Escaping the Dead Hand of the Past: The Need for Retroactive Application of the Civil Rights Act of 1991; Note

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NOTES

ESCAPING THE DEAD HAND OF THE PAST:
THE NEED FOR RETROACTIVE APPLICATION OF
THE CIVIL RIGHTS ACT OF 1991

Congress enacted the Civil Rights Act of 1991 ("the CRA" or "the 1991 Act") in response to three years of Supreme Court decisions that curtailed protections available to victims of employment discrimination. Between 1989 and 1991, the Supreme Court issued no less than seven decisions that restricted the legal framework that the Court had previously championed to enforce civil rights laws. Through these decisions, it became clear to many members of Congress and to civil rights groups that the Court was giving up its leadership role in ensuring equal protection. In response to the Court's rejection of its previous commitment to civil rights enforcement, Justice Blackmun remarked in one dissent: "One wonders whether the majority still believes that race discrimination - or more accurately, race discrimination against nonwhites - is a problem in our society, or even remembers that it ever was." President Bush agreed with Congress that there needed to be a legislative remedy for the Supreme Court decisions narrowing protection for minorities.

Congress drafted the 1991 Act to restore the legal landscape for victims of employment discrimination. In addition to overruling at least seven recent Su-

4. See supra note 2.
5. See, e.g., Julie Johnson, High Court Called Threat to Blacks, N.Y. TIMES, July 10, 1989, at A14 (Benjamin Hooks, executive director of NAACP, said the Court "is more dangerous to this nation" than the segregationist foes of the civil rights movement).
preme Court decisions, the 1991 Act provides for compensatory and punitive damages as well as jury trials under Title VII, in order to provide victims of employment discrimination on the basis of sex, religion, or national origin the same remedies available to victims of racial discrimination under 42 U.S.C. section 1981.

The full force of the Civil Rights Act of 1991 remains unrealized. Although the promise of more comprehensive protection exists, access to those protections may not extend to all victims of discrimination. Congress failed to agree on whether the CRA applies retroactively and left the issue for the courts to decide. The issue of retroactive application of the CRA challenges courts in two situations. First, courts must decide whether the CRA applies to pending cases filed before the new law went into effect, whether those cases are at trial for the first time, on appeal, or on remand. Second, federal courts must decide whether the 1991 Act applies to cases filed after November 21, 1991, the date President Bush signed the 1991 Act into law, but which involve pre-Act discriminatory conduct.

The question of retroactive application of the 1991 Act is bewildering to federal courts. Federal courts lack guidance on the retroactivity issue since the Act itself does not explicitly specify whether it should be applied to pending cases; the turbulent legislative history is inconclusive, and Supreme Court precedent over retroactive statutory construction is conflicting. Due to the equivocal and inconsistent authorities upon which federal courts must rely to decide the issue, it is hardly surprising that federal courts are handing down conflicting holdings. Federal district courts are split on the issue, some ruling in favor of retroactive application, and others against it. To date, seven federal

8. See supra notes 2-3. Section 114 of the 1991 Act also overruled Library of Congress v. Shaw, 478 U.S. 310 (1986), by providing that federal employees are entitled to all of the remedies available under Title VII, including interest. Section 113 responds to Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987), by allowing Title VII prevailing plaintiffs to reasonable costs for experts. The Act also responds to Evans v. Jeff D., 475 U.S. 717 (1986), by making proof that a waiver of attorneys' fees was not part of settlement a condition of a court ordered or stipulated dismissal.


11. See e.g., 137 CONG. REC. S15,485 (daily ed. Oct. 30, 1991) (Sen. Kennedy stating that "[i]t will be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment."); 137 CONG. REC. S15,325 (daily ed. Oct. 29, 1991) (Sen. Danforth stating legislative history is not conclusive of congressional intent).

12. See infra Part II-A.

13. See infra, Part II-B.


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appellate courts have reached the issue.\textsuperscript{17} All circuits reaching the issue, with the exception of the Ninth Circuit,\textsuperscript{18} have ruled against retroactivity. The Supreme Court had denied certiorari on the retroactivity issue twice and appeared content to leave the problem to the lower courts.\textsuperscript{19} Following the Ninth Circuit’s holding in favor of retroactivity, however, the Supreme Court recently granted certiorari to two cases which it will hear next fall.\textsuperscript{20}

Although federal courts are divided on the issue, the current trend of the courts is to deny retroactive application of the 1991 Act to cases pending when it was enacted and to cases filed after the 1991 Act was signed into law but involving pre-Act conduct.\textsuperscript{21} Even when the CRA merely restores rights eradicated by restrictive Supreme Court decisions or alters procedural rights, many courts have refused to apply the 1991 Act retroactively.\textsuperscript{22} Federal courts refusing to apply the 1991 Act retroactively rarely evaluate the reliance interests of the parties involved or even what law existed at the time the discriminatory conduct occurred.\textsuperscript{23} Courts have applied the overruled Supreme Court cases to litigation

\textsuperscript{17} See, e.g., Gersman, 975 F.2d at 899 (holding that CRA does not apply to pre-Act conduct regardless of date complaint filed); McBride v. French Riviera Health Spa, No. 92-1641, 1992 U.S. Dist. LEXIS 17774 (E.D. La. Nov. 19, 1992) (holding CRA amendments providing for compensatory and punitive damages did not apply to case filed April 24th, 1992, where case involved pre-Act conduct); Sloan v. Boeing, Co., 802 F. Supp. 384, 387 (D. Kan. 1992) (holding that CRA does not apply to cases filed after effective date of CRA if involved pre-Act conduct).

\textsuperscript{18} See, e.g., Gersman, 975 F.2d at 899 (holding section 101(2)(b) which overruled Patterson did not apply retroactively although discriminatory conduct occurred prior to Patterson decision); Holt v. Michigan Dep’t of Corrections, 974 F.2d 771, 773-74 (6th Cir. 1992) (same), petition for cert. filed, 1992 U.S. Dist. LEXIS 3446 (U.S. Nov. 10, 1992) (No. 92-980); Rowe v. Sullivan, 96 F.2d 186, 190 (5th Cir. 1992) (same); Vogel, 959 F.2d at 599 (applying Martin v. Wilks, 490 U.S. 755 (1989)).
which arose long before those Supreme Court decisions were handed down.24 As a result, federal courts are granting discriminatory employers a windfall. Federal courts' tendency to deny application of the CRA retroactively frustrates and delays Congress' goal in enacting the CRA to restore and broaden civil rights protections.

This Note argues that Congress should amend the CRA to provide for retroactive application of all its provisions, both those reversing prior Supreme Court decisions which gave a cramped interpretation over the scope of civil rights statutes25 and those granting Title VII plaintiffs parity with victims of racial discrimination under section 1981.26 This Note is divided into four parts. Part I explains the purpose of the CRA and its effect on civil rights litigation. Part II discusses the debate over retroactive application of the CRA. The debate is traced through the muddled language of the Act itself, its ambiguous legislative history, and conflicting Supreme Court precedent on statutory construction. Part III analyzes how federal courts have grappled with the issue. It concludes that left with no clear directive from Congress, courts are handing down inconsistent and often unfair decisions. Part IV examines the consequences of Congress' failure to mandate retroactive application. Part IV also recommends that Congress enact corrective legislation to ensure that the CRA applies retroactively to all cases that were pending when the CRA was handed down and to all cases filed after the date of enactment but involving prior discriminatory conduct. Only legislation can cure the inconsistent and often unjust judicial decisions caused by Congress' original failure to specify the proper application of the 1991 Act.

I. PURPOSE: OVERRULING THE SUPREME COURT

Congress' most important goal in enacting the 1991 Act was to erase recent Supreme Court decisions that were hostile to civil rights plaintiffs.27 These cases and the amendments overturning them are summarized below.


25. See supra note 3.

26. See supra notes 11-13. The Constitution does not prohibit retroactive law making. Calder v. Bull, 3 U.S. (3 DalI.) 386 (1798) (holding that ex post facto clause, U.S. Const. art. I, § 10, cl. 1, applies only to criminal law). The Supreme Court has often said that if Congress disagrees with its interpretation of federal statutes, Congress should change the law. E.g., Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989) ("[T]he legislative power is implicated, and Congress remains free to alter what we have done.").

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

The watershed Supreme Court decision that became the catalyst behind the enactment of the CRA was the 5-4 decision handed down by a Rehnquist majority in Wards Cove Packing Co. v. Atonio. Through Wards Cove, the Supreme Court reversed twenty years of legal analysis in Title VII employment discrimination cases based on disparate impact theories by overturning the seminal Title VII case, Griggs v. Duke Power Co. In Griggs, Chief Justice Burger, writing for a unanimous Court, rejected the argument that Title VII cases required proof of discriminatory intent to invalidate employment practices that exclude women or minorities from employment. Burger stressed that plaintiffs need not prove employers acted with discriminatory animus towards them to bring Title VII suits. Griggs provided that once the plaintiff proves she suffered a disparate impact, the burden of proof shifts to the employer to make the affirmative defense that the employment practice was required by a business necessity. The Griggs decision allowed plaintiffs to vindicate their grievances where employment practices, while neutral on their face, disproportionately excluded qualified workers from opportunities on the basis of sex, national origin, race, or religion.

In Wards Cove, Justice Rehnquist dealt a body blow to the Griggs holding by ruling that an employer must only make the weaker showing of “business justification,” not “business necessity.” When Justice Rehnquist articulated exactly what was meant by “business justification,” he revealed that protections provided to victims of employment discrimination in Griggs had been stripped away. He explained, “there is no requirement that the challenged practices be ‘essential’ or ‘indispensable’ to employer’s business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet . . . .” Congress responded to the Wards Cove decision by enacting section 105 of the CRA. Section 105 codifies the Griggs holding. It provides that once a Title VII plaintiff proves discriminatory impact, the burden of proof shifts to the employer to show business necessity. Also, section 105 restored the pre-Wards Cove analysis by easing the complaining party’s duty to show that specific employment practices contributed to employment discrimination.

B. Scope of 42 U.S.C. § 1981: Patterson v. McLean Credit Union

The 1991 Act also overruled Patterson v. McLean Credit Union. In that case, the Supreme Court severely restricted the scope of section 1981 by holding

provide adequate protection to victims of discrimination.
30. Id. at 432.
31. Id.
32. Id.
34. Id. at 659.
that the statute only protected victims of discrimination in the formation of contracts, not in the enforcement of contracts. That prior to the 1991 Act amendments, section 1981 provided, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens ..." The Supreme Court's cramped interpretation of the scope of section 1981 was not warranted by the explicit language of section 1981, its legislative history, or precedent. The decision severely restricted redress for victims of employment discrimination since Title VII actions only apply to employers with more than fifteen employees. In addition, at the time Patterson was handed down, Title VII did not provide for jury trials or for compensatory and punitive damages as section 1981 did.

The CRA restored the law to its state prior to Patterson through section 101(2)(b). It explicitly reinstated meaning to section 1981 by defining "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." Section 101(2)(b) restores a cause of action under section 1981 to employees who suffer harassment, are denied promotions, or are terminated on the basis of race.

C. Mixed Motive Cases: Price Waterhouse v. Hopkins

The CRA also reversed the holding in Price Waterhouse v. Hopkins. In Price Waterhouse, the plaintiff sued her employer accounting firm for denying her a promotion on the basis of her sex. Although she had brought in more business than any of the eighty-seven men considered for partner, she was passed over for partnership consideration. Her superiors told her that her professional problems would be solved if she dressed and acted more femininely. The Supreme Court held that the employer could avoid liability altogether if the employer demonstrated that it would have taken the same action absent the motivating

37. Id. at 185.
42. Id.
43. 490 U.S. 228 (1989).
44. Id. at 231-32.
45. Id.
46. Id. at 235.
discriminatory factor. Section 107 reversed *Price Waterhouse* and provides victims of employment discrimination compensation where they can show that discrimination was a motivating factor even if the employment decision complained of would have occurred absent the motivating factor.

**D. Seniority Systems: *Lorance v. AT&T Technologies***

The CRA also reversed *Lorance v. AT&T Technologies*. In *Lorance*, three plaintiffs premised their Title VII action on the theory that seniority systems disparately impacted women and that layoffs under the system constituted unlawful discrimination. In 1982, the plaintiffs were adversely affected for the first time by a seniority system that was implemented in 1979. The Supreme Court held that the statute of limitations commenced on the date the allegedly discriminatory seniority system was adopted and thus dismissed the suit as untimely. *Lorance* barred any discrimination suits based on seniority systems implemented before Title VII was enacted. After *Lorance*, challenges to discriminatory seniority systems could only be brought immediately after the systems were adopted, although many employees would not suffer discrimination and thus gain standing until years after the systems went into effect.

Section 112 restores civil rights protections to victims of discriminatory seniority systems by expanding the statute of limitations period. It provides that the statute of limitations period commences when (1) the seniority system is adopted; (2) when an individual becomes subject to the seniority system; or (3) when a person aggrieved is injured by the application of the seniority system or a provision of the system.

