Michigan Law Review

Volume 90 | Issue 7

1992

Retroactive Application of the Civil Rights Act of 1991 to Pending Cases

Michele A. Estrin
University of Michigan Law School

Retroactive Application of the Civil Rights Act of 1991 to Pending Cases

Michele A. Estrin

INTRODUCTION

The 101st Congress, responding to a stream of Supreme Court decisions that significantly eroded the rights and remedies of plaintiffs in employment discrimination actions,[1] passed the Civil Rights Act of 1990.[2] Congress sought not only to overrule these cases as they apply to future instances of discrimination, but also to nullify the effect of the holdings on past and pending cases. The statute's retroactive provisions stirred debate and disagreement as representatives grappled with concerns of fairness and constitutionality.[3] President Bush eventually vetoed the Act,[4] labeling it a "quota bill," and created an acrimonious standoff with Congress. Congress failed to override the veto.[5]

Congress resurrected the Act in 1991,[6] and it became the focal

1. *See* Independent Fedn. of Flight Attendants v. Zipes, 491 U.S. 754 (1989) (holding that prevailing plaintiffs may not seek attorney's fees from intervenors); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding that 42 U.S.C. § 1981, prohibiting discrimination in contracts, applies only to hiring decisions and not to postformation actions); Martin v. Wilks, 490 U.S. 755 (1989) (holding that third parties challenging an affirmative action consent decree can bring a collateral action to challenge the settlement); Lorance v. AT&T Technologies, 490 U.S. 900 (1989) (holding that the deadline for filing a challenge to a seniority system begins to run when the practice is adopted and not when workers are adversely impacted); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (overruling Griggs v. Duke Power Co., 401 U.S. 424 (1971), by shifting the burden of proof to employees in disparate impact cases to show that an employer's practice is not a business necessity); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that an employer is not liable for making a biased employment decision as long as the same decision would have been made without the discriminatory factors). Congress' response also involved three earlier decisions: Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987); Library of Congress v. Shaw, 478 U.S. 310 (1986); and Evans v. Jeff D., 475 U.S. 717 (1986).

2. *See* 136 CONG. REC. S15,407 (daily ed. Oct. 16, 1990) (recording the Senate vote on the final version of the bill (S. 2104)); 136 CONG. REC. H9994-95 (daily ed. Oct. 17, 1990) (recording the House vote on S. 2104). The language of S. 2104 appears in the Conference Report, H.R. CONF. REP. NO. 856, 101st Cong., 2d Sess. 1-13, *reprinted in* 136 CONG. REC. H9552-55 (daily ed. Oct. 12, 1990).

3. *See, e.g., H.R. 4000, The Civil Rights Act of 1990: Joint Hearing: Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary,* 101st Cong., 2d Sess. (1990); *Civil Rights Act of 1990: Hearing Before the Senate Committee on Labor and Human Resources on S. 2104,* 101st Cong., 1st Sess. (1989).

4. President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632-34 (Oct. 22, 1990), *reprinted in* 136 CONG. REC. S16,457-58 (daily ed. Oct. 22, 1990).

5. 136 CONG. REC. S16,589 (daily ed. Oct 24, 1990).

6. 137 CONG. REC. H53 (daily ed. Jan. 3, 1991) (noting its introduction as H.R. 1, 102d Cong., 1st Sess.). The Civil Rights Act as passed is Pub. L. No. 102-166, 105 Stat. 1071 (1991) (to be codified in scattered sections of 42 U.S.C.A. (West Supp. 1992)).

point of the nation's civil rights agenda. During the lengthy compromise process, lawmakers dropped the explicit retroactivity provisions and instead provided that the Act would be effective on its date of enactment.[7] This formulation leaves unclear whether the law applies retroactively to cases pending on the date of enactment or whether the Act only applies to cases arising thereafter. Unable to agree or compromise on this issue, Congress dodged the dilemma and left it to the federal courts for resolution. Since passage of the Act, federal courts have split on the issue.[8]

A retroactive law "gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute."[9] Despite a general presumption against retroactive lawmaking, the Constitution does not prohibit Congress from applying civil statutes to cases arising prior to a law's enactment.[10] A statute may raise retroactivity issues in one of two ways: (1) when Congress explicitly makes the bill effective on a date prior to the date of enactment, as in the vetoed 1990 Act; and (2) when Congress makes the bill effective on its date of enactment and declines explicitly to state

---

7. Pub. L. No. 102-166, § 402(a), 105 Stat. 1099 (1991).

8. As of April 17, 1992, 49 federal courts had ruled against retroactivity and 35 had ruled in favor of it, according to the Lawyers Committee for Civil Rights Under Law. Ruth Marcus, *A Percolating Legal Dispute on Civil Rights*, WASH. POST, Apr. 17, 1992, at A21.

