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Executive Veto, Congressional Compromise, and Judicial Confusion: The 1991 Civil Rights Act - Does It Apply Retroactively?

Linda Urbanik

Comment

Executive Veto, Congressional Compromise, and Judicial Confusion: The 1991 Civil Rights Act—Does It Apply Retroactively?

I. INTRODUCTION

On November 21, 1991, President Bush signed the Civil Rights Act of 1991 ("the Act")[1] into law.[2] Congress, in passing the Act, found that the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*[3] had "weakened the scope and effectiveness of federal

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

2. President's Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701-02 (November 21, 1991) [hereinafter President's Statement] (announcing the signing of S. 1745).

3. 490 U.S. 642 (1989). The 1991 Act overruled five 1989 Supreme Court decisions. *Compare* § 101(b), 105 Stat. at 1072-73 (stating that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts") *with* Patterson v. McLean Credit Union, 491 U.S. 164, 176 (1989) (holding that § 1981 protection in the making of contracts "does not extend . . . to conduct by the employer after the contract relation has been established"); *compare* § 105, 105 Stat. at 1074 (requiring plaintiffs in discrimination cases to demonstrate disparate impact "in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice' ") *with* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (decided June 5, 1989); *compare* § 107, 105 Stat. at 1075 ("an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for employment practice, *even though other factors also motivated the practice*") (emphasis added) *with* Price Waterhouse v. Hopkins, 490 U.S. 228, 244-45 (1989) (holding that "once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by providing that it would have made the same decision even if it had not allowed gender to play such a role") (footnote omitted); *compare* § 108, 105 Stat. at 1076 (forbidding challenges to consent decrees by those persons who, prior to the entry of the decree, either: (1) had actual notice of the decree sufficient to apprise that person that the decree might adversely affect his or her interests; or (2) had his or her interests adequately represented by another person with a similar fact situation who challenged the decree on the same legal grounds) *with* Martin v. Wilks, 490 U.S. 755, 762-63 (1989) (holding that plaintiffs, who were aware that consent decrees entered into by their employer in earlier litigation might affect them, but who chose not to intervene were entitled to litigate the issue in a new action); *compare* § 112, 105 Stat. at 1078-79 (stating that "an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose . . . when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system") *with* Lorance v. AT&T

civil rights protections,"[4] and that legislation was necessary to provide additional protection against employment discrimination.[5] The Act now allows a plaintiff claiming intentional employment discrimination under Title VII of the Civil Rights Act of 1964[6] to recover compensatory and punitive damages against his or her employer.[7] Additionally, a plaintiff may also demand a jury trial.[8]

Technologies, Inc., 490 U.S. 900, 911-12 (1989) (holding that "when a seniority system is nondiscriminatory in form and application, it is the allegedly discriminatory *adoption* which triggers the limitations period"). For a thorough discussion of the congressional response to all of these cases, see Sondra Hemeryck et al., *Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R.-C.L. L. REV. 475 (1990).

The 1991 Act also overruled two 1991 Supreme Court decisions. Section 109, which extends protection under Title VII to U.S. citizens in foreign countries, overruled EEOC v. Arabian American Oil Co., 111 S. Ct. 1227, 1236 (1991) ("[p]etitioners have failed to present sufficient affirmative evidence that Congress intended Title VII to apply abroad."). Section 113 overruled West Virginia University Hospital, Inc. v. Casey, 111 S. Ct. 1138 (1991), by authorizing recovery of reasonable expert witness fees by prevailing parties. *See* 137 CONG. REC. H9539 (daily ed. Nov. 7, 1991) (statement of Rep. Clay); *see also infra* note 35 and accompanying text (discussing §§ 109 and 402).

4. § 2(2), 105 Stat. at 1071.

5. § 3, 105 Stat. at 1071. The stated purposes of the Act, which amended the Civil Rights Act of 1964, were:

> (1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;
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> (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing v. Atonio, 490 U.S. 642 (1989);
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> (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964 (42 U.S.C 2000e et seq.); and
>
> (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Id.

6. 42 U.S.C. §§ 2000e-2000e-17 (1988).

7. § 102(b), 105 Stat. at 1072-73. This section provides:

> Sec. 102. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.
>
> The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section:
>
> Sec. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT. . . .
>
> (b) COMPENSATORY AND PUNITIVE DAMAGES.—
>
> (1) DETERMINATION OF PUNITIVE DAMAGES.—A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

These new provisions supplement the remedies, such as backpay and injunctive relief, that were already available to a claimant under the statute.[9]

Though Congress specifically identified each of the new rights and remedies available to a claimant under the Act, it failed to identify with any clarity the universe of claimants affected by these new provisions. Congress never stated whether the new provisions should be applied to lawsuits that were pending on November 21, 1991, the Act's effective date. Consequently, following the enactment of the new remedial provisions, many plaintiffs amended their complaints under the 1991 Act to seek damages that were not previously available.[10] Lacking clear guidance on this point, individual courts have struggled with the issue of the Act's applicability to specific plaintiffs, reaching conclusions that are simply irreconcilable as a body of law.[11]

Accordingly, this Comment examines the doctrine of retroactivity,[12] focusing on the application of a newly-enacted statute to

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Id.

8. § 102(c), 105 Stat. at 1073. This section provides in pertinent part:

> (c) Jury Trial.—If a complaining party seeks compensatory or punitive damages under this section—
>
> (1) any party may demand a trial by jury . . . .

Id.

9. § 102(a)(1), 105 Stat. at 1072. Section 102 provides:

> (a) RIGHT OF RECOVERY.—
>
> (1) CIVIL RIGHTS.—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

Id.

10. Because the 1991 Act contains specific sections that legislatively overrule previous Supreme Court decisions (*see supra* note 3) plaintiffs have argued that they should be allowed to proceed under the new Act even though, under prior Supreme Court precedent, their claims may have been barred. *See also infra* sec. III.A and III.B.

11. *See infra* secs. III.A and III.B.

12. A distinction between "retroactive" and "retrospective" statutes has been observed by courts and commentators. "Retroactive" refers to legislative action that determines the "legal significance of acts or events that have occurred prior to the date . . . of enactment." Gregory J. DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered*, 10 OHIO N.U. L. REV. 253, 255-56 (1983). Thus, a "retroactive" statute, in the pure sense of the term, voids, affirms, or modifies prior law. *Id.* at 255. On the other hand, the term "retrospective" indicates "new legal significance from [the statute's] effective date to pre-enactment events or facts." *Id.* Despite the distinction, the term "retro-

(1) cases pending on the statute's enactment date and (2) conduct occurring before that same date. The Comment begins by discussing the effective date provision of the Civil Rights Act of 1991 and the Act's legislative history. Next, it reviews two conflicting lines of Supreme Court precedent regarding the retroactivity of statutes. Against this background, the Comment focuses on the inconsistent interpretation and application of the 1991 Act, summarizing many recent lower court opinions, as well as the position taken by the Equal Employment Opportunity Commission, the agency responsible for administration of employment discrimination claims. The Comment then analyzes the two Supreme Court doctrines of retroactivity and suggests a preferred approach. The Comment proposes a temporary solution to the problem facing judges who are called upon to decide the applicability of the Act: until either the Supreme Court or Congress chooses to resolve the issue of the Act's retroactivity, courts should strive to ensure fundamental fairness to the parties in every case that involves the Act.

II. BACKGROUND

The logical starting point, in an analysis of the Act's applicability to cases pending on the date of enactment, is Section 402, the Act's "effective date" provision. However, Section 402(a) states only that the Act and its amendments take effect upon enactment.[13] As one appellate panel noted, this provision can sustain several logical interpretations: a court may conclude that the Act applies to (1) conduct that occurred after November 21, 1991, (2) complaints filed after that date, (3) complaints amended after that date, or (4) appeals taken after that date.[14] A court may also

active" is freely used to describe either situation. *Id.* at 256. Because this Comment focuses on the application of a new statute to pending cases and to conduct that occurred before the statute's enactment date, this author, too, will use the term "retroactive application" in this generic sense. For early analyses of the general prohibition against retroactivity, see Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 232 (1927) [hereinafter Smith I], and Bryant Smith, *Retroactive Laws and Vested Rights II*, 6 TEX. L. REV. 409 (1928) [hereinafter Smith II]. For discussion of constitutional and policy considerations, see W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216 (1960), and Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960).

13. § 402, 105 Stat. at 1099. Section 402 states:

> Sec. 402. EFFECTIVE DATE.
>
> (a) IN GENERAL.—Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

Id.

14. Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 932-33 (7th Cir.

decide that the provisions apply to cases that were pending on November 21, 1991, regardless of the stage of the proceedings.[15]

When the plain language of a statute does not provide clear textual guidance, courts often examine an act's legislative history to determine Congress's reasons for enacting the statute.[16] Courts should exercise care, however, when relying on statements made by legislators,[17] because it is difficult to know whether a specific statement reflects congressional intent or merely the intent of the individual lawmaker who read his or her remarks into the written record.[18]

A. Legislative History: Compromise Leads to Ambiguity

One year before it passed the Civil Rights Act of 1991, Congress provided the framework for the new law by passing a similar bill.[19] The 1990 bill contained language authorizing retroactive application of several provisions to cases pending at the time of enactment.[20] President Bush vetoed the bill, criticizing, among other

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1992) (noting that "[s]ection 402(a)'s language is hopelessly ambiguous . . . ."); *see also* Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 227 (7th Cir. 1992). The *Luddington* court surmised that the statute could be applied:

> (1) to cases filed and completed before the effective date of the statute that arise from acts committed before that effective date, (2) to cases filed before the effective date of the statute, but not completed by that date, that arise from acts committed before that date, (3) to cases filed after the effective date that arise from acts committed before that date, (4) to cases in any of these categories but in which the conduct complained of straddles the effective date of the statute, or (5) only to cases filed after the effective date that arise from acts committed entirely after that date.

Id. The court explained that the first four instances involved retroactivity, but the fifth did not. *Id.*

15. *Mozee*, 963 F.2d at 932.

16. *See, e.g.*, Sofferin v. American Airlines, Inc., 785 F. Supp. 780, 784-85 (N.D. Ill. 1992) (citing Illinois EPA v. United States EPA, 947 F.2d 283, 290 (7th Cir. 1991)). No legislative committee reports exist regarding S. 1745. Therefore, the floor debates provide the only available legislative history. Accordingly, the legislative history is exclusively found in the Congressional Record. *See* discussion *infra* sec. II.A.

17. *Sofferin*, 785 F. Supp. at 785 (citing Regan v. Wald, 468 U.S. 222, 237 (1984)).

