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Back to the Future: The Application of the 1991 Civil Rights Act to Pre-Existing Claims

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by Jennifer Jolly Ryan*

I. INTRODUCTION

On November 21, 1991, President Bush signed into law the Civil Rights Act of 1991 (the "1991 Act").[1] After two years of heated debate and compromise, Congress passed a comprehensive civil rights package that promises to strengthen and expand Title VII of the Civil Rights Act of 1964[2] ("Title VII") and Section 1981 of the Civil Rights Act of 1866[3] ("Section 1981"), largely by restoring anti-discrimination laws to their pre-1989 status as well as by instituting certain procedural changes for the courts to follow.

The 1991 Act provides access to compensatory and punitive damages, as well as trial by jury, to those alleging intentional discrimination based on religion, sex, national origin, or physical or mental disability.[4] Previously, Title VII only allowed for injunctive relief and the recovery of back pay and attorney fees.[5] The 1991 Act also allows prevailing plaintiffs to recover expert witness fees,[6] extends certain statutes of limitation,[7] changes the burden of proof in "mixed motive" and disparate impact

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1. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).
2. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988).
3. 42 U.S.C. § 1981 (1988).
4. 42 U.S.C.A. § 1981a (1988 & Supp. 1992).
5. 42 U.S.C. §§ 2000e-5(f)-(g), (k) (1988).
6. 42 U.S.C.A. §§ 1988, 2000e-5 (1988 & Supp. 1992).
7. *Id.* § 2000e-16.

cases,[8] and allows certain challenges to consent degrees.[9] In addition, the 1991 Act expands Section 1981 coverage to include conduct that occurs after the formation of an employment contract by adding causes of action for discrimination in the "performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[10] For the first time, Title VII jurisdiction is expanded to cover United States citizens employed by American companies while working in foreign countries.[11]

Congress passed the 1991 Act after two years of heated debate and many compromises. Many of the 1991 Act's most important provisions were intentionally left ambiguous to make the final legislation more acceptable to its opponents in Congress, as well as to avoid Presidential veto, which previous proposals had not endured. These ambiguities will certainly lead to increased and prolonged litigation. One of the most serious questions currently facing the courts is whether the 1991 Act's provisions should be applied to claims based on alleged discriminatory conduct that preceded the signing of the Act on November 21, 1991.

The issue of retroactivity is an important one for the courts and litigants because if the 1991 Act is not applied to pre-existing claims, relief under its provisions will be denied to civil rights claimants for many years to come. The 1991 Act, in essence, will not have any effect until the latter part of this decade. Historically, employment discrimination cases are subject to prolonged litigation.[12] In eight recent Supreme Court cases that were specifically overturned by the 1991 Act, the discriminatory conduct had occurred an average of nine years before the case reached the Court.[13]

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8. *Id.* §§ 2000e, 2000e-2.
9. *Id.* § 2000e-2.
10. *Id.* § 1981.
11. *Id.* § 2000e (Supp. 1992).
12. For instance, employers who intentionally violate Title VII through their discriminatory conduct, occurring as late as November 21, 1991, would not be subject to damages or trial by jury for another several years. Title VII requires that certain administrative procedures must be met prior to filing a claim in federal court. These administrative procedures prevent the filing of a lawsuit for approximately one year. Once a claim under Title VII is filed in federal court, final relief may not be granted until several more years. NAACP Legal Defense and Educational Fund, Inc., Application of 1991 Civil Rights Act to Pre-Existing Claims, p. 10 (Mar. 1992) (on file with NAACP Legal Defense and Educational Fund, Inc.).
13. *See* EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991) (plaintiff dismissed in 1984); West Va. Univ. Hosps. v. Casey, 111 S. Ct. 1138 (1991) (disputed practice occurred in January 1986); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) (seniority system adopted in 1979; plaintiff laid off in 1982); Martin v. Wilks, 490 U.S. 755 (1989) (original suit filed in 1974; disputed consent decree entered in 1981); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (plaintiff harassed 1972-1982, fired 1982); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plaintiff applied for but was not granted partnership in 1982);

Moreover, if the 1991 Act does not apply to previous discrimination claims, the courts will apply inconsistent authority to litigants for many years. A line of cases overturned by the 1991 Act will apply for many years to claims which arose prior to November 21, 1991.

The purpose of this Article is to provide an overview of the 1991 Act and how it affects recent decisions of the United States Supreme Court that severely narrowed the protections and remedies previously afforded civil rights claimants. This Article analyzes whether the 1991 Act's provisions should apply to claims existing prior to November 21, 1991 through a review of the legislative history, statutory language, Supreme Court authority addressing the application of statutes to pre-existing claims, and recent decisions of the federal circuit courts that have been confronted with the issue. This Article will conclude that, although there is substantial support for not applying the 1991 Act's provisions to pre-existing claims, the statutory language, the remedial nature of the 1991 Act, the legislative history, and Supreme Court decisions considering the retroactive application of procedural and remedial legislation, weigh in favor of applying most of the 1991 Act's provisions to pre-existing claims.[14]

II. Overview of Provisions of the Civil Rights Act of 1991

Title I of the 1991 Act,[15] entitled "Federal Civil Rights Remedies," embodies Congressional response to a series of recent decisions by the United States Supreme Court that severely narrowed the protections and remedies against employment discrimination. In total, the 1991 Act overturns eight Supreme Court decisions.[16] For the most part, the provisions dealing with these Supreme Court decisions restored the legal principles that previously prevailed.

Section 101 of the 1991 Act overturns the Supreme Court's decision in *Patterson v. McClean Credit Union*[17] and expands the scope of Section 1981. In addressing a racial harassment claim, the Supreme Court in *Patterson* interpreted Section 1981 as forbidding racial discrimination only

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Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (filed in 1974); Library of Congress v. Shaw, 478 U.S. 310 (1986) (Title VII complaints filed in 1976 and 1977).

14. In determining whether particular sections of the 1991 Act should apply, the author has often used the term "pre-existing claims" rather than the term "retroactive" because of the confusion the latter term has engendered. *See* Aledo-Garcia v. Puerto Rico Nat'l Guard Fund, Inc., 887 F.2d 354, 355 (1st Cir. 1989); *In re* Reynolds, 726 F.2d 1420, 1422 n.1 (1984). *See also* NAACP Legal Defense and Educational Fund, Inc., *supra* note 12.

15. 42 U.S.C.A. §§ 1981a, 1988, 2000e, 2000e-1, 2000e-2, 2000e-4, 2000e-5, 2000e-16, 1211, 12112; 29 U.S.C.A. § 626; 2 U.S.C.A. § 60*l* (Supp. 1992).

16. *See infra* notes 17-64.

17. 491 U.S. 164 (1989).

in the making of contracts and the rights to enforce them.[18] According to the Court, jurisdiction under Section 1981 did not extend to discrimination on the basis of race in the employer's discriminatory conduct after the contract's formation, such as in its performance or discharge.[19]

Section 101 overturns *Patterson* by permitting lawsuits by minorities alleging discrimination in "the making and performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[20] The expanded coverage of Section 1981 is advantageous to plaintiffs claiming intentional discrimination because they are now entitled to a jury trial, with no limit on punitive damages.[21] Furthermore, plaintiffs may receive compensatory damages for pain and suffering.[22] Although Section 101 is phrased as a substantive ban on discrimination, it predominantly provides new remedies for discriminatory conduct that has always been actionable under Title VII.[23] In the case of a discrimination claim arising prior to or even after the Supreme Court decided *Patterson*, employers can hardly complain that they did not know that their conduct was unlawful when it was otherwise illegal under Title VII, state law, or regulation.

Sections 104 and 105 of the 1991 Act overturn the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*,[24] relating to the burden of proof in disparate impact cases. These sections also change the definition of business necessity. In *Wards Cove*, the Supreme Court held that a plaintiff seeking to subject an employer to liability on a disparate impact theory must prove that the employer's business practice was unrelated to any legitimate business objective.[25] The Court concluded that statistical evidence of discrimination, alone, was not sufficient to establish a prima facie case under Title VII.[26] Once defendant alleges a legitimate business objective or reason for the conduct, the burden under *Wards Cove* shifts to plaintiff to prove that the employer's practice was unnecessary or that an alternative practice would be equally effective and not result in a disparate impact.[27] In doing so, the Court shifted the burden of evidence from the employer to the victim of discrimination[28] and re-

18. *Id.* at 176.
19. *Id.* at 177.
20. 42 U.S.C.A. § 1981(b) (Supp. 1992).
21. *See supra* note 4.
22. Peter M. Panken, *Civil Rights Act of 1991*, C669 ALI-ABA 611 (Dec. 5, 1991).
23. 42 U.S.C.A. § 1981 (1988 & Supp. 1992).
24. 490 U.S. 642 (1989).
25. *Id.* at 660.
26. *Id.* at 650, 653.
27. *Id.* at 659.
28. *Id.*

treated from long standing Supreme Court precedent established in 1971 in *Griggs v. Duke Power Co.*[29]

In *Griggs* the Supreme Court held that Title VII prohibits business practices that disproportionately exclude minorities and women, even if the practice appears to be race or gender neutral on its face.[30] Under *Griggs*, the burden of proof was on the employer to show that the practice was "related to job performance."[31] Section 105 overturns the decision in *Wards Cove* and codifies *Griggs* in relation to the burden of proof in disparate impact cases by providing

> An unlawful employment practice based on disparate impact is established under this title only if . . . a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact . . . and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.[32]

The provisions of the 1991 Act that alter the type of evidence required and burden of proof of litigants in a disparate impact case are both procedural and restorative. Therefore, retroactive application of Sections 104 and 105 would be warranted. However, retroactive application of Section 105, which alters the definition of business necessity, to claims arising between the time *Wards Cove* was decided and November 21, 1991 raises additional problems. If an employer could prove that it actually relied on the decision in *Wards Cove*, an employer may argue that it would be unfair to apply Section 105 in such circumstances, if the statutory language and legislative history of the 1991 Act, in regard to its effective date, is otherwise ambiguous.

Section 107 of the Act provides that an unlawful employment practice is established if race, color, religion, sex, or national origin was a motivating factor for the employment practice, even though the practice was also based on other non-discriminatory factors.[33] Section 107 overturns the Supreme Court's decision in *Price Waterhouse v. Hopkins*,[34] in regard to remedies in mixed motive cases. In *Price Waterhouse* the Court held that an employer could willfully discriminate against an employee and not be in violation of Title VII, so long as there were other, non-discriminatory reasons for the conduct.[35] Section 107 was Congress' direct response to

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29. 401 U.S. 424 (1971).
30. *Id.* at 430.
31. *Id.* at 431.
32. 42 U.S.C.A. § 2000e-2(K)(1)(A)(i) (Supp. 1992).
33. *Id.* § 2000e-5 (1988 & Supp. 1992).
34. 490 U.S. 228 (1989).
35. *Id.* at 254.

the *Price Waterhouse* decision and grew out of Congress' concern that the decision would legitimatize conduct even partially based upon race or sex.[36]

Section 107 is primarily remedial, in that it provides relief in mixed motive cases. In cases that would not have been otherwise under *Price Waterhouse*, the 1991 Act contemplates injunctive relief rather than back pay or damages. Accordingly, Section 107 should be applied to pre-existing claims.

Section 108 overturns the Supreme Court's decision in *Martin v. Wilks*,[37] in regard to the permissibility of collateral challenges by individuals with notice of affirmative action provisions in court orders and consent decrees or by individuals whose interests were adequately represented in previous litigation.[38] In *Martin* the Court held that such provisions could be challenged by individuals adversely effected, even after the entry of the consent decree or court order.[39] Section 108 provides that a person who wishes to challenge the legality of affirmative action under a previously entered court order or consent decree must challenge that decree when it is entered, rather then waiting until he or she is effected by the decree, if he or she had actual notice or was adequately represented by another person who had challenged the judgment or order on the same legal grounds or facts.[40] Now, affirmative action provisions in consent decrees and court orders, for the most part, are not subject to challenge except on grounds of collusion, fraud, or lack of subject matter jurisdiction.

The application of Section 108 to pre-existing claims would effect the finality of previous court judgments and consent decrees. Therefore, unlike most of the 1991 Act's other provisions, Section 108 appears to be substantive. However, the express terms of Section 108 appear to make it applicable to all claims, regardless of when the conduct occurred or when the court entered its order, as subparagraphs (A) and (B) of subsection (1)[41] literally provide that such actions taken pursuant to court order "may not be challenged" by certain individuals.[42] Moreover, Subsection (3)[43] mandates that "any action" challenging such actions "shall be

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36. *See* Melvin J. Hollowell, Jr., *The Civil Rights Acts of 1990 and 1991*, 70 MICH. B.J. 530, 533 (June 1991).

37. 490 U.S. 755 (1989).

38. 42 U.S.C.A. § 2000e-2 (Supp. 1992).

39. 490 U.S. at 761-65.

40. 42 U.S.C.A. § 2000e-2.

41. *Id.*

42. 490 U.S. at 1236.

