* The Court held this to be a factor in determining legislative intent. *Id.*

change in law rather than a clarification or declaration of existing law.

The Analysis is instructive on another topic addressed by Justice Moreno's opinion: the availability of other tort remedies prior to the FEHA amendment. Justice Moreno based his conclusion that the amendment did not change the law in part on "the circumstance that harassment by non-supervisory coworkers was tortious prior to the statutory amendment imposing liability for such conduct under the FEHA . . . ."[213] But the Analysis conveys that traditional battery or intentional infliction of emotional distress ("IIED") claims were insufficient prior to the amendment.[214] For example, a plaintiff may sue for battery, but only if there is sufficiently offensive physical contact to support such a suit.[215] Further, with respect to IIED, the plaintiff must show extreme and outrageous conduct which results in severe emotional distress.[216] Under the FEHA, however, the bar is much lower: the plaintiff need only prove that the harassing behavior sufficiently altered the workplace.[217] The Analysis correctly pointed out that the tort theories were inadequate to protect employees harassed by their co-workers.[218] Therefore, it is logical to conclude that the amendment changed rather than clarified existing law. Subdivision (j)(3) made employees liable under the FEHA who might not have been liable in tort. Justice Moreno missed out on making this distinction when discussing the fact that individual employees were liable even before the FEHA.

The Analysis, then, supports the inference that the amendment changed, rather than clarified, existing law despite the viewpoint of the author of the bill. The author maintained that AB 1856 did not change existing law as to what constituted sexual harassment and that the bill only "clarif[ied] that errant employees face the same threat of

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213. *McClung*, 99 P.3d at 1015 (Moreno, J., concurring and dissenting).

214. Cal. Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1856 at p. 4.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* (noting that "[t]he inadequacies of these theories to protect those who suffer harassment in the workplace highlight the need for a statute such as FEHA to create liability as a means of deterring and redressing unlawful workplace conduct").

legal sanctions."[219] But as noted above, when a statute purports to "clarify" or "declare" existing law, as did the FEHA amendment, courts cannot take the Legislature or administrative body at its word.[220] Courts will proceed to analyze whether the amendment actually changed existing law.[221] The FEHA, prior to AB 1856, held only employers and other individuals with supervisory responsibilities responsible for sexual harassment. Amending the statute caused employees in non-supervisory positions to be responsible under the FEHA in addition to sustaining tort liability for serious harassment. Also, a previous bill aiming to accomplish the same task as the FEHA amendment died on the Senate floor in 1995. Thus, examining the legislative history *and* text of the amendment, the amendment assigned new consequences to actions which did not exist under the FEHA before the amendment. Justice Moreno's concurring and dissenting opinion seemingly fell short in overcoming these hurdles. Similarly, the majority opinion could have used the information from the Analysis to buoy its conclusions.

## VI. IMPACT

### *A. Legal Impact*

The main impact of the court's decision in *McClung* falls on the haziness of the guidelines under which legislatures and administrative agencies must operate. The court's standard for proving legislative intent with respect to retroactive application of statutes is a high bar. This places a burden on drafters to state their intent to apply the provisions of the statute retroactively. Especially in California, legislators can ill-afford to merely state that an amendment clarifies or declares existing law. Importantly, another sentence is required, similar to the following: it is the intent of the Legislature to convey that this amendment does not change existing

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219. *Id.* at 2.

220. *See* People v. Cruz, 919 P.2d 731, 742 (Cal. 1996). There, faced with a statute which set out to clarify or declare existing law, the California Supreme Court asserted that a court must still determine whether the amendment actually constituted a change in law. *Id.*

221. *Id.*

law, and the provisions of this amendment are to apply to actions predating the passage of this amendment.

Even if intent is clearly expressed, however, the statute is subject to judicial scrutiny. If a court perceives that a law propagates constitutional violations, then it will not be given retroactive effect regardless of the clarity of intent. This, however, seems fair given the need to protect against provisions that are constitutionally objectionable. Legislatures and administrative bodies would be well-advised to consider whether their enactment impairs constitutional rights and perhaps add a statement in the act or amendment addressing potential constitutional concerns.

Another issue worth mentioning is the ongoing tension between the legislative and judicial branch. Disputes over retroactive application seem to spawn a tennis match of sorts between the two entities. But what is an administrative body to do if it cannot get on the same page as the courts? If a legislature desires to overrule a court's interpretation of a law, then this is viewed as a change in the law and the court cannot apply the change retroactively. In the meantime, plaintiffs and defendants bear the brunt of the inability of the courts and legislature to define precisely what a statute means. For instance, what if the Legislature intends for a statute to cover certain behavior, but the court does not interpret it as such? The court's interpretation is given significant effect in that if its decision "finally and conclusively" interprets the statute, a legislature cannot thereafter clarify that the meaning of the statute was different than what the court concluded.[222] All the while, a plaintiff seeking a remedy must hope that the court invites the Legislature to pass legislation to clarify its meaning, and the Legislature responds in kind by passing urgency legislation. If the Legislature delays in doing so, this might factor into a court's subsequent analysis of legislative intent. Specifically, the court would find that the Legislature did not consider the matter important enough to act quickly and the plaintiff would have little hope of convincing a court otherwise.