18. *Mozee*, 963 F.2d at 933-34; *see also* Steinle v. Boeing Co., 785 F. Supp. 1434, 1439 (D. Kan. 1992).

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

20. S. 2104, § 15(a). The Act provided that specified sections "shall apply to all proceedings pending on or commenced after" specified dates. S. 2104, § 15(a)(1)-(6); *see also Mozee*, 963 F.2d at 933 (finding that "the 1990 proposal contains explicit language that would have required courts to apply many of its provisions to cases pending at the time of its enactment").

things, its "unfair retroactivity rules."[21] In an apparent compromise designed to obtain the approval of the President, Congress passed a revised bill in 1991,[22] which did not include the controversial retroactivity provisions.[23] President Bush signed the 1991 bill into law on November 21, 1991.[24]

The floor debates that preceded the passage of the Act indicated that the members of Congress could not agree on whether the Act should apply retroactively.[25] Not even the principal sponsors of the Act could agree on the issue of its retroactivity.[26] In the Interpretive Memorandum issued by Senators Danforth and Kennedy, Senator Danforth stated that the Act should be applied prospectively in the absence of an explicit provision to the contrary.[27] In contrast, Senator Kennedy favored retroactivity and believed that courts should apply the Act's provisions to pending cases.[28]

Other congressmen also submitted statements of their views on retroactivity,[29] but there was no congressional consensus on the issue. Because it is inconclusive, the legislative history provides no guidance for interpreting the Act.[30] Interestingly, leaders from

21. 136 CONG. REC. S16562 (daily ed. Oct. 24, 1990); Fray v. Omaha World Herald Co., 960 F.2d 1370, 1375 (8th Cir. 1992). Congress failed to override the veto. *Fray*, 960 F.2d at 1375.

22. *See supra* notes 1-9 and accompanying text.

23. 137 CONG. REC. S15503-12 (daily ed. Oct. 30, 1991).

24. *See supra* note 2.

25. *See infra* notes 27-29 and accompanying text.

26. The principal sponsors of the Act were Senators Kennedy and Danforth. *See infra* notes 27-28 and accompanying text.

27. 137 CONG. REC. S15483 (daily ed. Oct. 30, 1991).

28. 137 CONG. REC. S15485 (daily ed. Oct. 30, 1991) ("[o]rdinarily, courts . . . apply newly enacted procedures and remedies to pending cases.").

29. *See* 137 CONG. REC. S15472, S15478 (daily ed. Oct. 30, 1991) for a section-by-section analysis and the views of Senators Dole, Burns, Cochran, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour and Thurmond, advocating a prospective approach. For further support of a prospective approach, see 137 CONG. REC. S17685 (daily ed. Nov. 19, 1991) (colloquy between Senators Levin and Rudman); 137 CONG. REC. H9542, H9548-49 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde); and 137 CONG. REC. S15483, S15485 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth). Additional support for a retroactive approach is found in 137 CONG. REC. H9549 (daily ed. Nov. 7, 1991) (statement of Rep. Fish); 137 CONG. REC. H9526, H9530-31 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards); and 137 CONG. REC. S15485 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy).

30. The three federal courts of appeals that have addressed the issue concluded that the legislative history provides no guidance whatsoever. *See Luddington*, 966 F.2d at 227 (stating that because the proponents of prospectivity and retroactivity could not reach an accommodation, they "dumped the question in the judiciary's lap without guidance"); *Mozee*, 963 F.2d at 932 (concluding that "whether Congress intended prospective or retroactive application of the 1991 Civil Rights Act cannot be deciphered from either the language of the statute or from the legislative history"); *Fray*, 960 F.2d at 1377 (commenting that both proponents and opponents of retroactivity were "willing to hand this

both sides of the issue agreed that the judiciary should determine whether and to what extent the Act applies to cases and claims pending on the date of enactment.[31] Despite their agreement on this point, these legislators remained divided on the question of *how* the courts should resolve the issue.[32]

Looking beyond the Act's inconclusive legislative history for guidance on the retroactivity issue, some courts have focused on the remarks made by President Bush as he signed the bill into law.[33] The President indicated that Senator Dole's statements, which urged prospective application of the Act, would guide the executive branch in its interpretation of the new law.[34]

Advocates of retroactive application contend, on the other hand, that two provisions of the Act, Sections 109(c) and 402(b), offer support for their position.[35] They argue that by including these

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controversial issue to the judiciary by passing a law that contained no general resolution of the retroactivity issue"); Vogel v. City of Cincinnati, 959 F.2d 594, 598 (6th Cir. 1992) (determining that the legislative history provides no guidance on this issue).

The frustration in the federal district courts is also apparent. *See infra* sec. III.B; *see also, e.g.*, Robinson v. Davis Memorial Goodwill Indus., 790 F. Supp. 325, 328 n.3 (D.D.C. 1992) (finding the legislative history "unhelpful"); King v. Shelby Medical Ctr., 779 F. Supp. 157 (N.D. Ala. 1991) (noting that "Congress . . . punted on the question of whether or not the Act applies retroactively").

31. *See* 137 CONG. REC. S15963 (daily ed. Nov. 5, 1991) (statement of Sen. Kennedy).

32. *See supra* note 29; *see also infra* secs. II.B.1 and II.B.2, and the discussion of the two conflicting approaches set forth by the Supreme Court in Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974), and Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).

33. *See* President's Statement, *supra* note 2; *see, e.g.*, *Sofferin*, 785 F. Supp. at 784.

34. *See* President's Statement, *supra* note 2; *Sofferin*, 785 F. Supp. at 785; 137 CONG. REC. S15953 (daily ed. Nov. 5, 1991); 137 CONG. REC. S15472, S15478 (daily ed. Oct. 30, 1991).

35. § 109(c), 105 Stat. at 1077-78. Section 109(c) provides:

> Sec. 109. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.
>
> (c) APPLICATION OF AMENDMENTS.—The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

Section 402(b), 105 Stat. at 1099, provides:

> Sec. 402. EFFECTIVE DATE.
>
> (b) CERTAIN DISPARATE IMPACT CASES.—Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

These provisions were added in response to two Supreme Court decisions. Section 109 was added to legislatively overrule EEOC v. Arabian American Oil Co., 111 S. Ct. 1227 (1991), by extending protections under Title VII to U.S. citizens employed in foreign countries. Section 402(b) was added to prevent any possible retroactive application of the Act to the litigation in Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989), in which Wards Cove Packing Co. had spent twenty-four years defending a disparate impact charge. *See* 137 CONG. REC. S15478 (daily ed. Oct. 30, 1991) (statement of Sen.

sections, which expressly provide for prospective-only application, Congress intended the rest of the Act to apply retroactively.[36] When examined as a whole, however, the legislative history does not support this result.[37] The floor debates suggest that Congress intended to draft narrow provisions that would apply only to a handful of Supreme Court decisions.[38] Indeed, it is the Act's legislative history that has generated most of the confusion regarding retroactivity.

B. Supreme Court Decisions on Retroactive Application of Statutes

A basic rule of statutory construction provides that when congressional intent regarding retroactive application of a new statute is expressed, that intent governs.[39] Because both the language of the 1991 Civil Rights Act and its legislative history are ambiguous, however, courts that have addressed the issue of the Act's retroactivity have had to rely on Supreme Court analysis for guidance. The Supreme Court, however, has taken two distinct approaches in its cases involving retroactivity. One view, the *Thorpe-Bradley* approach, is based on the Court's decisions in *Thorpe v. Housing Authority of Durham*,[40] and *Bradley v. School Board of Richmond*.[41] According to the *Thorpe-Bradley* line of decisions, in the absence of clear congressional intent, a statute should be applied retroactively unless that application would result in "manifest injustice."[42]

Dole) (noting that "[s]ection 402(b) specifically points out that nothing in the Act will apply retroactively to the Wards Cove Packing Company."); *see also* 137 CONG. REC. S15963 (daily ed. Nov. 5, 1991) (statement of Sen. Kennedy) (indicating that Sec. 402(b) was intended solely to protect Wards Cove Packing Co. from retroactive application of the Act to its protracted litigation); 137 CONG. REC. S15953 (daily ed. Nov. 5, 1991) (statement of Sen. Murkowski, drafter of Sec. 402(b)) (claiming that the 1990 Act was to "apply retroactively to all cases pending on the date of enactment, regardless of the age of the case" and that his proposed amendment intended to limit retroactive application of the Act regarding Wards Cove); *see also supra* note 3.

36. *See, e.g.*, 137 CONG. H9526, H9530 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards). Whereas sections 402(b) and 109(c) "express a clear purpose to deny retroactive application in the circumstances set forth, [Congress'] decision not to use similar language in Sec. 402(a) clearly shows [a] different purpose in all other circumstances." *Id.*

37. *See supra* note 30.

38. *See supra* note 36.

39. *See, e.g.*, Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 837 (1990) (stating that under either line of precedent with respect to retroactivity, "where congressional intent is clear, it governs").

40. 393 U.S. 268 (1969).

41. 416 U.S. 696 (1974).

42. *See Thorpe*, 393 U.S. at 282; *Bradley*, 416 U.S. at 711.

In contrast, *Bowen v. Georgetown University Hospital*[43] held that a statute is presumed to apply prospectively unless Congress has clearly indicated otherwise.[44]

1. The *Thorpe-Bradley* Doctrine

In *Thorpe*, the Court ordered retroactive application of the statute at issue, stating that a court is required to apply the law that is in effect at the time it issues a decision.[45] The *Bradley* Court extended this reasoning, concluding that a new law should apply retroactively to pending cases unless that application would (1) result in a manifest injustice or (2) contradict a clear legislative intent.[46]

In *Thorpe*, the petitioner, a tenant in a low-income housing project operated by the city of Durham, appealed an eviction order following the termination of her lease by the city.[47] Though she had asked repeatedly, the city never told her why she was being evicted.[48] Nevertheless, the trial court ordered her to leave the premises, and the Supreme Court of North Carolina affirmed that decision.[49] Petitioner appealed to the United States Supreme Court, and while her appeal was pending, the United States Department of Housing and Urban Development (HUD) issued a circular requiring local housing authorities to inform any soon-to-be evicted tenant of the impending eviction and to explain the reasons for the eviction to that tenant.[50] The U.S. Supreme Court vacated the judgment of the Supreme Court of North Carolina and remanded the case for further proceedings in light of the HUD circular.[51] On remand, the Supreme Court of North Carolina refused to apply the new rule and re-affirmed the eviction.[52]

Thorpe appealed the decision, and the United States Supreme

43. 488 U.S. 204 (1988).

44. *Id.* at 208.

45. *Thorpe*, 393 U.S. at 281-82.