43. 42 U.S.C.A. § 2000e-2.

brought in the court, and if possible before the judge, that entered such judgment or order."[44]

Section 109 overturns the decision in *EEOC v. Arabian American Oil Co.*,[45] which held that American citizens, employed outside of the United States by American firms, were not protected by Title VII.[46] Significantly, Section 109 is the only provision contained in Title I of the 1991 Act that includes an express prohibition against retroactive application.[47]

Section 112 is a procedural provision that overturns the Supreme Court's decision in *Lorance v. AT&T Technologies, Inc.*,[48] regarding when the statute of limitations begins to run for challenges to seniority system rules adopted for a discriminatory purpose.[49] In *Lorance* the Court held that the event which triggers a claim of employment discrimination, for statute of limitations purposes, is when the employer actually engages in the alleged discriminatory act, rather than when its effects are felt by an employee.[50] *Lorance* required employees to challenge a seniority system as soon as it was adopted, if they believed it might have any possible adverse effect on them in the future.[51] The decision in *Lorance*, making adoption of a seniority system the triggering event for statute of limitations purposes,[52] made challenges to discriminatory seniority systems virtually impossible. It was doubtful whether many plaintiffs would have standing to complain of a new system, since they had not suffered actual injury from the adoption of the system.[53] Moreover, in many instances an employee would not have notice of the new seniority system's rules within the statute of limitation period.[54] An employee may not be fully aware of the system's ramifications until he or she is effected by it.[55] The 1991 Act remedies both the standing and notice problems created by *Lorance* by providing that:

> an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose . . . (whether or not that discriminatory purpose is apparent on the face

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44. *Id.* § 2000e-5 (1988 & Supp. 1992).
45. 111 S. Ct. 1227 (1991).
46. *Id.* at 1236.
47. *See* 42 U.S.C.A. § 2000e Historical Notes (Supp. 1992).
48. 490 U.S. 900 (1989).
49. 42 U.S.C.A. § 2000e-5 (Supp. 1992).
50. 490 U.S. at 911.
51. *Id.*
52. *Id.*
53. Leon Friedman, *The Civil Rights Act of 1991, Procedural Issues: Retroactivity, Changes in Procedures for Attacking Consent Decrees and Seniority Systems; New Limitations Periods*, Q204 ALI-ABA 145 (1992).
54. *Id.*
55. *Id.*

> of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured . . . .[56]

Section 113 is a procedural provision that overturns the Supreme Court's decision in *West Virginia University Hospital v. Casey*,[57] by making expert witness fees available to prevailing parties.[58] It provides that a court may, in its discretion, include expert fees as part of the attorney fees.[59]

Similarly, Section 114 is a procedural change in the law. That section overturns the Supreme Court's decision[60] in *Library of Congress v. Shaw*,[61] that limited the award of counsel fees and back pay against the federal government.[62] Subsection (2) of Section 114 provides that the method of calculating the amount of counsel fees in a Title VII case against a federal agency shall be the same as in cases involving nonpublic parties.[63] Subsection (1) of Section 114 also extends the statute of limitations for filing a Title VII charge with the EEOC, against a federal agency, from thirty to ninety days.[64]

In addition to overturning the foregoing recent Supreme Court decisions, Congress and President Bush added several other provisions to the 1991 Act in order to strengthen the protections and remedies of individuals suffering from discrimination.[65] In cases involving intentional discrimination, Section 102 now permits the recovery of compensatory damages in the form of future pecuniary loss, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary loss.[66] Punitive damages are also recoverable if plaintiff proves that the employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[67] If a complaining party seeks compensatory or punitive damages, either the employer or employee may demand a trial by jury.[68] However, there are certain limitations on the recovery. Punitive damages may not be recovered against a

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56. 42 U.S.C.A. § 2000e-5(e)(2) (Supp. 1992).
57. 111 S. Ct. 1138 (1991).
58. 42 U.S.C.A. §§ 1988, 2000e-5 (Supp. 1992).
59. *Id.*
60. *Id.* § 2000e-16 (1988 & Supp. 1992).
61. 478 U.S. 310 (1986).
62. *Id.* at 322.
63. 42 U.S.C.A. § 2000e-16(c) (Supp. 1992).
64. *Id.*
65. *See infra* notes 66-68, 71, 76-79.
66. *See* 42 U.S.C.A. § 1981a(b)(2) (Supp. 1992).
67. *Id.* § 1981a(b)(1).
68. *Id.* § 1981a(c).

government, government agency, or political subdivision.[69] Moreover, there is a cap on combined punitive and compensatory damages, depending upon the number of employees in the organization.[70]

Section 106 prohibits the use of employment test scores in a discriminatory way.[71] Specifically, Section 106 prohibits employers from "race-norming" test scores in the form of adjusting or using different standards for evaluating the results of tests based upon race, religion, sex, or national origin.[72] Section 106 was adopted in order to prohibit discriminatory practices that Congress believed existed under prior law.[73] In some cases, Section 106 will prohibit racial banding techniques previously adopted as affirmative action guidelines.[74]

Section 115 amends the Age Discrimination in Employment Act[75] ("ADEA") to permit an individual suit to be brought within ninety days after receipt of a notice from the EEOC that it has dismissed the charge or terminated its consideration.[76] This section also directs the EEOC to provide notice to the claimant whenever it terminates an ADEA claim.[77] The 1991 Act also changes the statute of limitation for filing a lawsuit under the ADEA, which was formerly two years, or three years for a willful violation, after the cause of action arose.[78] The triggering event for statute of limitations purposes is now a notice from the EEOC in regard to the termination or dismissal of proceedings under the ADEA.[79]

Other changes contained in the 1991 Act include extending the protections and remedies of Title VII, the ADEA, the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act of 1973, to employees of the House of Representatives and agencies of the legislative branch.[80] Title III of the Act, entitled "Government Employee Rights Act of 1991," provides similar procedures, designed "to protect the right of Senate and other government employees" from discrimination on the basis of race, color, religion, sex, national origin, age or disability.[81] Finally, Title II of

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69. *Id.* § 1981a(b)(1).

70. *Id.* § 1981a(b)(3)(A)-(D) (15-100 employees, $50,000; 101-200 employees, $100,000; 201-500 employees, $200,000; more than 500 employees, $300,000).

71. *Id.* § 2000e-2 (1988 & Supp. 1992).

72. *Id.*

73. Friedman, *supra* note 53.

74. Panken, *supra* note 22.

75. 29 U.S.C. § 626(e) (1988).

76. 29 U.S.C.A. § 626(e) (Supp. 1992).

77. *Id.* § 626(f)(4) (amending § 7(e) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 626(e)).

78. *Id.* § 626.

79. *Id.* § 626(f)(4).

80. 2 U.S.C.A. § 60*l*.

81. *Id.* § 1201(b).

the 1991 Act, entitled "Glass Ceiling Act of 1991," creates a Glass Ceiling Commission to study the problems of discrimination in upper-level promotions.[82] The purpose of the Glass Ceiling Act of 1991 is to study the manner in which business fills management and decision making positions, the skill-enhancing practices used to foster necessary qualifications for advancement of women and minorities, and present compensation programs.[83] It also establishes an annual award for excellence in promoting a more diverse skilled work force at management and decision making levels in business.[84] This provision of the 1991 Act was drafted in response to congressional findings that, despite the dramatic growth of the presence of women and minorities in the work place, these groups remain under-represented in management and decision making positions in business.[85] Moreover, Congress found that artificial barriers exist to the advancement of women and minorities in the work place.[86]

III. Application of the Act to Pre-Existing Claims

A. *The Statutory Language and the Remedial Purposes of the Act*

The threshold issue, in determining whether the Civil Rights Act of 1991 should be applied to pre-existing discrimination claims, is whether Congress intended it to be so applied. If congressional intent is clear from the statutory language, then this intent controls.[87] In deciphering congressional intent, analysis must begin with the pertinent language of the statute, viewed in light of the language and design of the statute as a whole.[88]

Although the effective date of the Act is specified in Section 402(a),[89] that section alone provides little guidance as to what Congress' intent was in regard to pre-existing claims. Section 402(a) provides that, "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."[90] Standing alone, Section 402(a) is unclear as to whether the Act applies to discriminatory conduct that occurred after its enactment on November 21, 1991, whether it applies only to cases filed after its enactment, whether it applies to all proceedings beginning after the enactment, or whether the Act's procedural

82. 42 U.S.C.A. § 2000e Historical Notes.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 838 (1990).
88. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).
89. 42 U.S.C.A. § 1981 Historical Notes (Supp. 1992).
90. *Id.*

provisions apply to proceedings begun after enactment and the substantive provisions apply to conduct that occurs after the enactment. The Seventh Circuit is only one of the recent courts addressing the retroactivity issue which has determined that Section 402(a) is ambiguous.[91] The Sixth Circuit has also concluded that the language of Section 402(a) "could be construed to mean either that the Act should be applied to any charge or case pending on or after the date of enactment, or that it should be applied only to conduct occurring after that date."[92]

Additionally, it appears to be the majority view among the district courts that Section 402(a) provides no meaningful assistance in establishing whether the Act applies to pre-existing claims.[93] However, the language of the 1991 Act, as a whole, and stated remedial purposes of the Act, lend some support for an argument that Congress did intend for the Act to be applied to pre-existing claims.

Enforcement Methods for Remedying Discrimination in the Work Place. The 1991 Act begins with three very specific findings made by Congress.[94] First, Congress found that additional remedies under Title VII are needed to deter unlawful harassment and intentional discrimination in the work place.[95] Second, Congress made the finding that the Supreme Court had weakened the scope and effectiveness of Title VII

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91. The Seventh Circuit, in Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992), has recently concluded that any of the above interpretations of Section 402(a) are plausible.

92. Vogel v. City of Cincinnati, 959 F.2d 594, 598 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992).

93. *See* West v. Pelican Management Servs. Corp., 782 F. Supp. 1132, 1135 (M.D. La. 1992) ("Section 402(a) does not contain any language that at all addresses the issue, much less language that at all suggests that the Act should be applied retroactively to pending cases involving pre-enactment conduct.") *Id.* at 1135; Khandelwal v. Compuadd Corp., 780 F. Supp. 1077, 1078 (E.D. Va. 1992) ("This nebulous provision is really at the heart of the instant dispute and neither supports nor refutes retroactivity.") *Id.* at 1078; and Burchfield v. Derwinski, 782 F. Supp. 532, 535 (D. Colo. 1992) ("On its face, the language of section 402 fails to express a clear congressional intent regarding the retroactive application of the Act."). *Compare* VanMeter v. Barr, 778 F. Supp. 83, 84 (D. D.C. 1991) ("The 1991 Act contains no provision stating specifically whether or not the damages . . . [or jury selection provisions] apply to cases, such as the present case, already pending in U.S. District Courts."). *But see* Patterson v. McLean Credit Union, 784 F. Supp. 268, 274 (M.D. N.C. 1992)

> [T]he four words, "take effect upon enactment," must be interpreted to indicate a beginning point, November 21, 1991 [the date the President signed the bill into law], 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 . . . ."

Id. at 274.

94. 42 U.S.C.A. § 1981 Historical Notes (Supp. 1992).

95. *Id.*

protections.[96] Finally, the 1991 Act states that additional protection against unlawful discrimination in employment is necessary.[97] The stated purposes of the 1991 Act are: (1) to provide appropriate remedies for intentional discrimination; (2) to codify the concepts of "business necessity" and "job related" set forth in *Griggs v. Duke Power Co.*,[98] and in the other Supreme Court cases prior to *Wards Cove Packing Co. v. Atonio*;[99] (3) to provide guidelines for the adjudication of disparate impact cases; and (4) to respond to recent decisions of the Supreme Court by expanding the scope of civil rights statutes in order to provide adequate protection to victims of discrimination.[100]

A strong argument can be made that the 1991 Act should apply to pre-existing claims because, predominantly, Title I of the Act, entitled "Federal Civil Rights Remedies," encompassing Sections 101-118,[101] addresses exactly what it says that it does—that is, "remedies," rather than substantive rights.[102] For the most part, the provisions of the 1991 Act provide for the recovery of compensatory and punitive damages for discriminatory conduct that was previously unlawful.[103] It provides for expert witness fees, extends the statute of limitations for certain claims, and makes jury trials available.[104] The 1991 Act also changes the burden of proof in certain cases.[105] Predominantly, the provisions of the 1991 Act are remedial or procedural changes in the law.[106] The federal circuit courts have commonly applied changes in statutory law relating to procedure or remedies to pending cases.[107] Courts do this because there is no matured right to any particular remedy or lack thereof. Even if some substantive rights are affected, a statute will apply to pre-existing claims if "the predominant purpose . . . is procedural and remedial."[108]

In *Hastings v. Earth Satellite Corp.*,[109] the court of appeals noted: "[R]etroactive modification of remedies normally harbors much less potential for mischief than retroactive changes in the principles of liability

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96. *Id.*
97. *Id.*
98. 401 U.S. 424 (1971).
99. 490 U.S. 642 (1989).
100. 42 U.S.C.A. § 1981 Historical Notes (Supp. 1992).
101. *See supra* text accompanying notes 15-86.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *See id.*
107. Turner v. United States, 410 F.2d 837, 842 (5th Cir. 1969); United States v. Vanella, 619 F.2d 384, 386 (5th Cir. 1980); United States v. Mechem, 509 F.2d 1193, 1196 (10th Cir. 1975); Lussier v. Duggan, 904 F.2d 661, 665 (11th Cir. 1990).
108. 509 F.2d at 1196.
109. 628 F.2d 85 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980).

. . . . Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known."[110]

The retroactive application of most of the remedial and procedural provisions of the 1991 Act would be consistent with prior Supreme Court precedent. The Supreme Court previously applied the distinction between a substantive change in a litigant's obligation or liability and the mere heightened enforcement mechanisms through remedial law to the 1972 amendments to Title VII.[111] Section 717 of the 1972 Act for the first time prohibited federal agencies from discriminating on the basis of race, national origin, or religion and authorized awards of back pay, injunctive relief, and counsel fees.[112] Prior to the enactment of the 1972 amendments, the protections of Title VII did not extend to federal employees. In *Brown v. General Services Administration*,[113] the Supreme Court applied the 1972 Amendment to pre-existing claims.[114] The Court noted that, although Title VII did not prohibit federal employment discrimination prior to the enactment of Section 717, discrimination against federal employees had previously been actionable under the Constitution, certain statutes, and executive orders.[115] Therefore, the 1972 Act did not create a new substantive right for federal employees. It merely created a new remedy for the enforcement of existing rights.[116]

Pertinent to the issue of whether the 1991 Act should be applied to pre-existing claims, the following have all been considered to be remedial, rather than substantive changes in law: expansion of the amount of remedies that could be awarded,[117] election of remedies,[118] extensions of statutes of limitation,[119] alteration of the elements of a prima facie case,[120] or shifting the burden of proof from one party to another,[121] as

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110. 628 F.2d at 93.

