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Retroactivity of the Civil Rights Act of 1991: A Decision Not to Decide

Karen Rosenberg Stein†

When it drafted the 1991 amendments to the Civil Rights Act of 1964, Congress failed to specify whether most of the changes were to apply retroactively to suits that were initiated before its passage, or only prospectively, to cases brought after the legislation was enacted. Before the Supreme Court granted certiorari in February to two of the cases that revolved around this issue, over 150 suits had been litigated over the Act's proper application. In her comment, Ms. Stein seeks a resolution to this issue for the Civil Rights legislation, and argues for a new rule of interpretation which would presume prospective application of congressional enactments when Congress fails to dictate otherwise, thus substantially reducing costly and unnecessary litigation.

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I. INTRODUCTION

On November 21, 1991, President George Bush approved and signed into law the Civil Rights Act of 1991 (the Act). Because the bill was a product of compromise and political maneuvering, the drafters used intentionally vague and ambiguous language to get it passed. The result has been confusion in the court system and the wasted time and energy of both private parties and the judiciary. The source of this chaos is the question—intentionally left open—of whether the legislation can be applied to cases that were pending at the time the new law was enacted.

This Comment begins by discussing the language of the Civil Rights Act of 1991, particularly the major revisions of the previous law and the areas of dispute over retroactivity. As one court has put it, the “starting point for interpretation of a statute ‘is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.’”

4. The question also applies to whether the Act’s changes can be applied to cases brought after November 21, 1991, when the claims concern conduct prior to the enactment. See, e.g., Baynes v. AT & T Technologies, Inc., 976 F.2d 1370, 1373 (11th Cir. 1992); Gersman v. Group Health Ass’n, 975 F.2d 886 (D.C. Cir. 1992); Johnson v. Uncle Ben’s, Inc., 965 F.2d 1363, 1372 (5th Cir. 1992); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir.), cert. denied, 113 S. Ct. 207 (1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594, 598 (6th Cir. 1992).
Part II addresses the few provisions that hint at legislative intent and related Equal Employment Opportunity Commission [EEOC] Guidelines on the issue. As this commentary reveals, however, neither the statutory language nor administrative guidelines reveals a clear legislative intent on the question of retroactivity.

Part III examines the legislative history of the Act, from President George Bush's veto of the 1990 bill to various legislators' fabrications of legislative history to promote their respective views on retroactivity. As with Part II, this analysis demonstrates that the legislative history does not suggest a plain Congressional intent on retroactivity. On the contrary, the history illustrates only Congress' failure to decide and its consequent attempt to leave the question of retroactivity to the court system.

When there is no clear indication of congressional intent in either the language or the legislative history of a statute, courts must turn to judicially derived rules of construction in order to resolve the ambiguity. As part IV shows, however, the Supreme Court has established two major lines of cases dealing with retroactivity, each yielding a different result. Other Supreme Court cases avoid this dichotomy altogether, holding that the retroactivity decision should turn on whether the change to existing law is meant to be remedial or substantive. But here again, the courts disagree about whether the Act was intended to effect substantive or remedial changes.

Part V discusses the restorative theory of statutory construction, which argues for a presumption of retroactivity if the legislation at issue corrects or overrules a Supreme Court decision. Not surprisingly, the courts are divided here as well: some follow the restorative theory, some refer to it but find it inconclusive, some reject it outright, and still others claim that it simply does not apply.

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the ambiguous language of the bill is a result of congress' inability to reach a conclusion acceptable to a majority of the Senators and Representatives about the retroactive application of these radical changes to Title VII. Thus, Congress compromised, intentionally passing ambiguous wording and leaving it to the courts to decide whether to apply the Act to cases pending at the time the bill was signed into law.

Id. at 529.


10. See discussion infra at notes 228-40.
Although the various theories advanced in parts IV and V include arguments on both sides of the retroactivity issue, no single contention is clearly conclusive. For example, while nearly every Circuit that has ruled on the issue has held that the Act applies prospectively only, their conclusion is not dispositive, because other circuits have yet to rule, and the reasoning of those that have ruled is not consistent. Further, many federal circuit courts that have ruled for prospective application have failed to address adequately the fact that the Act’s two “prospective” provisions seem to imply retroactive application for the remainder of the Act. Thus, neither side conclusively wins the debate on retroactivity, and the result is confusion and wasted time and money: “Congressional indecision on the retroactivity issue has forced both the federal courts and litigants to expend valuable time and resources resolving an issue that is wholly unrelated to the merits of civil rights cases.” The only logical solution to Congress’ “decision not to decide” is for the

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13. Most of the federal circuit courts that have ruled on the issue agree that both the statutory language and the legislative history are inconclusive. See Gersman v. Group Health Ass’n, 975 F.2d 886, 890-92 (D.C. Cir. 1992) (“Congress has not provided a clear expression of its intent as to the retroactive or prospective application . . . in the language of the statute. . . . [W]e do not find the legislative history to resolve the question of legislative intent.”); Holt v. Michigan Dep’t of Corrections, 974 F.2d 771, 773 (6th Cir. 1992) (“The Act in question is silent on this matter. . . . The legislative history of this Act reveals that Congressional Democrats and Republicans could not agree on whether the Act should be applied retroactively. . . .”); Johnson v. Uncle Ben’s, Inc., 965 F.2d 1363, 1372 (5th Cir. 1992) (“The statutory language and legislative history is inconclusive on the question of retroactive application.”); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 933 (7th Cir.) (“A clear indication of congressional intent cannot be deciphered from the legislative history or the 1991 Act’s language.”), cert. denied, 113 S. Ct. 207 (1992).

Nevertheless, the Eighth Circuit Court of Appeals found the legislative history to be dispositive: “When a bill mandating retroactivity fails to pass, and a law omitting that mandate is then enacted, the legislative intent was surely that the new law be prospective only; any other conclusion simply ignores the realities of the legislative process.” Fray v. Omaha World Herald Co., 960 F.2d 1370, 1378 (8th Cir. 1992). The Eighth Circuit recently affirmed its holding in Fray. See Hicks v. Brown Group, Inc., 982 F.2d 295 (8th Cir. 1992).

14. See discussion infra part II.B.3.

Supreme Court to rule—and to rule quickly.\(^{16}\)

This Comment suggests a principled resolution to the retroactivity quandary, offering an approach different from those followed by other commentators. This solution, presented in part VII, would not only put to rest the retroactivity question of the Civil Rights Act but also would prevent Congress and the President from acting (or not acting) in such a wasteful and irresponsible manner in the future.

II

THE CIVIL RIGHTS ACT OF 1991

A. Basic Changes in the 1991 Act

The preamble of The Civil Rights Act of 1991 characterizes the Act’s purposes as follows:

To amend the Civil Rights Act of 1964[,] to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.\(^{17}\)

Section Three further describes the purposes of the Act, including “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.”\(^{18}\) The Act itself contains five titles: Federal Civil Rights Remedies, Glass Ceiling, Government Employee Rights,


\(^{17}\) 105 Stat. at 1071.

\(^{18}\) Section 3, 105 Stat. at 1071. The targets of the legislation as originally introduced in February, 1990, were five decisions handed down by the Supreme Court during 1989: Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (narrowing the coverage of § 1981); Martin v. Wilks, 490 U.S. 755 (1989) (broadening the situations under which affirmative action plans could be challenged after the fact); Lorance v. AT & T Technologies, Inc., 490 U.S. 900 (1989) (narrowing the situations under which a discriminatory seniority plan could be challenged); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (making it more difficult for plaintiffs to prevail on “disparate-impact” claims); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (making it more difficult for employees to establish liability in cases where the employer’s action was motivated by a mixture of legitimate and discriminatory intentions). See Joyner v. Monier Roof Tile, Inc., 784 F. Supp. 872, 876 nn.8-12 (S.D. Fla. 1992).

The other stated purposes of the Act are:

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(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 Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 499 U.S. 642 (1989);

(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.)

Section 3, 105 Stat. at 1071.
General Provisions, and Civil War Sites' Advisory Commission. As this wide range of topics illustrates, "it was the intention of Congress to alter the present picture of civil rights decisional law."\(^{19}\)

The debate over retroactivity has centered on three major changes that the 1991 Act made to the Civil Rights Act of 1964. The first is section 101, which overruled a 1989 Supreme Court case, *Patterson v. McLean Credit Union*.\(^{20}\) In that case, the Supreme Court interpreted section 1981\(^{21}\) as prohibiting discrimination *only* in the making and enforcement, but *not* in the termination, of employment contracts: "Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts."\(^{22}\) Thus, "employers' racially discriminatory conduct occurring after the formation of the employment contract, [including discharges,] is not actionable under section 1981."\(^{23}\)

However, section 101(2)(b) of the 1991 Act expands the coverage of section 1981:

> For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.\(^{24}\)

The Act has, therefore, extended section 1981 protection to include the performance and termination of contracts after their creation.

Second, the 1991 legislation altered the 1964 Act by expanding the scope of remedies available to victims of employment discrimination. Section 102 allows a party who complains of intentional discrimination under section 2000e-5, but cannot recover under section 1981, to seek both compensatory and punitive damages.\(^{25}\) The third change intro-

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21. Former section 1981 provided:
   All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. Rev. Stat. § 1977.
25. Section 102, entitled "Damages In Cases on Intentional Discrimination," declares in subsection (a)(1):
   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
duced by the 1991 Act provides that a complaining party who is seeking compensatory or punitive damages may demand a jury trial.26

B. The Search for Congressional Intent in the Act's Language

"In determining whether the Act—or any portion of the Act—applies retroactively, the court must be guided initially by the Congressional intent."27 To determine the congressional intent behind the Act, courts first must examine its language.28

I. Effective Date of the Act

Section 402(a) states the effective date of the 1991 Act: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."29 This is the Act's only reference to its effective date; but two other provisions specifically address retroactivity: section 402(b)30 and section 109(c).31 Both of these sections indicate that the Act should not be applied retroactively in the specific situations described in those provisions.32

Litigants and courts alike have drawn conflicting interpretations from the language of section 402(a). Some argue that because the statute's enactment date was November 21, 1991 and the legislation contains

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30. Section 402(b) states that "[n]otwithstanding any other provisions 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." Section 402(b), 105 Stat. at 1099.
31. The legislative history makes clear that this exception was placed in the statute to ensure that the Act would not apply to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), a disparate impact case that had been in litigation for approximately twenty-five years. Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 933 (7th Cir.), cert. denied, 113 S. Ct. 207 (1992). See 137 CONG. REC. S15,478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole) ("At the request of the Senators from Alaska, section [402(b)] specifically points out that nothing in the Act will apply retroactively to the Wards Cove Packing Company, an Alaska company that spent 24 years defending against a disparate impact challenge.").
32. See discussion infra part II.B.3.
no other language of prospectivity, courts addressing cases after the effective date should apply the Act, whether the conduct occurred before or after enactment. Additionally, some argue that since the purpose of the Act was to overturn Supreme Court rulings and restore the law to its prior position, the Act can “take effect upon enactment” in a meaningful way only if courts apply it retroactively. The reasoning behind this last argument is that if the courts do not apply the Act retroactively, the law Congress sought to overrule would prevail in thousands of cases where the disputed conduct occurred prior to November 21, 1991.