46. *Bradley*, 416 U.S. at 711.

47. *Thorpe*, 393 U.S. at 271. The tenant had been elected president of the tenants' organization, and the next day, the city terminated her lease. *Id.* She refused to vacate the apartment, and the city began eviction proceedings. *Id.*

48. *Housing Auth. of Durham v. Thorpe*, 148 S.E.2d 290, 292 (N.C. 1966).

49. *Thorpe*, 393 U.S. at 271-72.

50. *Id.*, 393 U.S. at 272-73. Furthermore, the regulation also required the local authorities to respond to tenants' inquiries. *Id.*

51. Thorpe v. Housing Auth. of Durham, 386 U.S. 620, 673-74 (1967).

52. Housing Auth. of Durham v. Thorpe, 157 S.E.2d 147, 150 (N.C. 1967). The court reasoned that since all of the critical events occurred before the effective date of the HUD circular, including the decision to terminate the lease, the circular could not be given retroactive effect. *Id.* The court held that the directive had no application to the facts of the case. *Id.*

Court reversed, concluding that the state supreme court erred when it refused to apply the new regulation to Thorpe's case—even though the regulation was not on the books when Thorpe was evicted.[53] The Court stated that the HUD regulation, when applied to Thorpe's case, would offer the tenant additional constitutional protection, but create no hardship or injustice for the housing authority, which had fully complied with the regulation in all subsequent cases.[54] Because the housing authority would suffer no injustice or hardship by offering Thorpe an explanation for her eviction, the Court concluded that the regulation should be applied retroactively.[55]

In *Bradley v. School Board of Richmond*,[56] the Supreme Court extended its decision in *Thorpe* and concluded that a court could apply a new law retroactively even if there was no clear congressional intent to that effect.[57] The *Bradley* plaintiffs, parents of children in the Richmond, Virginia school system, sought an award of attorneys' fees and expenses following successful desegregation litigation.[58] Though there was no statutory authorization for awarding attorneys' fees in a desegregation case, the district court invoked its general equitable powers and granted the petitioners' request.[59] The appellate court reversed, citing, *inter alia*, Congress' failure to specifically provide for this type of an award in a desegregation case.[60]

While the case was pending on appeal, Congress amended Section 718 of Title VII of the Emergency School Act[61] to provide for awards of attorneys' fees in appropriate school desegregation

53. *Thorpe*, 393 U.S. at 274. The Court relied upon Chief Justice Marshall's opinion in United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801): "[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. If the law be constitutional, . . . I know of no court which can contest its obligation." *Thorpe*, 393 U.S. at 282 (quoting *Schooner Peggy*, 5 U.S. (1 Cranch) at 110).

54. *Thorpe*, 393 U.S. at 283. The housing authority admitted that it complied with the notice provisions once the rule took effect, but had refused to apply the regulation to Thorpe only because the regulation had not been in effect at the time of the initial proceeding. *Id.*

55. *Id.*

56. 416 U.S. 696 (1974).

57. *Id.* at 715.

58. *Id.* at 705.

59. *Id.* at 705-06. The district court noted that other sections of the 1964 Civil Rights Act provided for awards of attorneys' fees and concluded that awards were justified in desegregation cases as well. *Id.* at 706-08.

60. *Id.* at 708-10.

61. 20 U.S.C. § 1617 (Supp. II 1970).

cases.[62] Though the appellate court considered applying the amendment to petitioners' claim, it ultimately concluded that the section was inapplicable.[63] The court stated that the attorneys had completed their work before the amendment was enacted and had no orders pending or appealable at the time the district court approved the award.[64] Petitioners appealed this decision.

Relying on *Thorpe*, the Supreme Court in *Bradley* stated that a court must apply the law in effect at the time of its decision unless a manifest injustice would result or clear congressional intent would demand otherwise.[65] The *Bradley* Court concluded that *Thorpe* does not compel a court to apply a new law retroactively when the law itself does not explicitly require that result.[66] Because the legislative history of Section 718 contained support for either interpretation,[67] the *Bradley* Court held that there was at least implicit approval for applying the statute to pending cases.[68] The Court cautioned, however, that its decision should not be construed as holding that courts must apply new laws to pending cases in the absence of a clear legislative directive to the contrary.[69]

The Court then discussed *Thorpe*'s manifest injustice exception.[70] Reviewing prior cases, the *Bradley* Court noted that none of the decisions had spelled out with any specificity the elements needed to trigger the exception.[71] Nevertheless, the Court an-

62. *Id.*

63. *Bradley*, 416 U.S. at 708-09.

64. *Id.* at 709-10.

65. *Id.* at 711. The Court stated: "We anchor 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." *Id.* The Court also discussed the state of the law following the *Schooner Peggy* decision:

> [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, . . . 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.

Id. at 712.

66. *Bradley*, 416 U.S. at 715 ("*Thorpe* thus 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."). The Court continued: "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." *Id.* (emphasis added).

67. *Id.* The Court noted the futile efforts of two lower courts to ascertain congressional intent from the legislative history. *Id.* at 716 n.22.

68. *Id.* at 716.

69. *Id.* at 715-16.

70. *Id.* at 716.

71. *Bradley*, 416 U.S. at 717.

nounced three factors that should be examined when determining whether the retroactive application of a new law would produce an unjust result: (1) the nature and identities of the parties; (2) the nature of the parties' rights; and (3) the nature of the impact of the change in law upon the parties' rights.[72]

Applying these factors, the *Bradley* Court concluded that no manifest injustice would result by applying the statute retroactively.[73] First, the Court noted that, even though private individuals had initiated the action, the subject matter was of "great national concern" to the public.[74] Second, the Court reasoned that the School Board had no mature or unconditional right to use the funds allocated to it by the taxpayers to run a segregated school system contrary to public law.[75] Third, the Court noted that the new legislation did not alter the substantive rights of the parties.[76] Even absent the new statutory provision, the Board was obligated to provide the students with a non-discriminatory education.[77] Furthermore, the Board was fully aware that, under alternative theories, it could have been required to pay attorneys' fees.[78] Thus, the *Bradley* Court concluded that since the three prongs of the test had been satisfied, no manifest injustice would result if the statute were applied retroactively.[79]

2. The *Bowen* Decision—Shifting Courses

Fourteen years later, the decision in *Bowen v. Georgetown University Hospital*[80] marked a clear departure from the *Thorpe-Bradley* approach. Stating that "retroactivity is not favored in the law," the *Bowen* Court held that a statute should not be given retroactive effect unless the statute explicitly requires this application or there

72. *Id.* For a discussion of the *Bradley* approach and the cases cited by the Court, see William V. Luneberg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 117 (1991) [hereinafter Luneberg].

73. *Bradley*, 416 U.S. at 717-21.

74. *Id.* at 719. The Court recognized that school desegregation litigation differed from "mere private cases" and concluded that this type of litigation deserved greater attention than cases between individual litigants. *Id.*

75. *Id.* at 720. The Court noted earlier decisions where it had refused to apply a new law to pending cases because such an action would "infringe upon or deprive a person of a right that had matured or become unconditional." *Id.*

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

77. *Id.*

78. *Id.* The alternative theories for recovery of attorneys' fees were discussed by the district court and the court of appeals. *Id.*

79. *Id.*

80. 488 U.S. 204 (1988).

is evidence of clear congressional intent to that effect.[81]

In *Bowen*, the Court examined the propriety of retroactive rulemaking by the Secretary of Health and Human Services.[82] In 1981, the Secretary promulgated a regulation to revise the method for calculating a key factor used to determine cost reimbursements from the federal government to individual hospitals.[83] After local hospitals challenged the validity of the rule, citing the Secretary's failure to provide appropriate notice and comment,[84] the district court declared the rule invalid.[85]

Three years later, the Secretary published a notice for public comment on a proposal to re-issue the 1981 regulation, retroactive to 1981.[86] Congress, in the interim, had amended the Medicare Act by requiring new cost-reimbursement considerations.[87] Following the comment period, the Secretary re-issued the 1981 rule and attempted to recover the sum the Department had previously paid pursuant to the district court's order.[88] The hospitals challenged the validity of the retroactive rule and prevailed on summary judgment in the district court.[89] The appellate court affirmed, noting that both the Administrative Procedure Act[90] and the Medicare Act[91] prohibited this type of retroactive rulemaking.[92] The Secretary then petitioned the Supreme Court for review,

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81. *Id.* at 208 (citations omitted).

82. *Id.* at 205-08. For a discussion of *Bowen* and its effect on administrative regulations, see Luneberg, *supra* note 72, at 107, 114, in which the author suggests that the *Bowen* approach has limited applicability.

83. *Bowen*, 488 U.S. at 206-07. Pursuant to the Medicare Act, the Secretary had the authority to promulgate cost-reimbursement regulations that placed limits on recoverable costs under the federal Medicare program. 42 U.S.C. § 1395x(v)(1)(A) (1988). Providers of health care services to individuals who qualified for Medicare benefits received reimbursements from the government for expenses incurred in the treatment of the beneficiaries. *Id.*

84. *Bowen*, 488 U.S. at 206. The Administrative Procedure Act requires an agency to provide notice and a public comment period before issuing a rule. 5 U.S.C § 551 *et seq.* (1988).

85. *Id.* at 206.

86. *Id.* at 207.

87. *Id.*

88. *Id.* "In effect, the Secretary had promulgated a rule retroactively, and the net result was as if the original rule had never been set aside." *Id.* The rule required the respondents, a group of seven hospitals, to return reimbursement payments in excess of $2 million. *Id.*

89. *Bowen*, 488 U.S. at 207-08. The district court concluded that retroactive application was not justified. *Id.*

90. 5 U.S.C. § 551 (1988).

91. 42 U.S.C. § 1395 (1988).

92. Georgetown Univ. Hosp. v. Bowen, 821 F.2d 750, 753 (D.C. Cir. 1987).

and the Court also affirmed.[93]

The Court began its analysis by stating that unless expressly required, congressional enactments and administrative rules are not to be given retroactive effect.[94] In the context of administrative law, the Court stated that a statute conferring rulemaking authority does not confer power to promulgate retroactive rules unless its terms explicitly so provide.[95] Although the Medicare Act specifically addressed and permitted retroactive action in some instances, the Court concluded that the reimbursement rules at issue should not be applied retroactively.[96] In addition, the Court held that the Act did not authorize retroactive rulemaking except in specific, limited circumstances.[97]

Therefore, the Court concluded, where Congress intended retroactive rulemaking, it expressly provided for that power.[98] Moreover, the legislative history indicated that Congress unambiguously intended to enact prospective cost-limit rules.[99] Thus, because neither the statutory language nor the legislative history provided any support for retroactive rulemaking authority, the Court rejected that argument.[100]

The *Bowen* Court did not analyze the Medicare Act provision under the *Thorpe-Bradley* rule. The Court also did not reject the *Thorpe-Bradley* approach.[101] By leaving *Thorpe-Bradley* intact, the *Bowen* Court presented a second approach to the issue of statutory retroactivity—an approach that directly conflicted with its prior decisions. The Supreme Court has not yet resolved this conflict.