**E. Expert Fees: *West Virginia University Hospital, Inc. v. Casey***

The CRA also undid the Supreme Court’s restrictive interpretation of attorneys fees in *West Virginia University Hospital, Inc. v. Casey*. In that case, the Supreme Court held that fees for services rendered by experts in civil rights litigation may not be shifted to the losing party as part of reasonable attorneys’ fees. In dissent, Justice Marshall said that at issue was more than how much plaintiff’s attorneys should get; at issue was the full and vigorous commitment that the promises of our country will be available to all regardless of sex or race. In the CRA, Congress adopted Justice Marshall’s position. Section 113

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47. *Id.* at 258. In hearings on the need to enact the CRA, Judith Lichtman, President of the Women's Legal Defense Fund, said that *Price Waterhouse* sent a "message that a little overt sexism or racism is okay, as long as it was not the only basis for the employer’s action." H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 47 (1991), reprinted in, 1991 U.S.C.C.A.N. 549, 585.

48. Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76 (1991). Damages are limited to remedying employment practices directly linked to discrimination; thus, where the employer shows that it would have taken the same action regardless of the motivating factor, the plaintiff will not be reinstated, hired, promoted, or awarded back-pay. *Id.*


50. *Id.* at 903.

51. *Id.* at 902.

52. *Id.* at 911.


55. *Id.* at 1148.

56. *Id.* at 1149 (Marshall, J., dissenting) (quoting *Hidle v. Geneva County Bd. of Educ.*, 681 F. Supp. 752, 758-59 (M.D. Ala. 1988)).
of the 1991 Act provides that expert fees may be included as part of attorneys' fees under section 1988 and Title VII.\footnote{57}

\section{Extraterritorial Reach: \textit{EEOC v. Arabian American Oil Co.}}

The CRA also overruled \textit{EEOC v. Arabian American Oil Co.}\footnote{58} by providing for extraterritorial application of Title VII to United States employers who employ U.S. citizens abroad. In that case, Chief Justice Rehnquist ignored the EEOC's stated intention that Title VII apply to discrimination against American citizens outside the United States because that position was not expressly reflected until twenty-four years after Title VII was passed.\footnote{59} Section 109 of the CRA renders the \textit{Arabian American Oil Co.} decision meaningless by restoring broader protections to American citizens working for American employers wherever located.\footnote{60}

\section{Consent Decrees: \textit{Martin v. Wilks}}

Prior to \textit{Martin v. Wilks},\footnote{61} most federal appellate courts precluded all challenges to Title VII consent decrees once courts had entered them.\footnote{62} These courts stressed that the effectiveness of decrees to settle claims early in the litigation process would be eliminated if the decrees were subject to repeated challenges. Additionally, these courts emphasized the importance of decrees in providing relief to victims of systematic employment discrimination. In \textit{Wilks}, the Supreme Court ended the restrictive rule followed by most federal courts and opened the floodgates to perpetual challenge by allowing nonlitigants unlimited challenges to decrees no matter how long after the decree they filed their objections.\footnote{63}

The \textit{Wilks} rule removed all incentives for employers to enter consent decrees since every time the employer hired or promoted an individual under the decree, the employer might be subject to suit.\footnote{64} Through section 108, Congress struck a balance between the overly restrictive rule preventing consent decree challenges prior to \textit{Wilks} and the overly broad rule enunciated in \textit{Wilks} itself.\footnote{65} It precludes those who had actual notice of the decree and its potential effects and had the opportunity to object to the decree from challenging it later. Section 108 also bars challenges to a consent decree when the court determines that the interests of the challenger were adequately represented by another person or where the court determines that reasonable efforts to notify interested parties of the decree were made.

\begin{footnotes}
\item[58] 111 S. Ct. 1227 (1991).
\item[59] Id. at 1233-36.
\item[61] 490 U.S. 755 (1989).
\item[62] Id. at 762 n.3 (citing cases). The Court admitted that a "great majority of the Federal Courts of Appeals" barred persons who were aware that a lawsuit might affect their interests but failed to intervene in a timely fashion to challenge the decree from filing a separate lawsuit challenging the decree. Id. at 762. \textit{See also} H.R. REP. No. 40, 2d Cong., 1st Sess., pt. 1, at 49 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 587 (citing federal cases precluding all challenges to Title VII consent decrees).
\item[63] 490 U.S. at 769.
\end{footnotes}
II. THE DEBATE OVER RETROACTIVE APPLICATION OF THE CIVIL RIGHTS ACT OF 1991

Although Congress sought to reverse restrictive Supreme Court decisions through passage of the 1991 Act, many courts are still relying on those now obsolete decisions when presented with cases that were pending when the 1991 Act was signed into law or even to cases filed after November 21, 1991 where the discriminatory conduct occurred prior to the passage of the 1991 Act. The debate over retroactivity centers on three sources of authority: the 1991 Act itself, its legislative history, and Supreme Court precedent on statutory construction. None of these sources gives a clear answer to the retroactivity questions confronting courts today. The 1991 Act does not state whether it applies retroactively. The legislative history reveals that Congress failed to agree on whether the 1991 Act applied prospectively only or retroactively. Further, Supreme Court precedent on statutory construction is conflicting. Thus, the lack of consensus among federal courts over whether the 1991 Act applies retroactively stems from the ambiguous sources of authority upon which courts must rely to decide the issue.

A. The 1991 Act

The bitter bipartisan debate over whether the 1991 Act applied retroactively to cases arising or pending before President Bush signed the CRA into effect on November 21, 1991, is reflected in the ambiguity now embodied in the 1991 Act itself. Several sections of the 1991 Act specifically address the issue of retroactivity. To those familiar with the quagmire of statutory interpretation, it should come as no surprise that these sections conflict. Section 102(d)(1)(A) suggests the 1991 Act applies prospectively; it defines a complaining party as a “person seeking to bring an action or a person who may bring an action.” Section 402(b), on the other hand, suggests the 1991 Act applies retroactively. It exempts the parties in Wards Cove from the CRA. Many proponents of

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66. See supra notes 21 to 24.
67. See infra Part II-A.
68. See infra Part II-B.
69. See infra Part II-C.
72. Section 402(b), 105 Stat. at 1099 provides that “nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.” Id. Congress designed the provision to apply only to the parties in the Wards Cove case. Senator Simon explained, “[section 402(b)] was intended to craft a special rule of law protecting the defendant in [Wards Cove] from the application of the parts of the bill overruling WARD COVE [sic] decision. These amendments express a clear purpose to deny retroactive application in the circumstances set forth.” 137 CONG. REC. H9530 (daily ed. Oct. 29, 1991).
retroactivity argue that since Congress explicitly legislated against applying the CRA retroactively to cover the parties in the *Wards Cove* case, the rest of the 1991 Act must apply retrospectively by necessary implication. Opponents argue that section 402(b) would be meaningless and redundant if the rest of the 1991 Act did not apply retroactively. In fact, Senator Murkowski, who drafted the section, believed the amendment was necessary to prevent the general rule of retroactive application. Similarly, section 109(c) provides: "The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act." Nothing in the 1991 Act helps reconcile sections implying that the 1991 Act applied retroactively with sections implying that the 1991 Act applied prospectively. No provision of the 1991 Act provides a clear statement of congressional intent. Even section 402(a), which provides that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment," is equivocal. It leaves unresolved the question of whether the 1991 Act applies to pending cases or discriminatory conduct occurring before the 1991 Act became law.

B. Legislative History

Members of Congress debated fiercely over whether the 1991 Act should apply retroactively. Generally, Democrats favored retroactive application, while Republicans and President Bush favored prospective application only. When the issue of retroactivity was debated, the controversy centered on the reversal of the restrictive Supreme Court decisions. As a result, Congress originally passed a version of the CRA which provided that provisions reversing unfavorable Supreme Court decisions would relate back to the date the unfavorable Supreme Court decisions were handed down. Some courts have characterized this original provision as a *super-retroactivity* provision since it would have reopened cases in which judgment had been entered prior to passage of the CRA. President Bush...
vetoed the proposed Act and the Senate fell one vote short of overriding it. Proposals for prospective-only application of the Act also failed to muster enough support to become part of the 1991 Act.

Most congressional debate focused on whether cases that had already been adjudicated could be reopened under the new Act. Opponents argued that retroactive application would violate the principle of res judicata that the same issue should not be relitigated. They also argued that providing for retroactive application would allow cases decided under the reversed Supreme Court decisions to be retried. Such a result, opponents argued, would not only be an onerous, if not impossible, burden on the courts, but would also jeopardize the integrity of the judiciary and undermine respect for the law.

Although opponents of retroactive application argued that it threatened judicial integrity, proponents doubted the Supreme Court had any integrity left to protect in the area of civil rights. Proponents believed that the Supreme Court had already abdicated its role in enforcing the civil rights statutes, had drastically cut back on the effectiveness of civil rights protections, and had left victims of unlawful discrimination without compensation. Proponents stressed that they were not seeking to implement new legislation, but only to restore the original meaning to the civil rights statutes. They asserted that applying the CRA retroactively - at least in cases where the 1991 Act restores rights sacrificed by restrictive Supreme Court decisions - is fair because the 1991 Act merely returns the law to its position at the time the discriminatory conduct occurred.

82. S. Doc. No. 101-35, 101st Cong., 2d Sess. 2 (1990). President Bush explained the veto, in part, as follows: "The Bill also contains a number of provisions that will create unnecessary and inappropriate incentives for litigation. These include unfair retroactivity rules . . . ." Id.
85. See supra note 27.
89. See, e.g., 136 CONG. REC. S9348 (daily ed. July 10, 1990) Sen. Simon said: [I]n this entire area of civil rights for individuals, the American public has looked to the courts for leadership. The U.S. Supreme Court in 1954 and succeeding years led and Congress has come along. We passed the Civil Rights Act in the early sixties. But fundamentally it has been the courts that have provided the basic protection for our people. And now we have a very different situation where it is clear the courts are not going to provide that basic protection. It is going to have to be the Congress that provides that basic protection.
Id.
In the end, Congress stalemated over the issue of retroactivity, leaving the 1991 Act without a clear rule, but still riddled with innuendos and implications. For many members of Congress, the CRA's ambiguity became a kind of mirror, reflecting whatever scope of applicability its viewer projected upon it. Even in its final form, senators and representatives offered conflicting views over when the CRA applied. Some members of Congress agreed at least that the final compromise version of the 1991 Act left the issue to the courts to decide. For example, Senator Kennedy, one of the leading proponents for retroactive application, conceded: "It will be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment." As should be expected, Congress members' views on how the courts should rule on the issue contrasted sharply. Senator Kennedy predicted that federal courts would apply the CRA retroactively as they had applied the Civil Rights Restoration Act of 1988, under the rule that when new laws restore prior laws, the new laws apply retrospectively. Senator Kennedy also claimed that courts would apply the 1991 Act retroactively under the presumption in favor of retroactivity set forth by the Supreme Court's holding in Bradley v. Richmond School Board. Senator Danforth, on the other hand, claimed that courts would apply the 1991 Act prospectively under the presumption in favor of prospective rulemaking set forth by the Supreme Court's contrary holding in Bowen v. Georgetown University Hospital.

C. Supreme Court Precedent

Senator Kennedy's and Senator Danforth's conflicting views over whether the Bradley presumption in favor of retroactivity or the Bowen presumption

The application of this bill to pending cases is eminently fair. Much of the conduct of employers and other respondents at issue in pending cases was committed before the Supreme Court radically altered the legal landscape, at a time when the defendants were on notice that the law applied to their conduct and they could be held accountable for their misdeeds. Our restoration of the law to these pending cases will often mean that the parties will be governed by the law they all understood to exist at the time the actions in question were taken. To fail to apply the law retroactively in these situations would give the respondents an undeserved windfall from the intervening Supreme Court errors.

Id. See supra discussion in Part II-A.