Still others maintain that the plain meaning of the language in section 402(a) is that the Act had no effect before November 21, 1991, and thus cannot be construed to govern events occurring prior to that time. Proponents find support for this contention in the Supreme Court’s directive that the plain meaning of a statute controls its application.

A district court that recently addressed the retroactivity question closely examined the plain meaning of several key words in section 402(a). Drawing on both Black’s Law Dictionary and Webster’s Dictionary, the Patterson court construed “take effect” as denoting a “beginning point from which action will occur, a starting point prior to which the contemplated action did not occur.” The court decided that “upon” means on or occurring during the course of a specified day, and defined “enactment” as the method by which a bill becomes a law.

Combining these definitions, the four words, “take effect upon enactment” must be interpreted to indicate a beginning point ... from which date the Act and its amendments would be operative on events coming within their scope, but having no effect on events occurring before that date as the Act was not operative prior to November 21, 1991.

Proponents of exclusively prospective application also assert that Congress has clearly expressed itself in other statutes when it intended

33. See e.g., Gersman v. Group Health Ass’n, 975 F.2d 886, 888-89 (D.C. Cir. 1992).

34. Smith v. Petra Cablevision Corp., 793 F. Supp. 417, 421 (E.D.N.Y. 1992); see also supra note 18 and accompanying text.


37. Patterson, 784 F. Supp. at 273.

38. Id. at 273-74.

39. Id. at 274.

40. Id.; see also Gersman v. Group Health Ass’n, 975 F.2d 886, 889 (D.C. Cir. 1992) (holding that neither Congressional enactments nor administrative rules will be construed to have retroactive effect unless their language requires this result); accord Franklin v. New Mexico, 730 F.2d 86, 87 (10th Cir. 1984) (holding that statutory language proclaiming amendments to be effective on the date of enactment indicates an intent for prospective application of the amendments).

retroactive application of a statute; because Congress failed to clarify its intention in the 1991 legislation, retroactive application should therefore be precluded.\textsuperscript{42} Another plausible reading suggests that section 402(a) lacks any relevance to the retroactivity question and that the provision exists simply to explain that the Act would become law upon enactment, not at some future date.\textsuperscript{43}

Because the language of section 402(a) invites such diverse interpretations, it offers no clear indication of Congress' intent.\textsuperscript{44} The Seventh Circuit candidly stated: "The fact that the Act becomes effective on the date of enactment provides no guidance as to whether the Act applies to pending cases."\textsuperscript{45} At most, this provision creates ambiguity as to whether Congress intended the Act to apply prospectively or retroactively.\textsuperscript{46}

2. \textit{Section 102 May Indicate Prospective Application Only}

Portions of section 102 also have been examined for evidence of congressional intent. Section 102 permits complaining parties to seek compensatory and punitive damages as well as to demand a jury trial.\textsuperscript{47} Section 102(d) defines a "complaining party" as "the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964."\textsuperscript{48} Several courts have held, however, that the only plaintiffs enti-


\textsuperscript{43} Smith, 793 F. Supp. at 421.

\textsuperscript{44} See Klaus v. Duquesne Light Co., 58 Fair Empl. Prac. Cas. (BNA) 951, 953 (W.D. Pa. Mar. 11, 1992) (holding that the statute should be applied retroactively unless this would lead to manifest injustice, since Congressional intent is unclear); see also Stout v. International Business Machs. Corp., 798 F. Supp. 998, 1002 (S.D.N.Y. 1992) (holding that the statute will not be applied to employment discrimination actions pending at the time of enactment when such actions will affect employers' substantive rights and liabilities).

The Mozee court summarized the many possible interpretations of the Act as follows:

[I]t might mean that the 1991 Act applies to conduct which occurred after the enactment, it might mean that the Act applies to cases filed after the enactment, it might mean that the Act applies to all proceedings beginning after the enactment, it might mean that the Act applies to all proceedings beginning after the enactment, it might mean that the Act's provisions apply to all pending cases at any stage of the proceedings, or it might mean that the Act's procedural provisions apply to proceedings begun after enactment and the substantive provisions apply to conduct that occurs after the enactment.


\textsuperscript{46} Id. at 932.

\textsuperscript{47} See supra notes 25-26 and accompanying text.

\textsuperscript{48} Section 102, 105 Stat. at 1073 (emphasis added).
tled to invoke the 1991 Act are those claimants who have not yet brought their actions.49

3. **Inclusio Unius Est Exclusio Alterius**50

The Ninth Circuit, various district courts, and many litigants have argued compellingly for retroactivity by examining the inclusion of sections 402(b)51 and 109(c)52 in the Act. Both provisions state that they are to be applied prospectively only. As a result, many have contended that it is reasonable to infer that Congress intended the remainder of the Act to be applied retroactively. In other words, since the two provisions serve to ensure that certain cases will be excluded from the retroactive reach of the Act,53 all others would seem to be included. The Ninth Circuit, in *Davis v. City of San Francisco*,54 went so far as to find that "the language of the Act reveals Congress' clear intention that the majority of the Act's provisions be applied to cases pending at the time of its passage."55

Support for this argument is based on Supreme Court precedent: "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."56 Moreover, it is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant."57 Indeed, the Ninth Circuit in *Davis* declared:

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50. The inclusion of one is the exclusion of another.

51. *See supra* note 30.

52. *See supra* note 31.

53. *See Davis v. City of San Francisco*, 976 F.2d 1536, 1551 (1992) (holding that the court could properly apply 1988 billing rates to plaintiff's counsel in Title VII claims, where plaintiff prevailed, regardless of the year in which the work was performed), *reh'g denied, vacated in part and remanded on other grounds*, 984 F.2d 345 (9th Cir. 1993); Croce v. V.I.P. Real Estate, 786 F. Supp. 1141, 1143 (E.D.N.Y. 1992) (holding that a plaintiff can amend her complaint to demand a trial by jury retroactively under the amended Title VII, if such retroactive application would not constitute "manifest injustice" for the defendant).

54. 976 F.2d 1536 (1992), *reh'g denied, vacated in part and remanded on other grounds*, 984 F.2d 345 (9th Cir. 1993).

55. *Id.* at 1550.


We would rob Sections 109(c) and 402(b) of all purpose were we to hold that the rest of the Act does not apply to pre-Act conduct. There would have been no need for Congress to provide that the Act does not pertain to the pre-passage activities of the Wards Cove Company, see Section 402(b), or of American businesses operating overseas, see Section 109(c), if it had not viewed the Act as otherwise applying to such conduct.\footnote{\textit{Davis}, 976 F.2d at 1551.}

The \textit{Davis} court further claimed that the other courts of appeals, in construing the entire Act to apply prospectively only, “have either ignored Sections 109(c) and 402(b) or the elementary canon of construction that we should avoid an interpretation of the Act which renders those sections superfluous.”\footnote{\textit{Id.} at 1552.} \textit{The Davis} opinion notes that in Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992), the Sixth Circuit failed to mention sections 109(c) and 402(b) when it held that the language and legislative history of the Act provide no guidance on retroactivity; the Seventh Circuit treated the sections in question as redundant instead of giving them meaning. Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir.).\textit{cert. denied}, 113 S. Ct. 207 (1992). The Fifth Circuit followed a similar approach in Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992). The Eighth Circuit, in Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992), did not ignore the provisions, but down-played their significance.

Since the \textit{Davis} opinion, the Eleventh Circuit also has ruled on the retroactivity issue. In Baynes v. AT & T Technologies, Inc., 976 F.2d 1370 (11th Cir. 1992), the Court determined that the Act applied prospectively only without discussing either section. \textit{See Jane Okransinski, 11th Circuit Speaks on Retroactivity, \textit{FULTON COUNTY DAILY REP.}, Oct. 30, 1992 at 1, 7} (Emory Law Professor and former General Counsel for the EEOC Charles Shanor observed of the 11th Circuit's decision that “it ignores [rather than rebuts] the strongest argument the other way.”). \textit{Hicks v. Brown Group, Inc.}, 982 F.2d 295, 297 (8th Cir. 1992); Thompson v. Johnson & Johnson Management Info. Ctr., 783 F. Supp. 893, 895-96 (D.N.J. 1992). \textit{See discussion infra} part III.

\begin{itemize}
\item \textit{Hicks v. Brown Group, Inc.}, 982 F.2d 295, 297 (8th Cir. 1992);
\end{itemize}

\textit{See discussion infra} part III.
provisions would apply to post-enactment conduct regardless of how the courts eventually applied the remainder of the Act.63

Proponents of exclusively prospective application contend that the Ninth Circuit's reasoning rests too much on negative implications.64 This contention resembles the insurance argument: Congress wanted to make sure that these two provisions would be prospective, but did not want to make a decision regarding the other provisions of the 1991 Act.65 Courts that follow this reasoning seem to suggest that the negative inference created by sections 402(b) and 109(c) is not sufficiently conclusive to overcome the mass confusion about the Act's passage.

Even though the statutory construction rule is quite persuasive, the courts have formed no consensus on its proper effect, and thus litigation continues.

4. The Language Does Not Indicate a Congressional Intent

Due to the varying plausible interpretations of the legislation, it is futile to argue that Congress intended to articulate a clear position: "The ambiguity [of the statute's language] is no accident . . . . [T]rying to ferret out 'legislative intent' in any traditional sense is impossible."66 Not surprisingly, a majority of courts that have visited the issue agree at least that the plain language of the statute does not conclusively reveal congressional intent about the Act's retroactive or prospective application.67 Obviously, had the legislature clearly intended the Act to be applied either retroactively or prospectively (or both), it would have plainly stated that intention. Instead, Congress simply decided not to decide: "Congress did not drop the retroactivity ball so much as it consciously 'punted on the question of whether or not the Act applies retroactively.'"68

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63. See, e.g., Mozee, 963 F.2d at 933 ("[T]his language can be interpreted as an extra assurance that this section's provisions will only apply to post-enactment conduct regardless of how the court eventually applies the Act's other provisions."); see also supra note 30 and accompanying text (discussing the reasons for applying § 402(b) prospectively only).

64. See, e.g., Johnson v. Uncle Ben's, Inc., 965 F.2d 1363, 1373 (5th Cir. 1992).

65. See discussion infra part III.


67. McLaughlin v. State of New York, 784 F. Supp. 961, 968 (N.D.N.Y. 1992); see also Hicks v. Brown Group, Inc., 982 F.2d 295, 297 (8th Cir. 1992) (stating Congressional intent is indiscernible); Gersman v. Group Health Ass'n, 975 F.2d 886, 890 (D.C. Cir. 1992) ("Congress has not provided a clear expression of its intent as to the retroactive or prospective application . . . in the language of the statute."); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 933 (7th Cir.) ("[W]e cannot divine from the Act's language whether Congress intended the Act to apply retroactively to pending cases."); cert. denied, 113 S. Ct. 207 (1992); Thompson v. Johnson & Johnson Management Info. Ctr., 783 F. Supp. 893, 895 (D.N.J. 1992) ("[T]he answer to whether the 1991 Act applies to cases pending . . . can only be answered by reference to something other than the language of the statute itself.").