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93. *Bowen*, 488 U.S. at 207-08.

94. *Id.* at 208.

95. *Id.* The Court observed that even where there is justification for retroactive rulemaking, courts should be reluctant to find such authority in a statute without an express statutory grant. *Id.* at 208-09.

96. *Id.* at 209.

97. *Id.* The Court observed, however, that federal appellate courts analyzing the retroactivity of the provision had reached different results. *Id.* at 209 n.1.

98. *Bowen*, 488 U.S. at 213.

99. *Id.* at 214. The legislative history directly addressed the question of retroactivity. *Id.*

100. *Id.* at 215. Thus, the court declared the reinstatement of the initial rule invalid. *Id.* at 216.

101. In fact, the *Bowen* Court did not cite to *Thorpe* or *Bradley* anywhere in the majority or concurring opinions. The Court's opinion rested on administrative law principles, the language of the statute and its legislative history. Therefore, in instances such as those that involve the 1991 Civil Rights Act, where the statutory language and legislative history are not clear, reliance on *Bowen* is misplaced. *See infra* secs. IV and V. Nevertheless, all of the courts that have analyzed the issue of retroactivity of the 1991 Act have discussed both the *Thorpe-Bradley* and *Bowen* doctrines as opposing approaches. *See infra* secs. III.A. and III.B.

3. *Kaiser*: Addressing, But Not Resolving, the Conflict

Although the decision in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*[102] did not resolve the conflict presented by *Thorpe-Bradley* and *Bowen*, lower courts regularly cite the opinion for its discussion and recognition of the Supreme Court's divergent doctrines.[103]

In *Kaiser*, a group of antitrust plaintiffs who had prevailed at trial sought to recover the postjudgment interest that had accrued on their damages during a lengthy appeal process.[104] During the appeal process, Congress modified the applicable postjudgment interest statute.[105] This modification changed the means by which the postjudgment interest rate was to be calculated.[106] The plaintiffs wished to have the postjudgment interest calculated at the higher rate allowed by the statute.[107]

Both the district court and the Third Circuit applied the *Bradley* presumption that courts are to apply the law in effect at the time a court renders its decision unless such application results in manifest injustice or runs counter to congressional intent.[108] Neither court found conclusive congressional intent.[109] However, while the district court found that the application of the amended statute would result in manifest injustice, the Third Circuit disagreed and held that the statute should be applied retroactively.[110] The United States Supreme Court granted certiorari.[111]

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102. 494 U.S. 827 (1990). For a discussion of *Kaiser* and its relation to *Bradley* and *Bowen*, see Daniel J. Capra, *Discretion Must Be Controlled, Judicial Authority Circumscribed, Federalism Preserved, Plain Meaning Enforced, and Everything Must Be Simplified: Recent Supreme Court Contributions to Federal Civil Practice*, 50 MD. L. REV. 632, 704 (1991).

103. *See infra* secs. III.A and III.B and cases cited therein. All of the courts cite to *Kaiser*, and especially to Justice Scalia's concurring opinion, to emphasize the confusion generated by the Supreme Court decisions.

104. *Kaiser*, 494 U.S. at 834.

105. 28 U.S.C. § 1961 (1976), *as amended by* The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, § 302 (1982).

106. *Kaiser*, 494 U.S. at 831-32. Under the old law, interest was to be calculated at the rate allowed by the law of the State in which the court sits. *Id.* Under the new law, interest was to be calculated based upon the yield for United States Treasury Bills settled immediately prior to the date of judgment. *Id.* Congress modified the law to remove any economic incentive for a losing defendant to appeal a judgment in order to collect interest on the sum owed to the plaintiff during the appeal process. *Id.* at 839.

107. *Id.* The Court considered whether the statute could be applied retroactively in order to determine: (1) the applicable rate of interest; and (2) the date from which the interest should be calculated. *Id.* at 829.

108. *Id.* at 832-33.

109. *Id.*

110. *Id.* at 833.

111. 491 U.S. 903 (1989).

Though the Supreme Court acknowledged the confusion that its previous holdings had generated,[112] it did not use the *Kaiser* case to resolve the problem.[113] Because the language of the amended statute and its legislative history made it clear that the amended statute was not to be applied before its effective date, the Court was able to resolve the *Kaiser* case without entangling itself in the larger issue.[114] Basing its decision solely on the statute's unambiguous legislative intent, the *Kaiser* Court did not attempt to reconcile the two conflicting approaches.[115]

III. DISCUSSION

After President Bush signed the Civil Rights Act of 1991 into law, many plaintiffs in pending cases filed motions to amend their complaints. These plaintiffs either alleged new causes of action under the Act or sought one of the Act's new remedies.[116] Though some district courts granted these motions to amend, other courts denied them.[117] This inconsistency typifies the divergent ap-

112. *Kaiser*, 494 U.S. at 837. The Court recognized the "apparent tension" between the *Bradley* and *Bowen* views. *Id.*

113. *Id.* (reasoning that the conflict need not be addressed because, under either view, clear congressional intent governs).

114. *Id.* at 837-38. Congress had delayed the effective date of the amendment by six months in order to familiarize courts with the change in law. In addition, the terms of the Senate committee report on the legislation indicate that the amended statute was not to be applied before the enactment date. *Id.* at 839.

115. *Kaiser*, 494 U.S. at 839-40. In his concurring opinion, Justice Scalia found the *Bradley* and *Bowen* views "in irreconcilable contradiction" and would have held that *Thorpe* and *Bradley* were "wrong." *Id.* at 841 (Scalia, J., concurring). In addition, he would have settled the issue by holding that, in the absence of specific authorization to the contrary, legislation operates prospectively only. *Id.* Justice Scalia then pointed to pre-*Thorpe* decisions in which the Court determined that, as a general rule, laws should not operate retroactively: "During the more than 150 years of doctrinal certainty, we did not *always* deny retroactive application to new statutory law. But when we accorded it, the reason was that the statute affirmatively so required." *Id.* at 843-44 (emphasis added). For a historical perspective, see Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936); *see also* Smith I and Smith II, *supra* note 12; DeMars, *supra* note 12 (noting the general prohibition against retroactivity).

Kaiser was a 5-4 decision. The dissenters contended that the "plain language" of the statute did not address the applicability of the amended statute to pending cases. *Kaiser*, 494 U.S. at 864 (White, J., dissenting, joined by Brennan, Marshall, Blackmun, JJ.). They also maintained that the case did not involve retroactivity at all, because the change in law did not create the possibility of overturning a final decision. *Id.* Furthermore, applying the amended statute did not result in altering legal consequences for past actions. *Id.* at 866. By applying the manifest injustice exception, a fair result could be obtained without applying a mechanical presumption against retroactivity. *Id.* at 866-69.

116. *See infra* secs. III.A and III.B and cases cited therein.

117. *See infra* note 187.

proaches taken by courts that have been asked to decide whether the Act applies retroactively to plaintiffs whose cases were pending on November 21, 1991. These courts have disagreed on the meaning of Section 402(a), its ambiguous legislative history, and the correct interpretation of conflicting Supreme Court precedent.[118] To date, three federal appellate courts have agreed that the Act should not be applied retroactively.[119] Taken together, the results are interesting; these courts read the same statute, analyzed the same legislative history, and studied the same Supreme Court decisions, yet they reached different conclusions.

A. The Decisions of the United States Courts of Appeals

Three federal appellate courts have ruled against retroactive application of the Civil Rights Act of 1991. Like the district courts, each recognized the difficulty of resolving the issue in view of the ambiguous language of the statute, its inconclusive legislative history, and the conflicting Supreme Court decisions on the issue.

In *Vogel v. Cincinnati*,[120] the appellant challenged the city's affirmative action policy with respect to hiring and promotions within the police department.[121] Even though the parties did not argue the applicability of the Act, the Sixth Circuit, *sua sponte*, addressed the issue and concluded that the Act did not apply.[122] After acknowledging that the legislative history provided no guidance,[123] the court considered the *Bradley-Bowen* dichotomy. The court recognized that it had frequently cited *Bradley* as controlling,[124] but concluded that *Bradley* should be read narrowly and

118. The courts agree only that the legislative history is ambiguous and the Supreme Court decisions are in conflict. *See infra* secs. III.A and III.B and cases cited therein.

119. *See* discussion *infra* sec. III.A.

120. 959 F.2d 594 (6th Cir. 1992).

121. This case was argued before the Sixth Circuit on November 5, 1991—sixteen days before the Act took effect. The appellant did not present subsequent arguments under the 1991 Act, but rather appealed entry of summary judgment for the city. *Id.* at 597. The city and the Department of Justice had entered into a consent decree following charges that the city engaged in discriminatory hiring and promotion practices against blacks and women in violation of Title VII. *Id.* at 596. The consent decree called for the city to hire and promote individuals, giving preference to blacks and women in order to meet specified percentages. *Id.* When Vogel, a white male, was not promoted he filed an action for damages, alleging that the city had exceeded its authority under the consent decree, or alternatively, that the affirmative action policy violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* The Sixth Circuit affirmed the district court's entry of summary judgment for the city. *Id.*

122. *Id.* at 597 (holding that "the 1991 Act does not govern the instant case, which involves conduct that occurred before the 1991 Act became law").

123. *Id.* at 598.

124. *Id.* The court stated that in a previous case, there had been a "choice between

not applied in situations where "substantive rights and liabilities" would be affected.[125] Apparently finding that this danger was present in the case at bar, the court held that the Act should not apply retroactively.[126]

The Eighth Circuit in *Fray v. Omaha World Herald Co.*[127] also refused to apply the Act retroactively. The court held that Section 101(2)(b) of the Act,[128] enacted while the case was on appeal, should not be applied retroactively.[129] The appellant, a black woman, worked part-time in appellee's mailroom and had applied for a full-time mailroom apprentice position.[130] Appellee, however, offered the apprentice position to a white male truck driver who had

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the broad statement of the law in *Bradley* and the recent affirmation in *Bowen* of the general rule against retrospective application." *Id.* (citing United States v. Murphy, 937 F.2d 1032 (6th Cir. 1991)).

125. *Vogel*, 959 F.2d at 598. The court indicated that the phrase, "substantive rights and liabilities," should be broadly construed. *Id.* (quoting *Murphy*, 937 F.2d at 1037-38).