111. *See* Brown v. General Servs. Admin., 425 U.S. 820 (1976).

112. Civil Rights Act of 1972, § 717, 42 U.S.C. § 2000e-5, 2000e-5(g) (1988).

113. 425 U.S. 820 (1976).

114. *Id.* at 835.

115. *Id.* at 825.

116. *Id.* at 826. *See also* Kroger v. Ball, 497 F.2d 702, 705 (4th Cir. 1974); Womack v. Lynn, 504 F.2d 267, 269 (D.C. Cir. 1974); Sperling v. United States, 515 F.2d 465, 473-74 (3d Cir.), *cert. denied*, 426 U.S. 919 (1975); Adams v. Brinegar, 521 F.2d 129, 131 (7th Cir. 1975).

117. 628 F.2d at 85; Dale Baker Oldsmobile, Inc. v. Fiat Motors of N. Am., 794 F.2d 213, 220 n.3 (6th Cir. 1986).

118. 794 F.2d at 216.

119. Cooper Stevedoring of La., Inc. v. Washington, 556 F.2d 268, 272 (5th Cir.), *reh'g denied*, 560 F.2d 1023 (5th Cir. 1977); Friel v. Cessna Aircraft Co., 751 F.2d 1037, 1039 (9th Cir. 1986); Davis Valley Distrib. Co., 522 F.2d 827, 830 n.7 (9th Cir. 1975).

120. New England Power Co. v. United States, 693 F.2d 239, 245 (1st Cir. 1982).

well as provisions for costs[122] and attorney fees.[123] Similarly, most of the provisions contained in the 1991 Act are procedural rather than substantive rights. On that basis, a strong argument for retroactive application of the Act can be made.

Decisions applying statutory law prospectively are generally based on concerns with protected vested rights and the past reliance on those rights by the parties to the litigation. Historically, the courts hesitated to apply changes in the law to conduct that occurred prior to the new law when the party would have acted differently in the face of the new law.[124] The basis for the rule against applying a new law to pre-existing claims is that new law should not be enforced before a party has the opportunity to become familiar with it.[125]

Significantly, the 1991 Act predominantly provides new remedies and shifts the burden of proof to rectify old wrongs.[126] Intentional discrimination in the work place was actionable long before the 1991 Act was enacted.[127] Moreover, the law in effect when many of the discrimination claims arose that are presently before the courts provided for the same enforcement mechanisms that have been "restored" by the 1991 Act.[128] Defendants in civil rights cases have been aware in the past that they could be potentially exposed to liability in connection with civil rights

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121. French v. Grove Mfg. Co., 656 F.2d 295, 298 (8th Cir. 1981); Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 182 (5th Cir.), *reh'g denied*, 920 F.2d 259 (5th Cir. 1990).

122. 794 F.2d at 217.

123. Overseas African Constr. Corp. v. McMullen, 500 F.2d 1291, 1297 (2d Cir. 1974).

124. *See* American Trucking Ass'n v. Smith, 496 U.S. 167, 179 (1990) (plurality opinion); Welch v. Henny, 305 U.S. 134, 147 (1938); Griffon v. United States Dep't of Health & Human Servs., 802 F.2d 146, 153 (5th Cir. 1986); Ralis v. RFE/RL, Inc., 770 F.2d 1121, 1126-27 (D.C. Cir. 1985); Friel v. Cessna Aircraft Co., 751 F.2d 1037, 1039 (9th Cir. 1985).

125. *See* Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 777 (1936).

126. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

127. Intentional discrimination has always been actionable under Section 1981, 42 § 1981. Moreover, on a disparate impact claim under Title VII of the Civil Rights Act of 1964, a showing of intentional discrimination was required. Section 703(a)(2)(h), as amended in 42 U.S.C. § 2000e-2(a)(2)(h).

128. It is clear from the stated purposes of the 1991 Act that Congress sought to restore and clarify the rights previously available in the civil rights laws. *See supra* notes 94-100. In essence, the 1991 Act simply codifies a longstanding congressional purpose of remedying discrimination which Congress believed the Supreme Court misinterpreted. For instance, through Sections 104 and 105 of the 1991 Act, Congress clarified that the Supreme Court had correctly articulated the standards for the burden of proof in disparate impact cases, in Griggs v. Duke Power Co. *See supra* notes 29-31.

violations.[129] Therefore, few defendants in civil rights cases today should be successful in arguing that they detrimentally relied on prior law or would have changed their conduct in the face of the new law.

The Purpose of the 1991 Act is to Restore Discrimination Law to its Previous Posture. The circuit courts often hold that when Congress specifically overturns the Supreme Court's interpretation of a law by stating that its purpose is to "return[] the law to its previous posture," a statute is generally applied to a pre-existing claim.[130] In order to avoid a windfall from an erroneous judicial decision, the courts have applied to pre-existing claims statutes that were clearly intended to correct erroneous judicial interpretations of the law.[131]

It is clear from the statutory language that Congress' purpose for enacting the 1991 Act was to overturn recent pronouncements of the United States Supreme Court that misconstrued Title VII by narrowing the protections and remedies it had previously afforded victims of discrimination. The purpose of the 1991 Act is to return the law to its condition prior to the disapproved judicial interpretations rendered by the Supreme

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129. The central question is whether "conduct on the part of either party would have differed if the statute had been in effect at the time of the . . . incident." Friel v. Cessna Aircraft Co., 751 F.2d 1037, 1039 (9th Cir. 1985). Since discrimination, generally, has been unlawful for many years, it is difficult to imagine that a defendant would have changed his or her conduct in light of additional enforcement mechanisms. As the Supreme Court indicated over one hundred years ago, "there is no such thing as a vested right to do wrong." Freeborn v. Smith, 69 U.S. 160, 175 (1865).

130. *See* Ayers v. Allain, 893 F.2d 732, 755 (5th Cir. 1990), *aff'd on rehearing* 914 F.2d 676, *en banc, cert. granted on other grounds*, Ayers v. Mabus, 111 S. Ct. 1579 (1991).

131. *See* Mrs. W. v. Tirozzi, 832 F.2d 748, 755 (2d Cir. 1987) (amendments to Education of the Handicapped Act retroactively applied since they "codifie[d] a congressional purpose long in place which Congress believed the Supreme Court had misinterpreted."); United States v. Hill, 676 F. Supp. 1158, 1165 (N.D. Fla. 1987); Ayers v. Allain, 893 F.2d at 754-55, *aff'd on rehearing*, 914 F.2d 676 *en banc, cert. granted*, Ayers v. Mabus, 111 S. Ct. 1579 (1991). In *Ayers*, the Fifth Circuit held that the Civil Rights Restoration Act, intended to correct the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984), applied to pending cases. Because the *en banc* court found there was no violation, it did not address the question of retroactivity. *Ayers*, 914 F.2d at 687 n.11. The courts have predominately applied the Restoration Act retroactively. *See* Lussier v. Dugger, 904 F.2d 661 (11th Cir. 1990); Leake v. Long Island Jewish Medical Ctr., 695 F. Supp. 1414 (E.D.N.Y. 1988), *aff'd*, 869 F.2d 131 (2d Cir. 1989) (per curiam); Bonner v. Arizona Dep't of Corrections, 714 F. Supp. 420 (D. Ariz. 1989). *But see* DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 799 (1991). In *DeVargas*, the court based its holding, in part, on a theory of separation of powers.

Court.[132] Thus, the statutory language of the Act provides substantial support for retroactive application.

The Language of the 1991 Act as a Whole. Finally, the language of the 1991 Act, when viewed as a whole, lends support for an argument that Congress intended to apply the Act to pre-existing discrimination claims. In particular, two specific provisions of the Act are expressly limited to acts of discrimination occurring after its enactment on November 21, 1991. Section 109, which, for the first time extends Title VII coverage to Americans working abroad for American corporations, and substantively effects existing rights, expressly limits the Act's application to acts occurring after November 21, 1991.[133] Second, Section 402(b) exempts from all provisions of the Act all disparate impact cases for which a complaint was filed before March 1, 1975 and for which an initial decision was rendered after October 30, 1983.[134]

Although Section 402(a), which makes all other provisions of the Act effective "upon enactment," is somewhat ambiguous, it is clear that Congress specifically decided that the 1991 Act would not apply to pre-existing claims involving allegedly discriminatory conduct occurring outside the United States and would not apply to a limited variety of discrimination claims based upon a disparate impact theory. In *Russello v. United States*,[135] the Supreme Court held that when Congress provides particular language in one section of a statute, but omits it in the same act, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[136]

A final rule of statutory construction, weighing in favor of applying the 1991 Act to all pre-existing claims, except for Sections 109(c) and 402(b), is that the courts are reluctant to adopt an interpretation of a statute that would render a portion of the statute superfluous.[137] Congress is presumed not to draft its legislation so as to be duplicative.[138] If the 1991 Act

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132. 42 U.S.C.A. § 1981 Historical Notes (Supp. 1992); *See also* 137 CONG. REC. S15953 (daily ed. Nov. 5, 1991).

133. 42 U.S.C.A. § 2000e(f) (Supp. 1992).

134. *Id.* § 1981 Historical Notes.

135. 464 U.S. 16 (1983).

136. *Id.* at 23 (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1982)).

137. Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988); *See also* Colautti v. Franklin, 439 U.S. 379, 392 (1979). Recently, several district courts have concluded that the 1991 Act applies to pre-existing claims, relying on the express exclusion of such claims in sections 109 and 402(b). *See* Mojica v. Gannett Co., 779 F. Supp. 94, 99 (N.D. Ill. 1991); Stender v. Lucky Stores, Inc., 780 F. Supp. 1302, 1308 (N.D. Cal. 1992); Graham v. Bodine Elec. Co., 782 F. Supp. 74, 77 (N.D. Ill. 1992); Long v. Carr, 784 F. Supp. 887, 890 (N.D. Ga. 1992).

138. *See* Arcadia, Ohio v. Ohio Power Co., 498 U.S. 73 (1990).

is interpreted as not applying to pre-existing claims, the exceptions contained in Sections 402(b) and 109(c) would be superfluous. As the Supreme Court recently stated, it is a "settled rule" of statutory construction "that a statute must, if possible, be construed in such fashion that every word has some operative effect."[139]

Sections 109(c) and 402(b) of the 1991 Act have been used to support the argument that if the Act as a whole was not intended to be applied retroactively, then Congress would not have needed to specifically provide prospective language in these two sections of the Act.[140] Most courts addressing the issue, however, have concluded that "Section 402(b) is nothing more than a clear assurance that courts would not apply the 1991 Act to the *Wards Cove* litigation regardless of how the courts might eventually construe the 1991 Act's applicability to pending cases."[141] Designed for a similar purpose, Section 109(c) is known as the "Arabian American exception," in reference to the Supreme Court's recent decision in *EEOC v. Arabian American Oil Co.*[142] It has been argued that the purpose of the non-retroactivity language in Section 109(c) simply was intended to prevent a reopening of the *Arabian American Oil* case.[143]

Moreover, in at least one case,[144] plaintiff offered, along with Section 109, two other prospective application-only provisions—Section 110 (establishing a Technical Assistance Institute) and Section 116 (preserving affirmative action plans). If Congress intended the remainder of the 1991 Act to apply prospectively only, then the new act would not include Sections 109, 110, and 116.[145]

The United States District Court for the Eastern District of Virginia did not accept this argument, however, asserting that "the presence of these three provisions demonstrates that where Congress wanted to express any intent concerning the retroactive application of the Act, it took

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139. United States v. Nordic Village, Inc., 112 S. Ct. 1011, 1015 (1992); Kungys v. United States, 485 U.S. 759, 778 (1988) (no provision of a statute should be construed to be entirely redundant).

140. Khandelwal v. Compuadd Corp., 780 F. Supp. 1077, 1078 (E.D. Va. 1992).

141. Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir.), *cert. denied*, 1992 WL 203083 (1992). *See also* Maddox v. Norwood Clinic, Inc., 783 F. Supp. 582, 584 (N.D. Ala. 1992) ("[I]t is clear that section 402(b) was inserted solely to ensure that the disparate impact provision of the bill (Section 105) would not apply to the defendant in *Wards Cove Packing Co., Inc.* . . . ."), and *Khandelwal*, 780 F. Supp. at 1078-79 ("As everyone who has followed the enactment of this Act knows, § 402(b) was inserted solely to insure that the Act would not be interpreted to allow further litigation in *Wards Cove Packing Co. v. Atonio*, [citation omitted], the only case satisfying this section's prerequisites").

142. 111 S. Ct. 1227 (1991).

143. 783 F. Supp. at 584.

144. 780 F. Supp. at 1077.

145. *Id.* at 1078.

the initiative to state that intent specifically. If Congress intended the remainder of the Act to apply retroactively, it would have stated so."[146]

The district court then proceeded to offer specific examples where Congress has made its intent clear. The court specifically cited the Black Lung Benefits Act, which provided for processing of benefits claims "pending on, or denied on or before" the effective date of the statute and the Federal Home Loan Bank Act, in which congressional intent was clearly stated.[147]

Such specific language supporting application of a statute to pending claims can also be found in the Civil Rights Act of 1990 ("the 1990 Act") which President Bush vetoed.[148] Discrimination claimants arguing that the statutory language demonstrates congressional intent face these obstacles.