A simple solution seems to be that legislatures and administrative agencies should take heed of the level of legislative intent required to

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222. *See* Bodinson Mfg. Co. v. Cal. Employment Comm'n, 109 P.2d 935, 939 (Cal. 1941).

apply a statute retroactively and conform the language of their amendments and statutes accordingly. Courts will likely persist in their function of interpreting statutes as they see fit, guided by the ancient principle of separation of powers.

A recent example in California that may have strong implications, both legally and socially, on retroactivity principles is the passage of Senate Bill 899 ("SB 899"). This bill, passed in 2004, relates to workers compensation and requires that apportionment of a permanent disability shall be based on causation. It states the following:

> A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the [work] injury, including prior [work] injuries.[223]

In *Kleeman v. Workers' Compensation Appeals Board*, the Court of Appeals recently reviewed this section of the Labor Code to determine whether it was to retroactively apply to cases pending on the date of its enactment.[224] The court determined that the section was a substantive change in law because liability of the employer may be changed or even eliminated where a permanent disability is caused by a pre-existing condition.[225] In examining legislative intent to apply this substantive change retroactively, the court concluded that there was sufficient evidence of intent. In section 47 of SB 899, the Legislature unambiguously stated that the changes brought about by SB 899 were to apply to pending cases as of the date of its enactment.[226]

Legally, *Kleemann* can be distinguished from *McClung* on the language contained in the two enactments. *McClung* had no such explicit language indicating intent to apply section 12940(j)(3) to pending matters. But in *Kleemann*, this language is evident. Since

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223. Cal. Lab. Code § 4663 (West 2004).

224. Kleemann v. Workers' Comp. Appeals Bd., 25 Cal.Rptr.3d 448 (Ct. App. 2005).

225. *Id.* at 455.

226. *Id.* at 456.

the right to workers compensation is granted by statute and not vested according to common law, there is no interference with a claimant's constitutional right and thus, the intent of the Legislature is given its full effect.[227]

### *B. Social Impact*

*Kleemann* is an example of a plaintiff affected by a court's finding of retroactive application. The plaintiff in *McClung*, however, is at the opposite end of the spectrum. Ms. McClung was left without a remedy because the court found that an amendment did not apply retroactively. Plaintiffs such as Ms. McClung might have no recourse simply because a legislature did not say the first time what it *really* meant. On the other hand, the policy reasons against retroactivity are likely so weighty as to justify the heavy burden placed on administrative agencies to draft laws that conform to this high standard. If a legislature or administrative body is permitted to freely apply laws retroactively, then actions by an individual before a statute's passage will subsequently take on different consequences all with the stroke of a pen. This is patently unfair to those who rely on the state of a law at the time of their actions.

Returning to *Kleemann*, plaintiffs in workers' compensation actions with cases pending during the passage of SB 899 were seriously affected by its retroactive application. Prior to SB 899, claimants did not have to worry about apportioning fault; a claimant filing for an injury sustained on the job expected to be compensated in full. After SB 899, however, the same plaintiff might be faced with the reality of receiving less than full compensation if the injury was pre-existing. The moral of *Kleemann* is clearly that legislative intent to apply retroactively will be given full effect by courts, as long as the rights of parties are not unconstitutionally denied. Since *Kleemann* involved statutorily given rights, there were no constitutional objections to retroactive application.

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227. *Id.* at 456.

## VI. CONCLUSION

Retroactive application of statutes is not an issue on the minds of Americans . . . until they are affected by it. Just ask Ms. McClung how she feels about being denied a remedy under the FEHA for Mr. Lopez' gross misconduct. Or ask Mr. Kleemann if he would have preferred full compensation instead of partial compensation for his work injury.

With sufficient intent, a legislature or administrative body may alter the legal consequences of actions occurring in the past. Indeed, it is necessary to honor legislative intent to the extent it is clear and unambiguous. Further, courts serve as guardians of the Constitution to ensure that people's rights are not inappropriately infringed by retroactive legislation. But what should be done when legislative intent is at first unclear, a court misinterprets the statute, and the Legislature then seeks to clarify what it meant all along? The unfortunate result is that plaintiffs and defendants assume the lion's share of the burden for this "back and forth" between the courts and legislature.

Legislatures and administrative bodies must take the lead in assuring that an enactment is clear on its face. Then, both the legislative and judicial bodies may effectively pursue their roles prescribed by the Constitution: the Legislature makes the law and the courts interpret it. Hopefully, clearer legislative enactments will lead to appropriate interpretations by the courts and the problems associated with "turning back the clock" will become a thing of the past.