126. *Id.* The court did not explain its finding, but stated merely that, "[c]learly, retroactive application of the 1991 Act would affect 'substantial rights and liabilities' of the parties." *Id.* One judge dissented because the issue of retroactivity had not been raised before the court. *Id.* at 601 (Ryan, J., dissenting).

127. 960 F.2d 1370 (8th Cir. 1992).

128. This section was added to legislatively overrule the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which construed 42 U.S.C. § 1981 as limited to claims involving a "refusal to enter into an employment contract on the basis of race." *See Fray*, 960 F.2d at 1372 (citing *Patterson*, 491 U.S. at 182). In *Patterson*, 491 U.S. at 195, the Court found that a denied promotion was not covered under 42 U.S.C. § 1981 unless the opportunity involved entering into a "new" contract with the employer, or creating a "new and distinct" relationship between the employer and the employee. Furthermore, the *Patterson* Court held that the claim must be based on a promotion that involved a "meaningful, qualitative change" in the employment contract. *Id.* For a detailed discussion of *Patterson* and the congressional response that it generated, see Hemeryck, *supra* note 3; *see also* B. Glenn George, *Employment Discrimination Under Section 1981: Post-Patterson Update and the Civil Rights Act of 1991*, ALI-ABA Course of Study, Advanced Employment Law and Litigation (American Law Institute), C669 ALI-ABA 295 (Dec. 5, 1991) (discussing *Patterson* and the 1991 Act).

129. *Fray*, 960 F.2d at 1373-74. The appellant filed this action in 1987 against her employer for alleged discriminatory conduct that occurred between 1984 and 1986. *Id.* at 1372. The Supreme Court decided *Patterson* in 1989, before appellant's case initially went to trial. Thus, the appellant argued that the Act overruled *Patterson*, which had not been the law at the time the conduct occurred, and therefore, that *Patterson* should not apply at all. *Id.* at 1371.

The court acknowledged that if it were to hold in favor of retroactive application, the appellant would be allowed to proceed, since Sec. 101(2)(b) legislatively overruled the Supreme Court's decision in *Patterson v. McLean Credit Union* (*see supra* note 128), which would otherwise have precluded her claim under 42 U.S.C. § 1981. *Id.* at 1373. If, on the other hand, the court were to find against retroactive application of Sec. 101(2)(b), then *Patterson* would control, and the appellant would not have an actionable claim. *Id.* The Eighth Circuit decided against retroactivity of the Act and concluded that *Patterson* precluded the appellant's failure-to-promote claim. *Id.*

130. *Id.* at 1371.

no mailroom experience.[131] Appellant filed a claim against the employer alleging sex and race discrimination in violation of federal and state laws.[132] The district court entered a judgment in favor of the appellant based on her Section 1981 and Title VII claims, but only awarded damages for the Section 1981 violations.[133]

The Eighth Circuit began its analysis by stating the "well-established principle" against retroactivity in general.[134] The court then noted that *Thorpe* and *Bradley* destabilized this settled doctrine.[135] The court stated that the *Bowen* decision, which contained no references to either *Thorpe* or *Bradley*, marked a return to traditional principles against retroactivity.[136] Moreover, according to the court, the recent decision in *Kaiser* dealt a strong blow to the advocates of retroactivity.[137] Nevertheless, the court acknowledged that both approaches require courts to defer to clear legislative intent.[138] Recognizing that Section 402(a), the statute's effective date provision, did not resolve the issue, the court examined the legislative history, but found no guidance there.[139] The appellant had argued that the inclusion of two prospective-only provisions, Sections 109(c) and 402(b),[140] indicated that Congress intended the rest of the Act to apply retroactively. The court, however, rejected this argument, stating that nothing in the legislative history suggested that result.[141]

The court then discussed whether Section 101, specifically, should be applied retroactively.[142] Noting both *Bowen's* presump-

131. *Id.* at 1372.

132. *Id.* The appellant filed this action pursuant to 42 U.S.C. §§ 1981 and 2000e (Title VII) and Neb. Rev. Stat. § 20-148. *Id.* at 1372 n.2.

133. *Id.* at 1372. Both parties appealed. *Id.*

134. *Fray*, 960 F.2d at 1374. The Court stated that "legislation must be addressed to the future, not to the past . . . [and] 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 legislature.' " *Id.* (quoting Greene v. U.S., 376 U.S. 149, 160 (1964)). The court also adopted the principle of "ancient Roman civil law" that legislation requires a prospective application unless otherwise specifically stated. *Id.*

135. *Id.* at 1374-75.

136. *Id.* "[A] unanimous Court restated the traditional principle without even citing *Bradley* or *Thorpe*: 'Retroactivity is not favored in the law.' " *Id.* (quoting *Bowen*, 488 U.S. at 208).

137. *Id.* (citing Justice Scalia's concurring opinion in *Kaiser*, 494 U.S. at 844-57).

138. *Id.* at 1375.

139. *Fray*, 960 F.2d at 1375-77.

140. *Id.* at 1377; *see also supra* note 35.

141. *Fray*, 960 F.2d at 1377. The court also found that although Congress responds to a Supreme Court decision with a legislative change in law, it does not necessarily follow that the new law is to be applied retroactively. *Id.*

142. *Id.*

tion against retroactivity as well as the absence of congressional intent to the contrary, the court concluded that *Bowen* barred retroactive application of Section 101.[143]

The court then discussed the *Bradley* test and concluded that the manifest injustice exception did not apply.[144] The court also emphasized the history of the 1991 Act. The President had vetoed the 1990 bill, which contained retroactive provisions, and an attempt to override his veto failed.[145] The President ultimately signed the revised bill, which did not contain the retroactive provisions.[146] The court concluded that the history of the 1991 Act established a legislative intent against retroactive application of the Act.[147]

In dissent, Judge Heaney argued that the Act should be applied retroactively,[148] and he criticized the majority's conclusion that Congress intended prospective-only application.[149] Though Judge Heaney agreed that a *Bowen* analysis did not require retroactive application of the 1991 Act, he contended that a *Bradley* analysis demanded this result.[150] In addition, because both approaches were good law, Judge Heaney suggested that the court's overriding

143. *Id.* Consequently, the court found it "clear" that, pursuant to the *Bowen* presumption against retroactivity, "*Patterson* has not been retroactively overruled." *Id.* The court based its reasoning on the fact that, while the 1990 bill specifically provided that the Act would apply to all cases pending on the date of the *Patterson* decision, the 1991 bill deleted that provision. *Id.* Furthermore, other retroactivity provisions in the 1990 bill had been deleted from the final 1991 version in an attempt to present a bill that would meet with presidential approval. *Id.*

144. *Fray*, 960 F.2d at 1378. The court acknowledged that "[i]f the *Bradley* test applies, the retroactivity question is much closer." *Id.* Because the conduct occurred before *Patterson*, the court concluded that the acts could be actionable under 42 U.S.C. § 1981 as written at that time. *Id.* Consequently, applying the statute retroactively would have had no effect on the rights and expectations of the parties. *Id.*

145. *See supra* notes 20-21 and accompanying text.

146. *Fray*, 960 F.2d at 1378.

147. *Id.* The court concluded that because the first bill proposing retroactivity failed and a second bill deleting the provisions was enacted, the new law should be applied prospectively only. *Id.* (citing NORMAN J. SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION, § 48.04 (5th ed. 1992)).

148. *Id.* at 1379. (Heaney, J., dissenting). The dissent also disagreed with the court's holding that the promotion in this case did not constitute a "new and distinct" employment relationship under *Patterson*. *Id.*; *see also supra* note 129.

149. *Fray*, 960 F.2d at 1379 (Heaney, J., dissenting). Consequently, the dissent argued that the majority erred when it concluded that the fact that a compromise version of the Act was passed was dispositive of the retroactivity question. *Id.* According to the dissent, the only certain conclusion was that Congress left it to the courts to decide the issue. *Id.*

150. *Id.* According to the dissent, under *Bradley*, in the absence of intent to the contrary, courts will apply a law retroactively to a pending case unless manifest injustice would result. *Id.* The dissent pointed out that, as even the majority had recognized, applying Section 101 to this case would not alter the positions of the parties. *Id.* at 1380. Therefore, no manifest injustice would occur if the section were applied. *Id.* Thus, con-

concern should be to ensure fairness to the parties involved in the dispute.[151]

In *Mozee v. American Commercial Marine Service Co.*,[152] the Seventh Circuit Court of Appeals also concluded that the Act should not apply retroactively. In *Mozee*, each party filed a petition for rehearing, both of which were pending before the court at the time the Act was enacted.[153] The court addressed two questions: whether the Act should apply retroactively on appeal, and whether it should apply on remand.[154] It answered *no* to both questions.[155]

After concluding that the language of Section 402(a) is "hopelessly ambiguous," the *Mozee* court discussed the Act's legislative history.[156] The court then noted the conflicting lines of Supreme Court precedent regarding retroactivity, but stated that it was not the province of a lower court to resolve the Supreme Court's conflicts.[157] Instead, the court attempted to reconcile the *Thorpe-Bradley* doctrine with the opposing view of *Bowen*.[158]

The court concluded that *Bowen's* presumption against retroac-

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trary to the majority's assertion, the dissent found that the different approaches yielded different results. *Id.* at 1380-81.

151. *Id.* at 1381. Because both *Bradley* and *Bowen* remain viable precedent, the dissent believed the court should have attempted to reconcile the doctrines to the extent possible. *Id.* at 1380. The dissent found principles of fairness in both decisions. *Id.* at 1380-81. First, *Bradley* explicitly provides for the "manifest injustice" exception to retroactivity. *Id.* at 1381. While *Bowen* has no such explicit corresponding language, the historical principles on which it is based suggest that the law denies retroactivity when such an application would interfere with a party's expectations or matured rights. *Id.*

Consequently, because the three factors enunciated in *Bradley* lead to the conclusion that no injustice would result from the retroactive application of Section 101 to this case, the Act should have been applied. *Id.* at 1381-82. The dissent observed that because the appellant brought suit before the *Patterson* decision, the employer had sufficient notice of an actionable claim. *Id.*

152. 963 F.2d 929 (7th Cir. 1992). In the original action, filed in 1977, a group of black employees alleged racial discrimination by their employer under Title VII. *Id.* The district court found for the employer, but the Seventh Circuit vacated the decision and remanded to the district court "because the initial findings of fact were insufficient to permit meaningful appellate review." *Id.* at 931. On remand, the district court found the employer liable under Title VII. *Id.* Both the employees and the employer filed motions for rehearing. *Id.* While the motions were pending, Congress passed the Civil Rights Act of 1991. *Id.* Consequently, the question in *Mozee* centered on the application of the Act to the actions that occurred in 1977. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 940.