91. See supra discussion in Part II-A.
98. 137 CONG. REC. S15,472-78 (Sen. Danforth, quoting, Bowen, 488 U.S. 204 (1988)).
against it controlled the application of the 1991 Act predicted the courts' current confusion. The *Bradley* and *Bowen* decisions cannot be harmonized. Their turbulent relationship continues to wreak havoc on federal courts wrestling with the retroactivity issue. Federal courts' reliance on the two conflicting and irreconcilable Supreme Court decisions largely explains the diverging decisions on the issue. In *Bradley*, Justice Blackmun held that courts should favor retroactive application of federal statutes "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."99 Twenty-four years later, however, in *Bowen*, Justice Kennedy said in dictum that "[r]etroactivity is not favored in the law" and stressed that "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." 100 Oddly, *Bowen* makes no reference to *Bradley*. Six years later, in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*,101 the Court recognized the tension between *Bradley* and *Bowen*, but did not settle the issue in *Bonjorno* because clear evidence of congressional intent existed in that case.102

1. *Bradley v. Richmond School Board*

In *Bradley*, the issue before the Court was whether plaintiffs could be properly awarded attorneys' fees under section 718 of Title VII,103 although that statute was not enacted until the suit was already pending.104 Plaintiffs asked the court for attorneys' fees for services rendered in desegregation litigation occurring from March 1970 to January 1971, even though the Education Amendments providing for reasonable attorneys' fees in school desegregation cases did not go into effect until 1972.105 Justice Blackmun, writing for the majority, 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 statutory direction or legislative history to the contrary exists.106 Justice Blackmun made it clear that the Court was stating a general rule favoring retroactive application and that its decision did not depend on legislative intent. He stated, "we must reject the contention that a change in law is only given effect in a pending case where that is the clear and stated intention of the legislature."107

More importantly, the Court detailed the origin and justification for the rule.108 Justice Blackmun analyzed Chief Justice Marshall's ruling in the early case of *United States v. Schooner Peggy*.109 In that case, Chief Justice Marshall held that on appeal, courts must adhere to the law in effect at the time, even if

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100. *Bowen*, 488 U.S. at 208.


102. Id. at 838.


105. Id. at 710.

106. Id.

107. Id. at 715.

108. Id. at 711-21.

109. 5 U.S. (1 Cranch) 103 (1801). The court of appeals had held that a French vessel seized on the high seas was properly condemned, and, thus, forfeitable to the United States. While the case was pending, the United States entered a treaty with France in which all property captured but not "definitely condemned" be returned to France. Id. at 104-07.
the law changed from the rule governing in the judgment below. Although Marshall cautioned against infringing on individual rights through retroactive application, he recommended that in cases of great national concern, the law in effect at the time of the appeal should control:

It is the general rule that the province of the appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns the court must decide according to existing laws.

It is hard to imagine a concern more national in its scope than the promise that the rights guaranteed in our Constitution will be protected equally among all Americans. Civil rights legislation falls directly within the sphere of national issues which Chief Justice Marshall said merited retroactive application.

After Chief Justice Marshall's opinion in Schooner, the question remained, however, whether courts were required to apply statutes retroactively or whether that was merely an option. Justice Blackmun stated that the issue was resolved in Thorpe v. Housing Authority. Thorpe stands for the proposition that, although an intervening law does not explicitly state that it applies to pending cases, it must be given recognition and effect unless doing so would cause "manifest injustice." In Bradley, Justice Blackmun set out a three-factor test to determine whether retroactive application would cause "manifest injustice." The factors are: (1) the nature and identity of the parties; (2) the nature of their rights; and (3) the nature of the impact of the change in law upon those rights. Under the first factor, Justice Blackmun found that awarding attorneys' fees retroactively would cause no injustice since the suit was not a "mere private suit between individuals."

110. Bradley, 416 U.S. at 711-12 (quoting, Schooner, 5 U.S. (1 Cranch) at 110).
111. Id.
112. See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 444 n.4 (1983) (noting that Congress granted prevailing civil rights plaintiffs the right to collect attorneys' fees because "the public as a whole has an interest in the vindication of the rights conferred by the [civil rights] statutes. . . . over and above the value of a civil rights remedy to a particular plaintiff"); Newman v. Piggie Park Enter., 390 U.S. 400, 417 (1968) (stating Congress intended civil rights plaintiffs to play role of a "private attorney general"); S. Rep. No. 1101, 94th Cong., 2d Sess. 2-6 (1976), reprinted in Civil Rights Attorneys Fees Awards Act of 1976, 94th Cong., 2d Sess., SOURCEBOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS at 200 (1976) (noting Congress' belief that civil rights plaintiffs act as "private attorneys generals"). But see Baynes v. AT&T Technologies, Inc., 976 F.2d 1370, 1374 (11th Cir. 1992) (per curiam) ("given the private nature of parties in most employment discrimination cases, when viewed one by one, are not 'great national concerns' under Bradley").
113. Thorpe v. Housing Auth., 393 U.S. 268 (1969), (cited in Bradley, 416 U.S. at 714 (Blackmun, J.)). In Thorpe, a tenant who had been evicted for starting a tenant's association brought suit challenging a violation of her First Amendment rights. While the suit was pending, the Department of Housing and Urban Development issued new procedural regulations governing eviction proceedings. The regulations did not state whether they applied retroactively to pending cases, but the Supreme Court held that they did. Id. at 270-73, 283.
114. Id. at 282 (cited in Bradley, 416 U.S. at 715 (Blackmun, J.)).
School desegregation was a "great national concern." Under the second element, the Court found that retroactive application would cause no injustice since the school board had no matured rights to the taxpayers' funds. Finally, under the third element, the Court found that awarding fees did not cause injustice since it did not alter existing rights. The Court might have awarded attorneys' fees under the common law anyway.

2. **Bowen v. Georgetown University Hospital**

The Supreme Court changed course 180 degrees in Bowen, where Justice Kennedy, writing for a unanimous court, said that courts should not apply statutes retroactively unless their language requires that result. The issue in Bowen was whether an administrative rule setting cost-reimbursement guidelines for recouping federal funds paid to hospitals under the Medicare program could be applied retroactively. The rule at issue was not a congressional statute but an administrative regulation promulgated by the Secretary of Health and Human Services. Although the Secretary intended the rule to apply retroactively, the Supreme Court focused on whether Congress had explicitly delegated retroactive rulemaking power to the Secretary, and held that it did not. Despite the narrow facts presented in Bowen, Justice Kennedy stated the Court's opposition to retroactivity broadly. He insisted, "Retroactivity is not favored in the law," and warned, "Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant."

In his concurrence in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, Justice Scalia alleged that the Thorpe-Bradley line of cases constituted an aberration of the well settled principle affirmed in Bowen that congressional enactments apply prospectively unless their language dictates a contrary result. Justice Scalia claimed that the Bradley line of cases was wrong, and should be overruled. The rest of the Court, however, has not agreed with Justice Scalia; thus, Bradley, although seemingly irreconcilable with Bowen, remains good law.

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116. *Id* at 718-19.
117. *Id* at 720. Justice Blackmun explained that the second element of the Bradley fairness test "relates to the nature of the rights affected by the change." *Id*.
118. *Id* at 720-21. Justice Blackmun explained that the third element measures the effect applying the new act would have on prior rights and expectations of the parties. It requires that applying the new law would comport with fundamental notions of fairness and due process. Blackmun elaborated, "The third concern has to do with the nature of the impact of the change in law upon existing rights, or, to state it another way, stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." *Id* at 720.
120. *Id* at 204-05.
121. *Id* at 206.
122. *Id* at 210. The Secretary also argued that retroactive application of a law is proper, regardless of congressional intent, when the law cures judicial invalidation of a prior law. The Court never reached the issue. *Id* at 207; see also infra note 96.
123. *Id* at 208-09.
125. *Id*.
126. *Id* at 827 (majority recognized "apparent tension" between Bradley and Bowen but did not resolve issue) *Id* at 866 (White, J., dissenting with Brennan, Marshall, and Blackmun) (arguing that Bradley "is a rule that we have applied with consistency"); Rodriguez Quijas v. Shearson/Am. Express, 490 U.S. 477, 484 (1989) (not for court of appeals to decide when Supreme Court decision constructively overrules another decision).
In deciding whether the CRA applies retroactively, federal courts have grappled with the conflict between *Bradley* and *Bowen*. Some have tried to reconcile the two; some have preferred one case to the other; while some have avoided reliance on the cases altogether. Whatever the approach, one conclusion is clear: the conflict between the irreconcilable holdings has left federal courts rudderless, tossed about on a sea of confusion over when the CRA governs.

### III. FEDERAL COURT RULINGS ON THE RETROACTIVITY RIDDLE

#### A. Overview

To date, seven federal courts of appeals have ruled on the issue of whether the CRA applies retroactively. These decisions, as well as the voluminous decisions of the federal district courts, can be grouped into roughly five categories of legal reasoning. First, a few courts have grounded their rulings on the facial language of the 1991 Act itself. Since the 1991 Act is ambiguous, it is not surprising that courts basing their decisions on the plain language of the 1991 Act itself have split over whether the 1991 Act applies retroactively. Second, some courts have reasoned that the legislative history is dispositive of Congress' intent and have premised their holdings on this basis. While purporting to rely on the same legislative history, however, courts have disagreed over whether the 1991 Act applies retroactively. Most courts have agreed, at least, that congressional intent is unclear and legislative history inconclusive. As a result, most courts have followed a third line of analysis, basing their holdings on the *substantive versus procedural rights* analysis. These courts hold

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129. *E.g.*, Davis *v.* City & County of San Francisco, 976 F.2d 1536, 1551 (9th Cir. 1992) (deciding retroactivity issue under explicit language of 1991 Act).

130. *See supra* note 17.

131. *See supra* notes 15-16.

132. *E.g.*, Davis, 976 F.2d at 1551.


135. *E.g.*, Fray, 960 F.2d at 1377 (legislative history mandates Act apply prospectively); *Stender*, 780 F. Supp. at 1302 (legislative history mandates Act apply retroactively).


137. To date, four circuits have premised their holdings on the *substantive/procedural rights* analysis. Gersman *v.* Group Health Ass'n, Inc., 975 F.2d 886 (D.C. Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3446 (U.S. Nov. 10, 1992) (No. 92-980); Johnson *v.* Uncle Ben's, Inc., 965 F.2d
that the Bowen presumption against retroactivity applies to all laws affecting substantive rights whereas the Bradley presumption in favor of retroactivity applies to all laws affecting procedural or remedial rights. Both cases now before the Supreme Court, Landgraf v. USI Film Products and Rivers v. Roadway Express, Inc., were decided under the substantive/procedural rights analysis.

Although this analysis is more intellectually sound than solely relying on the ambiguous 1991 Act or contradictory legislative history, it has proven no more useful. Even under the substantive/procedural rights analysis, courts have offered diverging views. Faced with the exact same provisions of the Act, courts have classified amendments oppositely; some label the provisions procedural, while other courts label the same provisions substantive. The substantive/procedural rights analysis has turned out to be unworkable since courts cannot agree what makes a right substantive.

Perhaps growing frustrated with the kaleidoscope of interpretations flowing from the substantive/procedural rights analysis, recently two federal appellate courts have adopted novel approaches to the problem. Although the Seventh Circuit had already ruled against retroactivity under the substantive/procedural analysis, the Seventh Circuit reconsidered the issue in Luddington v. Indiana Bell Telephone. In that case, discussed as the fourth approach, the Seventh Circuit ruled on policy grounds that although it is proper for judicial decisions to apply retroactively, it is inappropriate for the legislature to rule retroactively. The Eleventh Circuit is the most recent circuit to decide the issue.

B. Plain Language of the Act: Davis v. City & County of San Francisco

Some courts have held that sections 402(b) and 109(c), which provide for prospective application, imply that Congress intended the 1991 Act to apply retroactively to all other provisions, otherwise the language would be redundant.
These courts have relied on Supreme Court rulings that it is “an elementary canon of construction that a statute should be interpreted so as not to render one part inoperative”147 and that it is a “cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.”148

Under this analysis, the Ninth Circuit became the first circuit to hold in favor of retroactivity in Davis v. City & County of San Francisco,149 despite four previous appellate court decisions to the contrary.150 The issue presented was whether expert fees could be awarded as part of attorneys’ fees under the CRA or whether the Supreme Court’s decision in West Virginia Hospital, Inc. v. Casey,151 which the CRA overruled, applied. The court concluded that “the language of the Act reveals Congress’ clear intention that the majority of the Act’s provisions be applied to cases pending at the time of its passage.”152 Since section 402(b) and section 109(c) called for prospective-only application, the court inferred that Congress intended the rest of the 1991 Act to apply to cases pending at the time of enactment or to prior conduct not barred by the statute of limitations.153 The court relied on Supreme Court precedent ruling that in statutory construction, no sections should be construed to be inoperative or redundant.154 The court also supported its holding by citing to the Act’s findings and purposes sections which outline Congress’ intent to overrule recent decisions by the Supreme Court.155 The problem with the Ninth Circuit’s analysis is that it does not rebut arguments that other provisions of the 1991 Act imply that the 1991 Act applies prospectively only. Since many members of Congress agreed that the 1991 Act left the retroactivity issue unresolved and punted to the courts, it makes little sense to consider the Act’s cloudy language on the subject conclusive.156

C. Legislative History: Fray v. Omaha World Herald Co.

1. The Majority Opinion

Few courts have rooted their holdings in legislative history since congressional intent on the retroactivity issue is anything but clear.157 The Eighth Circuit,
however, became the only circuit to pin its analysis on congressional intent in *Fray v. Omaha World Herald Co.* In *Fray*, the Eighth Circuit considered whether section 101(2)(b) of the CRA, which overruled *Patterson*, applied retroactively to a suit pending on the date of enactment. In *Fray*, the plaintiff filed her action alleging race, sex, and retaliation discrimination under section 1981, Title VII, and state law. At the time Fray commenced her action, courts had consistently interpreted section 1981 to apply to discrimination at all stages of the contractual relationship, including discrimination in hiring, promotions, and termination. Shortly before the case went to trial, however, the Supreme Court decided *Patterson* and drastically limited the scope of section 1981. Based on the *Patterson* decision, the employer moved for partial summary judgment, arguing that *Patterson* foreclosed the claim. The district court denied the motion as untimely, and, at the end of the trial, the jury found that Fray’s employer had violated section 1981. Before Fray’s case was heard on appeal, the law governing the scope of section 1981 claims changed again. Congress restored the pre-*Patterson* interpretation of the scope of section 1981 claims through the CRA. On appeal, the employer argued that a section 1981 judgment must be reversed under *Patterson*, while Fray argued it should be upheld under the CRA.