III

LEGISLATIVE HISTORY

Only a statute is law. A legislator’s statement, a committee report, or a presidential veto is not. The Supreme Court has reiterated the fundamental principle that a bill does not become law until both houses of Congress pass it and the President approves it—or, if the President vetoes it, until the bill then passes through each house with a two-thirds vote. With these caveats in mind, the convoluted and sometimes fabricated legislative history of the Civil Rights Act of 1991 on the question of retroactivity can be examined: “Having failed to find an unequivocal mandate for or against retroactivity in the express language of the 1991 Act, [courts] must resort to a less preferred indicator of congressional intent, the legislative history.” This investigation will reveal that, as with the statutory language, the legislative history provides no answer to the retroactivity question. In fact, this discussion will show that Congress deliberately chose not to decide the issue, leaving it instead for the courts to determine.

A. The President Just Said No: Prior Proposed Legislation

The legislative record began in February, 1990, when Congress passed the original version of the bill. This version made clear that one purpose of the Act was to overrule Patterson. In addition, the 1990 bill provided that the counterpart to section 101(2)(b) of the 1991 Act, which overrules Patterson, applied retroactively. President Bush vetoed the 1990 bill, and Congress failed by one vote to override the veto. The President included among his reasons for vetoing the legislation that the retroactivity rules were “unfair.” When the House of Representatives resumed work on the issue, they again passed a rule retroactively over-

70. See supra notes 20-24 and accompanying text.
71. S. 2104, 101st Cong., 1st Sess. § 15 (1990). Section 15(a)(6) of the 1990 bill provided that it would apply to all cases pending on or commenced after June 15, 1989, the date of the Patterson decision. Fray v. Omaha World Herald Co., 960 F.2d 1370, 1375 n.7 (8th Cir. 1992) (citing 136 CONG. REC. S9968 (daily ed. July 18, 1990)).
turning *Patterson*. The Senate, however, drafted a bi-partisan compromise bill that deleted the retroactivity provision. The Senate version passed both Houses and became law on November 21, 1991, when the President signed the legislation. Many litigants have argued that because the 1991 Act contains no retroactivity provisions and because the 1990 Act, which did contain such provisions, failed to become law, the 1991 Act must have been intended to be prospective only. However, most courts have dealt with this argument as just another indicator that the legislative history is inconclusive. Nonetheless, the Eighth Circuit, in *Fray v. Omaha World Herald Co.*, found this explanation to be dispositive of congressional intent: "When a bill mandating retroactivity fails to pass, and a law omitting that mandate is then enacted, the legislative intent was surely that the new law be prospective only."  

As with almost every argument concerning retroactivity of the Act, there are counter-arguments worth considering. For example, the retroactivity provision in the 1990 version of the Civil Rights Act was a "super-retroactivity" provision that would have applied to all cases decided after June 15, 1989; that is, the provision would have covered cases that already had been decided. Therefore, "[t]he fact that the president vetoed this version . . . tells us nothing about the congressional intent concerning application of § 101 to cases pending on November 21, 1991." In other words, it can be argued that the change in language shows simply that final suits cannot be retried, but does not necessarily mean that the Act's coverage excludes pending suits. Furthermore, while the President's veto message to Congress noted that he relied on the Attorney General's opinion in deciding on the retroactivity issue, the Attorney General's only objection to the 1990 version's retroactivity provision was *not* that it applied the new Act to pending cases, but that it

79. E.g., Savko v. Port Auth. of Alleghany County, 800 F. Supp. 268, 271 (W.D. Pa. 1992) ("Given the pitched political battle leading to the passage of the 1991 Act and the garbled state of the congressional record, this court does not believe that the failure to include an explicit retroactivity provision may be read as indication of anything.").
80. 960 F.2d 1370 (8th Cir. 1992).
81. Id. at 1378.
83. Gersman v. Group Health Ass'n, 975 F.2d 886 (D.C. Cir. 1992) (Wald, J., dissenting) (emphasis added); see also Hicks, 982 F.2d at 302 (Heaney, J., dissenting).
applied the law to cases already decided. 85

A collateral argument has been made against the Eighth Circuit’s inference of prospectivity from the President’s veto, using the Eighth Circuit’s own logic: the Bush administration proposed a bill in 1991 that explicitly called for prospective application only. 86 Congress did not adopt this bill, but instead passed legislation that did not contain the prospective-only provision. Following the Fray court’s logic, the omission of this language creates a strong inference that by excluding the two provisions that by explicitly call for prospective application of the Act, the 1991 bill was intended to apply retroactively. 87

Finally, it can be argued that using the President’s veto of the 1990 bill to infer the legislative intent of the 1991 Act is problematic because, as most courts agree, the abundance of contradictory legislative history prevents any sound conclusion about such intent.

B. Partisan Debate

Congress adopted the 1991 legislation without ever having referred it to a committee. Consequently, no committee or conference reports are available for examination. 88 The only official commentary on the Act can be found in extensive floor debates and interpretative memoranda that parties on both sides of the issue inserted into the Congressional Record. Yet “[n]othing suggests that these statements and memoranda represent the views of anyone other than the [congressional] members who made or signed onto them.” 89 In fact, the Supreme Court has noted that floor statements are of questionable interpretative value. 90 Additionally, it is clear from the strong partisan division among members of Congress on the retroactivity issue that these debates carry very little probative value. As Senator Danforth (R-Mo.), one of the two principal sponsors of the Senate bill that eventually passed, stated, “a court would

85. Hicks, 982 F.2d at 302 (Heaney, J., dissenting) (citing Memorandum from Dick Thornburgh, Attorney General, to George Bush, President of the United States 10 (Oct. 22, 1990)).
86. “This Act and the amendments made by this Act shall take effect upon enactment. The amendments made by this Act shall not apply to any claim arising before the effective date of this Act.” H.R. 1375, 102d Cong., 1st Sess. (1991). The Civil Rights Act of 1991 that became law contains the first sentence of this provision, while the second sentence obviously is deleted. See 42 U.S.C.A. § 2000e (West 1981) (Historical Notes).
87. This argument was followed not only by the Ninth Circuit in Davis v. City of San Francisco, 976 F.2d 1536 (1992), reh’g denied, vacated in part and remanded on other grounds, 984 F.2d 345 (9th Cir. 1993), which held the Act to be retroactive, but originally was advanced in the Seventh Circuit’s opinion in Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir.), cert. denied, 113 S. Ct. 207 (1992), which held that the Act applied prospectively only.
89. Davis, 976 F.2d at 1553.
90. See, e.g., Smith, 793 F. Supp. at 423 (citing North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 527 (1982)).
be well advised to take with a large grain of salt floor debate and statements placed into the Congressional Record which purport to create an interpretation for the legislation that is before us." Indeed, some courts believe, as Senator Danforth does, that the congressional representatives "deliberately tried to create a 'legislative history' to support their personal views on this question, but the fact is that Congress, for no good reason, deliberately chose not to include in the statute itself a provision either for retroactive or for prospective-only application."

The other principal sponsor of the final bill was Senator Kennedy (D-Ma.). After Senator Danforth issued an "interpretative memorandum" stating his position on the Act, Senator Kennedy noted his concurrence on every issue except retroactivity. Senator Danforth stated in his interpretation that the Act was not to be applied retroactively; Senator Kennedy, on the other hand, indicated that the Act would be applied retroactively to cases already pending. Notwithstanding their disagreement, both sponsors of the Act knew that the Supreme Court faces conflicting lines of precedent concerning the application of newly enacted laws to pending cases. Consequently, each Senator drew from Supreme Court precedent that line which most favored his own position. Thereafter, the senators and representatives lined up according to

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95. My review of the Supreme Court case law supports my reading that in the absence of an explicit provision to the contrary, no new legislation is applied retroactively. Rather, new statutes are to be given prospective application only, unless Congress explicitly directs otherwise, which we have not done in this instance. 137 CONG. REC. S15,483 (daily ed. Oct. 30, 1991). Six days later, Kennedy again stated his position:

Many of the provisions of the Civil Rights Act of 1991 are intended to correct erroneous Supreme Court decisions and to restore the law to where it was prior to those decisions. In my view, these restorations apply to pending cases . . . .


[ ]here is disagreement among the supporters of the bill regarding this issue. Courts frequently apply newly enacted procedures and remedies to pending cases. This was the Supreme Court's holding in Bradley . . . in which the Court states: "The general rule . . . is that an appellate court must apply the law in effect at the time it renders its decisions.

97. See discussion infra part IV; see also Fray v. Omaha World Herald Co., 960 F.2d 1370, 1376 (8th Cir. 1992) ("[C]ongressional proponents of retroactivity argued that Bradley's presumption of retroactivity would of course apply, while opponents argued with equal vigor that Georgetown's presumption of non-retroactivity would carry the day.").
98. Senator Kennedy stated in support of retroactive application that:

Senator Danforth, on the other hand, stated in his interpretive memorandum that:
their respective party affiliations, Republicans arguing against and Democrats for retroactive application of the Act. What seems most clear is that "Congress did not want to resolve the issue for fear of destroying the fragile bipartisan coalition supporting the Act." It is also obvious that the legislative history is completely inconclusive. In fact, Senator Danforth described perhaps the most revealing aspect of the legislative history when he asserted:

[W]hatever is said on the floor of the Senate about a bill is the view of a Senator who is saying it. And if it is not written into legislative language, it does not necessarily bind and probably does not bind anybody else, including the 30-some odd co-sponsors of the legislation.

Yet it was Senator Kennedy who best characterized the main implication of the legislative history: "It will be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the day of enactment."

Most courts agree that the legislative history shows that Congress intentionally left the issue of retroactivity to the courts: "[B]oth Republicans and Democrats put all their eggs in the Supreme Court basket, each side hoping that the [C]ourt will resolve its own conflicting authorities in its favor." As a result, more than 150 cases have been litigated in the brief period since the bill's enactment. "Congress' deliberate muddying of the legal waters is largely responsible for the ongoing dispute among

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100. Smith, 793 F. Supp. at 425; see also McLaughlin v. State of New York, 784 F. Supp. 961, 970 (N.D.N.Y. 1992) ("Congress' abandonment of the retroactivity debate, and its decision to defer to the courts' interpretation, was likely a political compromise that was necessary to assure passage of the controversial Act."); The New Civil Rights Act: Is it Retroactive, LAW. ALERT, June 22, 1992, at 16, 17 ("[A] compromise was reached that left the issue unresolved.... About the only thing that can be concluded with any certainty is the Congress' 'intent' was to sidestep the issue.").