156. *Id.* at 933. Furthermore, the court rejected the argument that the inclusion of two prospective-only provisions gave rise to an inference that Congress intended the remainder of the Act to apply retroactively. *Id.* *See supra* note 36 and accompanying text.

157. *Mozee*, 963 F.2d at 935 (citing Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477 (1989)).

158. *Id.* at 935 ("We are left with the difficult task of reconciling the *Thorpe-Bradley*

tivity should apply in almost every case involving an ambiguously-worded statute.[159] *Thorpe-Bradley*, the court continued, controls only when retroactive application of a statute would not "infringe upon or deprive a person of a right that had matured or become unconditional."[160]

Having decided that the *Bowen* rule applies at any point during a proceeding when substantive rights could be affected by retroactive application of substantive provisions of a law, the court next considered whether the procedural and remedial provisions of the Act should be applied retroactively on appeal.[161] Because *Thorpe* and *Bradley* presented "unique" situations,[162] and because retroactive application of the provisions in those cases did not require a party to re-litigate the issues, the court determined that the *Bowen* presumption also applies to procedural provisions on appeal.[163] The court noted that, in most cases, retroactive application of a procedural provision would result in a new trial, causing the parties to incur significant legal costs in re-litigating the same controversy.[164] In those instances, *Thorpe-Bradley's* manifest injustice standard

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and *Bowen* lines of cases in a manner that comports with the policies underlying the need for prospective versus retroactive application.").

159. *Id.* at 935-36. The court cited Justice Scalia's concurring opinion in *Kaiser* in which he observed that the presumption against retroactivity found support in history and tradition. *Id.* at 935 (citing *Kaiser*, 494 U.S. at 855 (Scalia, J., concurring)). The court also noted that *Bowen* reinforced the traditional rule. *Id.* at 935-36.

160. *Mozee*, 963 F.2d at 936 (citing Bennett v. New Jersey, 470 U.S. 632 (1985)). For a discussion of retroactive laws and vested rights, see Smith I and Smith II, *supra* note 12.

The court turned to the Supreme Court's decision in *Bennett* for guidance. *Mozee*, 963 F.2d at 936. The *Bennett* court held *Thorpe-Bradley* inapplicable where retroactive application of a law infringes upon or deprives a person of a matured or unconditional right. *Bennett*, 470 U.S. at 639. Moreover, *Bennett* proposed that statutes affecting substantive rights and liabilities "are presumed to have only prospective effect." *Id.* Therefore, under the principles of fairness, *Bennett* guarantees that parties are held responsible only under the substantive laws in existence at the time their relevant conduct occurred. *Id.*

161. *Mozee*, 963 F.2d at 936. The plaintiffs argued that the following provisions were potentially applicable: Sections 101(b) (making and enforcing contracts in § 1981 claims); 104 and 105 (raising the business necessity defense for disparate impact cases under Title VII); and 102 (expanding the remedies available for intentional discrimination claims under Title VII to include compensatory and punitive damages). *Id.* at 931.

162. *Id.* at 937. The *Mozee* court interpreted the *Thorpe* opinion to indicate that requiring the housing authority to follow the regulations did not require it to incur any additional expenses or hardships. *Id.* (discussing *Thorpe*, 393 U.S. 268). In addition, the *Mozee* court believed that in *Bradley*, the imposition of attorneys' fees did not require the parties to re-litigate claims under different laws or to start proceedings over. *Id.* at 937-38 (discussing *Bradley*, 416 U.S. 696).

163. *Id.* at 937.

164. *Id.* The court confined its position to apply only to instances in which "the parties have already litigated the issues." *Id.*

would bar retroactive application of the law.[165]

Next, the *Mozee* court examined whether the Act should apply retroactively on remand.[166] The court concluded that a new provision that defines a substantive right should not be applied at any stage of an ongoing lawsuit—including proceedings on remand—because it is simply unfair to hold a party accountable for conduct that was not illegal when it occurred.[167] The court, however, distinguished this type of provision from one that is either procedural or remedial in nature, stating that new procedural and remedial provisions could be applied.[168]

The *Mozee* court acknowledged that there might be good reasons for a court to apply procedural and remedial provisions on remand that were not in effect at the time of the original trial.[169] In light of the *Bowen* presumption, however, the court recognized the general necessity of applying only those provisions that were in effect when the proceedings began.[170] The *Mozee* court stated, moreover, that the application of the Act's procedural and remedial provisions on remand would result in one set of laws governing remanded claims and a different set of laws governing claims affirmed on appeal.[171] Deeming this result inequitable and confusing, the court concluded that no provision of the Act should be applied on remand.[172]

In his dissent, Judge Cudahy criticized the majority for applying an abstract and mechanical analysis that he believed resulted in a conclusion that was neither rational nor just. He stated that the majority applied law that was not relied on at the time the discriminatory acts took place, was not given legal effect at the time the

165. *Mozee*, 963 F.2d at 937. The court recognized that where, as here, litigation had spanned fifteen years, changing trial procedures once the case had reached the appellate level for a third time would create injustice. *Id.*

Regarding the damages provisions under Section 102, the court found that *Bradley* would only apply to situations where damages provisions did not affect substantive rights. *Id.* Because the issue of damages had not been raised previously during the interlocutory appeal, retroactive application of the damages provisions in Section 102 would not alter the court's previous decision. *Id.* at 938.

166. *Id.* at 939.

167. *Id.*

168. *Id.*

169. *Id.* This is especially true, the court added, where the law would be applied retroactively to a completely new proceeding, thus eliminating the danger of duplicate proceedings of the same issue. *Id.*

170. *Mozee*, 963 F.2d at 940. Thus, a trial court would avoid the confusion of scrutinizing a statute section-by-section to distinguish between those provisions regulating substantive, procedural, and remedial rights. *Id.*

171. *Id.*

172. *Id.*

lawsuit was brought, and was not in effect at the time of the appeal.[173] In his view, the majority's analysis produced an unjust result.[174]

In *Luddington v. Indiana Bell Telephone Company*,[175] a second panel of Seventh Circuit judges agreed with the *Mozee* decision, again concluding that the 1991 Act should not apply retroactively. The plaintiff in *Luddington* had been denied several promotions, and subsequently he sued his employer, alleging racial discrimination.[176]

The *Luddington* court noted that the *Bradley*[177] line of cases applied the presumption that a statute should be applied retroactively.[178] Though it did not mention *Bowen*, the court noted that in other decisions the Supreme Court had ruled against retroactive application of a statute.[179] Despite this conflict, the *Luddington* court concluded that, in the absence of clear judicial and congressional guidance, courts should follow the traditional "rule of law," which limits the applicability of a new law to future conduct only.[180]

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173. *Id.* at 940 (Cudahy, J., dissenting). The dissent emphasized the relevance of the legislative overruling of the Supreme Court decision in *Patterson*. Judge Cudahy asserted that the effect of the Act was to restore the law to the same position as it had been in when the case arose. Thus, the Act imposed no new liabilities on the parties. *Id.* at 941 (Cudahy, J., dissenting).

174. *Id.* (Cudahy, J., dissenting). The majority stated that although the result was unfortunate, it was neither irrational nor unjust. *Id.* at 938 n.4. The majority concluded that the *Patterson* decision suggested that the cases before it had incorrectly interpreted the former Act. *Id.* at 938. Furthermore, because this case had been ongoing for fifteen years, it would have been unjust to remand under a new statute. *Id.*

175. 966 F.2d 225 (7th Cir. 1992).

176. *Id.* at 226. The plaintiff filed claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, and 42 U.S.C. § 1981, which guarantees the right to contract. The district court granted the company summary judgment. *Id.* While the case was on appeal from the district court's decision, Congress passed the Civil Rights Act of 1991. *Id.*

177. *See* discussion *supra* sec. II.B.1.

178. *Luddington*, 966 F.2d at 229. The court noted that this presumption applied "at least . . . to cases pending on the statute's effective date." *Id.*

179. *Id.* "Justice Scalia examined the two lines of cases in Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 841 (Scalia, J., concurring) and pronounced them in 'irreconcilable contradiction.' We agree. We too have straddled this divide." *Id.* For a discussion of *Kaiser*, see *supra* notes 102-15 and accompanying text.

180. *Luddington*, 966 F.2d at 228. The court stated that those subject to the law could then "conform their conduct" to the law and not be sanctioned for conduct that they previously thought was lawful. *Id.*

Furthermore, the issue in *Luddington* centered around the legislative overruling of *Patterson*. *Id.* at 225. In this regard, the court continued, when Congress overrules a Supreme Court decision, "it is not registering disagreement with the merits of what the Court did; it is laying down a new rule of conduct—ordinarily for the future." *Id.*

According to the *Luddington* court, had the 1991 Act made only technical changes to the existing law, the presumption of prospective application would have been rebutted.[181] The court noted, however, that the Act altered remedies, procedures, and evidentiary burdens.[182] Because these substantial changes in the law might have a great effect on a party's future conduct,[183] the court held that the Act should only be applied to conduct that takes place after the statute's effective date.[184] According to the *Luddington* court, retroactive application of the Act to cases that were pending on November 21, 1991 would significantly disrupt ongoing litigation and would also defeat the reliance interests of employers.[185]

B. The Split in the District Courts

Though three courts of appeals have agreed that the Act should not apply retroactively, the inconsistent district court decisions suggest that the question is far from settled.[186] Although district courts have split on the issue,[187] most of these cases were decided

181. *Id.* at 228-29. The court observed that the 1991 Act does not prohibit any conduct not already prohibited by Title VII. *Id.*

182. *Id.*

183. *Id.* at 229. The court noted that the new statute subjects defendant employers to greater liability. *Id.*

184. *Luddington*, 966 F.2d at 229. Thus, the plaintiff's Section 1981 claims were precluded, but his claims under Title VII remained unaffected. *Id.* at 230.

185. *Id.* The court maintained that the situation in this case would be representative of many others. *Id.* (stating that a case in its sixth year of litigation would have to be remanded). Similarly, numerous other cases would also have to be remanded, creating "massive dislocations" in the litigation process. *Id.*

186. *See infra* note 187 and cases cited therein.