B. The Legislative History

If the courts cannot determine congressional intent from the statutory language, they must then turn to the legislative history of the 1991 Act. Given the many compromises contained in the 1991 Act after President Bush vetoed the original 1990 Act containing explicit language on retroactivity, and given the heated debated by both opponents and proponents of the 1991 Act, the legislative history is anything but clear on this issue. On July 18th, 1990, Congress passed the 1990 Act.[149] Like the 1991 Act, Congress intended this bill to overrule eight Supreme Court cases which limited the effectiveness of the existing civil rights laws.[150] Senator Danforth described the problems caused by the recent Supreme Court decisions on civil rights:

> [W]hat was wrong in 1989 was not simply that the Supreme Court wrongly decided a half a dozen cases, some of them dealing with technical issues such as how to define business necessity. What was wrong was that in the year 1989 the Supreme Court chose to turn the clock back, and that can never happen in civil rights; it can never be allowed to happen.[151]

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146. *Id.* (footnote omitted).

147. *Id.* at 1078 n.1 (citing 30 U.S.C. § 945 (1988) and 12 U.S.C. § 1439a (1988 & Supp. 1990)).

148. *See* 136 CONG. REC. S9,968 (July 18, 1990) (Civil Rights Act of 1990, § 15 Application of Amendments and Transition Rules).

149. S2104, 101st Cong., 1st Sess. (1990).

150. *See supra* note 13 and accompanying text.

151. 137 CONG. REC. S15,500 (daily ed. Oct. 30, 1991).

Criticized by its opponents as encouraging racial employment quotas, President Bush vetoed the 1990 Act on October 22, 1990.[152] Among the President's reasons for disapproval of the 1990 Act was that "[t]he bill . . . contain[ed] a number of provisions that [would] create unnecessary and inappropriate incentives for litigation."[153] First on the President's list of reasons for vetoing the 1990 Act were the unfair retroactivity rules.[154] One year later, President Bush signed into law a compromise bill, the 1991 Act.[155] Significantly, the 1991 Act did not include the vetoed 1990 Act's clear retroactivity rules.[156] Litigants arguing against the 1991 Act's application to pre-existing claims may use this significant compromise to their advantage.

The fact that both the Senate and the House accepted the final version of the 1991 Act without returning it to the committee makes an analysis of the retroactivity issue and the legislative intent of the 1991 Act particularly difficult. However, through a process of intense negotiations concluding on October 24, 1991, both sides carefully examined the specific language of the final version. This is evident in both the closing statements of Senator Hatch and Senator Danforth. Senator Hatch reminded the Senate that "[t]he language has been extremely crucial and important. Employment law is one of the most difficult areas in all law in our country, and what appears to be the smallest words to those not skilled or

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152. 136 CONG. REC. S16,419 (daily ed. Oct. 22, 1990) (President's remarks regarding the veto of S2104).

153. *Id.*

154. The 1990 Act contained the following explicit provisions on retroactivity.

§ 15. Application of Amendments and Transition Rules.

(a) Application of Amendments—The amendments made by—

(1) section 4 shall apply to all proceedings pending on or commenced after June 5, 1989;

(2) section 5 shall apply to all proceedings pending on or commenced after May 1, 1989;

(3) section 6 shall apply to all proceedings pending on or commenced after June 12, 1989;

(4) sections 7(a)(1), 7(a)(3) and 7(a)(4), 7(b), 8, 9, 10, and 11 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

(5) section 7(a)(2) shall apply to all proceedings pending on or commenced after June 12, 1989; and

(6) section 12 shall apply to all proceedings pending on or commenced after June 15, 1989.

136 CONG. REC. S9968 (daily ed. July 18, 1990) (quoting S2104, 101st Cong., 1st Sess. (1990)).

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

156. *See* Pub. L. No. 102-166, 105 Stat. 1071.

not experienced in this area actually happen to be very, very important words . . . ."[157]

Senator Hatch's impression of the importance of the statutory language was echoed by Senator Danforth who stated the following:

> So often in the last year and a half we have been focusing on issues that are so narrow that in order to describe them it took so much time that the audience went to sleep. We got involved in endless debates on the narrowest of points, important points, but very narrow points. A single word could become the answer to passing the bill or not passing the bill.[158]

Even this type of tough scrutiny, in the absence of committee reports, could not provide the courts with a mutually acceptable and recognizable congressional intent. The Congressional Record from October 24, 1991, through the final signing on November 21, 1991, contains numerous statements and memoranda provided by senators hoping to color the legislative history in their favor. As Senator Danforth warned:

> It is very common for Members of the Senate to try to affect the way in which a court will interpret a statute by putting things into the Congressional Record . . . . Sometimes the Senator will say, but for such and such provision, which I interpret in such and such a way, I never would support this bill. That is one method of trying to doctor the legislative history and influence the future course of litigation . . . . Whatever 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 . . . . [A] court would 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.[159]

Ironically, Senator Danforth is greatly responsible for one of the most obvious efforts to manipulate the legislative history. He placed a statement in the Congressional Record which states, "[t]he bill provides that, unless otherwise specified, the provisions of this legislation shall take effect upon enactment and shall not apply retroactively."[160] However, the 1991 Act's principal Democratic sponsor, Senator Kennedy, rejected Senator Danforth's interpretation.[161] Senator Kennedy stated that "[i]t

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157. 137 CONG. REC. S15,498 (daily ed. Oct. 30, 1991).

158. 137 CONG. REC. S15,499 (daily ed. Oct. 30, 1991).

159. 137 CONG. REC. S15,325 (daily ed. Oct. 29, 1991).

160. 137 CONG. REC. S15,485 (daily ed. Oct. 30, 1991). The following cosponsors supported the memorandum: John C. Danforth, William S. Cohen, Mark O. Hatfield, Arlen Specter, John H. Chafee, Dave Durenberger, and James M. Jeffords. *Id.*

161. *Id.*

[would] be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment."[162] Echoing the Supreme Court's holding in *Bradley*, Senator Kennedy noted that, ordinarily, "courts in such cases apply newly enacted procedures and remedies to pending claims."[163]

The most heated debates came after October 31, 1991 when the *Washington Post* published a story[164] describing how the Wards Cove Packing Company paid $175,000 to a lobbyist to obtain a tailor-made exemption to the 1991 Act contained in Section 402(b).[165] Even greater problems in the debates arose when it was discovered that, by clerical error, Section 402(b) had been omitted from the 1991 Act. Known as the "Murkowski Amendment," Section 402(b) was so critical to the conservative Republicans that, even in light of the public criticism the amendment received, Senator Dole presented the exclusion of Section 402(b) to the Senate as an error for correction.[166]

However, not all of the senators accepted Section 402(b) as an inconsequential error. Senator Adams argued that "this is not a technical amendment that we are debating, because it contains a very deep and substantive issue that goes to the heart of this bill."[167] Additionally, Senator Akaka voiced his concerns: "[i]t is an extremely cruel irony that the plaintiffs in *Wards Cove v. Atonio*, the very case which we seek to overturn in this Act, would be the only American workers deprived of having their merits of their claim considered under the *Griggs* standard."[168]

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162. *Id.*

163. *Id.*

164. Ruth Marcus, *Job Discrimination Bill Would Not Apply to Case Against Seattle-Based Cannery*, WASHINGTON POST, Oct. 31, 1991.

165. 137 CONG. REC. HR9,555 (daily ed. Nov. 7, 1991).

166. Senator Dole stated the following:

> [T]his is a technical amendment; it is a correction to the civil rights bill. The Senate, when it approved the civil rights bill on Wednesday, left out a significant section of the bill and this afternoon will be voting on a technical correction. Language exempting the Wards Cove Packing Co., a Seattle cannery whose employment practices gave rise to one of the central disputes in the bill, was inadvertently left out of the final version of the legislation.
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> . . . .
>
> [I]f we cannot make technical corrections around this place after somebody has made an agreement, we are never going to get anything done.

137 CONG. REC. S15,952-53 (daily ed. Nov. 5, 1991).

167. 137 CONG. REC. S15,950 (daily ed. Nov. 5, 1991).

168. *Id.* This argument was also made on the House floor by representatives such as Pat Schroeder who stated the following:

> I do not think there is anything worse than special interest legislation in a civil rights bill. At least they hit every woman equally; but here you are talking about 2,000 people who have been asked to be treated the way they would have been treated under prior court decisions had they ever been interpreted that way, and

Significant to the retroactivity issue, Senator Kennedy explicitly supported the inclusion of Section 402(b) because he believed that it would further strengthen the position that overall the 1991 Act applied to pending claims.[169] He reminded the opposing senators of the following:

> Many of the provisions of the Civil Rights Act of 1991 are intended to correct erroneous Supreme Court decisions and to restore the law where it was prior to those decisions. In my view, these restorations apply to pending cases, which is why the supporters of the Murkowski amendment sought specific language to prevent the restorations from applying to that particular case. In fact, the adoption of the Murkowski amendment makes it more likely that the restorations in the act will apply to all cases except the *Wards Cove* case itself. Ironically, the defeat of the Murkowski amendment would make it more likely the courts would not apply the restorations to any pending cases, including the *Wards Cove* case.[170]

During this debate, Senator Dole attempted to further influence the legislative history with an after the fact interpretation of Section 402. Senator Dole included in the legislative history a statement that Section 402, as well as the "technical correction" pertaining to *Wards Cove* in Section 402(b), will not apply to cases arising before the effective date of the 1991 Act.[171]

It soon became evident that without Section 402(b), the Civil Rights compromise of 1991 would not survive.[172] On November 5th, Section 402(b) passed the Senate with 22 senators remaining firmly against it.[173] On November 7th, with 93 members in opposition, the House passed a procedural rule that precluded amendments to delete Section 402(b).[174] When President Bush signed the bill into law on November 21, 1991,

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> now we are going to go back to the prior court decisions, but we are going to say to them, "too bad." Nice you called it to our attention, but the people who own the company are much more moneyed and more powered than you are, so you get rolled, but other people in the future will get civil rights as they used to be.

137 CONG. REC. S9,511 (daily ed. Nov. 7, 1991).

169. 137 CONG. REC. S15,963 (daily ed. Nov. 5, 1991).

170. *Id.*

171. 137 CONG. REC. S15,952-53 (daily ed. Nov. 5, 1991).

172. The seriousness of the issue was best described by Representative Edwards, one of the Act's original sponsors:

> We were very disturbed when we found . . . this special exemption for the Wards Cove Packing Co . . . . It is outrageous . . . . However, . . . [i]t is not going to do any good to destroy this bill. There are going to be thousands, maybe millions of employees in the future that we are cutting out of rights if we do. I assure you also that this bill if it goes back to the Senate will probably never emerge again.

137 CONG. REC. HR9,512 (daily ed. Nov. 7, 1991).

173. 137 CONG. REC. S15,968 (daily ed. Nov. 5, 1991).

174. 137 CONG. REC. HR9,516 (daily ed. Nov. 7, 1991).

there was still no consensus between opponents and proponents on the question of retroactivity. Senator Kennedy appears to have been correct when he predicted that the issue of whether the Act would apply to pending claims ultimately will rest with the courts. It is unfortunate that Congress was unable to assist the courts in this process. For as Senator Danforth conceded, "[a]ny judge who tries to make legislative history out of the free-for-all that takes place on the floor of the Senate is on very dangerous grounds."[175]

C. Supreme Court Precedent on the Application of New Law to Pending or Pre-Existing Claims

As indicated above, the statutory language on the issue of retroactivity is not altogether clear. The legislative history can be construed to lend support for either prospective or retroactive application of the 1991 Act. The 1991 Act represents a hard fought compromise. If a court concludes that the language or legislative history of the new law on the issue of retroactivity is ambiguous, it must then turn to judicially created rules of construction for statutes in absence of express legislative intent.

To date, many courts confronted with the issue of retroactivity of the 1991 Act have concluded that the statutory language and legislative history of the 1991 Act are unclear.[176] Therefore, one of the most difficult tasks faced by the courts in interpreting the 1991 Act is the reconciliation of an "apparent tension" between recent Supreme Court precedent on the issue of when legislative enactments will apply to pre-existing or pending

175. 137 CONG. REC. S15,346 (daily ed. Oct. 29, 1991).

176. The following district courts have decided that legislative history is unclear: Limuell v. Donvey Corp., 795 F. Supp. 902 (E.D. Ark. 1992); Golightly-Howell v. Oil, Chem. & Atomic Workers Int'l Union, 788 F. Supp. 1158 (D. Colo. 1992); Kennedy v. Fritsch, 796 F. Supp. 306 (N.D. Ill. 1992); Smith v. Petra Cablevision Corp., 793 F. Supp. 417, (E.D.N.Y. 1992); McLaughlin v. New York, 784 F. Supp. 961 (N.D.N.Y. 1992); Joyner v. Monier Roof Tile, Inc., 784 F. Supp. 872 (S.D. Fla. 1992); Steinle v. Boeing Co., 785 F. Supp. 1434 (D. Kan. 1992).

discrimination claims.[177]

Manifest Injustice: *Bradley v. Richmond School Board.*[178] In *Bradley* the Supreme Court set forth the general rule regarding to the retroactive application of statutes.[179] In retroactively applying a new attorney fee provision in a school desegregation case, the Supreme Court held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[180] In *Bradley*

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177. The judicial development of this narrow area of the law will not only have an impact upon individuals suffering from discrimination for years to come, but will also have a substantial effect upon the government's ability to apply statutory changes to pending cases. To the extent that any choice must be made between Bradley v. Richmond Sch. Bd., 416 U.S. 696 (1974) and Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1985), the *Bradley* rule is the better choice because it allows more flexibility than *Bowen's* per se prohibition against retroactivity. Without the *Bradley* rule, much of the government's enforcement efforts in the public's interest would be hindered. In many instances, the application of statutory changes to pending cases furthers the statutory purposes and interests of justice. If *Bradley* were not applied, the savings and loan bail-out litigation would be jeopardized. *See* Kirkbride v. Continental Casualty Co., 933 F.2d. 729 (9th Cir. 1991); *In re* Resolution Trust Corp., 888 F.2d 57, 58 (8th Cir. 1989) (FDIC relies on retroactive application of Financial Institutions Reform, Recovery & Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified at various sections of Title 12 and Title 15 of the United States Code)). The government has also relied upon *Bradley* in its hazardous waste cleanup litigation and in cases involving fraud against the government. *See* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. Rockwell Int'l Corp., 730 F. Supp. 1031 (D. Colo. 1990); United States v. Marengo County Comm'n, 731 F.2d 1545 (11th Cir. 1984).