103. J. Stephen Poor, Rights Act's Retroactivity Still Disputed, NAT'L L.J., Jan. 27, 1992, at 19, 22; see also Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 227 (7th Cir. 1992) ("This politically convenient solution was facilitated by the fact that the courts do not have a consistent rule [for deciding retroactivity]. . . . Either of the contending factions in Congress could thus hope that statutory silence would work in its favor.").
the federal courts as to the Act's retroactivity, an issue that must ultimately await resolution by the Supreme Court."\textsuperscript{104}

\textbf{C. The EEOC Guidelines}

"At the signing ceremony for the [Civil Rights Act of 1991], . . . President Bush dictated that Senator Robert Dole's opinion that the Act not be given retroactive effect be treated as authoritative interpretative guidance by all officials in the executive branch of government."\textsuperscript{105} The EEOC, as part of the executive branch, followed the President's directive: on December 27, 1991, the EEOC issued a "Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct."\textsuperscript{106} However, these "guidelines" address only the provision of the Act dealing with compensatory and punitive damages. The statement explores statutory language, legislative history, and judicial precedents and concludes that "the Commission will not seek damages under the Civil Rights Act of 1991 for events occurring before November 21, 1991."\textsuperscript{107}

While many have criticized the EEOC's position, the directive recognizes that the language of the Act is not clear "as to pending cases or post-Act charges challenging pre-Act conduct."\textsuperscript{108} Moreover, the directive reasons that while the two sections containing "prospective only" language might create an inference of retroactivity for the remainder of the Act, "it cannot be said that 'the[ ] language [of those sections] requires this result.'"\textsuperscript{109}

Still, the EEOC acknowledges that because the legislative history offers conflicting views on the issue, the history does not conclusively resolve the retroactivity question. In fact, after briefly exploring the conflicting Supreme Court precedent, the Commission openly admitted that due to the ambiguity created by the two lines of cases, "the issue of whether the damages provision in the new Act should be applied retroactively is much in question."\textsuperscript{110} Yet after acknowledging ambiguities, the EEOC concluded that the Act would not be applied retroactively. While this decision seems to choose one line of Supreme Court authority over the other simply because "it represents . . . the more recent holding,"\textsuperscript{111}

\begin{enumerate}
\item EEOC Notice No. 915.002 (Dec. 27, 1991) (on file with author).
\item Id.
\item Id.
\item Id. at 4 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)). It is interesting to note that the Supreme Court decision on which the EEOC relies for this conclusion (Bowen) is part of one of the two conflicting lines of Supreme Court precedent.
\item Id. at 7 (emphasis added).
\item Id.
\end{enumerate}
the EEOC actually has obediently followed the "Republican legislative history, as ordered by the president."112

Criticism of the policy statement's restrictive interpretation of the Act has been leveled by Senators, civil rights groups, and women's organizations, among others.113 Richard Seymour of the Lawyers' Committee for Civil Rights, said the "EEOC's policy statement on retroactivity has done 'enormous damage,'"114 and called the EEOC's decision reprehensible.115 What Mr. Seymour found so disturbing was that even after the EEOC acknowledged that the law was unclear, the agency nevertheless surrendered "the contention that compensatory and punitive damages are available under the new law without informing civil rights claimants that 'strong arguments are available' taking the opposite view."116 Mr. Seymour declared that the federal courts should not defer to the EEOC's interpretation, because it relied on guessing rather than on technical expertise gained from years of enforcing civil rights laws.117

Various federal courts have discussed the EEOC's statement, and, not surprisingly, many disagree over what, if any, deference the Commission deserves. The Supreme Court, in Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.,118 held that in the absence of clear legislative intent, "we have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . ."119 In addition, the Court has asserted that the construction given a statute by an agency usually is entitled to deference so long as its interpretation is reasonable.120 The Sixth Circuit followed this reasoning in Vogel v. City of Cincinnati,121 declaring that the EEOC's decision appeared reasonable.122 It held that

112. J. Stephen Poor, Rights Act's Retroactivity Still Disputed, Nat'l L.J., Jan. 27, 1992, at 19. The panel that unanimously adopted the policy was composed of three Republicans, one Democrat and one independent. All were appointed by President Bush or President Ronald Reagan. Cutoff Date Set for Civil Rights Claims, Chi. Trib., Dec. 31, 1991, at C9.
113. See, e.g., EEOC Performance, Restrictive Stand on 1991 Act Attacked on Capital Hill, BNA Daily Rep. for Executives, Apr. 29, 1992, at A-10. For example, Senator Edward Kennedy said this about the EEOC's ruling: "You're charged as an independent agency to root out discrimination and you've chosen to adopt the narrower interpretation. . . . That sends a powerful negative message." Id.
114. Id.
116. Id.
117. Id.
119. Id. at 844.
120. See EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988) ("[T]he EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference."); Chevron, 467 U.S. at 843-44 (stating that generally, absent a clear legislative intent, the construction given a statute by the agency that administers it is entitled to deference, provided it is reasonable).
121. 959 F.2d 594, 598 (6th Cir. 1992).
122. Id.
the Act does not apply retroactively. Other courts have found that while the EEOC's statement is due some degree of deference, it is not dispositive.123

Still other courts have rejected outright the EEOC's directive. These decisions distinguish the Chevron case on the grounds that it dealt with an agency promulgating regulations, whereas the EEOC in this instance was not enacting regulations but merely issuing a policy statement. Furthermore, "[c]ourts may accord less weight to [EEOC] guidelines than to administrative regulations which Congress has declared shall have the force of law . . . ."124 When Congress enacted Title VII, it did not grant the EEOC power to promulgate rules or regulations.

Another purported difference between Chevron and the policy statement at issue is that unlike the agency in Chevron, the EEOC is not charged with administering all civil rights legislation. Rather, it is one of many in the field of players who remedy civil rights discrimination. As a result, the EEOC does not possess such exclusive expertise in the area that its directives merit special deference.125

Still, the Supreme Court potentially strengthened the agency's position in EEOC v. Arabian American Oil Co.,126 where it held that the level of deference accorded an agency "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."127 Some courts, however, have refused to defer to the EEOC's position on the retroactivity issue because they have found the policy statement neither reasonable nor well-supported.128 Their conclusions stem in part from the fact that the Commission's statement was based not on expertise, but on analysis of how the EEOC expected the courts to resolve the Supreme Court conflict.129 And on February 13, 1992, the United States Commission on


124. Id.


128. See, e.g., Davis v. City of San Francisco, 976 F.2d 1536, 1555-56 (1992) (rejecting EEOC Policy Guidance regarding retroactivity as lacking "the power to persuade"), reh'g denied, vacated in part and remanded on other grounds, 984 F.2d 345 (9th Cir. 1993); Savko v. Port Auth. of Alleghany County, 800 F. Supp. 268, 272 (W.D. Pa. 1992) (rejecting EEOC Policy Guidance as neither reasonable nor well-supported).

129. Smith, 793 F. Supp. at 425; see also Davis, 976 F.2d at 1555-56, Stout, 798 F. Supp. at 1004 (stating the EEOC's position was not due deference because it was based upon the same sort of statutory analysis in which courts regularly engage).
Civil Rights recommended that the EEOC's Policy Guidance be rescinded.  

IV  
SUPREME COURT PRECEDENT

This analysis now turns to Supreme Court precedent for guidance: “Without a clear indication of congressional intent in either the language of the 1991 Civil Rights Act or in the Act’s legislative history, we must turn to judicially derived rules of construction in order to resolve this ambiguity.” Yet confusion and conflict have resulted because the Supreme Court’s two lines of cases appear irreconcilable, each pronouncing a different presumption when applying new law to pending cases. In Bradley v. Richmond School Board, the Court held that a statute was presumed to apply retroactively unless either clear statutory language stated otherwise or doing so would result in manifest injustice. Later, however, the Supreme Court, in Bowen v. Georgetown University Hospital, indicated that courts should not apply congressional enactments retroactively unless statutory language requires such a result. Prior to enactment of the 1991 legislation, the federal circuit courts were split on the question of which presumption to follow.

A. The Bradley Bunch: A Presumption of Retroactive Application

Ancient Roman civil law applied legislation prospectively unless the legislature explicitly stated otherwise. This principle was incorporated into English common law and prevailed through many centuries. In fact, until 1969, the Supreme Court almost exclusively followed this established doctrine that, absent legislative declaration to the contrary, statutes should be presumed prospective only.

133. Id. at 711.
135. Id. at 208.
136. See McLaughlin v. State of New York, 784 F. Supp. 961, 971 (N.D.N.Y. 1992) (comparing Simmons v. Lockhart, 931 F.2d 1226, 1230 (8th Cir. 1991) (holding court will not retroactively apply statutes without a clear legislative intent); Leland v. Federal Ins. Adm’r, 934 F.2d 524, 527-28 & n.7 (4th cir. 1991) (adopting prospective presumption); Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, 963 n.6 (D.C. Cir. 1990) (Thomas, J.) (same) with United States v. Peppertree Apartments, 942 F.2d 1555, 1561 n.3 (11th Cir. 1991) (court is bound by retroactive presumption); Federal Deposit Ins. Corp. v. Wright, 942 F.2d 1089, 1095 n.6 (7th Cir. 1991) (same); United States v. R.W. Myer, Inc., 889 F.2d 1497, 1505 (6th Cir. 1989)).
One case stood out as an exception to this rule, however. In the 1801 case *United States v. Schooner Peggy*, the Court applied a law retroactively:

[I]f subsequent to the judgement and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed . . . . It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws.

Still, after *Schooner Peggy* it remained unclear whether a change in the law occurring while a case was pending on appeal was to be given effect only where, by its terms, the law was to apply to pending cases, as was true of the convention under consideration in *Schooner Peggy*, or, conversely whether such a change in the law must be given effect unless there was clear indication that it was *not* to apply in pending cases.

In 1969, the Supreme Court resolved this issue and upset the longstanding judicial presumption of exclusively prospective application. In *Thorpe v. Housing Authority*, the Court adopted a broad reading of *Schooner Peggy*, holding that "an appellate court must apply the law in effect at the time it renders its decision." The *Thorpe* opinion cleared up the *Schooner Peggy* question because it stood for the proposition that

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139. *5 U.S. (1 Cranch) 103* (1801).
140. *Id.* at 110. *Schooner Peggy* concerned an American Ship that seized a French vessel. The question was whether the French vessel could be condemned. The trial court found that it could not, but on appeal, the Circuit Court reversed and allowed condemnation. While the case was pending appeal by the Supreme Court, the United States and France entered into a convention that provided that all French property not currently and definitively condemned would be returned to France. The Supreme Court reversed the Court of Appeals, sending the vessel back to France. The Court's reasoning was that because the case was still pending appeal, the property was not definitively condemned.
142. *393 U.S. 268* (1969). *Thorpe* involved an eviction proceeding initiated by the Housing Authority. A tenant had been evicted without explanation for the action and had sued. The case progressed to the North Carolina State Supreme Court. Housing Auth. v. Thorpe, 148 S.E.2d 290 (N.C. 1966). While the case was pending a Supreme Court appeal, the Department of Housing and Urban Development established the requirement that housing authorities provide tenants with the reasons for their evictions. The Supreme Court remanded the case for a decision in light of the new regulation. The case made its way back to the Supreme Court after the state courts refused to apply the directive retroactively. The Supreme Court held that although the regulation did not indicate whether or not it was to be applied retroactively, it was, nonetheless, to be applied to anyone residing in the housing on the date of the directive's promulgation. *Bradley*, 416 U.S. at 714.
143. *Thorpe*, 393 U.S. at 281.
“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.” It should be noted, as Justice Scalia recently pointed out in a concurring opinion, that Thorpe made no mention of the many cases from the past calling for a prospective application presumption when the new law did not explicitly state an intent to the contrary.

In 1974, the Supreme Court in Bradley reaffirmed its position in Thorpe. Bradley was a desegregation case brought under the Civil Rights Act of 1871. The plaintiffs requested an award of attorneys' fees, but at the time no statute authorized such an award in school desegregation actions. While the case was pending appeal, the Education Amendments of 1972 became law. Included in those amendments was section 718 of Title VII of the Emergency School Aid Act, which grants federal courts the authority to award reasonable attorney's fees in school desegregation actions. The circuit court refused to award attorney's fees, and the Supreme Court granted certiorari. The Court, relying on both Schooner Peggy and Thorpe, rejected the contention that "a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature."