187. *See Fray*, 960 F.2d at 1383. The *Fray* court noted that the following district court decisions have held against applying the Act retroactively: Ribando v. United Airlines, Inc., 787 F. Supp. 827 (N.D. Ill. 1992); McCormick v. Consolidation Coal Co., 786 F. Supp. 563 (N.D. W. Va. 1992); Hatcher-Capers v. Haley, 786 F. Supp. 1054 (D.D.C. 1992); Rowson v. County of Arlington, 786 F. Supp. 555 (E.D. Va. 1992); Sofferin v. American Airlines, 785 F. Supp. 780 (N.D. Ill. 1992); Guillory-Wuerz v. Brady, 785 F. Supp. 889 (D. Colo. 1992); McLaughlin v. New York, 784 F. Supp. 961 (S.D.N.Y. 1992); Toney v. Alabama, 784 F. Supp. 1542 (M.D. Ala. 1992); McCullough v. Consolidated Rail Corp., 785 F. Supp. 1309 (N.D. Ill. 1992); Hameister v. Harley-Davidson, Inc., 785 F. Supp. 113 (E.D. Wis. 1992); Percell v. International Business Machs., Inc., 785 F. Supp. 1229 (E.D.N.C. 1992); Steinle v. Boeing Co., 785 F. Supp. 1434 (D. Kan. 1992); Cook v. Foster Forbes Glass, 783 F. Supp. 1217 (E.D. Mo. 1992); Thompson v. Johnson & Johnson Mgmt. Info. Ctr., 783 F. Supp. 893 (D.N.J. 1992); Patterson v. McLean Credit Union, 784 F. Supp. 268 (M.D.N.C. 1992); Kimble v. DPCE, Inc., 784 F. Supp. 250 (E.D. Pa. 1992); Thomas v. Frank, 791 F. Supp. 470 (D.N.J. 1992); Tyree v. Riley, 783 F. Supp. 877 (D.N.J. 1992); Maddox v. Norwood Clinic, Inc., 783 F. Supp. 582 (N.D. Ala. 1992); West v. Pelican Mgmt. Servs. Corp., 782 F. Supp. 1132 (M.D. La. 1992); Doe v. Board of County Comm'rs, 783 F. Supp. 1379 (S.D. Fla. 1992); Burchfield

before the Sixth Circuit handed down its decision in *Vogel*.[188] It remains to be seen whether district court judges will tailor future retroactivity decisions to conform with the slowly emerging body of appellate holdings.

The split in the district courts can be traced to the Supreme Court's seemingly irreconcilable decisions in *Bradley* and *Bowen*.[189] Courts concluding that the Act should be applied retroactively have generally followed *Bradley*,[190] while most of those holding against retroactivity have cited *Bowen* as controlling.[191] Some courts have concluded that under either approach the Act should not be applied retroactively.[192] Courts focusing their analyses solely on the statutory language have reached predictably contra-

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v. Derwinski, 782 F. Supp. 532 (D. Colo. 1992); Khandelwal v. Compuadd Corp., 780 F. Supp. 1077 (E.D. Va. 1992); Futch v. Stone, 782 F. Supp. 284 (M.D. Pa. 1992); Sorlucco v. New York City Police Dept., 780 F. Supp. 202 (S.D.N.Y. 1992); Van Meter v. Barr, 778 F. Supp. 83 (D.D.C. 1991); Hansel v. Public Serv. Co. of Colo., 778 F. Supp 1126 (D. Colo. 1991).

In contrast, the *Fray* court noted that the following district court decisions have held that all or parts of the Act apply retroactively: Lee v. Sullivan, 787 F. Supp. 921 (N.D. Cal. 1992); Andrade v. Crawford & Co., 786 F. Supp. 1302 (N.D. Ohio 1992); Sample v. Keystone Carbon Co., 786 F. Supp. 527 (W.D. Pa. 1992); United States v. Department of Mental Health, 785 F. Supp. 846 (E.D. Cal. 1992); Poston v. Reliable Drug Stores, Inc., 783 F. Supp. 1166 (S.D. Ind. 1992); Sanders v. Culinary Workers Union Local No. 226, 783 F. Supp. 531 (D. Nev. 1992); Watkins v. Bessemer State Tech. College, 782 F. Supp. 581 (N.D. Ala. 1992); Joyner v. Monier Roof Tile, Inc., 784 F. Supp. 872 (S.D. Fla. 1992); Long v. Carr, 784 F. Supp. 887 (N.D. Ga. 1992); Graham v. Bodine Electric Co., 782 F. Supp. 74 (N.D. Ill. 1992); Goldsmith v. Atmore, 782 F. Supp. 106 (S.D. Ala. 1992); Saltarikos v. Charter Mfg. Co., 782 F. Supp. 420 (E.D. Wis. 1992); Stender v. Lucky Stores, Inc. 780 F. Supp. 1302 (N.D. Cal. 1992); King v. Shelby Medical Center, 779 F. Supp. 157 (N.D. Ala. 1991); Mojica v. Gannett Co., 779 F. Supp. 94 (N.D. Ill. 1991).

188. 959 F.2d 594 (6th Cir. 1992); *see* discussion *supra* sec. III.A.

189. *See* Steinle v. Boeing, 785 F. Supp. 1434, 1442 (D. Kan. 1992); *see also* Sanders v. Culinary Workers Union Local No. 226, 783 F. Supp. 531, 538 (D. Nev. 1992) ("This Court fails to see how these two cases [*Bowen* and *Bradley*] can be reconciled.").

190. *See, e.g.*, Poston v. Reliable Drug Stores, Inc., 783 F. Supp. 1166, 1168-69 (S.D. Ind. 1992) (applying *Bradley* in a complaint alleging racially motivated harassment); Stender v. Lucky Stores, Inc., 780 F. Supp. 1302, 1308 (N.D. Cal. 1992) (noting that the Ninth Circuit has followed *Bradley*).

191. *See, e.g.*, *Steinle*, 785 F. Supp. at 1442. The court stated:

> Because there is no clear evidence from the statute or its history to indicate that it should be applied to pending cases and because this court must apply the *Bowen* presumption, the court concludes that the statute is not to be applied retroactively to cases pending at the time the Act was enacted.

Id.

192. Sofferin v. American Airlines, Inc., 785 F. Supp. 780 (N.D. Ill. 1992). The court determined that under *Bowen* the Act should be applied prospectively because there is no clear legislative intent to the contrary. *Id.* at 784. Additionally, the court stated that the Act should be applied prospectively under *Bradley* because it fails all three elements of the manifest injustice test. *Id.*

dictory conclusions.[193] For example, at least one court was persuaded that Congress, by including Sections 402(b) and 109(c), which are expressly prospective, intended the rest of the Act to apply retroactively.[194] In contrast, other courts have concluded that the omission of retroactive provisions in the 1991 Act indicates that Congress intended the entire Act to apply prospectively.[195]

Noting the Act's ambiguous language and inconclusive legislative history, several courts have simply focused on reaching a fair result when determining whether the Act should be applied retroactively.[196] For example, in considering the retroactive application of Section 102, one court held that the employer-defendant's matured rights would not be affected because the conduct that triggered the action was unlawful even before the Act was passed.[197] As illustrated by these divergent opinions, the district courts have analyzed and interpreted the Act inconsistently, have frustrated parties, and have produced a cottage industry of needless appellate litigation in the process.

C. The EEOC Position

Following the enactment of the Civil Rights Act of 1991, the Equal Employment Opportunity Commission (EEOC) announced that it would not seek damages in any cases, whether filed before or after the Act's effective date, that alleged pre-Act conduct.[198] This

193. *See, e.g.*, Sanders v. Culinary Workers Union Local No. 226, 783 F. Supp. 531, 537-39 (D. Nev. 1992) (discussing the inconsistent precedents and finding that they cannot be reconciled).

194. *See, e.g., id.* at 537. The court stated that "if the Act were only to apply prospectively these provisions would be superfluous." *Id.* In addition, the court noted that the fact that the Act is to take immediate effect indicates Congress' belief that application of its provisions was urgent. *Id.*

195. *See, e.g.*, Maddox v. Norwood Clinic, Inc., 783 F. Supp. 582, 585 (N.D. Ala. 1992) (determining that provisions omitted from the 1990 bill and previous draft versions suggest congressional intent to have the final 1991 Act apply only prospectively).

196. *See, e.g.*, Robinson v. Davis Memorial Goodwill Indus., 790 F. Supp. 325, 329 (D.D.C. 1992) (following an approach that combines both the *Bradley* and *Bowen* tests and concludes that a presumption of retroactivity only applies where deprivation of vested or matured rights would not occur).

197. *Id.* at 332.

198. *EEOC Policy Guidance on Retroactivity of Civil Rights Act of 1991*, Daily Labor Report (BNA), No. 1, at D-1 (January 2, 1992) [hereinafter *EEOC Policy Guidance*]. At the time of enactment, at least 850 court cases were pending, and more than 60,000 charges were on file with the EEOC. *Employers' Group Urges EEOC to Enforce Omnibus Civil Rights Law Prospectively*, Daily Labor Report, (BNA), No. 225, at A-5 (November 21, 1991) [hereinafter *Employers' Group*]. Of the court cases, between 400 and 500 involved claims of intentional discrimination for which compensatory (and perhaps punitive) damages would have been available under the 1991 Act if the conduct had occurred

announcement also reflected the confusion generated by the language of Section 402(a), the Act's ambiguous legislative history, and the Supreme Court's conflicting views on retroactivity. The EEOC acknowledged that the language of the Act was unclear regarding its applicability to pending cases and to post-Act charges challenging pre-Act conduct.[199] The EEOC also questioned whether the inclusion of the two prospective-only sections necessarily implied that the remainder of the Act should apply retroactively.[200] Citing *Bowen*, the EEOC concluded that the language of the two sections did not require such a result.[201] The EEOC also acknowledged that a court choosing to take a different approach would probably reach a different result.[202] Nevertheless, the EEOC concluded that it would adhere to *Bowen*, which represented the Court's "more recent" position,[203] and that it would not read the remedial provisions of the Act to apply retroactively.

IV. ANALYSIS

Until the Supreme Court resolves its conflicting positions on the issue of retroactivity, or until Congress amends and clarifies its ambiguously drafted legislation, the question of retroactive application of the Civil Rights Act of 1991 will continue to cause confusion. Unfortunately, neither Congress nor the Court is likely to act on this issue in the near future. Because the language of the statute does not provide the answer, and the legislative history is inconclusive, courts must turn to the Supreme Court's confusing precedent for guidance.