However, the government often contradicts itself in its interpretation of whether *Bradley* or *Bowen* applies. *See* Response of the United States to Defendant's Motion to Strike Claims for Damages and Penalties at 23, United States v. Rent America, Inc., 734 F. Supp. 474 (S.D. Fla. 1990) (a statute will be presumed to apply to cases pending at the time of its passage unless there is a "clear indication" that it is not to apply); Supplemental Brief for Appellees at 12, Rowe v. Sullivan, 967 F.2d 186 (5th Cir. 1992) (statutes are presumed to have only prospective effect unless Congress states otherwise). In a recent case involving fraud against the government, the United States successfully argued before the Eleventh Circuit that *Bradley* "creates a presumption that statutes will apply retroactively . . . ." Brief of Appellee at 23, United States v. Peppertree Apartments, 942 F.2d 1555 (11th Cir. 1991), *cert. granted and judgment vacated by* Bailes v. United States, 112 S. Ct. 1755 (1992). The Eleventh Circuit held that the retroactive application of a statute which allowed the government to recover double damages for Housing and Urban Development ("HUD") violations, did not result in manifest injustice and that the change in the statute, involving damages, was remedial. *Id.* at 1561. However, on appeal to the United States Supreme Court, the government abandoned its claim for relief for "double damages" under the new statute, thereby preventing the Supreme Court from resolving any confusion created by the *Bowen* and *Bradley* doctrines. Bailes v. United States, 112 S. Ct. 1755 (1992).

178. 416 U.S. 696 (1974).

179. *Id.* at 696.

180. *Id.* at 711.

the Court articulated a three part test to be applied in the absence of express congressional intent, when considering whether a statute's retroactive application would result in manifest injustice.[181]

First, the courts ought to consider the nature of the litigation and identity of the parties.[182] The major focus in applying this prong of the *Bradley* test is whether the case at issue involves the private interests between individuals or whether the litigation involves matters of "great national concern."[183] In the latter, the application of a new statute to pre-existing claims is presumed, under *Bradley*, in the absence of clear congressional intent.[184]

Title VII, drawing strength through the recent enactment of the 1991 Act, is a matter of great national concern and is not limited to merely private interests. Congress stated, in the 1991 Act, that legislation was necessary to provide additional protections against unlawful discrimination in the work place through additional remedies under Title VII.[185] Moreover, the enactment of the 1991 Act came only after the televised Anita Hill and Clarence Thomas hearings before Congress, which brought the subject of sexual harassment in the work place to the nation's attention.[186] The Court in *Bradley* identified two specific illustrations of public matters, rather than purely private concern—school desegregation and the public accommodations provisions to Title II of the 1964 Civil Rights Act.[187] In *Albermale Paper Co. v. Moody*,[188] the Supreme Court determined that Title VII was also of vital public importance, stating that the enforcement of Title VII served the important national goals of "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[189] In addressing the nature of the litigation and identity of the parties, the Court in *Bradley* identified the disparity of power and resources between employee and employer.[190] A similar disparity of power and resources often exists in civil

181. *Id.* at 717.

182. *Id.* at 717-18.

183. *Id.* at 718-19.

184. *Id.*

185. Civil Rights Act of 1991, § 2(1), Findings, 105 Stat. at 1071; § 3(1) Purposes, 105 Stat. at 1071.

186. Congress confirmed Clarence Thomas as an Associate Justice of the United States Supreme Court on October 15, 1991. *See* 137 CONG. REC. S14,705 (daily ed. Oct. 15, 1991). Thirty-seven days later, the Civil Rights Act of 1991 was signed into law. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

187. 416 U.S. at 718-19.

188. 422 U.S. 405 (1975).

189. *Id.* at 421.

190. *See* Merrick T. Rossein, *Application of the Civil Rights Act of 1991 to "Existing Claims,"* Q204 ALI-ABA 175 (1992) (considering *Bradley*, 416 U.S. at 718).

rights cases, as individuals suffering from discrimination are often reluctant to risk career advancement and do not have the resources of their employers.

The second *Bradley* test to determine whether "manifest injustice" will result from the application of new law to a pre-existing claim focuses upon whether the rights effected by application of a new law are vested rights.[191] "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 became unconditional."[192]

The third prong of the *Bradley* test examines whether a change in the law and its application to pre-existing claims would impose "new and unanticipated obligations" on the parties.[193] In *Bradley* the Court concluded that because the new statute at issue dealt only with counsel fees, and did not affect when or how schools were required to desegregate, the retroactive application of the new law would work "no change in the substantive obligation of the parties" because there was no basis for concluding that the school board, in refusing to desegregate, relied on the absence of a counsel fee statute.[194]

Under the third prong of the *Bradley* test for determining whether "manifest injustice" would result from the retroactive application of legislation, discrimination claimants may argue that it is doubtful that the remedial changes in the 1991 Act would alter any of the substantive rights of employers. Nor would employers likely have changed their conduct in the face of the new legislation.

Presumptions Against Retroactivity in Absence of Express Intent: *Bowen v. Georgetown University Hospital,*[195] and *Kaiser Aluminum & Chemical Corp. v. Bonjorno.*[196] In two decisions subsequent to *Bradley*, the Supreme Court held that congressional enactments and administrative rules are presumed to operate prospectively only, unless their language explicitly provides for retroactivity.[197] In *Bowen* the Supreme Court held that the rule making authority of the Secretary of Health and Human Services did not include authority to adopt a retroactive cost-limit rule.[198]

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191. 416 U.S. at 720.
192. *Id.* at 719 (citing Greene v. United States, 376 U.S. 149, 160 (1964)).
193. *Id.* at 720.
194. *Id.* at 721.
195. 488 U.S. 204 (1988).
196. 494 U.S. 827 (1990).
197. 488 U.S. at 208; 494 U.S. at 837-38.
198. 488 U.S. at 215. "Under the Medicare program, health care providers are reimbursed by the Government for expenses incurred in providing medical services to Medicare

The Supreme Court, in *Bowen*, dealt solely with the Secretary's rule making authority under the Medicare Act.[199] Yet, the Supreme Court created a broad presumption of prospective application of legislation. It announced that "[r]etroactivity 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."[200]

In concluding that the cost-limit rule in *Bowen* should be applied retroactively, the Supreme Court reasoned that "[t]he statutory provisions establishing the Secretary's general rulemaking power contain no express authorization of retroactive rulemaking."[201] Indeed, there was clear legislative intent that retroactive application was not contemplated.[202] Because the *Bowen* opinion solely addressed the retroactivity of the rulemaking provisions of the Medicare Act, the Court's opinion as to the retroactive application of congressional enactments is dicta. Moreover, the Court's broad announcement of the presumption of prospective application was unnecessary to its opinion because it based its holding upon clear legislative intent.

Two years after the Court's decision in *Bowen*, the Court again faced the question of when new law will retroactively apply to pre-existing

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beneficiaries. *See* Title XVIII of the Social Security Act, 79 Stat. 291, as amended, 42 U.S.C. § 1395 et. seq. (the Medicare Act)." 488 U.S. at 265. The Secretary of Health and Human Services has congressional authority to set limits on the levels of Medicare costs that will be reimbursed. *Id.* at 206. On June 30, 1981, the Secretary issued a cost-limit schedule that affected the method for calculating the "wage index" used to indicate salary levels of hospital employees throughout the United States. *Id. See also* 46 Fed. Reg. 33637, 33638-39 (1981). In District of Columbia Hosp. Ass'n v. Heckler, No. 82-2520, slip op. (D.D.C. Apr. 29, 1983), a group of hospitals brought suit in district court alleging that, by issuing the wage index rule, the Secretary violated the Administrative Procedure Act, which required notice and opportunity for public comment before issuance. The Secretary settled the hospitals' cost reimbursement reports with the pre-1981 wage index rule, retroactive to July 1, 1981. *Id.* After considering the comments received, the Secretary reissued the rule retroactively, and proceeded to collect the funds previously paid as a result of the District of Columbia Hospital Association litigation. *Id.* After exhausting administrative remedies, respondents brought the case to the United States District Court for the District of Columbia, which held that retroactive application was not justified. Heckler, Nos. CIV. A. 82-2520, 83-0223, 1984 WL 48798 (D.D.C. Mar. 7, 1984). On appeal, the United States Court of Appeals for the District of Columbia affirmed. Georgetown Univ. Hosp. v. Bowen, 821 F.2d 750 (D.C. Cir. 1987). The court of appeals specifically based its holding on the fact that the Administrative Procedure Act and the Medicare Act forbids retroactive rule making. *Id.* at 753. Furthermore, the court of appeals stated that the Medicare Act bars retroactive cost-limit rules. *Id.* at 758. The United States Supreme Court affirmed in Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).

199. 488 U.S. at 205-06.

200. *Id.* at 208 (citing Greene v. United States, 376 U.S. 149 (1964)).

201. *Id.* at 213.

202. *Id.*; *see also* § 223(b) of the Social Security Amendment of 1972, 86 Stat. 1393, amending 42 U.S.C. § 1395X(V)(1)(A).

claims. Again, the Supreme Court, in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*,[203] relied upon clear legislative intent prohibiting retroactive application of a statute.[204]

The issue before the Supreme Court, in *Bonjorno*, was whether the amended Federal Rule of Appellate Procedure 37 would apply to judgments entered before its effective date.[205] While recognizing the continued validity of the *Bradley* "manifest injustice" test, the Court in *Bonjorno* concluded that it was unnecessary to reconcile the two lines of precedent represented in *Bradley* and *Bowen* "because under either view, where the congressional intent is clear, it governs."[206] The Court found that the plain language of the original and amended versions of Section 1961 made it clear that the Act was "not applicable to judgments entered before its effective date."[207]

Notably, the 5-4 majority opinion in *Bonjorno* overruled neither *Bradley* or *Bowen*, although it did recognize an "apparent tension" between those two lines of cases.[208] The four dissenting justices would have retro-

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203. 494 U.S. 827 (1990) (majority opinion delivered by O'Connor, J. joined by Rehnquist, C.J., and Stevens, Scalia, and Kennedy, J.J.). Bonjorno filed suit against Kaiser, alleging that defendant violated the Sherman Act by monopolizing the aluminum drainage pipe market in the Mid-Atlantic region of the United States. At the first trial, the district court entered a directed verdict for Kaiser. The United States Court of Appeals for the Third Circuit reversed. In a second trial, a jury found for Bonjorno and awarded damages in the amount of $5,445,000. The district court set aside this award because it found that the amount of damages was not supported by the evidence. It ordered a retrial limited to the issue of damages. The district court granted Kaiser's motion for judgment notwithstanding the verdict as to a portion of the damages awarded by the jury upon retrial. On appeal, the court of appeals reversed the lower court's reduction of damages. Kaiser's petition for rehearing *en banc* was denied, as was its petition to the United States Supreme Court for certiorari. *Id.* at 829-31. While the appeal was pending, Congress amended Federal Rule of Appellate Procedure 37 that originally required that post judgment interest be "calculated from the date of the entry of judgment, at the rate allowed by State law." *Id.* at 831 (quoting 28 U.S.C. § 1961 (1976)). The amendment passed in 1982, as part of the Federal Courts Improvement Act of 1982. *Id.* (citing Pub. L. No. 97-164, 96 Stat. 25 (1982)). Section 302 of that Act provided that the interest be calculated "at a rate equal to the coupon issue yield equivalent . . . of the average accepted auction price for the last auction of fifty-two week . . . [from] the date of the judgment." *Id.* at 831-32 (quoting § 302(a)(1), (2)(a), 96 Stat. at 55-56 (amending 28 U.S.C. § 1961)). Applying the *Bradley* presumption, the district court held that it would result in a "manifest injustice" to apply the amended post judgment interest formula. *Id.* at 832. Bonjorno appealed contending that the amended Federal Rule of Appellate Procedure 37 should be used. The court of appeals, also relying on *Bradley*, reversed on the issue of which version of the Federal Rules as to how post judgment interest should be applied. *Id.* at 832-33.

204. *Id.* at 837-38.

205. *Id.* at 834.

206. *Id.* at 837.

207. *Id.* at 838.