The Eighth Circuit held that the CRA did not apply retroactively, reversing the lower court’s holding for the plaintiff. Unable to reconcile the *Bowen* and *Bradley* rules for statutory construction, the court grabbed hold of the baseline rule set forth in both opinions that “the courts must give effect to a clear congressional directive as to a statute’s retroactivity.” The court then glossed over the ambiguities of the Act’s muddled legislative history and argued that Congress’ intent to apply the bill prospectively only could be gleaned from one simple fact: President Bush had vetoed a bill providing for retroactive application and a compromise bill omitting these provisions had been enacted. The Eighth Circuit claimed this alone was dispositive.

2. Judge Heaney’s Scathing Dissent

In dissent, Judge Heaney attacked the majority for reducing the complex legislative history to the simple fact that retroactivity provisions were omitted. Judge Heaney reconciled *Bowen* and *Bradley* by finding the “common thread”

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158. 960 F.2d 1370 (8th Cir. 1992).
159. Id. at 1378.
160. Id. at 1372.
161. Id. at 1371-72, 1378; see supra note 39.
162. Fray, 960 F.2d at 1372, 1378.
163. Id. at 1372.
164. Id.
165. Id. at 1373-74.
166. Id. at 1373.
167. Id. at 1371.
168. Id. at 1378.
169. Id. at 1375.
170. Id. at 1375-77.
171. *Id.* at 1379-80 (omission of retroactivity provisions dispositive merely of Congress’ intent to leave retroactivity decision to courts) (Heaney, J., dissenting).
of an “overriding concern for fairness” running through each holding.\textsuperscript{172} He rejected the majority’s belief that the Court’s statement in Bowen, “‘[r]etroactivity is not favored in the law,’” stands for a broad general rule.\textsuperscript{173} Instead, he argued that Bowen only applied to cases where retroactive application would interfere with a party’s “‘justified expectations’ or vested rights.”\textsuperscript{174} Since Fray commenced her suit before Patterson was decided, Heaney reasoned that defendants had no expectations that it would apply; thus section 101(2)(b), which restored the pre-Patterson rule, should govern.\textsuperscript{175}

His analysis centered on the three-factor fairness test set out in Bradley.\textsuperscript{176} Under the first element, the identities of the parties, Heaney found that the case was not a mere private case between individuals but a civil rights dispute involving national concerns of paramount importance.\textsuperscript{177} Under the second element, the relevant rights of the parties, Heaney pointed out that Fray had the right to recover for discrimination at the time of her employment.\textsuperscript{178} Finally, and most importantly, Judge Heaney asserted that applying section 101(2)(b) retroactively did not impose any new or unexpected burdens on the employer.\textsuperscript{179} Fray based her civil rights suit on discriminatory conduct, all of which occurred before the Supreme Court decided Patterson. The employer constructively knew that his conduct might make him liable under section 1981.\textsuperscript{180} For these reasons, Heaney dissented from the majority and argued that the 1991 Act should apply retroactively.

Judge Heaney’s analysis under the Bradley three-factor fairness test better considers the rights and liabilities of each of the parties and the effects of retroactive application than the majority’s analysis. The majority resolved the complex issue of retroactivity by isolating a single moment from the Act’s lengthy and turbulent enactment history that was not representative of congressional intent. As a result of the majority’s fanciful interpretation of legislative history, the court exempted the employer from liability for discriminatory conduct that was illegal when the employer acted and illegal when the lawsuit was filed. Though the employer discriminated and the suit was brought before Patterson was decided, and the CRA restored the pre-Patterson interpretation of section 1981, the majority still decided the case under the intervening Patterson decision. It avoided judicial responsibility for its unjust decision by pinning the blame on a fictitious congressional directive. Although many lower federal courts have reached similar conclusions, few have followed the Fray analysis.

\textsuperscript{172} Id. at 1381.
\textsuperscript{173} Id. (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)).
\textsuperscript{175} Id. at 1381-82.
\textsuperscript{177} Id. at 1381 (citing Bradley, 416 U.S. at 718-19 (1974); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801)).
\textsuperscript{178} Id.
\textsuperscript{179} Id. at 1381-82.
\textsuperscript{180} Id.
D. Substantive/Procedural Rights Analysis

Most courts rely on the *substantive versus procedural rights* analysis to resolve the issue. These courts argue that the *Bowen* presumption of prospective application applies whenever substantive rights are at issue and the *Bradley* rule in favor of retroactive application is limited to statutes affecting procedural or remedial rights. Interestingly, many courts have found a way to squeeze every provision of the 1991 Act into the "substantive" rights category - including the right to a jury trial, thus denying retroactive application under the *Bowen* presumption. The Seventh Circuit's cramped interpretation of what constitutes a "procedural" provision implicating the *Bradley* presumption in favor of retroactivity illustrates just how far some courts have gone. In Mozee v. American Commercial Marine Service Co., the Seventh Circuit asserted that "on appeal, Bradley, at the most, applies when evaluating damage provisions that do not affect substantive rights, and arguably applies only to attorney fee provisions." As the Mozee decision illustrates, although the courts are purporting to reconcile the *Bowen* and *Bradley* decisions, they are often pushing the *Bradley* rule into oblivion.

The Supreme Court may hinge its determination of the retroactivity issue on the substantive/procedural rights analysis. However flawed the substantive/procedural rights analysis, it has allowed courts to reconcile the conflicting *Bowen* and *Bradley* decisions. The Court may prefer to account for the "apparent tension" between the two cases, rather than overruling *Bradley*. The fact that the Court granted certiorari to two cases - one involving "procedural" amendments, the other involving "substantive" amendments suggests that the Court may adopt the substantive/procedural rights analysis.

1. Substantive/Procedural Rights Analysis Often Abused.

The substantive/procedural rights analysis works to reconcile *Bradley* with *Bowen* when courts treat only those laws altering vested or matured rights as laws affecting "substantive" rights. A broader definition of "substantive" rights is unfaithful to *Bradley*. The Supreme Court stated its holding in favor of retroactivity broadly in *Bradley*, drawing on a history of Supreme Court decisions favoring retroactivity. Courts subscribing to the substantive/procedural rights

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182. Id. at 938.
183. Bonjorno, 494 U.S. at 827.
185. Id. Bradley, 416 U.S. at 710-11 (citing United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801)); 416 U.S. at 714 (citing Thorpe v. Housing Auth. of Durham, 393 U.S. 268 (1969)); id. at 714 n.17 (citing United States v. Alabama, 362 U.S. 602 (1960) (holding that Civil Rights Act of 1960 passed while case was pending appeal applied); Ziffrin, Inc. v. United States, 318 U.S. 73 (1943) (holding that amendment to Interstate Commerce Act applied on appeal); Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941) (holding that in diversity suit federal appellate court must apply intervening state supreme court decision decided after lower federal trial court decision); Carpenter v. Wabash R.R. Co., 309 U.S. 23 (1940) (holding amendment to Bankruptcy Act applied to pending cases); United States v. Chambers, 291 U.S. 217 (1934) (dismissing pending prosecutions brought pursuant to National Prohibition Act after ratification of Twenty-first Amendment)).
analysis have often erroneously relied upon the Supreme Court’s ruling in *Bennett v. New Jersey*\(^\text{186}\) to grossly expand the meaning of “substantive” rights. In that case, decided one year before *Bowen*, the Court was presented with the narrow issue of whether 1978 amendments to Title I of the Elementary and Secondary Education Act applied retroactively to determine whether Title I Funds were misused during 1970 to 1971.\(^\text{187}\) In ruling against retroactively applying changes in the federal grant program, the Court stressed that doing so would deny both federal auditors and grant recipients fixed, predictable standards for determining if expenditures were proper.\(^\text{188}\) Applying the amendments retroactively would have upset the parties’ reliance on the prior grant schedule. The majority said that the *Bradley* presumption in favor of retroactivity did not apply since *Bradley* expressly prohibited the presumption where doing so “would infringe upon or deprive a person of a right that had matured or become unconditional.”\(^\text{189}\) The Court explained that the *Bradley* rule comported with the general rule that “statutes affecting substantive rights and liabilities are presumed to have only prospective effect.”\(^\text{190}\)

Although *Bennett* merely restated the second and third factors of the *Bradley* fairness test, courts have relied on this decision to chart out new, unprecedented courses. Under the current analysis, courts are classifying amendments as “substantive” without reference to the law’s effect on the parties involved. Courts are rejecting the *Bradley* presumption without first considering the three elements of the *Bradley* fairness test.

The current substantive/procedural rights analysis is untrue to the evolution of the general rule against retroactivity.\(^\text{191}\) As American jurisprudence developed


\(^{187}\) *Bennett*, 470 U.S. at 633-34.

\(^{188}\) *Id.* at 640.

\(^{189}\) *Id.* at 639 (quoting *Bradley*, 416 U.S. at 720 (citing Greene v. United States, 376 U.S. 149, 160 (1964); Claridge Apartments Co. v. Comm’r, 323 U.S. 141, 164 (1944); Union Pac. R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913)); see Gersman v. Group Health Ass’n Inc., 975 F.2d 886, 904 n.3 (D.C. Cir. 1992) (noting that *Bennett* merely restated the *Bradley* presumption that a court should not apply an intervening change to a pending action where it would deprive persons of matured or unconditional rights; arguing that courts should not rely on the *Bennett* rule unless the statute being interpreted alters rights upon which the parties actually relied) (Wald, J. dissenting); Bridges v. Eastman Kodak Co., 800 F. Supp. 1172, 1177 (S.D.N.Y. 1992) (“*Bennett* is in accord with the traditional approach to retroactivity taken by American courts, which historically applied a presumption of nonretroactivity only to statutes that affected vested rights.”); Petitti v. New England Tel. & Tel. Co., No. 85-3951, 1992 U.S. Dist. LEXIS 18112, at *16 (D. Mass. Nov. 16, 1992) (arguing substantive standards of conduct test set out in *Bennett* matches concerns underlying second and third prongs of *Bradley* manifest injustice test).

\(^{190}\) *Id.* at 639 (citing United States v. Security Indus. Bank, 459 U.S. 70, 79 (1982); Greene v. United States, 376 U.S. 149, 160 (1964)). The *Bradley* decision advocated a discretionary rule which analyzed the nature of the rights and parties involved to determine whether retroactive application would be fair. Where rights had ripened so that the parties expected to benefit from them, the Court warned that new laws which disturbed those “vested rights” should not apply. In *Bennett*, the Court redefined the second and third elements of the *Bradley* fairness test as the rule that “substantive” rights do not apply retroactively. *Id.*

\(^{191}\) In the mid-nineteenth century, Great Britain distinguished between statutes changing standards
in the early twentieth century, courts limited the rule against retroactive application. Courts applied the rule selectively to invalidate retroactive laws which impaired vested rights. Justice Story, who criticized retroactive laws, defined them narrowly to mean those laws disturbing vested rights or adding new unexpected liabilities or duties. Where retroactive laws impaired vested rights, courts generally reasoned that the laws were contrary to justice and violated the social compact. On the other hand, where retroactive laws did not impair matured rights, many courts declared these retroactive laws necessary and desirable under Story's definition. Similarly, in the nineteenth century, Chancellor Kent explained that his objection to applying statutes retroactively "is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy ... adding to the means of enforcing existing obligations." Kent asserted that laws that go towards enforcing existing laws, remedial laws as he called them, may apply retrospectively.