The Bradley Court discussed two exceptions to the retroactive presumption: first, when the legislature expresses a prospective-only application; and second, when the court decides that implementing the law in effect at the time of its decision will result in "manifest injustice." Relying on Schooner Peggy and Thorpe, the Bradley court established three factors for defining an injustice: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights."

The first factor for defining "manifest injustice" is whether the case is of "great national concern," as in both Bradley and Schooner Peggy, or is instead one of the "mere private cases between individual[s]." In other words, the Court must determine whether resolving the core issues of the case would benefit the community at large. The second factor is

144. Bradley, 416 U.S. at 715.
149. Id. at 715-16:
"While neither our decision in Thorpe nor our decision today purports to hold that courts must always apply new laws to pending cases in the absence of clear legislative direction to the contrary, we do note that insofar as the legislative history of § 718 is supportive of either position, it would seem to provide at least implicit support for the application of the statute to pending cases.
150. Id. at 717.
151. Id. at 718.
the nature of the rights affected by the change: "The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional."152 The third factor is the impact of the change in law upon existing rights. This concern "stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard."153

B. The Bowen Strand: A Prospective Presumption

Despite the Bradley doctrine, the Supreme Court recently seemed to rehabilitate the traditional principle. In 1982, in United States v. Securities Industrial Bank,154 the Court stated "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively . . . ."155 Three years later, in Bennett v. New Jersey,156 the Court reaffirmed its Securities Industrial holding that "statutes affecting substantive rights and liabilities are presumed to have only prospective application."157 Then, in 1988, in its opinion in Bowen v. Georgetown University Hospital,158 the Supreme Court forcefully directed courts not to apply statutes retroactively: "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."159 Interestingly, the issue in Bowen was not retroactive application of a statute; the above statement appears to be dictum.160 Additionally, Bowen never referred to Bradley or Thorpe, so it certainly did not overrule them. The Court did, however, cite many cases supporting a presumption against retroactivity.161 And since neither Bradley nor Thorpe explicitly overruled the line of cases cited in Bowen as arguing against retroactive

152. Id. at 720. The Bradley Court held that no matured or unconditional rights were affected by § 718 because the School Board had no such right in the funds (that would be used to pay the attorney's fees) allocated to it by the taxpayers. Instead, the funds were essentially held in trust for the public and the Board was at all times subject to the condition that the funds were to be used as the public wished through the duly elected representative.

153. Id. The Bradley court decided that the availability of § 718 served merely to create an additional basis for the defendant's potential obligation to pay attorney's fees. Therefore, the new provision did not impose an additional or unforeseen obligation on the defendant. Id. at 721.


155. Id. at 79.


157. Id. at 639. The Bennett case actually was decided using the Bradley rules, but the Court determined that the facts took the case out of the retroactive presumption under the manifest injustice exception. See discussion infra part IV.E.


159. Id. at 208.

160. The issue in Bowen was whether the Secretary of Health and Human Services may exercise his rule-making authority to promulgate cost limits that are retroactive. Id. at 205.

161. Id. at 208.
application, the lower courts are left with two seemingly contradictory lines of precedent.  

C. Recognizing the Conflict

In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, a plurality decision, the Supreme Court acknowledged that neither the *Bradley* nor the *Bowen* line of cases had been overruled. The opinion, written by Justice O'Connor, conceded there was "apparent tension" between the rule articulated in *Bradley* and the axiom reaffirmed in *Bowen*. Yet the Court declined the opportunity to reconcile the two lines of precedent, because under "either rule, where the congressional intent is clear, it governs," and the Court determined that the statute in question clearly evinced a congressional intent not to apply to judgments entered before its effective date.

Justice Scalia concurred in the result, but wrote separately to explore the *Bradley-Bowen* dichotomy. He chided the Court for failing to reconcile the two lines of cases, declaring that they stood not merely in "apparent tension" but rather in "irreconcilable contradiction." Justice Scalia urged the Court to overrule *Bradley* and to adopt the rule of construction that had been "applied, except for these last two decades of confusion, since the beginning of the Republic and indeed since the early days of the common law: absent specific indication to the contrary, the operation of nonpenal legislation is prospective only." Justice Scalia supported his position with several arguments. First, he insisted that prospective application was deeply rooted in our history and cited a long line of cases to that effect. Next, Scalia maintained that the *Bradley* and *Thorpe* decisions were based on a misinterpretation of *Schooner Peggy*. He believed that *Schooner Peggy* stood for the following proposition: "[W]hen Congress plainly says—contrary to the ordinary presumption which courts will 'struggle hard' to apply—that current law

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164. *Id.* at 837.
165. *Id.*
166. *Id.* The Court was considering an amendment to 28 U.S.C. § 1961 that changed the rate at which post-judgment interest would be calculated. The amendment became law while an appeal was pending. *Id.* at 831.
167. *Id.* at 841 (Scalia, J., concurring).
168. *Id.*
169. *Id.* at 842-44. Justice Scalia wrote:
   During these 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. . . . If the new law was silent as to its application, we consistently employed the presumption that it applied only prospectively.
170. *Id.* at 846-47
rather than the pre-existing law governs the rights of parties, then courts 'must apply' that current law."171 Finally, Justice Scalia argued that the presumption of retroactivity is "contrary to fundamental notions of justice, and thus contrary to realistic assessment of probable legislative intent."172

In Kaiser, four justices dissented, disagreeing with the majority's view that the legislature's intent was clear.173 Writing for the dissent, Justice White asserted that the plain language of the statute did not state whether it was to be applied to pending cases, and thus "it is necessary to apply the rules of construction that the Court has followed for almost two centuries in determining the temporal operation of federal statutes."174 The dissenters went on to state that the "apparent tension" between the two Supreme Court rules of construction is "more apparent than real."175 Their reasoning was that the instant case did "not involve true retroaction, in the sense of the application of a change in law to overturn a judicial adjudication of rights that has already become final."176 Finally the dissent, using the Bradley rule of construction, determined that there was no manifest injustice involved and advocated retroactive application.177

I. Is Kaiser the Answer?

Many parties and some courts have found Justice Scalia's opinion not only persuasive, but also indicative of what the Supreme Court will do when faced with the issue of retroactivity in the Civil Rights Act of 1991.178 Still, as Judge Heaney noted in a recent Eighth Circuit dissenting opinion, "Justice Scalia does not speak for the full Court on this is-

171. Id.
172. Id. at 855. Justice Scalia concluded with this summary of his findings:
What the record shows, therefore is the following: (1) An unbroken line of precedent, prior to 1969, applying a presumption that statutes are not retroactive (except for repeal of penal provisions) in all cases. (2) In 1969, with Thorpe, a departure from that tradition (based upon a misreading of our precedent) for cases in which the statute has been enacted after initial adjudication. (3) From 1969 to the present, (a) firm adherence to the prior tradition in cases not involving post adjudication enactment, and (b) the expression of adherence to the new presumption in postadjudication-enactment cases, but with only one case (Bradley, in 1974) where that probably produced a difference in outcome, and with one case (Bennett, in 1985) where it seemingly should have produced a difference in outcome but was not permitted to do so.

Id. at 853-54.
173. Justice White was joined by Justices Brennan, Marshall and Blackmun. Id. at 858; see also id. at 859 (White, J., dissenting) ("[The majority's interpretation] is too convoluted a reading of § 1961.").
174. Id. at 864.
175. Id.
176. Id.
177. Id. at 866-69
sue. It is our responsibility to follow the full Court rather than a single justice. In any event, the Kaiser opinion clearly shows that the Bradley line of cases has not been overruled by the Bowen line. Instead, both are valid, but exist in “apparent tension.”

Some argue that because of the current make-up of the Court, Justice Scalia’s opinion will be adopted by the majority when the Court reconsiders the retroactivity issue. However, the Clinton Administration is expected to push for retroactive application of the Act. Moreover, the Supreme Court recently remanded a case in which the cause of action arose prior to the Act’s passage “for further consideration in light of the Civil Rights Act of 1991.” Although on remand the D.C. Court of Appeals found that the Act applied prospectively only, the Supreme Court’s remand suggests that the Court may not have abandoned the principles of Bradley for the rule of Bowen.

Despite Justice Scalia’s portentous concurring opinion in Kaiser, and the fact that Bowen is more recent than Bradley, the posture of the current and future Court on retroactivity is not settled. For example, in James Beam Distilling Co. v. Georgia, a more recent case than either Bowen or Kaiser, the Supreme Court held that it is “overwhelmingly the norm, and is in keeping with the traditional function of the courts to decide cases before them based upon their current understanding of the law.” And although James Beam concerned retroactive application of a judicial decision only, another Supreme Court decision, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, decided the same day as Beam, held that a statute of limitations rule regarding claims brought under section 10(b) and Rule 10b-5 of the securities laws was to be applied retroactively. These remain the most recent Supreme Court pronouncements on the issue.

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180. Stephen Franklin, Giddy Labor May Not Get All it Wants From Clinton, CHI. TRIB., Nov. 7, 1992, at C1.
181. Gersman v. Group Health Ass’n, 112 S. Ct. 960, 961 (1992) (memorandum decision; corporation and one of its shareholders brought action against customer that had allegedly cancelled contract of corporation because of shareholder’s religious affiliation).
182. See Gersman v. Group Health Ass’n, 975 F.2d 886, 887 (D.C. Cir. 1992).
188. See supra note 180 (discussing the Clinton Administration’s desire for retroactive application).
D. Confusion Abounds

If the Supreme Court precedent is not confusing enough, courts applying the Bradley rule of construction to the 1991 Act also disagree about the proper result. Indeed, many courts applying the Bradley factors have found no manifest injustice inherent in retroactive application, and even an appellate court applying the Bowen rule has admitted that under Bradley, no manifest injustice would occur. Nevertheless, numerous courts have argued that application of the three Bradley factors yields a determination of manifest injustice. The first factor, the nature and identity of the parties, suggests that the court look to whether the suit seeks to vindicate private interests or matters of public concern. Courts have acknowledged that even when a dispute is between two private parties, the issues involved may be of great public concern: "'[I]t cannot be seriously questioned that an act involving clarification of the nation's civil rights laws and the procedures and remedies available for enforcing those laws, implicates 'great national concerns.'" Additionally, a district court has argued that because Congress has required plaintiffs seeking to pursue a Title VII action to first present their claims to the EEOC, a federal government agency, there is ostensible public interest in the outcome of Title VII cases. It is evident, then, that courts have effectively used the first factor of the Bradley test to support retroactive application.

Other courts have disagreed, urging that "protecting an individual's civil rights does not require the Act to be applied retroactively." These courts have reasoned that prospective application will not detract from the Act's deterrent effect because in these cases, since the harm


190. Fray v. Omaha World Herald Co., 960 F.2d 1370, 1378 (8th Cir. 1992) ("If the Bradley test applies ... this case does not fall within the 'manifest injustice' exception to Bradley's presumption of retroactivity.").


192. See supra notes 151-53 and accompanying text.


already has been inflicted, the question of deterrence is moot. Consequently, these courts hold that such cases implicate no national concern.