208. *Id.* at 837.

actively applied the statute in *Bonjorno*, dealing with computation of interest on federal judgments, noting that the "apparent tension" between the rules in *Bradley* and *Bowen* is "more apparent than real."[209] The dissenters noted that the rule against retroactivity had little to do with *Bowen* since it did "not involve a 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."[210]

Justice Scalia was the only Justice arguing that *Bradley* was inconsistent with *Bowen* and should be overruled.[211] After criticizing the majority for not resolving the conflict between the two cases, Justice Scalia stated, in a concurring opinion, that "absent specific indication to the contrary, the operation of nonpenal legislation is prospective only."[212]

Reconciling *Bradley*, *Bowen*, and *Bonjorno*: *Bennett v. New Jersey*.[213] The pronouncements of the Supreme Court in *Bradley* and *Bowen*, at first glance, appear to be at odds. *Bradley* indicates that unless there are specific indications to the contrary, a new statute should be applied retroactively, absent manifest injustice.[214] To the contrary, the Supreme Court in *Bowen*, in dicta, stated that unless there is specific indication to the contrary, a new statute should be applied prospectively only.[215] Although seemingly contradictory, neither case has been overruled. Moreover, *Bowen* involved an agency's rulemaking authority rather than congressional enactments, and both of the recent opinions of the Supreme Court in *Bowen* and *Bonjorno* turned on the fact that congressional intent was clear on the retroactivity issue.[216] A court should not apply a statute to pre-existing claims under either the *Bradley* or *Bowen* tests, if the court can ascertain from the statutory language or legislative history that Congress intended a prospective application only.[217]

As discussed in Sections III(*A*) and (*B*) of this Article, the statutory language and legislative history of the 1991 Act are not completely clear as to whether Congress intended the 1991 Act to have retroactive or prospective application. At most, the legislative history indicates that one of the significant compromises contained in the 1991 Act is that the issue of retroactivity was specifically left for the courts to decide. If a court con-

209. *Id.* at 864 (White, Brennan, Marshall & Blackmun, J.J., dissenting).
210. *Id.*
211. *Id.* at 841 (Scalia, J., concurring).
212. *Id.* (footnote omitted).
213. 470 U.S. 632 (1985).
214. 416 U.S. at 711.
215. 488 U.S. at 213-14.
216. 488 U.S. at 213; 494 U.S. at 837.
217. 416 U.S. 711; 488 U.S. 208.

cludes that the statutory language or legislative history is unclear, it must then reconcile the apparent tension between *Bradley* and *Bowen*.

If the manifest injustice test of *Bradley* has continued validity, it would be dispositive of the applicability of most of the remedial and procedural provisions of the 1991 Act to pre-existing claims. On the other hand, those defending against discrimination claims have recently argued that a majority of the Supreme Court has rejected *Bradley*, on the basis of *Bowen* and *Bonjorno*, and would therefore interpret the Act to be inapplicable to pending litigation and all pre-existing claims.[218]

The argument that the Supreme Court rejected *Bradley* is not persuasive for two reasons. First, by recognizing the apparent tension between the *Bradley* and *Bowen* rules, the Supreme Court in *Bonjorno* reaffirmed the continued validity of the *Bradley* manifest injustice test.[219] Second, the Supreme Court in *Bennett* explained how the two lines of cases could be reconciled.[220] The Court in *Bennett* held that the presumption against retroactivity, adopted by the Court in *Bradley*, is a presumption regarding statutes, which if applied retroactively, would effect substantive rights and obligations.[221] Therefore, *Bennett* suggests that the courts should look to the underlying conduct, to which the new law will be applied, in determining whether a statute applies retroactively or prospectively. In concluding that the presumption of retroactivity announced in *Bradley* did not apply to a new law changing standards regarding how states could use federal grants for educationally deprived students, the Supreme Court in *Bennett* crystallized the distinction between the prospective application of vested, substantive rights, and the retroactive application of remedial or procedural provisions.[222] In *Bennett* New Jersey sought review of the Secretary of Education's final decision requiring the State to refund $1,031,304 granted to it under Title I of the Elementary and Secondary Education Act of 1965.[223] On review, the United States Supreme Court stated the following:

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218. Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 935 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992) (defendant argued that the Supreme Court's decision in *Bowen* indicates an intent to overrule the *Bradley* line of cases).

219. *See supra* note 180 and accompanying text.

220. 470 U.S. at 632.

221. 470 U.S. at 638.

222. *Id.* at 637.

223. *Id.* at 634. The Department of Education alleged that these funds had been used for ineligible programs. On appeal, the state argued that after this decision had been made, Title I was amended in such a way to permit a refund for these prior expenditures. The United States Court of Appeals for the Third Circuit held that substantive standards of the 1978 amendments apply to grants under that Act approved under earlier standards. New Jersey Dep't of Educ. v. Hofstedler, 724 F.2d 34, 35 (3d Cir. 1983).

> [T]he presumption announced in *Bradley* does not apply here . . . . This holding rested on the general principle that a court must apply the law in effect at the time of its decision . . . which *Bradley* concluded holds true even if the intervening law does not expressly state that it applies to pending cases. *Bradley*, however, expressly acknowledged limits to this principle. "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." This limitation comports with another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect.[224]

The Court in *Bennett* held that the substantive nature of the obligations that arose under the Title I program, and *Bradley* itself, suggested that the change in "substantive requirements for federal grants should not be presumed to operate retroactively."[225] Such a retroactive application of substantive requirements of a federal grant program "would deny both federal auditors and grant recipients fixed, predictable standards for determining if the expenditures are proper."[226]

Bennett suggests that the *Bradley* line of cases, applying a manifest injustice test to the retroactive application of statutes, is consistent with *Bowen*, because the circumstances expressly excepted from the *Bradley* presumption involve statutes that would affect vested rights or standards on which the parties would have relied. The decisions in *Bowen* and *Bradley* can be reconciled on the basis that the *Bowen* presumption applies in circumstances in which application of a new law to a pre-existing claim would constitute manifest injustice within the meaning of *Bradley*.[227]

Under the analysis provided in *Bennett*, if a change in law merely involves procedural or remedial changes to already prescribed discriminatory conduct, as in the provisions for jury trial, additional damages, or costs, the *Bradley* rule in favor of retroactivity would apply. On the other hand, when the new law would prescribe conduct that was not actionable at the time the conduct occurred, the *Bowen* presumption of prospective application would apply.

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224. 470 U.S. at 639 (citations omitted).

225. *Id.* at 638.

226. *Id.* at 640.

227. *See supra* note 12 and accompanying text.

D. Circuit Court Cases in Regard to Application of Civil Rights Act of 1991 to Pre-Existing Claims

To date, several circuit courts have dealt with the issue regarding whether the 1991 Act applies to pre-existing claims. Most of them have determined that the 1991 Act has prospective application only to the particular claims litigated. As indicated below, most of the circuits that considered the issue conclude that the statutory language is ambiguous, but the courts differ on the significance of the legislative history. However, the courts give continued validity to the *Bradley* manifest injustice test although not always agreeing on what circumstances cause manifest injustice. Undoubtedly, there will continue to be inconsistent reasoning and most probably a split among the circuits before the issue of retroactivity is finally resolved by the Supreme Court.

***Vogel v. City of Cincinnati:*[228] Section 108 Claims in Regard to Challenges to Consent Decrees.** The first appellate decision on the applicability of the Civil Rights Act to pending cases was rendered by the Sixth Circuit on March 13, 1992.[229] In *Vogel v. City of Cincinnati*,[230] Vogel, a white male, challenged a consent decree entered into by the City of Cincinnati in 1981. The consent decree established a long term goal of having the promotion of blacks and women in the ranks of the city's police division approximate the proportion of qualified blacks and women in the city's work force. The decree did not require the city to hire unnecessary personnel, or to hire, transfer, or promote a less qualified person over a more qualified one on the basis of properly validated employment selection devices.[231]

In order to implement the decree, the city adopted a new procedure for hiring police recruits, which included a written examination. Candidates achieving a score of at least sixty percent on the examination were placed on an eligibility list. When selecting candidates from the eligibility list, the city gave preference to qualified blacks and women as necessary to meet the goals set forth in the consent decree. Vogel was not selected as a recruit in 1989, as a result of the city's affirmative action policy, but received an appointment in 1990. As a result of his delayed appointment, Vogel sought benefits for the period that he was denied a position due to the affirmative action policy. He claimed that the city had exceeded the

228. 959 F.2d 594 (6th Cir. 1991).

229. Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1991).

230. 959 F.2d 594 (6th Cir. 1991).

231. *Id.* at 596.

scope of the consent decree and had violated his rights to equal protection under the laws.[232]

Oral arguments in *Vogel* took place less than three weeks before the 1991 Act was enacted. Without the benefit of briefing or oral arguments on the issue of the 1991 Act's application to pre-existing claims, the court held that the 1991 Act would not apply to the case because the city's conduct occurred before the 1991 Act became law.[233]

In analyzing what, if any, precedential or persuasive effect the Sixth Circuit's decision in *Vogel* will have in future cases, the specific provisions of the 1991 Act at issue in that case must be ascertained. That is not a simple task, since no briefing of the matter occurred and the court never specifically states what section of the 1991 Act it was considering. However, a close reading of *Vogel* makes clear that the court was considering Section 108 of the 1991 Act, which provides that a person who wishes to challenge a consent decree must do so when it is entered, so long as actual notice of the decree existed or adequate representation by another person with the same interests existed.[234]

In holding that *Vogel* had standing to challenge the city's consent decree on constitutional grounds, the court necessarily relied upon *Martin v. Wilks*.[235] Contrary to Section 108 of the 1991 Act, the Supreme Court in *Martin* held that people who are not made a party to a consent decree have standing to commence a constitutional challenge to the decree.[236] Initially finding that the 1991 Act, on its face, does not make clear whether it should be applied retroactively or prospectively, the Sixth Circuit in *Vogel* held that the 1991 Act does not apply to pre-existing claims for two reasons.[237] First, the court placed great reliance on an EEOC policy statement that it would "not seek damages under the Civil Rights Act of 1991 for events occurring before November 21, 1991."[238] The court concluded that, "[i]n light of the ambiguity of the statute on its face and the lack of congressional guidance, the EEOC's decision to apply the 1991 Act prospectively appears reasonable."[239]

Second, the court read *Bradley* narrowly, as applying only in cases when "substantive rights and liabilities" would not be affected.[240] Without specifying the precise substantive rights and violations involved, the

232. *Id.* at 596-97.
233. *Id.* at 597.
234. 42 U.S.C.A. § 2000e-2(n)(3) (Supp. 1992).
235. 490 U.S. 755 (1989).
236. *Id.* at 761-65. *See supra* note 39.
237. 959 F.2d at 598.
238. *Id.*
239. *Id.* (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-44 (1984)).
240. *Id.* (citing United States v. Murphy, 937 F.2d 1032, 1037-38 (6th Cir. 1991)).

court held that retroactive application of the 1991 Act would affect "substantive rights and liabilities" of the parties.[241]

The procedural or persuasive affect of *Vogel* is questionable for several reasons. First, the issue of retroactivity of the 1991 Act was never fully briefed or argued by the petitioner in *Vogel*. Second, the only plausible application of the 1991 Act to the facts of *Vogel* concerned the substantive issue regarding whether plaintiff in that case had standing to bring his action under Section 108 of the 1991 Act. As to any remedial issues involving damages, the decision is merely dicta since the court found that plaintiff was not entitled to any relief on his claim.

Finally, a strong argument can be made that the Sixth Circuit's reliance on the EEOC policy statement that the agency would not seek damages under the 1991 Act, retroactively, is misplaced. The courts accord great deference to the EEOC's statutory interpretations when they speak to matters for which they have enforcement responsibility.[242] However, it is doubtful that the court should accord great deference to the EEOC's interpretation on the issue of retroactivity of the 1991 Act since it has no rulemaking responsibility as to that question.[243]

Moreover, the EEOC's policy statement was not based on agency expertise at all. Rather, the policy statement is based solely on the agency's interpretation of the statute. Significantly, the agency concedes that the statute creates an "inference" that the 1991 Act is retroactive because of the specific exemption provision contained in Sections 109(c) and 402(b).[244] The remainder of the EEOC statement merely represents that agency's interpretation of Supreme Court precedent. The statement provides that:

> *Bowen* represents the Supreme Court's more recent holding on this issue, and the Commission will follow the dictates of that case with regard to the retroactivity of the damages provisions. Accordingly, the Commission will not seek damages in charges filed prior to enactment of the Act, or in post-Act charges that challenge pre-Act conduct.[245]

It is clear that the EEOC in issuing its policy statement interpreted the Supreme Court precedent in *Bowen* rather than the 1991 Act itself. The

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241. *Id.*

242. *See* Griggs v. Duke Power Co., 401 U.S. at 433-34 (commenting on EEOC regulations that permitted the use of only job-related tests by employers and according deference to EEOC's interpretation of Title VII's provisions that provided that employers could not use tests to discriminate).

243. *See* EEOC v. Arabian American Oil Co., 111 S. Ct. 1227, 1235 (1991); General Electric v. Gilbert, 429 U.S. 125, 140-43 (1976).

244. *EEOC Policy Guide on Retroactivity of the Civil Rights Act of 1991*, Fair Empl. Prac. Cas. (BNA) No. 688, at 405:6972 (Dec. 27, 1991).

245. *Id.* at 405:6975 (footnotes omitted).

fact that the EEOC has chosen to follow *Bowen* in making litigation decisions should not bear on the courts at all, as the interpretation of Supreme Court precedent is the special province of the courts.[246] In any event, the EEOC's policy statement has been criticized[247] and challenged as a violation of Section 1-305 of Executive Order 12067,[248] as amended by Executive Order 12107,[249] which requires the EEOC to circulate proposed policy to other federal agencies and to solicit public comment prior to announcement.[250]

In summary, the Sixth Circuit's decision in *Vogel* has limited precedential or persuasive value. It appears to be dicta on the issue of whether the application of the 1991 Act applies to pre-existing claims. Moreover, the decision should be narrowly applied, if at all, solely to issues involving the retroactivity of Section 108 of the 1991 Act dealing with standing to challenge consent decrees or court orders on constitutional grounds. Although Section 108 is couched as a procedural change, certain litigants may rely upon the fact that prior to the decision in *Martin v. Wilks*,[251] collateral attacks on consent decrees or judgments were precluded. Therefore, the retroactive application of Section 108, effecting consent decrees and judgments entered between the time the Court decided *Martin v. Wilks*[252] and November 21, 1991, may be one of the few instances when the retroactive application of the 1991 Act interferes with vested, substantive rights.