The manner in which federal courts have denied plaintiffs the benefit of the CRA on grounds that the CRA alters "substantive rights" perverts the original rule that laws infringing on vested or unconditional rights of persons cannot apply retroactively. The expansion of the rule replaces its original justice and fairness concerns with a robotic and expedient formula. The current analysis contrasts sharply with Bennett, where the Court refused to apply the new grant schedule retroactively to avoid disrupting the expectations of the parties involved. Under the expanded rule, courts are no longer considering whether parties involved relied on rules which the law altered or cherished rights which the law changed. The formulaic test sacrifices fairness for efficiency.
2. Substantive Rights: Ignoring Reliance Interests

Many courts have applied the substantive/procedural rights analysis blindly. Some courts have characterized the CRA amendments as affecting “substantive” rights without ever considering whether the CRA changed the law that existed when the parties acted. Once the classification is made, the presumption applies and fairness considerations are often overlooked. For example, in one of the two cases now before the Supreme Court on the issue, Rivers v. Roadway Express, Inc., the Sixth Circuit labeled section 101(2)(b), which reversed Patterson, as a provision affecting “substantive” rights, and thus denied plaintiffs access to the CRA.199

In Roadway Express, African-American employees sued their employer for retaliatory discharge under section 1981.200 The employer fired the plaintiffs in 1986 after they successfully pursued grievances against the employer for subjecting them to racially discriminatory disciplinary proceedings.201 In 1987, the employees filed their complaints alleging violations under section 1981.202 Two years later, shortly before the case was scheduled to go to trial, the Supreme Court decided Patterson which drastically cut back on the scope of section 1981.203 The Supreme Court’s cramped interpretation of section 1981 limited the Reconstructionist Congress’ guarantee that newly freed blacks would have the same right to “make and enforce contracts” as white workers enjoyed. Under the Supreme Court’s novel interpretation of the statute in Patterson, section 1981 only applied to discrimination in the formation of contracts, not in post-formation contractual discrimination. Thus, the district court dismissed plaintiff-employees’ claims against the allegedly discriminatory employer on the basis that Patterson barred the claims.

In doing so, the district court applied Patterson retroactively. The conduct at issue took place three years prior to the Patterson decision. There is absolutely no possibility that Patterson guided the employees’ or the employer’s actions, yet the Sixth Circuit opined that applying the decision retroactively would not produce “substantial inequitable results” or “unduly prejudice the plaintiff.”204 The Sixth Circuit denied retroactive application of section 101(2)(b) which restored the pre-Patterson law on the basis that amendments affecting “substantive rights and liabilities” should not be applied retroactively.205 How restoring the law

[under substantive/procedural rights analysis] foists a legal regime on the parties that they could not have ‘known,’ much less relied upon, when they acted.”) (Wald, J., dissenting); Johnson v. Uncle Ben’s Inc., 965 F.2d 1363, 1372 (5th Cir. 1992) (“We recognize the apparent anomaly that, at the time of [defendant’s] conduct, Patterson had not yet been decided and, under the decisions of many lower courts, § 1981 applied to racial discrimination in promotions.”); Hill v. New York City Bd. of Educ., No. CV-87-3008, 1992 U.S. Dist. LEXIS 17330, at *67 (E.D.N.Y. Nov. 12, 1992) (“[D]ifferentiating between pre- and post-Patterson conduct would sacrifice the finality and stability that Supreme Court cases and statutes bring - or should bring - to the law.”).  
200. Id. at 492.  
201. Id.  
202. Id.  
203. Id.  
204. Id. at 493.  
205. Id. at 497.
which existed when the conduct at issue took place affects "substantive" rights of the parties is entirely unclear. The Sixth Circuit offers no explanation of what "substantive rights and liabilities" of the specific parties the provision affected; instead, it merely quotes the Sixth Circuit's equally flawed opinion on the issue in *Vogel v. City of Cincinnati.*

The Sixth Circuit also rooted its opinion in the Eighth Circuit's decision in *Fray,* discussed above, though it admitted that the legislative history is ambiguous.

In *Vogel v. City of Cincinnati,* the Sixth Circuit also failed to analyze how the CRA affected the rights and liabilities of the parties before the court. Without examining the effect of section 108, the section at issue, on the parties involved, the court held that section 108 did not apply retroactively to conduct occurring before its enactment. In *Vogel,* a white male challenged the affirmative action policy of the Cincinnati Police pursuant to a consent decree. The City entered the consent decree to settle an action brought by the Department of Justice charging it with engaging in hiring and promotion practices which discriminated against African-Americans and women.

The Sixth Circuit based its holding on the *Bowen* rule against retroactive application. The court eliminated the conflicting authority of *Bradley* by narrowly construing it; the court ruled *Bradley* should not apply where ""substantive rights and liabilities," broadly construed, would be affected." Section 108 of the CRA altered Vogel's expectations and rights by barring nonlitigants from challenging decrees.

The court held that the CRA did not apply to the case, but it denied Vogel standing to challenge the affirmative action program on other grounds. The result in the case is not troubling, but the decision remains seriously flawed. The court never considered how section 108 altered the parties' rights. It just grounded its holding under the general rule that where a statute affects substantive rights, the statute applies prospectively. Judge Ryan concurred in the final judgment, but dissented from the majority's conclusion that the CRA did not apply retroactively. He pointed out that "[t]he basis for the court's ruling does not rest upon any consideration peculiar to Vogel's claim, but rather upon a more

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206. *Id.* at 496 (quoting *Vogel,* 959 F.2d at 598) ("'Bradley should be read narrowly and should not be applied in contexts where 'substantive rights and liabilities,' broadly construed, would be affected. Clearly, retroactive application of the 1991 Act would affect 'substantive rights and liabilities' of the parties to this action.'").

207. *Id.* at 496.

208. 959 F.2d 594 (6th Cir. 1992).

209. *Id.* at 598.

210. *Id.* at 596.

211. *Id.* at 597.

212. *Vogel,* 959 F.2d at 598 (citing United States v. Murphy, 937 F.2d 1032, 1037 (6th Cir. 1991)). The Court also relied on the EEOC's statement that it would "not seek damages under the [CRA] of 1991 for events occurring before November 21, 1991." *Id.* It explained that where legislative intent is lacking, construction given by the agency should be given "deference" if it appears "reasonable." *Id.* (citing *Chevron U.S.A. Inc. v. Natural Resource Defense Council,* 467 U.S. 837, 843-44 (1984)). Without explanation, the Sixth Circuit concluded that the EEOC's policy that the Act apply prospectively appeared reasonable. *Id.* (citing EEOC Declares 1991 CRA Does Not Apply to Pre-Act Conduct, Daily Lab. Rep. (BNA), no. 1, at A8 (Jan. 2, 1992)).

213. *Id.* (citing United States v. Murphy, 937 F.2d 1032, 1037-38 (6th Cir. 1991)).

214. *Id.* at 597.
 universally applicable analysis of the statute's retroactivity under general principles of statutory construction.\textsuperscript{215}

Although the Sixth Circuit failed to analyze whether the CRA affected Vogel's or the city's reliance on prior laws, its conclusion was not unjust. If the court had undertaken to determine whether section 108 altered Vogel's vested rights, it would have found that it did. By contrast, when the Sixth Circuit applied the Vogel holding in \textit{Roadway Express}, it denied retroactive application even where section 101(2)(b) merely restored the parties' rights and liabilities as they existed when the discrimination occurred and when the complaints were filed. Similarly, the Fifth, Seventh, and District of Columbia Circuits refused to apply provisions of the CRA retroactively even where doing so would restore the parties' rights and liabilities as they existed when the discrimination occurred and when the complaints were filed. As discussed in detail below, each of these circuits ignored the parties' reliance on law which the CRA reinstated and applied Supreme Court precedent which did not even exist at the time the discriminatory conduct occurred.\textsuperscript{216}

Under the clear statement rule that "statutes affecting substantive rights 'are ordinarily addressed to the future and are to be given prospective effect only,"\textsuperscript{217} the Fifth Circuit held against applying the CRA retroactively in \textit{Johnson v. Uncle Ben's Inc.}\textsuperscript{218} The Fifth Circuit rejected arguments that the discriminatory conduct at issue occurred before \textit{Patterson} had been decided at a time when many federal courts were applying section 1981 to discrimination in promotions, warning that if reliance were a factor, litigation would become unwieldy.\textsuperscript{219} Undoubtedly, the Fifth Circuit's broad holding against retroactive application, regardless of evidence showing that the CRA restored rights as they existed at the time the discriminatory conduct occurred, provides a clear and workable standard. Unfortunately, the \textit{per se} rule sacrifices fairness for administrative ease. As the court itself said, "Any other holding would require unwieldy distinctions between classes of litigants based on the degree to which they relied on the legal regime antedating the Civil Rights Act of 1991."\textsuperscript{220} The Fifth Circuit placed judicial efficiency above individual rights.

Similarly, the Seventh Circuit ruled against retroactive application of the CRA in \textit{Mozee v. American Commercial Marine Service Co.}\textsuperscript{221} under the substantie/procedural rights analysis. By the time this case reached the Seventh Circuit on appeal for the second time, the case had already been in litigation for over fifteen years.\textsuperscript{222} The suit involved a class action challenging the defendant's

\textsuperscript{215} \textit{Id.} at 601 (Ryan, J. dissenting).
\textsuperscript{217} \textit{Uncle Ben's Inc.}, 965 F.2d at 1374 (quoting Turner v. United States, 410 F.2d 837, 842 (5th Cir. 1969); citing United States v. Vanella, 619 F.2d 384, 385 (5th Cir. 1980); quoting Greene v. United States, 376 U.S. 149, 160 (1964)).
\textsuperscript{218} 965 F.2d 1363 (5th Cir. 1992).
\textsuperscript{219} \textit{Id.} at 1374.
\textsuperscript{220} \textit{Id.}
\textsuperscript{221} 963 F.2d 929 (7th Cir. 1992), \textit{cert. denied}, 113 S. Ct. 207 (1992).
\textsuperscript{222} \textit{Id.} at 931.
employment practices as discriminatory against African-Americans under section 1981 and Title VII. The issue presented was whether sections of the CRA making compensatory damages and jury trials available under Title VII and restoring the pre-Patterson interpretation of the scope of section 1981 applied retroactively to cases on appeal and on remand.

The Seventh Circuit ruled that it would apply the Bowen rule in favor of prospective application to all statutes affecting substantive rights, but would only apply Bradley to cases involving damages provisions not affecting substantive rights. The court refused to apply section 101(2)(b) which overruled Patterson retroactively, alleging it affected substantive rights, despite the parties’ reliance on pre-Patterson law, which the CRA restored. Although the Seventh Circuit admitted that allowing for jury trials and compensatory damages did not affect substantive rights, the court ruled that the Bradley line of cases did not apply there, either. The court ignored the broad language Justice Blackmun used to establish the general rule in Bradley and limited the case to its facts. In vehement dissent, Judge Cudahy attacked the majority opinion, stating, “Through a mechanical application of principles that are ill-fitting here, the majority has succeeded in applying rules of law not relied upon at the time of the discriminatory acts, not recognized when the suit was brought and not in force now.”

The District of Columbia Circuit also held against retroactive application of section 101(2)(b), which overruled Patterson, on the ground that where substantive rights are at issue, the Bowen rule in favor of prospective application governs. In Gersman v. Group Health Ass’n, Inc., the court noted that the conduct involved occurred before the decision in Patterson was handed down, but claimed that was “of no legal effect.” The majority argued that it could not consider whether the parties relied on pre-Patterson law since there was no way to determine what parties believed the law to be when they acted.

3. Substantive Rights: Examining Reliance Interests

Although federal appellate courts have held against retroactive application under the rule that statutes affecting substantive rights should apply prospectively, several district courts have reached the opposite conclusion under the same rule. In Stender v. Lucky Stores, Inc., for example, the court was presented with the question whether the CRA applied to a suit alleging employment discrimination on the basis of race and sex which was pending at the time the CRA was enacted. The court stressed that, since Congress intended the 1991 Act to

223. Id.
224. Id.
225. Id. at 936.
226. Id.
227. Id. at 940-41 (Cudahy, J., dissenting).
228. Id. at 937.
229. See supra note 182 and accompanying text.
230. Id. at 941 (Cudahy, J., dissenting).
231. Id. at 898.
233. Id. at 899.
234. Id.
236. Id. at 1303.
correct wrongly decided Supreme Court decisions, the 1991 Act must be applied retroactively to fulfill Congress’ restorative intent.\textsuperscript{237} The court rejected arguments that the 1991 Act must be applied prospectively since the CRA changed the substantive law in disparate impact cases. Under the facts of the case, the CRA merely returned the law to its state at the time plaintiffs filed suit, prior to the Supreme Court’s decision in \textit{Wards Cove}.\textsuperscript{238} The court also explained that the CRA did not affect the substantive rights of the parties, since the discriminatory conduct at issue was unlawful under Title VII from the start of the liability period.\textsuperscript{239}

Similarly, in \textit{Mojica v. Gannett Co.},\textsuperscript{240} the court retroactively applied sections of the CRA overruling \textit{Patterson} and allowing jury trials.\textsuperscript{241} The court reasoned that applying the CRA retroactively did not infringe on the rights of the parties since the discriminatory conduct alleged occurred prior to \textit{Patterson} when rules governing discriminatory conduct comported with CRA amendments to section 1981.\textsuperscript{242} The court stressed that the law prior to the CRA was clear and the defendant’s alleged conduct was prohibited.\textsuperscript{243} Unlike the well reasoned holdings in \textit{Stender} and \textit{Mojica}, none of the federal appellate courts relying on the rule that statutes affecting substantive rights apply prospectively examined the expectations of the parties involved nor inquired whether the amendments altered vested or matured rights.