The Supreme Court has remanded three Title VII cases to the circuit courts for resolution in light of the 1991 Act. *See* Hicks v. Brown Group, Inc., 112 S. Ct. 1255 (1992); Holland v. First Va. Banks, Inc., 112 S. Ct. 1152 (1992); Gersman v. Group Health Assn., 112 S. Ct. 960 (1992).

The Sixth, Seventh, and Eighth Circuits have held that the Act does not apply retroactively. *See* Vogel v. City of Cincinnati, 959 F.2d 594 (6th. Cir. 1992); Mozee v. American Commercial Marine Serv. Co., F8 Fair Empl. Prac. Cas. (BNA) 1201 (7th Cir. 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992). *See infra* section II.C.

For examples of district courts that have applied the act retroactively, see Grahm v. Bodine Elec. Co., 782 F. Supp. 74 (N.D. Ill. 1992); Stender v. Lucky Stores, Inc., 780 F. Supp 1302 (N.D. Cal. 1992); King v. Shelby Medical Ctr., 779 F. Supp. 157 (N.D. Ala. 1991); Mojica v. Gannett Co., 779 F. Supp. 94 (N.D. Ill. 1991); Bristow v. Drake Street, Inc., 57 Fair Empl. Prac. Cas. (BNA) 1367 (N.D. Ill. 1992); Davis v. Tri-State Mack Distributions Inc., 57 Fair Empl. Prac. Cas. (BNA) 1025 (E.D. Ariz. 1991); La Cour v. Harris Co., 57 Fair Empl. Prac. Cas. (BNA) 622 (S.D. Tex. 1991).

For examples of courts holding that the Act does not apply to pending cases, see Burchfield v. Derwinski, 782 F. Supp. 532 (D. Colo. 1992); Khandelwal v. Compuadd Corp., 780 F. Supp. 1077 (E.D. Va. 1992); Hansel v. Public Serv. Co., 778 F. Supp. 1126 (D. Colo. 1992); Van Meter v. Barr, 778 F. Supp. 83 (D.D.C. 1991); Johnson v. Rice, 58 Fair Empl. Prac. Cas. (BNA) 31 (S.D. Ohio 1992); High v. Broadway Indus., Inc., 57 Fair Empl. Prac. Cas. (BNA) 1159 (W.D. Mo. 1992); James v. American Intl. Recovery, Inc., 57 Fair Empl. Prac. Cas. (BNA) 1226 (N.D. Ga. 1991).

Additionally, the Equal Employment Opportunity Commission (EEOC) has determined that the law does not reach pending cases, and in so doing has affected the outcomes of an estimated 400-500 pending cases. *EEOC Declares 1991 Civil Rights Act Does Not Apply to Pre-Act Conduct*, DAILY LAB. REP. (BNA), Jan. 2, 1992, at A-8. *See infra* notes 140 and 178 and accompanying text.

9. Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 692 (1960).

10. In Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), the Supreme Court held that the ex post facto clause, U.S. CONST. art. I, § 10, cl. 1, applies only to criminal laws.

whether or not the bill should be applied to cases pending in the courts, as in the 1991 Act. In either instance, retroactive application nullifies the effect of contrary Court decisions, and inevitably one party or class of parties must bear the burden of this restructuring of rights and interests. The Supreme Court has generally approved of retroactivity in the first instance,[11] yet faced with the second type of retroactivity the Court has two conflicting presumptions, one denouncing retroactivity and one presuming retroactive effect. The Court has declined to resolve this conflict.

The controversy surrounding the question of retroactive application of the Civil Rights Act stems from the current conflict between the Supreme Court and Congress over the interpretation of federal statutes. In response to the Court's narrow interpretation of certain statutes, Congress has increasingly resorted to overruling those decisions it finds unfavorable.[12]

This Note addresses the applicability of the Civil Rights Act of 1991 to cases pending on the Act's date of enactment. Part I discusses current Supreme Court doctrine on the issue. This Part finds that the Court has endorsed two conflicting views on retroactively applying statutes to pending cases and that the lower federal courts consequently lack a principled framework for dealing with retroactivity issues in the 1991 Act. Part II describes the battle over the Civil Rights Acts of 1990 and 1991 and the subsequent confusion over the enacted statute's reach. This Part finds that Congress provided conflicting textual guidance and useless legislative history, both of which fail to resolve the retroactivity issue. Part III rejects the use of a presumption to resolve the retroactivity question and instead provides an analytic framework for deciding the appropriate application of the Civil Rights Act. This approach acknowledges the potential dangers of retroactivity but requires courts to assess whether or not these risks should be determinative in the context of a given statute and cases arising under it. This Note concludes that courts should decide cases arising under the Act by applying the law in effect at the time of decision. Such application does not interfere with significant equitable or constitutional concerns, but rather promotes the goals of efficiency and fairness.