***Fray v. Omaha World Herald Co.*:[253] Section 101, Expanding the Scope of 42 U.S.C. § 1981 to Cover Discriminatory Conduct After Contract Formation.** The principal issue on appeal in *Fray v. Omaha World Herald Co.*,[254] was whether Section 101 of the Civil Rights Act of 1991, expanding the scope of Section 1981 to cover discriminatory conduct after contract formation, applied retroactively to cases pending when it was enacted.[255] The Eighth Circuit, in *Fray*, held that Section 101

246. Immigration & Naturalization Serv. v. Cardoza Fonseca, 480 U.S. 421, 422 (1987).

247. *See* United States Commission on Civil Rights, Memorandum of Law on the EEOC's Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Changes and Pre-Act Conduct (Feb. 13, 1992).

248. Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (1978).

249. Exec. Order No. 12,107, 44 Fed. Reg. 1055 (1978).

250. *See* National Treasury Employees Union v. Kemp, C.A. No. C 92-0115 BAC (N.D. Cal. Jan. 2, 1992).

251. 490 U.S. 755 (1989).

252. 490 U.S. 755 (1989).

253. 960 F.2d 1370 (8th Cir. 1992).

254. 960 F.2d 1370 (8th Cir. 1992).

255. *Id.* at 1371.

did not apply retroactively,[256] and therefore, this case was governed by *Patterson v. McLean Credit Union*.[257]

Georgianna Fray was a part-time production worker in the mail room at the Omaha World Herald. In June 1985, she applied for a full-time mail room apprentice job that promised better pay and full benefits. The job notice stated that the company preferred someone with "mail room experience." After losing the promotion to a white male truck driver with no mail room experience, Fray filed discrimination claims with the Nebraska Equal Opportunity Commission and the EEOC. Subsequently, she brought suit alleging race, sex, and retaliatory discrimination in violation of 42 U.S.C. § 1981, Title VII, and state law.[258]

In applying *Patterson*, the Eighth Circuit held that the question of whether a promotion claim is actionable under Section 1981, depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, "then the employer's refusal to enter the new contract is actionable under [Section] 1981 . . . . Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under [Section] 1981."[259]

The court denied Fray recovery under Section 1981, as interpreted by *Patterson*, because the court did not see the promotion Fray sought as a "new and distinct contractual relation."[260] Under the Civil Rights Act of 1991, Section 101, Fray's claim would have been actionable. Congress specifically provided that "the term 'make and enforce contract' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[261]

In determining that Section 101 of the 1991 Act would not apply to Fray's pre-existing claim of discrimination connected with her application for promotion under 42 U.S.C. § 1981, the court relied upon the legislative history of the 1991 Act.[262] Noting that proponents of retroactivity commanded a majority in both houses of Congress, The Eighth Circuit concluded that the decisive factor in denying Fray's claim was that this majority "could not override the President's veto of a 1990 bill that contained express retroactive provisions."[263] Among the reasons cited by the

256. *Id.*
257. 491 U.S. 164 (1989).
258. 960 F.2d at 1372.
259. *Id.* at 1373.
260. *Id.*
261. Civil Rights Act of 1991, 42 U.S.C.A. § 1981(b) (Supp. 1992).
262. 960 F.2d at 1376-77.
263. *Id.* at 1377.

President for his veto was the bill's "unfair retroactivity rules."[264] The court in *Fray* noted that the proponents of retroactivity "could do no better than send an ambiguous law to the judiciary."[265] The court considered dispositive the fact that the 1991 Act was a compromise between proponents of the 1990 Act and the Bush Administration. According to the Eighth Circuit, that fact was a clear indication of congressional intent that the 1991 Act should apply prospectively only.[266]

While recognizing the inherent tension between the Supreme Court's decisions in *Bradley* and *Bowen*, the Eighth Circuit held that Fray's claim should be denied because under either case the courts must give effect to a clear congressional directive regarding a statutes's retroactivity.[267] Therefore, the court concluded that it could decide the retroactivity issue without resolving the "thorny doctrinal conflict" presented by *Bradley* and *Bowen*.[268] The court determined that if the presumption against retroactivity in *Bowen* applied to the case, then it would be clear that *Patterson* was not retroactively overruled, absent a clear indication that Congress intended a prospective application.[269]

On the other hand, the Eighth Circuit recognized that the retroactivity question in *Fray* would be much closer if the manifest injustice test of *Bradley* applied.[270] Fray sought damages under Section 1981 for constructive discharge and a discriminatory failure to promote, arising out of her employer's conduct that occurred before *Patterson*. At that time, the employer's discriminatory conduct was unlawful under either Section 1981 or Title VII.[271] Therefore, the court conceded that the retroactive application of Section 101 in *Fray* would "neither alter the rights and expectations of the parties nor disturb previously vested rights."[272]

As discussed in Section III(*B*) of this Article, the legislative history as to whether Congress intended retroactive application of the 1991 Act is unclear. The fact that the 1991 Act represents a compromise bill after the rejection of the Bush Administration's proposal containing specific, prospective language, indicates that Congress may well have intended to leave this issue to the courts to resolve. Therefore, the inherent weakness

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264. 136 CONG. REC. S16,562 (daily ed. Oct. 14, 1990).

265. 960 F.2d at 1377.

266. *Id.*

267. *Id.* at 1378; *Bradley*, 416 U.S. at 711 (presumption of retroactivity does not apply if "there is statutory direction or legislative history to the contrary"); *Bowen*, 488 U.S. at 208 (the Act is prospective unless it expressly provides for retroactive application).

268. 960 F.2d at 1375.

269. *Id.* at 1377.

270. *Id.*

271. *Id.* at 1378. *See, e.g.*, Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975).

272. 960 F.2d at 1378.

of the decision in *Fray* is its failure to reconcile the decisions in *Bradley* and *Bowen* regarding when legislation will retroactively be applied. Significantly, the court in *Fray* indicates that the retroactive application of Section 101 to the case would not "alter the rights and expectations of the parties [or] disturb previously vested rights."[273]

For the reasons stated in Section III(*B*) of this Article, the Eighth Circuit's sole reliance upon the legislative history, to conclude that the 1991 Act should not be retroactively applied, is erroneous. In jurisdictions willing to give *Bradley* continued validity when procedural or remedial rights rather than vested substantive rights are involved, the decision in *Fray* supports the conclusion that the 1991 Act should be applied to pre-existing claims involving Section 101 because discriminatory conduct against employers was actionable, even before the enactment of the 1991 Act.[274]

***Mozee v. American Commercial Marine Service Co.*:[275] Section 101, Expanding the Scope of 42 U.S.C. § 1981, and Sections 104 and 105, Changing the Burden of Proof in Disparate Impact Cases.** Recently, the Seventh Circuit faced the retroactivity issue in *Mozee v. American Commercial Marine Service Co.*[276] This case involved an appeal of a class action suit brought in 1977, by black employees of Jeffboat, Inc., a division of the American Commercial Marine Service Company. Plaintiffs sought both compensatory and punitive damages as a

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273. *Id.*

274. Judge Heaney, in his dissenting opinion in *Fray*, reaches this conclusion. 960 F.2d at 1379-83. He concludes that under either *Bradley* or *Bowen*, a "fairness analysis" must be applied "[u]nder the historical rule that [*Bowen*] represents, retroactivity is disfavored where its application would interfere with a party's 'justified expectations' or vested rights." *Id.* at 1381 (Heaney, J., dissenting). Judge Heaney determined that under a "fairness analysis," the 1991 Act has retroactively applied to *Fray's* Section 101 claim, because the acts of intentional discrimination giving rise to liability occurred many years before *Patterson* was decided. *Id.* at 1380-81 (Heaney, J., dissenting).

> Fray began working at the World Herald in 1984 and brought suit in 1987. Until the Supreme Court decided *Patterson* in 1989, there was every indication that the conduct that formed the basis of Fray's complaint was actionable under section 1981. During the period that Fray worked at the World Herald, the newspaper was on notice that section 1981 might apply to an employer's conduct . . . . [T]herefore, application of the Civil Rights Act of 1991 best serves the interests of fairness by restoring the rights of the parties as they were when Fray began her lawsuit.

Id. at 1381-82 (Heaney, J., dissenting).

275. 963 F.2d 929 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992).

276. 963 F.2d 929 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992); *see also* Luddington v. Indiana Bell Tel. Co., 966 F.2d 225 (7th Cir. 1992) (holding that the 1991 Act is not retroactive as to pending Section 202 claims).

result of the alleged discrimination in the employer's promotion, compensation, discipline, seniority, and training practices.[277]

As in *Fray*, the discrimination claimants sought relief under Section 1981 and the expanded definition of contract under Section 101(b). In addition, they asserted that the burden of proof in regard to business necessity in disparate impact cases should be governed by Sections 104 and 105 of the 1991 Act.[278]

The Seventh Circuit held that Sections 101(b), 104, and 105 of the 1991 Act, apply prospectively only, in cases both on appeal and on remand, as their retroactive application would require an entirely new proceeding.[279] First, the court looked to the statutory language in order to determine Congress' intent on the retroactivity issue. Like the Sixth and Eighth Circuits, the Seventh Circuit concluded that the language of the statute was unclear.[280] The court found that the Act's mandate that it "shall take effect upon enactment" was subject to several interpretations and therefore, "provides no guidance as to whether Congress intended the Act to apply prospectively or retroactively to cases pending on appeal or cases remanded to the district court."[281] Moreover, the fact that Congress specifically provided that the nonretroactivity provisions in Sections 109(c) and 402(b) were not dispositive because the court considered them to be simply "extra assurance[s]" that the courts would not apply the 1991 Act to the *Wards Cove* litigation and cases involving United States citizens working abroad for American corporations, regardless of how the courts construe the 1991 Act in the future.[282]

The Seventh Circuit also found that the legislative history on the subject of retroactivity was unclear.[283] The employer in *Mozee* raised the same argument that the Eighth Circuit had favorably accepted in *Fray*. It argued that because the 1991 Act omitted specific language as to retroactivity, as a compromise after the vetoed 1990 bill, Congress must have intended a prospective application of the 1991 Act.[284] Contrary to the Eighth Circuit in *Fray*, the court in *Mozee* found that the fact that Congress did not adopt the Bush Administration's proposal containing explicit prospective language negates the argument that Congress, by omis-

277. 963 F.2d at 931.
278. *Id.*
279. *Id.* at 937-40.
280. *Id.* at 931.
281. *Id.* at 932.
282. *Id.* at 933.
283. *Id.*
284. *Id.*

sion, intended prospective application and at best leaves the 1991 Act ambiguous.[285]

After finding that the statutory language and legislative history was ambiguous on the retroactivity issue, the court in *Mozee* turned to the conflicting Supreme Court precedents in *Bradley*, *Bowen*, and *Bonjorno*.[286] The court first recognized that the manifest injustice test set forth in *Bradley* had not been overruled,[287] as the Supreme Court relied upon that decision in the post *Bowen* case of *National Treasury Employees Union v. Von Raab*.[288] Significantly, the Seventh Circuit concluded that *Bowen*, which did not even mention *Bradley*, "is not directly applicable to cases where courts are asked to decipher the prospective versus retroactive application of congressional statutes to pending cases."[289] Rather than involving the retroactive application of statutes, *Bowen* merely involved an agency's authority to promulgate rules with retroactive effect in the absence of express congressional authority.[290] Finally, the Seventh Circuit noted that the Supreme Court in *Bonjorno* indicated that *Bradley* has not been overruled because it specifically recognized an "apparent tension" between the line of retroactivity cases.[291]

In attempting to reconcile Supreme Court precedent, the Seventh Circuit concluded that the "presumption of prospective application" adopted by the Supreme Court in *Bowen* is the general rule and that the "manifest injustice" test of *Bradley* still applies in limited circumstances.[292] Following *Bennett*, the Seventh Circuit concluded that the manifest injustice rule "by its own terms does not apply when the retroactive application of a statute 'would infringe upon or deprive a person of a right that had matured or become unconditional' "[293] and that statutory provisions impacting substantive rights and obligations will not be retroactively applied.[294]

The court in *Mozee* concluded that it makes no difference if the provision in question on appeal is procedural or substantive.[295] If the retroactive application of even a procedural provision could require a new trial and double expenses, manifest injustice would result.[296] The court con-

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285. *Id.*
286. *Id.* at 934.
287. *Id.*
288. *Id.*; 489 U.S. 656 (1989).
289. 963 F.2d at 934.
290. *Id.* at 934-35; 488 U.S. at 208.
291. 963 F.2d at 935-36; 494 U.S. at 837.
292. 963 F.2d at 935-36.
293. *Id.* at 936 (quoting *Bennett*, 470 U.S. at 639, *quoting Bradley*, 416 U.S. at 720).
294. *Id.*
295. *Id.* at 937.
296. *Id.*

strued *Bradley* narrowly, concluding that in cases on appeal *Bradley* would, "at most, appl[y] when evaluating damage provisions that do not affect substantive rights, and arguably only applies to attorney fee provisions."[297] Recognizing that the 1991 Act's provisions regarding the availability of compensatory and punitive damages contained in Section 102 may be retroactive under *Bradley*, the court declined to rule on that issue because it was not properly before the court.[298] However, the court held that Section 101(b), expanding the scope of 42 U.S.C. § 1981 and Sections 104 and 105, regarding the burden of proof in disparate impact cases, were another matter.[299] The retroactive application of these provisions to cases on appeal could require a new trial and double expenses. In the court's opinion, such a retrial would rise to the level of manifest injustice.[300]

Judge Cudahy dissented in *Mozee*, on the basis that all of the events giving rise to liability, including the filing of the lawsuit fifteen years ago, occurred long before the decision in *Patterson*.[301] Moreover, he noted that the 1991 Act simply restored the law that was in effect at that time.[302] Significantly, Judge Cudahy reasoned that the effect of Section 101 is to make the damage provisions of 42 U.S.C. § 1981 applicable to conduct that Title VII always prohibited.[303] Therefore, the retroactive application of Section 101 would not affect substantive rights.[304] Finally, Judge Cudahy concluded that the fact that Congress provided explicit prospective language in Section 109 demonstrates congressional intent to apply the remainder of the 1991 Act retroactively.[305]

The court's decision in *Mozee* turns upon the fact that the retroactive application of the 1991 Act would require a new trial. In that sense, the decision elevates the procedures and remedies available during that first trial to the status of vested rights or obligations. Such status appears extremely unjust, since those rights and reduced obligations only arose by virtue of *Patterson*, decided long after the initial complaint was filed. Moreover, the courts' dismissal of the distinction between procedural and substantive rights is contrary to its own reliance on the Supreme Court's opinion in *Bennett*, which focuses upon the underlying conduct of the parties and crystallizes that very distinction.