\textbf{4. Procedural Rights}

Federal courts holding both for and against retroactive application of the 1991 Act have generally agreed that statutes affecting procedural or remedial rights are presumed to apply retroactively. Purporting to follow the same general rule, however, courts have disagreed over what provisions of the CRA constitute procedural amendments and which constitute substantive changes in the law.\textsuperscript{244} Section 102(b), which allows for compensatory and punitive damages in Title VII cases, has divided courts the most.\textsuperscript{245}

\textsuperscript{237} Id. at 1306 (“Congress’ clear intention was to undo the effects of these cases, which it believed were wrongly decided, and to restore civil rights law to its previous state. The restorative intent behind the 1991 Civil Rights Act can only be fully satisfied by applying it to cases which were pending at the time of its enactment.”).

\textsuperscript{238} Id. at 1308.

\textsuperscript{239} Id.

\textsuperscript{240} 779 F. Supp. 94 (N.D. Ill. 1991).

\textsuperscript{241} Id. at 99.

\textsuperscript{242} Id. at 98.

\textsuperscript{243} Id.


In *Landgraf v. USI Film Products*, one of the two cases now before the Supreme Court, the Fifth Circuit held that provisions allowing for compensatory and punitive damages as well as the right to a jury trial did not apply retroactively. In that case, Barbara Landgraf filed her suit in 1989 against her employer asserting sexual harassment and retaliation claims under Title VII. Landgraf received a bench trial nine months prior to the enactment of the CRA. The district court found that Landgraf had been sexually harassed but denied her any relief under Title VII since the court was not convinced that sexual harassment, as opposed to personality conflicts, caused Landgraf to resign. On appeal, Landgraf argued that the remedial or procedural provisions of the CRA - including the right to a jury trial and to compensatory and punitive damages - should apply retroactively.

Despite the *Bradley* presumption that procedural provisions should apply retroactively, the Fifth Circuit ruled against retroactivity. The court ruled against applying plaintiff's right to a jury trial retroactively since the case had already been tried and retrying the case "would be an injustice and a waste of judicial resources." The court also ruled against allowing the plaintiff to collect compensatory and punitive damages — arguing that doing so would "result in a manifest injustice." Although the court recognized that expanded remedies did "not change the scope of the statute's coverage," the court opined that amended damages provisions "are a seachange in employer liability for Title VII violations." The court said that allowing victims of employment discrimination to recover more fully for their injuries changed the reach of Title VII. It explained, "There is a practical point at which a dramatic change in the remedial consequences of a rule works change in the normative reach of the rule itself." The

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may weigh the legal consequences of his discrimination and choose to continue his unlawful conduct. An employer cannot pay for the right to discriminate because no such right has ever existed." *Robinson*, 790 F. Supp. at 332. *Compare*, *Luddington*, 966 F.2d at 229 (Posner, J.) (analogizing retroactively applying amendment allowing for expanded remedies to retroactively applying a change in the law which makes life imprisonment the punishment for parking violations) *with* *Petitti v. New England Tel. & Tel. Co.*, No. 85-3951, 1992 U.S. Dist. LEXIS 18112, at *26 n.10 (D. Mass. Nov. 16, 1992) ("Judge Posner also raised the specter of a parking violation becoming retroactively punishable by life imprisonment. Surely, however, Bradley's manifest injustice escape hatch would not countenance such horrors.") (citations omitted). Judge Posner exaggerates the impact expanded remedies will have on employers since § 102(b)(3) sets caps for both compensatory and punitive damages as follows:

- Employers with more than 14 but less than 101 employees: $50,000.
- Employers with more than 100 but less than 201 employees: $100,000.
- Employers with more than 200 but less than 500 employees: $200,000.
- Employers with more than 500 employees: $300,000.

Section 102(b)(3), 105 Stat. at 1073.

247. Id. at 428.
248. Id. at 432.
249. Id. at 430.
250. Id. at 428.
251. Id. at 433.
252. Id.
253. Id.
254. Id.
255. Id.; see also *Luddington*, 966 F.2d at 229 (allowing compensatory and punitive damages "can have as profound an impact on behavior outside the courtroom as avowedly substantive changes . . . . The amount of care that individuals and firms take to avoid subjecting themselves to
court argued that by strengthening the damage provisions of Title VII, Congress tipped the scales and increased an employer’s incentive to comply with Title VII. The court said, “It would be an injustice within the meaning of Bradley to charge individual employers with anticipating this change in damages . . . .”  

The Fifth Circuit’s departure from the presumption that laws affecting procedural rights should apply retroactively in *Landgraf* contrasts sharply with the Fifth Circuit’s strict adherence to the presumption that laws affecting substantive rights should apply prospectively in *Uncle Ben’s*.  

In *Landgraf*, the Fifth Circuit worried about subjecting a discriminatory employer to expanded damages when the employer was found guilty of unlawful intentional discrimination. Discrimination on the basis of race, religion, national origin, or sex was illegal prior to the expanded remedies available to victims of discrimination under the 1991 Act. The CRA did nothing to alter the illegality of discrimination under Title VII. It merely strengthened enforcement provisions by increasing available damages. Yet the Fifth Circuit argued that it would be unfair to subject employers to costs that they did not anticipate when they intentionally and unlawfully discriminated. Apparently, the court was concerned that employers be able to rely on predictable costs when they decide to illegally discriminate. Under the Fifth Circuit’s analysis, the costs of discrimination, like the Medicare reimbursements at issue in *Bowen*, should be subject to fixed and predictable standards.  

By contrast, in *Uncle Ben’s*, the Fifth Circuit did not consider the injustice of retroactively applying *Patterson* to exempt the defendant-employer from liability under section 1981 for racially discriminatory promotion practices. As discussed earlier, the case involved discriminatory conduct that was illegal when it occurred and was illegal under the CRA at the time of the trial and on appeal. Nevertheless, the court applied the intervening *Patterson* decision which was handed down after the alleged discrimination took place and refused to rely on section 101(2)(b) of the 1991 Act which restored pre-*Patterson* law. In *Uncle Ben’s*, the court classified section 101(2)(b) as affecting “substantive” rights and thus applied the *Bowen* presumption in favor of prospective-only application.

The Fifth Circuit’s reliance on the *Bradley* and *Bowen* presumptions has been anything but evenhanded. When faced with the issue of whether provisions of the CRA which reversed *Patterson* applied retroactively, the Court applied the *Bowen* presumption in favor of prospective-only application and refused to consider whether the amendment altered the rights of the parties involved. When squarely presented with proof that the provision at issue restored the pre-*Patterson* law which existed when the employer discriminated, the court refused to consider it, alleging that considering reliance interests would lead to unwieldy distinctions. By contrast, when required to apply the *Bradley* presumption in favor of liability whether civil or criminal is a function of the severity of the sanction . . . .”); Crumley v. Delaware State College, 797 F. Supp. 341, 352 (D. Del. 1992) (“Because of the potential for lawsuits, decisions to downsize or to terminate employees often include a calculus of exposure to damages in civil suits. For this reason it can be persuasively argued that it is unreasonable to expect defendants to pay damages that were not calculated into their decisions.”).  

256. *Landgraf*, 968 F.2d at 433; cf. Lockley v. Chao, No. 91-1345, 1993 U.S. Dist. LEXIS 1315, at *29-30 (D.D.C. Feb. 4, 1993) (allowing compensatory damages and right to jury trial where United States Peace Corps is defendant since “principles of fairness that require notice and the right to be heard before subjecting private parties to retroactive liability do not obtain against the government.”).  

257. See supra note 218.  

258. See supra note 220.
retroactivity, the Fifth Circuit went to great lengths to imagine ways that retroactive application might interfere with reliance interests. The inconsistent importance the Fifth Circuit allocated to employer reliance raises questions about the legitimacy of the Fifth Circuit's analysis in *Landgraf*. Why the Fifth Circuit subjected the presumption in favor of retroactivity to microscopic scrutiny but mechanically applied the presumption in favor of prospective application is unclear. The court's unequal reliance on the Bradley/Bowen presumptions raises serious questions about the future of Bradley.

In contrast to the Fifth Circuit's analysis in *Landgraf*, several district courts have held that expanded remedies under Title VII do apply retroactively. For example, in *Jaekel v. Equifax Marketing Decision Systems, Inc.*, the district court held that section 102(b), making compensatory damages and jury trials available in Title VII cases, applies retroactively, at least to cases involving conduct occurring before the date of enactment but filed after it. The court reconciled Bowen and Bradley, explaining that "statutes affecting substantive rights and liabilities are presumed to have only prospective effect;" all other statutes are assumed to apply retroactively under Bradley unless "manifest injustice" would result. The court held that expanding remedies did not alter the nature of the discriminatory conduct prohibited, but merely lifted an "artificial ceiling" and "upped the ante." Similarly, since no substantive right to a bench trial exists, the court reasoned that providing for jury trials would not affect substantive rights.

Many courts have allowed the right to a jury trial to apply retroactively. These courts point out that the defendant never had a right to a bench trial, thus the provision does not alter substantive rights. Surprisingly, not all courts agree. Since jury trials under Title VII may only be requested when asking for compensatory or punitive damages, many courts that have barred retroactive application of expanded remedies are also barring retroactive access to jury trials.

5. The Substantive/Procedural Rights Analysis Fails

When the courts cannot even agree that the right to a jury trial is a procedural right, the substantive/procedural rights analysis breaks down. As courts decide

260. Id. at 494.
261. Id. at 492 (quoting Bennett v. New Jersey, 470 U.S. 632, 639 (1985)).
262. Id. at 493 ("[D]efendant, if liable for intentional discrimination, is required to bear more accurately the full cost of the injury inflicted, or in other words, to make plaintiffs more nearly whole.").
263. Id. at 492-93.
265. E.g., Waheed v. H & R Block, No. 91-CV-2428-D, 1993 U.S. Dist. LEXIS 670, at *3 (N.D. Tex. Jan. 19, 1993) (since plaintiff not entitled to compensatory and punitive damages retroactively, plaintiff not entitled to jury trial); Davila v. New York Hosp., No. 91-C5992, 1993 U.S. Dist. LEXIS 36, at *3 (S.D.N.Y. Jan. 4, 1993) ("[T]he identity of the trier of fact has great effect on many trial preparation decisions. Full blown civil litigation involving both compensatory and punitive damages before a jury is far removed from non-jury litigation with conciliation mechanisms and only limited equitable non-punitive relief.").
the retroactivity issue on a piecemeal basis, one day ruling on whether amendments changing the scope of section 1981 apply retroactively, another day deciding whether the right to a jury trial applies retroactively, a labyrinth of conflicting decisions are being handed down.

For civil rights plaintiffs, access to provisions of the CRA will not only depend on what rights are implicated, be they procedural or substantive, but on what court hears the case. In the Second Circuit, for example, one of several circuits yet to rule on the retroactivity issue, district judges within the same circuit, and sometimes within the same district, have taken diverging views.266 When plaintiffs have no good way of predicting whether the law applies to them or not, the swift resolution of suits through settlement is impeded and forum shopping begins.

The substantive/procedural rights analysis fails for two reasons. First, since the terms "substantive" and "procedural" are amorphous, courts can and have played fast and loose with the terms. Second, courts relying on the substantive/procedural rights analysis have ignored parties' reliance interests. Many courts have automatically applied the restrictive Supreme Court decisions which the CRA sought to overrule to cases involving conduct which arose before those cases were even decided. In cases where applying the 1991 Act would merely reinstate the law which existed when the discrimination occurred, many courts have resurrected the decisions the CRA overruled and applied them to disputes pre-dating the Supreme Court's restrictive interpretations of the civil rights statutes.

Once a court operating under the substantive/procedural rights analysis classifies a provision as "substantive," the Bowen rule in favor of prospective-only application kicks in and victims suffering discrimination prior to November 21, 1991 are barred from relying on the "substantive" provision. Instead, courts apply the restrictive Supreme Court interpretations of civil rights statutes handed down between 1989 and 1991. That result makes no sense when the Supreme Court decision applied antedated the discrimination at issue.