The second prong of the Bradley manifest injustice test asks whether the intervening statute infringes on existing rights that have matured or become unconditional. An argument in favor of retroactivity is that the rights at issue in the Act are not new—only the remedies for violating existing rights. Similarly, many courts have held that expanding a defendant's potential liability to include compensatory and punitive damages and jury trial does not infringe upon a defendant's unconditional right, because defendants have no unconditional right to limit a plaintiff to a particular type of remedy. In other words, "defendants did not have a matured 'right' to expect that their discrimination, if proved, would result in a certain set of remedies." The essence of this argument is this: because the relevant amendments to the Act affect only the level of recoverable damages, not the legality of the conduct in question, it is fair to apply these changes to pending cases. In the context of section 1981, a court has argued that "[t]he defendant is deprived of no rights it had at the time it took the actions at issue. The 1991 Act effectively returns Section 1981 to where it was before Patterson." Some courts attempting to use the second Bradley factor have found no manifest injustice. In fact, at least two district courts have found that no mature or unconditional rights were in question in their respective cases. On the other hand, at least one circuit court has used the second Bradley factor to draw a distinction between substantive and remedial changes. The Eleventh Circuit maintained in Baynes that because the Act changes both substantive and procedural obligations, the nature of the parties' rights weigh against retroactivity.

The final Bradley factor requires the court to determine the impact

197. Klaus, 58 Fair Empl. Prac. Cas. (BNA) at 954; see also Croce, 786 F. Supp. at 1146.
201. See Long v. Hershey Chocolate, 60 Fair Empl. Prac. Cas. (BNA) 27, 30 (M.D. Pa. May 1, 1992) ("[T]here do not appear to be any matured rights at issue here and this exception is not applicable."); Kimble v. DPCE, Inc., 784 F. Supp. 250, 253 (E.D. Pa. 1992) ("I can find no basis for an unconditional right in this case.").
202. Baynes v. AT & T Technologies, Inc., 976 F.2d 1370, 1374-75 (11th Cir. 1992). The court stated that if the Act had made only procedural and remedial changes, then it would be applied retroactively. Id. at 1374. The extension of § 1981 liability was considered a substantive change by the court. Id. at 1375. See discussion infra part IV.E.
of the changes made by the Act upon the defendant’s pre-existing rights: If the Act imposes a “new and unanticipated obligation” on the parties, then there is a manifest injustice.\textsuperscript{203} Most courts approving retroactive application view this third factor as turning on whether the alleged discriminatory conduct was prohibited prior to enactment of the 1991 legislation. In most instances, the courts have found that the defendant had no “right” to engage in discriminatory conduct; on the contrary, the defendant “had every reason to expect that its alleged behavior would result in a federal lawsuit.”\textsuperscript{204} Therefore, retroactive application would affect only the trial procedure and the amount of damages for which the defendant is liable. Also, whatever change in the Act precipitated the overruling of \textit{Patterson} would not affect existing rights, since “the conduct alleged was always prohibited by Title VII even if not by § 1981 to the extent \textit{Patterson} was in force.”\textsuperscript{205} Finally, in most of the cases involving \textit{Patterson} conduct, that conduct actually took place before the \textit{Patterson} decision, so the prevailing law would have been consistent with the 1991 Act.\textsuperscript{206} Thus, the courts have not viewed the legislation as affecting any pre-existing rights.\textsuperscript{207}

Proponents of prospective application argue that the third \textit{Bradley} factor implicates a manifest injustice. For example, the Eleventh Circuit has stated: “Although the basic norm of nondiscrimination is unchanged by the Act, we believe that imposing potential liability for damages for post-hiring behavior under section 1981, as opposed to the lesser Title VII remedies, would significantly and unfairly have an effect on the par-

\begin{itemize}
  \item \textsuperscript{203} \textit{Bradley}, 416 U.S. at 720-21.
  \item \textsuperscript{204} Savko v. Port Auth. of Alleghany County, 800 F. Supp. 268, 275 (W.D. Pa. 1992).
  \item \textsuperscript{205} Mojica v. Gannett Co., 779 F. Supp. 94, 98 (N.D. Ill. 1991). In Luddington v. Indiana Bell Tel. Co., 966 F.2d 225 (7th Cir. 1992), the Seventh Circuit Court of Appeals stated: Before the Act was passed—which is to say in the short-lived regime of the \textit{Patterson} decision—a plaintiff in an employment discrimination case based on race could invoke section 1981 and thus obtain common law damages only if the discrimination took the form of refusal to hire in the first place or, if the plaintiff was already an employee, to promote into a new employment relation. . . . A discharge, or a refusal to make an ordinary promotion or a lateral transfer, was not covered; a victim of discrimination in these forms was remitted to lesser remedies, those of Title VII. The new statute brings these acts under section 1981 and thus subjects employers to greater liabilities.
  \item \textsuperscript{206} Id. at 229.
  \item \textsuperscript{207} See, e.g., Graham v. Bodine Elec. Co., 782 F. Supp. 74, 76-77 (N.D. Ill. 1992) (finding that most of the conduct took place before \textit{Patterson}, when the prevailing law was consistent with the 1991 Act); Mojica, 779 F. Supp. at 98 (finding that the alleged conduct began prior to the holding in \textit{Patterson} and that the prevailing law was thus consistent with the 1991 Act).
\end{itemize}
ties."\(^\text{208}\) That court also observed that the case in question had been in litigation for two and-a-half years, in a non-jury trial (based on prior law).\(^\text{209}\) Similarly, a Pennsylvania district court has reasoned that to apply the statute retroactively would mean that the defendant actually behaved under a different set of consequences than those he or she believed to be in effect.\(^\text{210}\) Consequently, "the availability of this additional liability would have significantly altered all subsequent proceedings and strategic decisions by [defendant], especially with regard to settlement strategy."\(^\text{211}\)

E. Another Possible Theory: Substantive v. Remedial

Some litigants and courts have looked to the 1985 Supreme Court decision in \textit{Bennett v. New Jersey}\(^\text{212}\) in their attempts to reconcile the \textit{Bradley} and \textit{Bowen} lines. That decision concerned substantive provisions of the 1978 Amendments to the Elementary and Secondary Education Act of 1965. The Court held that the provisions could not be applied retroactively to determine whether funds granted in previous years were misused.\(^\text{213}\) In arriving at this decision, the Court read \textit{Bradley} as discouraging the presumption that changes in substantive requirements should operate retroactively.\(^\text{214}\) The reasoning was that \textit{Bradley} concerned a statutory provision for attorney's fees—perhaps not a substantive change. The \textit{Bennett} court took the \textit{Bradley} manifest injustice limitation (that the intervening change to a pending action must infringe on a matured or unconditional right) and concluded that the limit comported "with another venerable rule of statutory interpretation, \textit{i.e.}, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect."\(^\text{215}\) Using that reasoning, the \textit{Bennett} court could rule that the amendments in question were substantive changes, and thus should be applied only prospectively.

Some courts have applied this reasoning to the 1991 Act controversy, holding that the \textit{Bowen} presumption should cover changes in the law that define the scope of a party's substantive rights and obligations, while the \textit{Bradley} presumption should operate when only remedial or

\(^{208}\) \textit{Baynes}, 976 F.2d at 1375; see also \textit{Landgraf v. USI Film Prods.}, 968 F.2d 427, 433 (5th Cir. 1992) ("It would be an injustice . . . to charge individual employers with anticipating this change in damages available under Title VII."); \textit{cert. granted in part}, 113 S. Ct. 1250 (1993).

\(^{209}\) \textit{Baynes}, 976 F.2d at 1375.


\(^{211}\) \textit{Id.} (citing Defendant's Response at 14).

\(^{212}\) 470 U.S. 632 (1985).

\(^{213}\) \textit{Id.} at 632.

\(^{214}\) \textit{Id.} at 638.

procedural alterations were made. These courts, unlike those finding no manifest injustice under Bradley, have concluded that the 1991 Act makes substantive changes to the law. The strongest argument for this is that section 101 of the 1991 Act is a substantive change because it enlarges the area of conduct considered discriminatory. One response to these arguments is that Title VII always prohibited the disputed conduct, just not under section 1981.

Some courts also have adopted the more difficult position that since the changes allowing for compensatory and punitive damages and providing for a jury trial affect substantive rights, they should not apply retroactively: "Changes in procedure are often the product of a shifting notion of the nature of an injury and bring in their wake significant changes in individual behavior and the effectuation of substantive rights." The Seventh Circuit has reasoned that the amount of care a party takes to avoid liability is a direct function of the severity of the sanction. Thus when the severity is increased, the parties are entitled to readjust their level of care before becoming liable for the increased amounts. Indeed, the same court has reasoned that since the Act "makes changes in remedies, procedures, and evidence . . . such changes can have as profound an impact on behavior outside the courtroom as avowedly substantive changes." Despite its holding that the Act should be applied prospectively only, however, the court has conceded that "it is arguable that courts should apply the procedural and damage provisions in effect at the time of the trial."

Lex K. Larson has argued that compensatory damages are remedial in nature and therefore should apply retroactively. Yet one line of cases views punitive damages as quasi-criminal in nature and thus not to

217. See supra notes 189-94 and accompanying text.
218. See supra notes 20-24 and accompanying text. Some of the courts that have held § 101 changes to be substantive include Gersman, 975 F.2d at 899; Uncle Ben's, 965 F.2d at 1374; Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592, 595 (5th Cir. 1992).
219. See supra note 205 and accompanying text.
220. Stout, 798 F. Supp. at 1006 (relying on the majority position in U.S. v. Burke, 112 S. Ct. 1867, 1874 (1992)).
222. Id.
223. Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 939 (7th Cir.) (reasoning that "it does not seem unfair to force litigating parties to comply with the more recent statutory changes with regard to damages."). cert. denied, 113 S. Ct. 207 (1992).
be imposed retroactively on defendants who did not know they might be liable for such damages.\textsuperscript{225} In response, however, Larson observes that "[t]his yields the surprising result that compensatory and punitive damages could be treated differently for retroactivity purposes although they are uttered in the same breath throughout most of the Act."\textsuperscript{226} Following this logic, the results of jury trials would be applied retroactively when dealing with compensatory damage claims and prospectively for claims involving punitive damages.\textsuperscript{227}

Unfortunately, this substantive-versus-remedial theory of interpretation creates even more confusion: since the principle only delays the retroactivity determination, the courts still must decide whether the new legislation is remedial or substantive. And even if the courts can agree, some parts of the statute may be construed as remedial, others as substantive. This result will only confuse the public, not only because applications of the statute will vary, but because the application decision will not be based on any explicit provision of the Act.

V

THE RESTORATIVE APPROACH

Another line of cases espouses what might be called the restorative approach to retroactivity: "[W]here 'Congress enacts [a] statute to clarify the Supreme Court's interpretation of previous legislation thereby returning the law to its previous posture,' the Act must be applied retroactively."\textsuperscript{228} But again, the courts disagree about the proper application of this doctrine to the Act. Some believe that the Act fits squarely

\textsuperscript{225} The New Civil Rights Act: Is It Retroactive?, LAW. ALERT, June 22, 1992 at 16, 18 (citing Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984); Nees v. Hocks, 536 P.2d 512 (Or. 1975); Kelsey v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1979)).