I. RETROACTIVITY DOCTRINE IN THE FEDERAL COURTS

When faced with an ambiguous law, courts often turn to the canons of construction, time-honored "rules of thumb" for statutory in-

11. *See, e.g.*, Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) (rejecting a due process challenge to a federal statute that retroactively imposed liability on employers who withdrew from multiemployer pension plans).

12. *See infra* note 115; *see also* Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CAL. L. REV. 729, 748 n.103 (1991).

terpretation.[13] Karl Llewellyn noted that "there are two opposing canons on almost every point,"[14] and this observation holds true where retroactivity issues arise. The Supreme Court has endorsed a presumption that instructs judges to read statutes prospectively in the absence of legislative direction to the contrary, as well as a maxim that obligates courts to apply the law in effect at the time they render a decision. Section I.A presents the Supreme Court's doctrine on retroactivity, in which the clash of two distinct lines of cases demonstrates the tensions surrounding the issue. Section I.B discusses federal court interpretations of the Supreme Court's alternate approaches and concludes that the current doctrine is not only unworkable but also doctrinally unjustifiable. Section I.C discusses the historical bias against retroactive laws reflected in the presumption against retroactivity. This section reveals the flaws of this presumption, manifested in the canon requiring a clear statement from Congress on retroactivity. This Part concludes that, because the Court has endorsed two conflicting views on retroactively applying statutes to pending cases, the lower federal courts lack guidance for dealing with retroactivity issues in the 1991 Act.

A. *The Court's Dueling Doctrines*

The Supreme Court speaks with two voices when it comes to applying ambiguous statutes retroactively. On the one hand, the Court has long eschewed applying statutes retroactively in the absence of congressional direction. On the other hand, the Court has also ordered courts to apply the law in effect at the time of decision, an "ancient principle"[15] that necessarily results in retroactive application of statutes. This contradictory stance has caused confusion, and today confronts courts trying to resolve whether to apply the Civil Rights Act to pending cases.

The Court recently reasserted the presumption against retroactivity in *Bowen v. Georgetown University Hospital,*[16] stating that "[r]etroactivity is not favored in the law" and that, as a result, "congressional enactments and administrative rules will not be construed

13. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 639 (1988). Canons can be used as intrinsic aids to garner meaning from a statute's words (e.g., *expressio unius,* the inclusion of one thing indicates exclusion of the other), or they may direct a court to subject-matter oriented policy preferences (e.g., statutes should be interpreted to avoid constitutional conflicts). *See generally id.* at 639-96.

14. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and The Rules or Canons About How Statutes Are To Be Construed,* 3 VAND. L. REV. 395, 401 (1950).

15. PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 369 n.4 (3d ed. 1988) ("[C]ourts are obligated to apply law (otherwise valid) as they find it at the time of their decision, including when a case is on review, the time of the appellate judgment.").

16. 488 U.S. 204 (1988).

to have retroactive effect unless their language requires this result."[17] Accordingly, the Court held that, without explicit congressional authorization, the Department of Health and Human Services could not promulgate retroactive rules. Although the case dealt with retroactive rulemaking, it reflected the long-accepted canon of construction that a law will not be applied retroactively unless Congress expressly commands such an application.[18] This presumption acts as a "clear statement rule"[19]: it refuses to attribute an intent to Congress without explicit authorization. A clear statement rule puts priority on the text of a statute, rather than allowing courts to reason from a statute's purpose and legislative history.[20]

Retroactivity concerns are not so easily resolved, however, because an alternate maxim commands courts to apply the law in effect at the time they render a decision. This competing presumption first arose in *United States v. Schooner Peggy,*[21] in which the Court had to decide whether to apply a newly enacted treaty to a pending case. Speaking for the Court, Chief Justice Marshall said that "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."[22] Since the treaty expressly mandated its application to pending cases, Marshall applied the law retroactively. The case, however, did not address whether a change in law could be applied to pending cases if there were no explicit language commanding that effect.

The Court eventually addressed this open question in *Thorpe v. Housing Authority of Durham,*[23] in which a tenant who had been

17. 488 U.S. at 208. *Bowen* concerned government reimbursement to health care providers for expenses involved in providing medical services to Medicare beneficiaries. In 1981, the Secretary of Health and Human Services issued regulations that changed the methods used to calculate reimbursements. Hospitals brought suit, and the rule was subsequently stricken by the federal district court because the Secretary failed to follow proper administrative rulemaking procedures. The Secretary reissued the rule in 1984 and retroactively recollected the sums paid to the hospitals under the district court's decision. The Court enjoined such retroactive rulemaking.