One section of the CRA which courts have labeled as "substantive," section 101(2)(b), illustrates the unreasonableness of decisions premised on the substantive/procedural rights analysis. Section 101(2)(b) overturned Patterson and restored the pre-Patterson interpretation of the scope of section 1981.267 In Patterson, the Supreme Court cut the legs out from under section 1981 by limiting the cause of action to pre-contractual employment discrimination. In doing so, it barred claims based on failure to promote or discriminatory dismissals.268 Prior to that ruling, victims of employment discrimination could recover under section 1981 for post-contractual employment discrimination.269 Most courts now agree that section 101(2)(b) constitutes a "substantive" change in the law.270 Thus, many courts, including the Fifth Circuit in Landgraf,271 the case now before the Supreme


267. See supra note 41 to 42 and accompanying text.


269. See supra note 39.

270. See supra note 22.

271. See supra note 246.
Court, have mechanically refused to apply section 101(2)(b) to cases pending when the CRA was enacted.272 Such a holding is reasonable if Patterson was the law when the alleged discrimination occurred. But in disputes born before Patterson was decided, when courts interpreted section 1981 literally, and thus more broadly, applying the CRA retroactively would merely restore the law to its prior state. In those instances, the employer would not be prejudiced by retroactive application since the employer's rights and expectations under section 101(2)(b) of the CRA would be the same as under the law which governed when the discrimination occurred. Despite the fairness of applying section 101(2)(b) retroactively where the 1991 Act merely restores prior law, most courts have refused to do so. Few have hesitated to apply Patterson retroactively, however, to cases arising before the Supreme Court gutted the scope of section 1981.273

The judiciary's use of the substantive/procedural rights analysis as a clear statement rule that cannot be bent to evaluate whether the section of the 1991 Act at issue really changes the rights of the parties involved at all, or whether it returns the law to its prior state, is patently unfair. Judge Heaney of the Eighth Circuit recently condemned the trend to decide the retroactivity issue under the Bowen standard in favor of prospective only application whenever “substantive” rights are involved.274 He argued that doing so:

fails to involve courts in any examination of the effects of particular laws and instead applies a stringent and unyielding test. Statutes differ in purpose and effect, yet the clear-statement rule treats them all identically. In certain cases, the Bowen presumption may prevent unjust application of the laws. With some statutes, however, retroactivity ‘can ... actually serve the cause of legality.... It can serve to heal infringements of the principle that like cases should receive like treatment’ .... When a court applies the clear statement rule to an ambiguous statute without justification, it avoids its judicial responsibility to interpret statutes.275

Unfortunately, few courts have been willing to examine how the CRA will affect the rights and expectations of the parties involved.276

E. Luddington v. Indiana Bell Telephone Co.: Policy Grounds

Although the Seventh Circuit had ruled against retroactive application of the CRA in Mozee277 under the substantive/procedural rights analysis, the court

272. See supra notes 22 and 198.
273. See supra notes 23-24. One circuit court judge apologized for the inequity, stating, “this case is one of a vanishing breed to which we must apply the Patterson standards. Unfortunately, the parties never had the opportunity to develop the record from this perspective.” Taylor v. Western & S. Life Ins. Co., 966 F.2d 1188, 1199 (7th Cir. 1992) (Ripple, J.). See also, Davila v. New York Hosp., No. 91-5992, 1993 U.S. Dist. LEXIS 36, at *21 n.12 (S.D.N.Y. Jan. 4, 1993) (“That the conduct for which Davila seeks to recover occurred prior to the Patterson decision, when many lower courts had concluded that section 1981 applied to racial discrimination in promotions, terminations, and other aspects of contractual relations, does not warrant a different result.”); Rush v. McDonald’s Corp., 966 F.2d 1104, 1120 (7th Cir. 1992) (noting that “since the conduct complained of by the plaintiff occurred between 1985 and 1987, it follows that her action under section 1981 is barred by Patterson” without accounting for fact that conduct preceded Patterson holding by two years).
275. Id. at *17 (quoting Estrin, supra note 96, at 2048-50).
276. See supra note 198.
277. Mozee, 963 F.2d at 931.
abandoned that line of analysis when it took up the issue again in *Luddington v. Indiana Bell Telephone Co.* The issue presented in *Luddington* was whether section 101(2)(b), overruling *Patterson*, and section 102(b), allowing victims to recover compensatory and punitive damages in Title VII cases, applied retroactively to a case where both the discriminatory conduct occurred and the case was filed before the CRA was enacted. Unlike other circuit courts ruling on the issue of retroactivity, the Seventh Circuit did not hinge its decision on the Supreme Court's holding in *Bowen*. Instead, Judge Posner, writing for the majority, grounded the decision on the premise that judicial decisions should apply retroactively, but legislation should not.

He offered three reasons to justify applying judicial decisions, including *Patterson*, retroactively: (1) litigants might lack incentives to seek legal change through courts if decisions would not apply retroactively; (2) courts might feel too free to make changes in law if decisions were not applied retroactively, because costs in the disturbance of expectations would be minimized by prospective application; and (3) the power of the court to disturb settled expectations is held in check by a judicial tradition of incremental change.

Judge Posner also explained why the rule that judicial decisions should apply retroactively should be reserved for congressional enactments. First, he asserted that the "legislature has awesome power uncabined by a professional tradition of modesty" which constrains courts from abusing their ability to make laws apply retroactively. This argument is ironic in the context of the CRA, where the Supreme Court had widely strayed from its own path of decisions and Congress erased the Supreme Court's mistakes and led the law back to its prior path. Second, Posner alleged that Congress did not and could not restore pre-*Patterson* interpretations of section 1981. In clear contrast to the explicit language of the 1991 Act itself, where Congress unequivocally states that its purpose is "to respond to recent decisions of the Supreme Court," Judge Posner asserted that the "new civil rights act reflects contemporary policy and politics, rather than a dispute between Congress and the Supreme Court over the mechanics of interpretation." Judge Posner ignored overwhelming evidence in both the Act itself and legislative history that Congress drafted the CRA in direct response to a series of Supreme Court decisions that curtailed civil rights protections. In an early version of the Act, Congress explicitly provided rules of statutory interpretation for courts interpreting the civil rights laws. Stronger

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278. 966 F.2d 225 (7th Cir. 1992).
279. Id. at 226.
280. *Luddington*, 966 F.2d at 228.
281. Id.
282. Id.
283. Id. at 228-29. Posner argued that the pre-*Patterson* legal regime was merely a set of lower-court decisions constituting a tentative regime, which *Patterson* swept away. *Id.*
286. See supra note 27.
287. See S.2104, 101st Cong., 2d Sess. § 1107 (1990) quoted in, 136 CONG. REC. H9554 (daily ed. Oct 12, 1990) (setting out "Rules of Construcion for Civil Rights Laws" for judicial interpretation as follows, "All Federal laws protecting the civil rights of persons shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies.").
proof that the CRA owed its very existence to the dispute between Congress and the Supreme Court over statutory interpretation can hardly be fathomed. Posner's analysis simply replaces reality with his own views on how Congress should function.

Third, Judge Posner also offered pragmatic reasons against applying the Act retroactively. He stated that broad retroactive application would defeat employers' reliance interests and create "massive dislocations" in ongoing litigation. He also asserted that courts should avoid selective retroactive application to cases where the employer can show little or no reliance interest on the law altered by the CRA because such a policy would "create unwieldy distinctions." Judge Posner's arguments based on administrative convenience and costs are unpersuasive. In the similar decision handed down by the District of Columbia Circuit in Gersman v. Group Health Ass'n, also holding that section 101(2)(b) did not apply retroactively, Judge Wald dissented, explaining it would be just as easy for the court to apply the section retroactively than to follow the majority rule and rely on the dying Patterson decision. Judge Wald stressed that, even if applying the 1991 Act retroactively required the judiciary to "undertake an extra burden, costs and administrative difficulties are not trumps, and, in this case, they seem well worth bearing in the service of fairness and justice for the parties." Judge Posner left the question open, however, as to whether the 1991 Act applies to cases filed after the CRA was enacted but involving conduct occurring before the date of enactment. He stated, "We hold that the new act is applicable only to conduct engaged in after the effective dates . . . in the act, at least if the suit had been brought before the effective date." Judge Posner's concerns with administrative convenience support applying the 1991 Act to all cases filed after its enactment date. Any other holding would result in two diverging strands of judicial interpretation - one governed by Supreme Court precedent obliterated by the Act, the other governed by the CRA itself. Unless the CRA applies to all complaints dated after November 21, 1991, "massive ongoing litigation" will continue. If parties must litigate whether the conduct involved occurred prior to the passage of the CRA, courts will be forced to make the "unwieldy distinctions" Judge Posner cautioned against. Few courts, however, have distinguished between

288. Id. at 229-30.
289. Id. at 229.
290. Id.
292. Id. at 899.
293. Id. at 914-15.
294. Id. (Wald, J. dissenting) at 914.
295. Id.
296. Luddington, 966 F.2d at 229-30.
297. Id. (emphasis added).
pending cases and suits filed after the enactment date but involving pre-Act conduct. Many lower federal courts have relied on *Luddington* to bar retroactive application of the CRA to cases filed after the date of enactment but involving pre-Act discrimination.\(^{298}\) As litigation continues over the application of the CRA to pre-Act conduct, regardless of when the complaint was filed, it is becoming apparent that *Luddington* did little to shut the floodgates to the onslaught of litigation surrounding retroactivity.

**F. Baynes v. AT&T Technologies**

The Eleventh Circuit is the latest federal court of appeals to rule on the retroactivity issue. Unlike the majority of courts now deciding the issue under the *substantive/procedural rights* analysis, the Eleventh Circuit analyzed the issue under both *Bowen* and *Bradley* without making any effort to distinguish the two cases. In *Baynes v. AT&T Technologies*,\(^{299}\) the Court considered whether section 101(2)(b), which overruled *Patterson*, and section 102(c), allowing for jury trials, applied retroactively to a case pending on appeal when the CRA was enacted.\(^{300}\) Finding the 1991 Act void of a congressional directive over proper application, the court concluded that the 1991 Act must apply prospectively under the *Bowen* rule.\(^{301}\) The court lauded the *Bowen* rule, stressing that the "judicial branch cannot unilaterally craft into statutes provisions which Congress plainly did not agree to enact into law."\(^{302}\) The court also emphasized that people should be able to conform their conduct to the law without the threat of retrospective liability or increased penalties.\(^{303}\)

The court went on to analyze the issue under the *Bradley* three-factor fairness test.\(^{304}\) Under the first element, the nature and identities of the parties, the court distinguished the *Bradley* school desegregation case from the employment discrimination case before the court. It argued, "Given the private nature of the parties in most employment discrimination cases, we think these cases, when viewed one by one, are not ‘great national concerns’ under *Bradley*, but rather are ‘private cases between individuals.’"\(^{305}\) The court’s reasoning is satisfactory only if one does not consider employment discrimination a societal problem.

Under the second element, the nature of the parties’ rights, the court considered whether the provisions of the 1991 Act at issue worked substantive

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298. Tomblin v. Chicago State Univ., No. 92-C2937, 1993 U.S. Dist. LEXIS 100, at *2 (N.D. Ill. Jan. 8, 1993) ("[T]his Court has since held (as have most if not all of its colleagues in this Circuit) that *Luddington*’s analysis applies with equal force to post-1991-Act lawsuits such as this one, which cover allegedly discriminatory conduct that preceded the effective date of the 1991 statute."); Beasley v. Spiegel, No. 92-C4008, 1992 U.S. Dist. LEXIS 17934, at *11 (N.D. Ill. Nov. 24, 1992) ("[I]t is recommended that the Act not be applied to preact conduct regardless of the filing date."); Redden v. Wal-Mart Stores, 806 F. Supp. 210, 211 (N.D. Ind. 1992) ("The court agrees with those district courts within this circuit that have held that *Luddington* forecloses applicability of the 1991 Act in cases in which the challenged conduct occurred before November 21, 1991, even if the complaint was filed after that date.").

299. 976 F.2d 1370 (11th Cir. 1992).

300. *Id.* at 1372.

301. *Id.* at 1373.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at 1374 (quoting *Bradley*, 416 U.S. at 717).
changes on prior law. The court concluded that section 101(2)(b), which overruled Patterson, constituted a "substantive" change in law, but concluded that section 102(c), which allowed jury trials in Title VII cases, constituted a procedural or remedial change in the law. The court was unwilling, however, to treat these discrete provisions of the 1991 Act separately. Finding that the 1991 Act affected some substantive rights, the court concluded that the entire 1991 Act must apply prospectively.

Finally, the court considered the effect of the change in law upon the parties' rights. The court determined that although the 1991 Act did not alter the "basic norm of nondiscrimination . . . imposing potential liability for damages for post-hiring behavior under section 1981, as opposed to the lesser Title VII remedies, would significantly and unfairly have an effect on the parties." The court considered what prior law guided the employer and victim throughout the litigation of the case, but failed to analyze what law existed when the discrimination occurred. The court did not address whether the employer discriminated before Patterson changed the scope of section 1981, or whether the discrimination occurred after the Patterson decision had been decided. Although the court purported to consider the Bradley three-factor fairness test, in truth, its analysis was severely deficient and untrue to the original test. The court trivialized the importance of employment discrimination cases, failed to treat the party's individual rights distinctly, and failed to consider whether the new law changed the law in effect when the parties acted, as opposed to the law in effect when the case was litigated.