Because both the *Thorpe-Bradley* and *Bowen* approaches remain good law, the judiciary will probably continue to disagree on the relative merits of each line of cases. Justice Scalia has stated that the Court should adopt a blanket prohibition against retroactivity

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after the effective date. *EEOC Declares 1991 Civil Rights Act Does Not Apply to Pre-Act Conduct*, Daily Labor Report (BNA), No. 1 at A-8 (January 2, 1992). The Equal Employment Advisory Council (EEAC), an employers' group, urged Chairman Kemp to proclaim a prospective-only policy because the retroactive language of the 1990 bill had been deleted in the final 1991 version. *Employers' Group*, *supra*, at A-5. Therefore, the EEAC contended, the Act could apply prospectively only. *Id.*

199. *EEOC Policy Guidance*, *supra* note 198, at D-1.

200. *Id.* The EEOC acknowledged that the two sections "may create an inference that the remainder of the Act has retroactive effect." *Id.*

201. *Id.*

202. *Id.* (determining that accepting the *Bowen* presumption supports prospective-only application and accepting the *Bradley-Thorpe* presumption supports retroactive application).

203. *Id.*

and return to the "traditional view" that legislation should only apply prospectively unless otherwise specifically indicated.[204]

A. Response to Justice Scalia: Why Thorpe-Bradley *Is The Better Approach*

Arguably, the *Bowen* decision only controls cases that involve an administrative agency's rule-making authority.[205] Indeed, the *Bowen* Court never discussed the *Thorpe-Bradley* approach to retroactivity.[206] While at least one court has stated that the circumstances of *Thorpe* and *Bradley* were "unique,"[207] and did not, therefore, give rise to a general presumption of retroactivity, strict adherence to a contrary presumption would have prevented even those "unique" plaintiffs from litigating their claims. *Thorpe-Bradley* offers a more equitable approach than *Bowen* does, because the latter, which requires inflexible adherence to an unyielding standard, unreasonably denies relief to too many injured parties.

The paramount consideration, therefore, is a principle of basic fairness.[208] Underlying not only this principle, but also the presumption against retroactivity, is the premise that parties should not be held accountable for laws that were not in existence at the time of their relevant conduct.[209] The focus must necessarily turn, then, to that conduct and to the effect that the retroactive applica-

204. *Kaiser*, 494 U.S. at 841 (Scalia, J., concurring). Justice Scalia finds that an analysis beginning with a presumption of retroactivity, pursuant to the *Thorpe-Bradley* rule, is contradictory to legislative intent. *Id.* at 857. He believes that the manifest injustice exception, advocated by *Thorpe-Bradley*, is no more than a "surrogate for policy preferences." *Id.* Adopting this line of reasoning, Justice Scalia maintains, is not "really talking about 'justice' at all, but about mercy, or compassion, or social utility . . . ." *Id.*

An inflexible rule that would prohibit retroactive application of some new laws, however, cannot co-exist with the overriding jurisprudential policy of fairness to the parties. Consider, for example, applying this concept to the *Thorpe* plaintiff. *See* discussion *supra* sec. II.B.1. It seems paradoxical that our legal system would rather evict a tenant in violation of her constitutional rights rather than to force a government agency to apply one of its own rules retroactively even though no hardship would befall the agency.

205. *See supra* sec. II.B.2.

206. The Supreme Court's statement that "retroactivity is not favored in the law," should not be read as a "blind acceptance" of this "historical" rule, especially in view of the Court's subsequent decision not to overrule *Bradley*. *See* Fray v. Omaha World Herald Co., 960 F.2d 1370, 1381 (8th Cir. 1992) (Heaney, J., dissenting); *see also supra* note 101.

207. Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 935 (7th Cir. 1992).

208. *See* Robinson v. Davis Memorial Goodwill Indus., 790 F. Supp. 325, 329 (D.D.C. 1992).

209. *See supra* text accompanying note 167; *see also Robinson*, 790 F. Supp. at 329 (stating that "a person should not be held liable for conduct that was lawful at the time of occurrence and which the person justifiably expected would remain so").

tion of a new law would have on the rights of those parties.[210] If the parties enjoyed "vested or substantial" rights and justifiable expectations,[211] then the retroactive application of a statute that interfered with those rights and expectations would undoubtedly be unfair. This, for example, occurred in *Bowen*, where the retroactive application of the proposed new rule would have impaired the justifiable expectations and matured rights of the plaintiffs.[212]

Nevertheless, had the *Bowen* court used the *Thorpe-Bradley* approach to resolve that dispute, it would have reached the same result. Although the *Thorpe-Bradley* approach presumes that a statute should be applied retroactively, the presumption includes two exceptions. A law will not be presumed to apply retroactively if there is (1) evidence of contrary congressional intent or (2) evidence that retroactive application will result in a manifest injustice.[213] These exceptions allow a court to block retroactive application of a new statute whenever that application would be inequitable.[214] Conversely, the *Bowen* doctrine fails to provide any exceptions to its presumption against retroactivity.

B. Application of the Supreme Court Doctrines to the 1991 Civil Rights Act

In many instances, plaintiffs whose cases were pending on the Act's enactment date have attempted to recover damages provided by the Act because the conduct complained of was unlawful when it occurred.[215] If a court follows the *Bowen* presumption against retroactivity, the plaintiffs will not be allowed to seek damages

210. *See* Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 229 (7th Cir. 1992) ("[M]any of us would squawk very loudly indeed if people with unpaid parking tickets were made retroactively liable to life imprisonment; and in fact such a change although purely remedial would violate the ex post facto clause."). However, even though this example was only a hypothetical, the penalty is disproportionate to the conduct. Additionally, an analysis under *Thorpe-Bradley* would find this scenario to result in manifest injustice to the defendant.

211. *See supra* note 75.

212. *See supra* sec. II.B.2.

213. *Bradley*, 416 U.S. at 711; *see also supra* note 46 and accompanying text.

214. Justice Scalia cautioned against extended discretion bestowed upon federal judges under the *Bradley* test. *Kaiser*, 494 U.S. at 857. However, in a somewhat contradictory remark, he also stated that a "clear reaffirmation of the presumption of nonretroactivity" will not always make a court's decision "simple" and that it will "remain difficult" to determine whether that presumption has been overcome. *Id.*

215. *See, e.g.*, *Fray*, 960 F.2d 1370 (finding that prior to the 1991 amendment, such conduct "was clearly actionable under Title VII"); Joyner v. Monier Roof Tile Co., 784 F. Supp. 872, 879 (S.D. Fla. 1992) (concluding that retroactive application would not impose an additional obligation on the defendant and that it would merely supplement the remedies available to the plaintiff).

under the Act because of the inflexible presumption against retroactivity. The scope and severity of the alleged discriminatory conduct are irrelevant under this view. In contrast, the *Thorpe-Bradley* approach, which requires a court to consider whether a manifest injustice[216] would result if the new Act is applied retroactively, places a greater premium on fairness to the parties. To bar a plaintiff's recovery in the name of a doctrine that disfavors retroactivity is to contravene Congress' chief reason for passing the Civil Rights Act of 1991: Congress intended to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace.[217]

V. PROPOSAL

Until the Supreme Court resolves the issue of statutory retroactivity by reconciling or overruling its conflicting decisions, the 1991 Civil Rights Act will provide inconsistent protection to plaintiffs whose cases were pending on the Act's effective date. To that end, the Supreme Court should either limit the holding in *Bowen* to the context of administrative law, clarify *Bowen's* relationship to *Thorpe-Bradley*, or explain the circumstances under which each approach should be followed.

In the interim, courts should apply the *Thorpe-Bradley* approach. The flexibility of this approach will ensure that a plaintiff's claims will not be foreclosed until a court has weighed a variety of factors. Moreover, the *Thorpe-Bradley* approach will not and should not result in retroactive application of a new provision in every instance.[218] A court should not be bound by rigid rules that prevent it from conducting a thorough analysis of the matters at bar. Similarly, a plaintiff should not be denied recovery because of a court's mechanical approach.

Some courts have allowed the plaintiffs to proceed in their requests to seek damages under the Act,[219] concluding that the

216. *See supra* notes 72-79 and accompanying text (discussing the factors to be applied under the manifest injustice test).

217. *See supra* note 3 and accompanying text.

218. *See, e.g.*, McCullough v. Consolidated Rail Corp., 785 F. Supp. 1309, 1314-16 (N.D. Ill. 1992). The court refused to apply the Act's damages provisions retroactively because doing so would result in manifest injustice. *Id.* The court found that if the Act applied, the defendant employer faced potential liability for unanticipated amounts of damages. *Id.* Therefore, the court held that the Act created new and substantial rights and liabilities. *Id.*

219. *See, e.g.*, Robinson v. Davis Memorial Goodwill Indus., 790 F. Supp. 325 (D.D.C. 1992) (permitting the plaintiff alleging racial and gender discrimination to proceed with amended complaint seeking damages). A strict *Bowen* analysis would have

vested rights of defendant employers would not be affected by retroactive application of the new remedial provisions.[220] These courts have stated that retroactive application of the Act's new remedial provisions only ensures enforcement of laws already in existence.[221] Courts adhering to the *Bowen* presumption never reach this step. As a result, their decisions fail to deter unlawful conduct and, in effect, they give credence to a wrongdoer's argument that, had the new provisions been in effect at the time the discriminatory acts occurred, the defendant would have thought twice about engaging in such conduct.[222] The *Thorpe-Bradley* rule allows a court to consider society's need to impose punishment upon those defendants who knowingly violate the law. This option is not open to courts that follow the *Bowen* approach. Therefore, with respect to the applicability of the new remedial provisions, *Thorpe-Bradley* is the better alternative because it requires courts to weigh all facts and possibilities. A plaintiff, whose case alleging unlawful discriminatory conduct was pending on November 21, 1991, should not be denied the protection of the Civil Rights Act of 1991 *solely* because those protections were not in effect when the alleged wrongdoing occurred.

VI. CONCLUSION

The language of the Civil Rights Act of 1991 is ambiguous with respect to the Act's possible retroactive effect on cases pending as of November 21, 1991. Because the Act's legislative intent is inconclusive, a court called upon to construe the meaning of the new law must rely on Supreme Court precedent regarding the issue of retroactivity. However, the Court's decisions in this area suggest two conflicting approaches to the problem. Because both of these approaches remain viable, a lower court confronted with the retroactivity problem should decide the question by focusing on principles of fairness as dictated by the individual facts of the case. A court should not apply a mechanical rule against retroactivity; instead, it should address the issue in light of all relevant factors pursuant to the *Thorpe-Bradley* doctrine. By following the *Thorpe-*

completely foreclosed the plaintiff from seeking damages without any consideration of the underlying facts.

220. *Id.* at 332. The court found that Section 102 of the Act only addresses the "longstanding prohibition" against intentional discrimination. *Id.*

221. *Id.*

222. *Id.*

Bradley rule, a court will ensure a thorough analysis of the issues while safeguarding an aggrieved party's right to relief.

LINDA URBANIK