\textsuperscript{226} Id. at 18-19. At least one district court has stated that it would not take a piecemeal approach to retroactive application. Doe v. Board of County Comm'nrs, 783 F. Supp. 1379, 1385 (S.D. Fla. 1992). However, a court in the same district held otherwise because "it has long been recognized that Title VII and section 1981 are separate and distinct causes of action for discrimination in employment." Joyner v. Monier Roof Tile, Inc., 784 F. Supp. 872, 880 (S.D. Fla. 1992) (citing Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975); Freeman v. Motor Convoy, Inc. 700 F.2d 1339, 1349 (11th Cir. 1983)).

The Eleventh Circuit since has ruled that "[b]ecause the Act changes substantive obligations as well as remedial or procedural rights . . . we believe the nature of the parties' rights weigh against retroactivity in this case." Baynes v. AT & T Technologies, Inc., 976 F.2d 1370, 1375 (11th Cir. 1992).

\textsuperscript{228} Rowson v. County of Arlington, 786 F. Supp. 555, 558-59 (E.D. Va. 1992) (citing Ayers v. Allain, 893 F.2d 732, 754-55, vacated on other grounds, 914 F.2d 676 (5th Cir. 1990) (en banc), cert. granted on other grounds, 111 S. Ct. 1579 (1991)). Rowson does not embrace this line, however, suggesting instead that "the restorative legislative distinction favoring retroactivity does not apply" and ultimately asserting that "whether the 1991 Act should be applied retroactively to pending cases . . . clearly . . . must be addressed and resolved by the Supreme Court."; see also Mrs. W. v. Tirozzi, 832 F.2d 748, 755 (2d Cir. 1987); Leake v. Long Island Jewish Medical Ctr., 695 F. Supp. 1414, 1417-18 (E.D.N.Y. 1988), aff'd per curiam, 869 F.2d 130 (2d Cir. 1989).
within the principle, but they are split over whether such a conclusion is dispositive. Still other courts reason that because the Act does not clarify Supreme Court interpretation, the restorative legislation doctrine is inappropriate.

Section Three of the 1991 Act specifically states that one of the purposes of the new law is “to respond to recent decisions of the Supreme Court.”229 Thus, arguments have been advanced that Congress intended to return section 1981 to the same coverage it provided prior to the Patterson decision.230 This conclusion stems from the fact that from 1870, the year section 1981 first passed, until 1991, Congress never felt it necessary to explain the phrase “to make and enforce contracts.”231 It was only after Patterson that the legislature decided to clarify the original meaning of the provision.232 Thus, parties have argued—and some courts have maintained—that “in cases where Congress is correcting Supreme Court interpretations of a statute rather than creating new rights, the statute is frequently interpreted retroactively absent evidence of intent to the contrary.”233 Some courts, including the Ninth Circuit, deem this theory conclusive:

Given Congress’ sense that the Supreme Court had construed the Nation’s civil rights laws so as to afford insufficient redress to those who have suffered job discrimination, it appears likely that Congress intended the courts to apply its new legislation, rather than the Court decisions which predated the Act, for the benefit of the victims of discrimination still before them.234

Nevertheless, some courts reject the restorative legislation doctrine outright. For example, the Eighth Circuit recently stated:

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 . . . . The new civil rights act reflects contemporary policy and politics, rather than a dispute between Congress and the Supreme Court over the mechanics of interpretation.235

While the reactions of the Eighth and Ninth Circuits may appear to be just a difference of opinion over Congress’ “overruling” the Supreme

229. See supra note 18.
230. The 1991 Act also intended to overrule four other Supreme Court decisions. See supra note 18.
234. Davis v. City of San Francisco, 976 F.2d 1536, 1552 (1992), reh’g denied, vacated in part and remanded on other grounds, 984 F.2d 345 (9th Cir. 1993). Other courts following the restorative legislation principle include Watkins and Graham.
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Court, they nonetheless constitute another distinct, irreconcilable difference among the courts on the problem of retroactivity.

Another, and perhaps stronger, argument against the restorative legislation principle is that some of the Act's provisions are new (for example, the compensatory and punitive damages allowance). Before the 1991 Act, Title VII expressly limited recovery to equitable relief; consequently, the reasoning goes, these provisions must not have been created in response to Supreme Court decisions. Instead, they were additional substantive remedies. Because from this perspective the Act cannot be seen as completely restorative, some courts have held that the theory is inapposite.

Other courts find the restorative theory plausible but not conclusive. For instance, at least one district court has used it to argue "against concluding there is a fair indication Congress intended the 1991 Act to apply prospectively only." And yet another court, in the Fourth Circuit, recognized the arguments on both sides of the restorative legislation question, but could not say whether either position was decisive. Indeed, the court urged that "[t]he question of whether the 1991 Act should be applied retroactively to pending cases is clearly one that must be addressed and resolved by the Supreme Court."

The restorative doctrine raises problems similar to those presented by the substantive-versus-remedial theory, namely begging the question and creating further confusion. Adopting the restorative principle will only move the question from whether the Act is retroactive to whether the legislation is restorative.

VI
THE PREJUSSION ARGUMENTS

Aside from the Fray decision in the Eighth Circuit and the Davis decision in the Ninth Circuit, almost every court ruling on retroactivity has found that no clear legislative intent can be gleaned from either the statutory language or the legislative history of the Civil Rights Act of 1991. As a result, most arguments on either side of the retroactivity issue center on what presumption or legal theory to apply and how to apply it. Courts are split on every aspect of this particular question, from deciding

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237. See, e.g., Hicks, 982 F.2d at 298; Long v. Hershey Chocolate, 60 Fair Empl. Prac. Cas. (BNA) 27, 30 (M.D. Pa. May 1, 1992); McLaughlin, 784 F. Supp. at 972.

238. Mojica v. Gannett Co., 779 F. Supp. 94, 97 (N.D. Ill. 1991) ("[T]hat Congress overturned Supreme Court interpretations of an existing statute provides some support for applying the new amendments retroactively.").

239. Rowson, 786 F. Supp. at 560.

240. Id.
which of the many doctrines apply to reconciling the conflicting principles.

A. The Prospective-Only Arguments

Numerous arguments favor applying the Civil Rights Act of 1991 prospectively only. Perhaps the strongest such argument is that of the seven circuits that have ruled, six have found that the Act does not apply retroactively. Nonetheless, there are viable arguments calling for retroactive application of the Act, and several circuits have yet to rule on the issue.

Although some courts have assumed exclusively prospective application because the outcome would be the same under either Bradley or Bowen, many of the courts that apply the Act only prospectively have actually done so because they have adopted the Bowen line of cases as precedent. Courts have given many reasons for this decision. One is that the Civil Rights Act of 1991 is distinguishable from the statute at issue in Bradley on two grounds: first, that the cases at issue are between private parties, whereas Bradley involved an action against a government agency; second, that the Bennett distinction, which reasons that the Act makes substantive changes and thus should not apply retroactively, is compelling.

Other courts and commentators have offered administrative reasons for adopting Bowen over Bradley. For example, a “case by case application of Bradley’s ‘manifest injustice’ exception to the many provisions of the 1991 Act would be unworkable.” In addition, some courts have insisted that retroactive application would “produce massive dislocations in ongoing litigation.” On this point, one estimate claims that 7000 to 10,000 cases would be affected if the Act were to be applied retroactively. As a result, it is argued, parties may point out that if the “Act applies retroactively, numerous cases that have been tried to the bench will have to be sent all the way back to the starting gate for a retrial before a jury, thus in effect wasting weeks or months of judicial effort.”

242. In fact, a federal district court in Ohio has held the compensatory damages provision of the Act to be applied retroactively, even after the Sixth Circuit ruled against such application. Keys v. U.S. Welding, Fabricating & Mfg., 59 Fair Empl. Prac. Cas. (BNA) 1537, 1544 (N.D. Ohio Aug. 26, 1992). This points out yet another indication that the question of retroactivity is far from being closed.
243. See discussion supra part IV.D.
244. See supra notes 146-48 and accompanying text.
245. See discussion supra part IV.E.
Of course, a plaintiff might counter this argument by asserting that the judge's factual findings could be considered binding on a jury, leaving the jury to decide only damages.  

Courts also have chosen the Bowen precedent because "[t]he presumption against retroactive application best preserves the distinction between courts and legislatures: the former usually act retrospectively, settling disputes between persons, the latter usually act prospectively, setting the general rules for future conduct." Support for this assertion can be found in United States v. Security Industrial Bank, a Supreme Court case that presented "the principle that statutes operate only prospectively, while judicial decisions operate retrospectively.

Many courts also prefer Bowen because it is more recent than Bradley and is thus more likely to reflect the view of the current Supreme Court. Additionally, courts follow Bowen because it has historical roots and over 180 years of Supreme Court precedent.

Lastly, numerous courts have used the Rule of Law doctrine to conclude that the Act applies prospectively only. For example, Judge Posner of the Seventh Circuit has stated:

The idea that the law should confine its prohibitions and regulations to future conduct, so that the persons subject to law can conform their conduct to it and thus avoid being punished, whether criminally or civilly, for conduct that they had no reason to think unlawful, is a component of

v. Belmont Homes, Inc., 970 F.2d 53, 56 (5th Cir. 1992) ("[T]o require a party to retry a case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources.") (quoting Landgraf v. USI Film Prods., 968 F.2d 427, 432-33 (5th Cir. 1992), cert. granted in part, 113 S. Ct. 1250 (1993)).

Id. at 79-80.

But see supra note 180 and accompanying text (discussing the Clinton Administration's desire for retroactive application).

the traditional conception of the “rule of law.” 256

Many of these courts have relied on Justice Scalia’s concurring opinion in Kaiser stating that “the presumption of prospective application is grounded in notions of fairness because parties should only be held accountable for the laws at the time of their conduct.” 257 Retroactive application, therefore, is unfair to a public trying to conform its behavior to the law, because such application would compel people to live in fear that the legislature will change what the public understands to be legal conduct. 258 The Bowen presumption insures that parties are liable for only those acts, and their accompanying damages and procedures, that were in violation of the law at the time the conduct took place.

This argument thus builds on the concept of notice. When the severity of a remedy for committing an illegal act increases, the public should get notice of such change in order to adjust their conduct accordingly. 259 The Bowen presumption against retroactivity provides greater notice to affected parties. 260

### B. The Retroactive Arguments

There are as many justifications for the retroactive application as against it. The strongest argument is that because the Act includes two provisions calling for “prospective only” application, the balance of the Act can be inferred to apply retroactively. 261

Most of the other arguments deal with which presumption to apply when no legislative intent can be determined. One such argument is that the Supreme Court, when faced with the retroactivity issue, remanded the case “in light of the 1991 Act,” implying that the overruling of Patterson affects pre-Act cases. 262 Another strong argument for retroactive application of the Act is that because the legislative changes are only remedial and procedural, the discriminatory conduct was always illegal, so public expectations should be clear. 263 In addition, the restorative legislation doctrine is espoused because the Act explicitly states that it is overruling Supreme Court decisions. 264 Retroactivity proponents inter-

256. Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 228 (7th Cir. 1992); see also Holt v. Michigan Dep’t of Corrections, 974 F.2d 771, 774 (6th Cir. 1992). The Luddington court concedes that the conception is not immutable or absolute, but that it is the right policy for courts to follow absent of any other guidance. 966 F.2d at 228.