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297. *Id.* at 938.
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.* at 940 (Cudahy, J., dissenting).
302. *Id.* at 941.
303. *Id.*
304. *Id.*
305. *Id.*

Again, litigants arguing in support of retroactive application of the 1991 Act should focus upon the precise provisions addressed by the Seventh Circuit in *Mozee*, in order to determine its precedential value. The decision in *Mozee* lends some support to the argument that any damage provisions contained in the 1991 Act should be retroactively applied, as well as any provision when retroactive application would not require an entirely new proceeding. Moreover, the *Mozee* opinion should have no bearing on matters that have not been filed, or are pending, but have not been tried. The decisive factor for the court in *Mozee*, in determining that Sections 101, 104, and 105 should have prospective application, was that the case had been in litigation for fifteen years and that it would be unfair to make the employer incur the expense of a new trial.[306] As the dissent in *Mozee* indicates, it appears far more unjust to deprive a victim of discrimination a complete remedy, merely because, for a brief period, while the case was "inching through a thicket of litigation," the Supreme Court chose to narrow the scope and remedies of Title VII.[307]

***Harvis, Rivers & Davison v. Roadway Express, Inc.*[308] and *Johnson v. Uncle Ben's, Inc.*:[309] Section 101 and Retroactive Application of *Patterson v. McClean Credit Union*.[310]** In *Harvis, Rivers & Davison v. Roadway Express, Inc.*,[311] the Sixth Circuit recently revisited the issue of whether the 1991 Act, and one of the disfavored Supreme Court opinions the 1991 Act explicitly overruled, should apply retroactively.[312] First, the court addressed whether *Patterson v. McClean Credit Union*[313] should apply retroactively to plaintiffs' claims arising from their discriminatory discharge prior to the date of that decision. The court noted that the court in *Patterson* limited the scope of Section 1981 actions "by holding that [Section] 1981 does not apply to discrimination

306. *Id.* at 937.
307. *Id.* at 941.
308. 973 F.2d 490 (6th Cir. 1992).
309. 965 F.2d 1363 (5th Cir. 1992).
310. 491 U.S. 164 (1989).
311. 973 F.2d 490 (6th Cir. 1992). Certiorari has recently been granted by the United States Supreme Court in two consolidated cases involving the retroactivity of the Civil Rights Act of 1991. Those cases were reported in the courts below as *Landgraf v. USI Film Prods.*, 968 F.2d 427 (5th Cir. 1992) and *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992). Oral arguments are expected in the Fall of 1993. The grant of certiorari comes close to the time that the Ninth Circuit, in *Davis v. City & County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992), held that the Act was retroactive. Prior to the decision in *Davis*, all of the circuit courts confronted with the issue of retroactivity were in agreement. With the recent split among the circuits, the importance of resolving the issue of retroactivity is pervasive.
312. 973 F.2d at 490.
313. 491 U.S. 164 (1989).

in conditions of employment, but only prohibits discrimination in the formation of the employment contract or the right to enforce the contract."[314] Because claims of discriminatory discharge do not involve contract formation, they are no longer cognizable under Section 1981. With little explanation, the Sixth Circuit in *Roadway Express, Inc.* held that *Patterson* should apply retroactively to plaintiffs' claims even though they arose long before *Patterson* was law.[315]

Second, the Sixth Circuit confronted the issue of whether the 1991 Act, enacted while *Roadway Express, Inc.* was pending on appeal, should apply retroactively. Consistent with its previous decision in *Vogel*, the Sixth Circuit concluded that the legislative history and language of the 1991 Act are ambiguous on the retroactivity issue.[316] The court reiterated its statement that *Bradley* should be read narrowly and should not be applied when " 'substantive rights and liabilities,' broadly construed, would be affected."[317] Again, with little explanation, the Sixth Circuit concluded that the retroactive application of the 1991 Act would affect the substantive rights and liabilities of the parties.[318] Moreover, the court rejected the argument raised by appellants that *Vogel* was not determinative of their Section 101 claims because that decision involved only Section 108 of the 1991 Act.[319] In a broad sweep, the court held that any distinctions between the individual sections of the 1991 Act are immaterial, noting that the decisions in *Vogel* and *Fray* "examined the retroactivity of the 1991 [Act] as a whole, not in terms of specific sections, and both courts concluded that applying the Act retroactively would adversely affect substantive rights and liabilities."[320]

Aside from the Sixth Circuit's failure to recognize any distinctions between the various substantive and procedural sections of the 1991 Act, perhaps the most interesting aspect of the *Roadway Express, Inc.* opinion is its inconsistency in holding that the retroactive application of *Patterson* does not affect substantive rights while the same application of Section 101 of the 1991 Act would adversely affect such rights. Although this point is perplexing, what is clear from the Sixth Circuit's decision in *Roadway Express, Inc.* is that the court will most likely continue to hold that the 1991 Act is not retroactive, no matter what right or section of the Act is involved in the particular litigation.

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314. 973 F.2d at 493 (citing *Patterson*, 491 U.S. at 176).
315. *Id.*
316. *Id.* at 496.
317. *Id.* (quoting *Vogel*, 959 F.2d at 598).
318. *Id.*
319. *Id.*
320. *Id.*

Similarly, the Fifth Circuit, in *Johnson v. Uncle Ben's Inc.*,[321] has recently held that Section 101 does not apply retroactively.[322] The court recognized the "apparent anomaly that, at the time of [the] allegedly discriminatory conduct, *Patterson* had not yet been decided."[323] The appellee's reliance on *Patterson* would be minimal.[324] However, the Fifth Circuit applied *Patterson* retroactively and gave the 1991 Act prospective application only on the basis that "[a]ny other holding would require unwieldy distinctions . . . based on the degree to which they relied on the legal regime antedating the Civil Rights Act of 1991."[325]

***Davis v. City & County of San Francisco*:[326] Section 113, Attorney Fees and Cost.** The Ninth Circuit Court of Appeals authored one of the most thorough court opinions on the issue of whether the 1991 Act applies to pre-existing discrimination claims on October 6, 1992.[327] In *Davis* the court addressed the issue, specifically in the context of Section 113, which provides that a court may, in its discretion, include expert witness fees as part of the attorney's fee. However, because the court based its decision on the language of the 1991 Act itself, and attacked the insufficient reasoning of the circuit court cases previously discussed in this Article, the significance of the decision in *Davis* is clearly not limited to Section 113. It should apply to the Act in its entirety, with the exception of Sections 109(c) and 402(b).

The Ninth Circuit, in *Davis*, reasoned that it did not need to choose between the *Bradley* and *Bowen* presumption regarding the retroactivity issue, as "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."[328] First, the court found that Section 402(a) of the 1991 Act, with its specific mandate that, with certain stated exceptions, the Act shall take effect upon enactment, was " 'some indication that [Congress] believed that application of [the Act's] provision was urgent.' "[329] Moreover, the court considered it strong evidence that Congress expressly limited the 1991 Act's application to acts of discrimination oc-

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321. 965 F.2d 1363 (5th Cir. 1992).

322. *Id.* at 1372.

323. *Id.* at 1374.

324. *Id.*

325. *Id.*; *see also* Baynes v. A.T.T. Technologies, Inc., 796 F.2d 1370 (11th Cir. 1992); Gersman v. Group Health Ass'n, 975 F.2d 886 (D.C. Cir. 1992) (holding that the Act does not apply to cases in which judgment is entered before its effective date).

326. 976 F.2d 1536 (9th Cir. 1992).

327. *Id.*

328. *Id.* at 1550.

329. *Id.* (quoting *In re* Reynolds, 726 F.2d 1420, 1423 (9th Cir. 1984)).

curring after its enactment, in Sections 109(c) and 402(b).[330] The Ninth Circuit, in *Davis*, noted that the courts that have determined that the 1991 Act should apply prospectively only "have either ignored Sections 109(c) and 402(b) or the elementary canon of construction that [the court] should avoid interpretation of the Act which renders those Sections superfluous."[331] Additionally, the court in *Davis* concluded that Congress' express findings and purposes of the 1991 Act, contained in Sections 2 and 3, were highly significant.[332]

The court stated that:

> [g]iven 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. Indeed, . . . to construe Congress' intent otherwise would lead to incongruous results.[333]

The court in *Davis* also addressed the issue of to what extent the legislative history of the 1991 Act indicates Congress' intent, as well as the EEOC policy guidance, which interpreted the Act's damage provisions to apply only to claims arising after the effective dates of the Act. Consistent with the reasoning advanced in Section III(*B*) of this Article, the Ninth Circuit held that the legislative history of the Act, equally colored by both opponents and proponents of retroactive application, is ambiguous at best.[334] Furthermore, the court gave no weight to the EEOC policy guidance because the damages provision of the 1991 Act, addressed in the policy guidance, are not administered by the EEOC. The court noted that "the guidance does not represent the interpretation of a statutory provision with respect to which the EEOC has enforcement responsibilities, and its significance is questionable in light of that fact."[335]

By focusing upon the statutory language with its express findings and purposes, as well as the Congress' express exclusions from retroactive application found in Sections 109(c) and 402(b), the Ninth Circuit in *Davis* avoided the sometimes unwieldy determination of what rights are purely substantive or procedural, as well as any problems created by the results in *Bradley* and *Bowen*. It is clear from the statutory language that Con-

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330. *Id.* at 1551.

331. *Id.* at 1552 (citing *Vogel*, 959 F.2d 594; Luddington v. Indiana Bell Tel. Co., 966 F.2d 225 (7th Cir. 1992); *Uncle Ben's, Inc.*, 965 F.2d 1363).

332. *Id.* at 1553.

333. *Id.* at 1552.

334. *Id.* at 1552-55.

335. *Id.* at 1556.

gress intended to overturn recent decisions of the United States Supreme Court that narrowed the protections and remedies afforded victims of discrimination and with two exceptions, found in Sections 109(c) and 402(b) of the 1991 Act, determined that the need to do so was urgent. The application of the Courts' reasoning in *Davis* would most effectively accomplish that purpose.

IV. CONCLUSION

Overturning a number of recent, controversial Supreme Court cases that narrowly interpreted the protections and remedies of Title VII was the stated purpose of the Civil Rights Act of 1991.[336] As Senator Danforth indicated, the Court chose to "turn the clock back," particularly in the Court's 1989 term and that can never be allowed to happen to civil rights.[337] Although these decisions constituted the law of the land for a brief period of time, the question now faced by discrimination claimants and courts is how long will the disapproved Supreme Court decisions be permitted to stand as an obstacle to the remedial purposes of the 1991 Act. Indeed, if the Act does not apply to discrimination claims that arose prior to November 21, 1991, its provisions will not "take effect upon enactment," as mandated by Congress, and the clock will remain turned back for victims of discrimination for many years to come.

The task of determining whether the 1991 Act's provisions apply to pre-existing claims is not an easy one. In order to fully effectuate the purposes of the 1991 Act, the most direct course for the courts to take is to follow the reasoning of the Ninth Circuit in *Davis*. However, most of the circuits have held that the statutory language does not contain a plain statement of congressional intent on this issue. Moreover, the legislative history is colored with statements by both opponents and proponents of retroactivity as a result of the many hard fought compromises reached among them after President Bush vetoed the 1990 Civil Rights Act. Therefore, litigants and the courts will most likely be faced with reconciling the Supreme Court precedents of *Bradley* and *Bowen*, until the Supreme Court finally resolves the issue.

As the Supreme Court suggested in *Bennett*, the most feasible way of reconciling *Bradley* and *Bowen* is by reviewing the underlying conduct and determining whether the retroactive application of new law affects substantive, vested rights, relied upon by the parties, or whether the changes in law are merely remedial or procedural.[338] In the latter case, new law, in the absence of congressional intent to the contrary, ought to

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336. 42 U.S.C.A. § 1981 Historical Notes (Supp. 1992).
337. *See supra* note 151 and accompanying text.
338. 470 U.S. at 637.

apply to pre-existing discrimination claims. However, Section 108, the retroactive application of which would affect the finality of previous court judgments and consent decrees, may be considered a substantive provision that affects vested rights upon which the parties relied. If the courts determine that the statutory language is unclear and the legislative history is ambiguous, the retroactive application of Section 108 may then be warranted in a limited number of cases. In cases when reliance on the former law can be demonstrated, the 1991 Act should be applied prospectively to decrees and judgments entered between the time the Supreme Court decided *Martin v. Wilks*[339] and the signing of the 1991 Act into law on November 21, 1991.

339. 490 U.S. 755 (1989).