G. Federal Courts Have Failed to Analyze the Retroactivity Issue Consistently

Federal courts have faltered when faced with the retroactivity issue. None of the methods federal courts have taken to resolve the dispute works very well. Federal courts have failed to interpret the murky language of the 1991 Act consistently, have failed to interpret Congress' intent on the issue consistently, and have failed to agree on substantive/procedural distinctions. The Seventh Circuit's oft cited Luddington holding is also disturbing because Judge Posner misrepresented congressional intent behind the 1991 Act. He focused on administrative convenience rather than fairness considerations. Although the Luddington decision only decided against retroactivity for cases pending when the CRA was enacted, many lower courts are expanding the holding to apply to pre-Act conduct cases as well, no matter when the complaint was filed. The expansion of Luddington has led to continued litigation over the retroactivity issue. The Eleventh Circuit's decision in Baynes is no more helpful in resolving the issue since the Court abused the three-factor Bradley fairness test to arrive at its conclusion. The myriad of inconsistent and sometimes even unjust decisions the
federal courts are handing down proves the need for an end to the tangled web of ambiguity surrounding the retroactivity question.

IV. THE NEED FOR CORRECTIVE LEGISLATION

Congress' failure to enact a provision calling for retroactive application is now unraveling the purpose of the CRA. Without retroactive application, a gap in the law is created where some plaintiffs in court today are governed by yesterday's Supreme Court decisions which the 1991 Act overruled or by weak Title VII enforcement provisions which the 1991 Act strengthened. The federal courts have been wrestling with the retroactivity problem for over a year now and no end to the problem is expected anytime soon. The decisions of the lower courts are troubling both in their analysis and in their results. In their defense, federal courts have been handicapped in addressing the problem by the equivocal language of the 1991 Act, its turbulent legislative history, and conflicting Supreme Court precedent on statutory construction. The federal courts have not been resolving the issue very well, and in fact, they are not the branch of government that should be resolving the problem at all. Congress created the mess; Congress must fix it.

A. Consequences of the Federal Courts' Failure and Inability to Apply the 1991 Act Retroactively

The Judiciary's failure and inability to apply the 1991 Act retroactively has many undesirable consequences. In cases where the CRA merely restores the rights of the parties involved by reversing Supreme Court decisions, the federal courts' refusal to apply the CRA retroactively is unfair to victims of employment discrimination and grants employers who did not rely on the decisions an unjustified windfall. Whenever federal courts continue to rely on the Supreme Court decisions which the CRA overruled, congressional policy in enacting the CRA is defeated.

The refusal of a majority of lower federal courts to apply the procedural amendments to Title VII retroactively raises other problems. The 1991 Act allows victims of discrimination the right to a jury trial and to compensatory and punitive damages when they prove that their employer intentionally discriminated against them. Prior to the expanded remedies, some employers may have been less vigilant in avoiding discrimination. Although intentional discrimination was always illegal under Title VII, the expanded remedies may have increased some employers' incentives to comply with the law. But it did not alter employers' substantive rights, unless employers had a substantive right to discriminate. Clearly, under Title VII, they did not. Thus, under the Bradley presumption that statutes affecting procedural or remedial rights apply retroactively, courts should uniformly be holding that the expanded remedies and the right to a jury trial apply retroactively. They have not. As a result, some victims of discrimination are being less than fully compensated for their injuries.

The confusion over whether the CRA applies retroactively is placing a heavy burden on federal courts. Without a clear rule, plaintiffs and employers may be reluctant to settle cases, thus, adding to the federal courts' already heavy dockets. Even in circuits which have ruled on the issue, litigation continues since each section of the CRA poses a new angle to the question. In addition, in circuits

312. In the Eighth Circuit, for example, the court of appeals has redceded the issue of retroactivity
where courts have decided against retroactivity, victims of employment discrimi-
ination who cannot sue under the 1991 Act amendments will have less incentive
to seek redress for legitimate grievances. For example, when compensatory and
punitive damages under Title VII are not available, fewer victims may file suit.
If so, discriminatory employers may escape punishment for their illegal conduct.

Courts’ inconsistent rulings on the retroactivity issue are piercing holes
through congressional policy and eroding Congress’ promise to strengthen pro-
tections available to victims of employment discrimination. Federal courts are
now handing down a dual line of competing decisions — one under the expanded
CRA, the other under the restrictive Supreme Court decisions and weaker Title
VII enforcement provisions which pre-dated the CRA. As those dying cases and
superseded enforcement provisions continue to exert dead hand control, the public
promise of the CRA slips away. One month before President Bush signed the
1991 Act into law, Representative Edwards of California argued that application
of the CRA to pending cases was essential lest the courts speak with two voices
on employment discrimination matters. He cautioned:

Practical concerns as well as those of elementary fairness, have led us to the
conclusion that the application of the bill to pending cases is essential. Litigation
under Title VII and § 1981 can take decades to resolve. To have limited this
legislation to conduct occurring after the date of enactment would have led to
an intolerable result: For the next two decades, the courts will be handing down
two sets of contradictory decisions . . .

Representative Edwards’ worst predictions have now been realized.
The problem with courts’ continued application of those restrictive interpre-
tations of the civil rights statutes is that the full restorative intent of the 1991
Act is delayed indefinitely. The dichotomous cases courts are handing down now
are frustrating our country’s national policy against employment discrimination
as Congress most recently defined it in the 1991 Act. The federal courts’ thinning
of Congress’ commitment to eradicating employment discrimination lends cre-
dence to Chief Justice Marshall’s recommendation, almost two hundred years
ago, that in cases of great national concern, courts must decide according to
existing laws even if the new laws affect the rights of the individual parties
involved.

Marshall recognized that societal policy goals sometimes outweigh individual
rights. An example where our country’s policy goals have overridden individual’s
prior rights is the abolition of slavery. When Congress enacted the Thirteenth
Amendment, it did not limit the force of the amendment to blacks born or
brought to the country after the amendment was ratified. The amendment freed
all slaves, whatever alleged property right prior slave owners may have paid for

at least five times since Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992). In Fray,
the Eighth Circuit held against retroactive application of § 101(2)(b). Id. at 1378. The Eighth Circuit
has reconsidered the issue for other provisions of the 1991 Act, each time ruling against retroactivity.
Davis v. Tri-State Mack Distribs., Inc., 981 F.2d 340, 344 (8th Cir. 1992) (§ 113); Hughes v.
Matthews, 980 F.2d 734 (8th Cir. 1992) (§ 102(c)); Huey v. Sullivan, 971 F.2d 1362, 1365 (8th Cir.
1992) (§ 114); Parton v. GTE North, Inc., 971 F.2d 150, 155-56 (8th Cir. 1992) (§ 102); see also
Fray § 102(2)(b) does not apply retroactively).

314. See supra note 111 and accompanying text.
and expected to receive. If the amendment had not applied uniformly, it would have made a mockery of the nation's new commitment to ending slavery. Similarly, unless the nation's strengthened commitment to ridding discrimination in employment is uniformly applied, the nation's policy is severely undermined. When courts decide employment discrimination cases under the old rules rather than under Congress' renewed commitment to obliterate employment discrimination, Congress' goals in enacting the 1991 Act go unrealized.

B. The Issue Should Not Be Left to the Supreme Court.

The Supreme Court has granted certiorari to two cases involving the retroactivity issue which it will hear next fall. Since the legislative history is equivocal and the language of the Act anything but clear, the Court, like the lower courts, will be unable to rely on congressional intent and ultimately, will be forced to turn to case law for guidance. How the Court will reconcile the Bowen/Bradley conflict remains unclear. In Bonjorno, however, Justice Scalia argued in dicta that Bradley should be overruled. Although there were four dissenters who disagreed with Justice Scalia in that opinion, two of the dissenters, Justice Brennan and Justice Marshall, have since retired. Whether Scalia now has enough support to carry out the reversal of Bradley or whether he still wants to do so remains unknown.

Congress' differences with the Supreme Court over proper interpretation of the civil rights statutes prompted the drafting of the CRA in the first place. Thus, it makes little sense to leave the job of deciding the extent of the CRA's application to the Supreme Court now. When the Supreme Court decides the issue, it will most likely rule in a way that causes yet another dispute between the legislative and judicial branches to erupt.

When the Supreme Court finally decides the issue, it is likely to rule against retroactively applying all provisions of the Act — both those affecting procedural and substantive rights. Recently the Court suggested in dicta that Congress' decision to permit jury trials and allow victims of intentional discrimination to collect compensatory and punitive damages under Title VII, "signals a marked change in its conception of the injury redressable by Title VII." The Court also stated in dicta, "the CRA of 1991, amended Title VII in significant respects." The Court's emphasis that CRA provisions allowing for jury trials and expanded remedies in Title VII cases caused "marked change" and constituted "significant" amendments, suggests that when the Court decides the issue, it will characterize purely remedial changes as substantive amendments. Thus, the Court

316. See supra note 125.
318. Burke, 112 S. Ct. at 1874 n.12.
319. Id. at 1872 n.8 (citation omitted).
may rule against retroactivity under the *Bowen* rule that where "substantive" rules are at issue, the law must only apply prospectively.

Congress should provide the Supreme Court with a directive that the 1991 Act applies retroactively. Unless Congress supplies the mandate, the Supreme Court will most likely uphold the *Landgraf* and *Roadway Express* decisions which denied retroactive application of the CRA. If the Supreme Court was going to rule in favor of retroactivity, one expects that they would not have been content to leave the issue to the lower courts when the circuits had unanimously held against retroactivity. The Court denied certiorari on the issue twice before granting certiorari last February. The Court's delay in addressing the issue predicts the conclusion the Court will reach. With a new Congress and a new President in place, Congress should enact corrective legislation that allows for the 1991 Act to be uniformly applied to all employment discrimination suits presently being decided in the federal courts. It makes little sense to save a response until after an unfavorable Supreme Court decision has been handed down.

**C. Proposed Statute for Correcting the Retroactivity Problem**

I propose the following amendment to resolve the chaotic, inconsistent, and often unfair treatment that courts have given to the retroactivity issue. The proposed amendment aims to ensure that courts will apply the CRA to all cases filed after the CRA was enacted and to all cases that were pending when the CRA was enacted that have not yet exhausted their appeals. The statute should read:

> This Act amends the Civil Rights Act of 1991, and all amendments made by the Civil Rights Act of 1991, be they substantive, procedural, remedial, or otherwise, to apply to all parties who filed their claims on or after November 21, 1991 and to all cases pending on that date, regardless of when the alleged discriminatory conduct occurred, to which the statute of limitations period has not yet run nor final appeal been exhausted at the time of this enactment.

This proposed amendment will not reopen cases that have been finally settled, but assures that courts will apply the CRA to cases on the docket now. This amendment should correct the divisive dual line of decisions the federal courts are handing down. It would fulfill Congress' goal to restore civil rights protections as they existed prior to the Supreme Court's restrictive decisions, without opening up a Pandora's box by relitigating cases that have been finally decided.

**V. CONCLUSION**

Congress should act quickly to fulfill the promises of the Civil Rights Act of 1991. With the 103d Congress in place, Congress should do now what it failed

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320. *See supra* note 315.

321. Most arguments posed by members of the 101st Congress against applying the 1991 Act retroactively no longer relate to the issue facing courts today. That debate largely centered upon a super-retroactivity provision which required cases decided under Supreme Court decisions which the 1991 Act overruled to be reopened and redecided under the CRA. *See supra* notes 77-79. This Note does not advocate that Congress undertake the herculean task of drafting legislation that would require courts to reach back in time and reopen old cases already finally decided where appeals have been exhausted. It urges Congress to end the unjust dichotomous decisions that courts are handing down today.
to accomplish under the Bush administration: legislate retroactive application of the CRA. After President Bush vetoed an early version of the Act which specifically called for retroactive application, the Senate fell short of overriding the veto by one vote and left the issue to the courts. Faced with the issue, most courts of appeals have refused to apply the 1991 Act to cases pending when President Bush signed the 1991 Act into law. Some have also refused to apply the 1991 Act to cases filed after the CRA was enacted but involving discrimination which occurred before the CRA became law. For this reason, federal courts are continuing to apply Supreme Court decisions which Congress sought to overturn through the CRA.

Many courts are applying those much criticized Supreme Court decisions to cases that were already pending before the Supreme Court decisions were handed down. These courts have refused to apply the CRA even in cases where the CRA merely restored the law to its position when the discrimination occurred and when the complaint was filed. This result threatens judicial integrity. As Representative Edwards predicted, without retroactive application, the federal courts are handing down "two sets of contradictory decisions" and no end to the dual line of cases is expected soon.

This anomalous result should be corrected. What the courts are unwilling to do, Congress can do. Congress should pass legislation providing for retroactive application of the CRA. This legislation will complete the goals of the CRA. With it, the dead hand control exerted by the restrictive Supreme Court decisions that the CRA sought to overturn will be laid to rest for good. With it, like cases will be treated alike and victims of discrimination will be treated equally no matter when the discrimination against them took place. Without it, victims of discrimination will continue to go uncompensated. The need for retroactive application is clear. The time to act is now.

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322. See supra note 313.
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