257. Mozee, 963 F.2d at 935 (citing Kaiser, 494 U.S. at 855).


259. See Luddington, 966 F.2d at 229; see also supra note 216 and accompanying text.

260. Libisch v. Black & Decker Corp., 803 F. Supp. 1066, 1068 (D. Md. 1992) (“The amount of care that individuals and firms take to avoid subjecting themselves to liability whether civil or criminal is a function of the severity of the sanction.”).

261. See discussion supra part II.B.3.

262. See supra note 181 and accompanying text.

263. See supra note 204 and accompanying text.

264. See discussion supra part V.
pret this avowed purpose to mean that Congress wanted the new legislation, not the old cases, to apply.\(^{265}\)

A district court in Illinois, while relying on a Seventh Circuit decision, advanced another theory for adopting retroactive application. In electing to follow *Bradley*, the court reasoned that "any tension between the two lines of precedent is negated because, under *Bradley*, a statute will not be deemed to apply retroactively if it would threaten manifest injustice by disrupting vested rights."\(^{266}\) The court thus concluded that applying the *Bradley* exception would ensure a valid result. Still, as discussed previously, courts applying *Bradley* do not agree on whether manifest injustice results from applying the 1991 Act retroactively.\(^{267}\)

One ever-possible argument for retroactivity is that the *Bowen* facts are not applicable to the issue at hand. While *Bowen* concerned an administrative agency's ability to promulgate retroactive rules, perhaps *Bowen* did not mention *Bradley* and its progeny because *Bowen* is not directly applicable to cases where courts are deciding whether congressional statutes should be applied to pending cases.\(^{268}\) Similarly, it is always possible to argue that courts following *Bowen* rely on case language that amounts to mere dicta.\(^{269}\)

Finally, a practical argument for applying rule changes retroactively is that in many of the cases in question, the conduct at issue occurred before the Supreme Court rendered the *Patterson* decision. Since *Patterson* was in effect for only a few years,\(^{270}\) this would undermine any assertion that the law being applied differs from the defendant's expectations.

**VII**

**CONCLUSION**

In the short time after the Act was passed in 1991 and before the Supreme Court granted *certiorari* in Rivers v. Roadway Express, Inc., 61 U.S.L.W. 3437 (U.S. Feb. 22, 1993), and Landgraf v. USI Film Prod., 61

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\(^{265}\) See Davis v. City of San Francisco, 976 F.2d 1536, 1552 (1992), *reh'd* denied, *vacated in part and remanded on other grounds*, 984 F.2d 345 (9th Cir. 1993); see also *supra* note 234 and accompanying text.


\(^{267}\) See *discussion supra* part IV.D.

\(^{268}\) Although this hypothesis has not been used to argue for applying the *Bradley* rule, one court has relied on this reasoning to hold that *Bowen* did not overrule *Bradley*. See *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir. 1992).

\(^{269}\) The specific passage upon which many courts rely is this: "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

U.S.L.W. 3371 (U.S. Feb. 22, 1993), parties have litigated more than 150 cases solely because of the undecided question of retroactivity. Congress is much to blame. Aware that the Act could not pass with a specific provision on either retroactive or prospective rule application, and knowing as well that there was no clear Supreme Court rule, Congress created a convenient solution: by deliberately avoiding any statement of intent on retroactivity, each side hoped that silence would work in its favor. The result, however, is that “[e]very federal court in the United States is now faced with the problem which this [ ] amendment presents.”

Consequently, “thousands of judicial hours, which Congress could easily have saved, are spent.”

Moreover, Congress deliberately “dumped the retroactivity question into the judiciary’s lap without guidance,” thus asking the courts to resolve political questions that Congress itself was unable (and unwilling) to answer. “The burdens placed on the judicial system ‘frustrate the early and orderly resolution of issues which should demand greater attention—compensating the victim or vindicating accused commercial entities.'

The President bears some responsibility as well. Although Congress writes bills, the President has the power to veto them. When President Bush vetoed the earlier version of the Civil Rights Act of 1991, he knew, like Congress, that litigation would proliferate. Thus he also is to blame for the wasted time and resources of the court system and its litigants. Interestingly, the Bush administration was also inconsistent in its position on retroactivity. While a 1988 law allowing the government to claim double damages in Housing and Urban Development cases was silent on the retroactivity issue, administration attorneys argued for double damages in cases where the action occurred prior to enactment of the law. However, after the government won double damages, the administration reversed its position, in *Bailes v. United States*. In fact, critics say that the administration “flip-flopped to avoid trouble when the high court considers whether the Civil Rights Act of 1991 may be applied retroactively.”

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272. *Id.* at 158; see also Joyner v. Monier Roof Tile, Inc., 784 F. Supp. 872, 876 (S.D. Fla. 1992) (stating clarity would have spared many hours of judicial labor).
Perhaps in response to such criticism, in August, 1991, the President's Council on Competitiveness issued recommendations for improving the legal system. The report recognized that "‘poorly drafted federal statutes’ shared part of the responsibility for increasing litigation."\textsuperscript{279} The report then proposed a "litigation hazards" checklist against which all legislative proposals should be reviewed; one salient item on the list was "whether the legislation is to be applied retroactively."\textsuperscript{280} Adopting such a precautionary litany would prove invaluable, saving precious resources and improving the integrity of the legislative system.

While Congress and the President deserve much of the blame for failing to resolve the retroactivity question, the Supreme Court merits criticism as well. By failing to address the "irreconcilable contradiction" in its precedent on retroactivity, the Court has "left the door open for Congress to pass legislation without agreeing on its applicability to current controversies. . . . [I]n effect it has allowed Congress to shift the cost and burden of resolving the issue from Congress to private litigants and the courts."\textsuperscript{281}

Although Congress has shirked its duty to decide the issue, the Supreme Court must cut the existing losses and make a determination on retroactivity at once.\textsuperscript{282} Obviously the lower courts would be hard pressed to decide the issue, since rebuttable arguments exist on every side. Moreover, "the Supreme Court emphasized in 1989 that it is not within the province of the courts of appeals to determine when Supreme Court decisions in one line of cases effectively overrule Supreme Court decisions in another line of cases."\textsuperscript{283} Thus, the lower courts have their hands tied in trying to reconcile the two divergent lines of precedent concerning retroactivity.

Two dissenting opinions in the Eighth Circuit\textsuperscript{284} and a recent Michi-


\textsuperscript{280}. In fact, such a checklist already had been proposed by a congressionally mandated committee made up of judges and congressional representatives to study problems facing the federal courts. See Burchfield v. Derwinski, 782 F. Supp. 532, 536-37 (D. Colo. 1992) (citing Report of the Federal Courts Study Committee 91-92 (Apr. 2, 1990)).


\textsuperscript{282}. It is clear that the Supreme Court must rule on this issue. Fortunately, on February 22, 1993, the Supreme Court granted certiorari to two pertinent cases. See supra note 16. In Rivers v. Roadway, Inc., No. 92-938, the Court will determine whether the Sixth Circuit was correct in holding that the 1991 Act does not apply retroactively to pending § 1981 claims. The Court also will examine a Fifth Circuit case to resolve whether the jury trial and compensatory and punitive damages provisions of the Act are to be applied retroactively. These two cases should allow the Court to settle the retroactivity question as it relates to all the major provisions of the 1991 Act.


\textsuperscript{284}. Fray v. Omaha World Herald Co., 960 F.2d 1370, 1379-81 (8th Cir. 1992) (Heaney, J.,
gan Law Review article\textsuperscript{285} all have tried to reconcile the two lines of Supreme Court cases by arguing that since both lines of cases reflect an overriding concern for fairness, the decision whether to apply the statute retroactively should depend on various factors of fairness, or as the law review article states, should focus on the "actual objections to retroactivity and whether these objections inhere in a particular statute."\textsuperscript{286} However, even if the lower courts could agree on the factors of fairness or the dangers of retroactivity, the courts still would face the difficult task of deciding whether retroactive application of the 1991 Act would be fair and, if so, how to avoid the dangers of retroactivity.\textsuperscript{287} In other words, the courts still would disagree about whether the Act should apply retroactively as well as prospectively.

There is only one answer: the Supreme Court must decide the issue at once. And not only must the Court decide the retroactivity of the Civil Rights Act of 1991, it also should proscribe future legislative behavior that would, as here, waste time and money. To this end, the Court should establish a clear rule or presumption that Congress must explicitly override in every instance to avoid the presumption. The Supreme Court has taken this approach in other areas in order to avoid the voluminous litigation that results from uncertainty. For example, in 1991 the Supreme Court offered such a ruling on the issue of jurisdiction:

It is a long-standing principle of American Law "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." This "canon of construction... is a valid approach whereby unexpressed congressional intent may be ascertained"\textsuperscript{288}

... We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is "the intention of the Congress clearly expressed,"... we must presume it "is primarily concerned with domestic conditions."\textsuperscript{288}

While conceding that many arguments could be made to infer a retroactive intent from the 1991 Act, it seems that exclusively prospective application is the fairer and more logical presumption. First, people's expectations would not be upset. They would know, at the time of their conduct, the corresponding consequences. In addition, such a hard and fast presumption would send a message to Congress, which could not then throw up its hands and "let the courts decide." If Congress then remained silent on the issue, it would nonetheless have stated its intent

\textsuperscript{286} Id. at 2069.
\textsuperscript{287} See discussion supra Part IV.D.
that application be prospective only. Congress would have to work against this presumption every time it wanted a new law to be applied retroactively.

Additionally, there is a strong policy reason for a straightforward and strict presumption rule. Although, as discussed previously, other "doctrines" are available for deciding the issue, such as the restorative theory and the substantive-versus-remedial dichotomy, these approaches do not conclusively answer the retroactivity question. Instead, they leave the courts to characterize the legislation as restorative or new, remedial or substantive. This creates precisely those problems that arise from the retroactivity issue today. The costs of uncertainty may be couched in different language, but they remain. For example, courts may disagree as to the characterization of the legislation. In addition, the public may be confused if the result of the doctrines makes part of the new legislation retroactive and part prospective. What's more, this confusion may be compounded by outrage when the public realizes that these arbitrary decisions are not based on anything stated in the statute, thus suggesting that Congress has shirked its responsibilities.

One potential argument against the rigid presumption rule is that such a strict edict may make legislation harder to pass. A clear example is the Act itself: because silence in the legislation would have meant prospective application only, the democrats would not have voted for the bill, and a majority vote would have been unobtainable. The answer to this argument is, "so what?" Indeed, that is the very point of the presumption: it is better for Congress to debate and resolve the problem before the bill becomes law than to send the undecided question to the courts, where time and money will be wasted as judges wrestle with the issue of retroactivity rather than the merits of the case.

Finally, a rigid presumption rule for exclusively prospective application is the best way to reduce litigation, because a retroactive presumption still would necessitate litigating whether its application caused a "manifest injustice." A rule that dictates prospective application of federal laws unless the statute expressly says otherwise will decrease the need for parties to litigate any retroactivity question and clearly will identify who was covered under the new law.

But above all, no matter the outcome, the Supreme Court must decide the retroactivity issue immediately.