18. *E.g.*, "Statutes are not to be given retroactive effect . . . unless the legislative purpose so to do plainly appears." United States v. Magnolia Petroleum Co., 276 U.S. 160, 162-63 (1928); *see also* Union Pac. R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913); United States Fidelity & Guar. Co. v. United States *ex rel.* Struthers Wells Co., 209 U.S. 306, 314 (1908); White v. United States, 191 U.S. 545, 552 (1903).

19. *See generally* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court,* 95 HARV. L. REV. 892, 905 (1982).

20. *Id.* at 898.

21. 5 U.S. (1 Cranch) 103 (1801). The circuit court had determined that a French vessel seized by an American ship on the high seas was properly condemned, and therefore forfeited to the United States. While the case was pending before the Supreme Court, the United States and France signed a treaty in which all property captured and not yet "definitively condemned" was to be restored to France.

22. 5 U.S. (1 Cranch) at 110.

23. 393 U.S. 268 (1969).

evicted from low-income housing for organizing a tenant's association brought suit, claiming a violation of her First Amendment rights. While her case was pending before the Supreme Court, the Department of Housing and Urban Development issued new procedural requirements to precede the initiation of eviction proceedings. Although the regulations did not expressly state whether they applied to pending cases, the Court applied the new regulation retroactively, holding that "[t]he general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision."[24] Under this formulation, pending cases are decided under existing law[25] enacted after the accrual of the cause of action, with or without words to that effect.

In *Bradley v. School Board,*[26] the Court reinforced *Thorpe* by rejecting the "contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature."[27] The Court stated that "even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect."[28] The case involved a desegregation suit brought by black parents against the city of Richmond. The district court, relying on common law, had awarded the plaintiff class attorneys' fees.[29] The appellate court reversed the award, stating that Congress, and not the courts, should authorize such fees.[30] However, during the pendency of the appeal, Congress enacted the Education Amendments of 1972, which granted federal courts the authority to award reasonable attorney's fees when appropriate in school desegregation cases.[31]

The Supreme Court retroactively applied the attorney's fees statute, holding that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[32] The Court did not hold that courts must always apply new laws to pending cases but that, when the legislative history supports either position, there is implicit support for applying the statute to pending cases.[33] In this instance, the Court chose not to read "into the statute the very fee limitation that Congress eliminated."[34]

---

24. 393 U.S. at 281.

25. The Court did not distinguish between statutes and administrative regulations. *See* 393 U.S. at 282.

26. 416 U.S. 696 (1974).

27. 416 U.S. at 715.

28. 416 U.S. at 715.

29. *See* 416 U.S. at 706-08.

30. *See* 416 U.S. at 708-09.

31. Pub. L. No. 92-318, § 718, 86 Stat. 235, 369 (repealed 1978).

32. 416 U.S. at 711.

33. *See* 416 U.S. at 715-16 & n.21.

34. 416 U.S. at 716 n.23.

Bradley stands for the proposition that laws will generally be applied retroactively unless Congress directs otherwise or if doing so will result in "manifest injustice." The Court sets forth three means of identifying "manifest injustice" that would preclude retroactive application of a law: (1) the nature and identity of the parties; (2) the nature of the rights affected; and (3) the impact of the change in law on preexisting rights.[35] This test may eliminate the inequities caused by application of a stringent antiretroactivity presumption. In *Bradley,* the Court found no manifest injustice. First, the litigation pitted a publicly funded governmental entity with vast resources against children who had been denied their constitutional right to nondiscriminatory education and who lacked the same ability to promote their interests.[36] Unlike a routine private lawsuit between individuals, the case involved plaintiffs acting as private attorneys general to enforce a policy upon which Congress placed high priority.[37] The Court analogized the situation in *Bradley* to that described in *Schooner Peggy,* where Chief Justice Marshall asserted that in areas of "great national concern[ ] . . . the court must decide according to existing laws."[38] Second, in looking at the nature of the rights affected, the Court acknowledged that it would refuse to apply a change in law to a pending action where "to do so would infringe upon or deprive a person of a right that had matured or become unconditional."[39] The Court did not find, however, that the Richmond School Board had any matured or unconditional right to the public funds that would go to pay attorney's fees.[40] Third, the Court determined that the law did not impose new or unanticipated obligations on a party without notice.[41] The Board could have been responsible for attorney's fees under common law theories, and it was unlikely that the Board's actions would have been any different had the statute been in effect.[42]

The *Bowen* and *Bradley* presumptions simply cannot be reconciled.[43] *Bowen* presumes that all statutes are prospective unless Congress explicitly states otherwise. *Bradley* presumes that all statutes apply to pending cases unless Congress explicitly states otherwise or if

35. *See* 416 U.S. at 717.

36. *See* 416 U.S. at 718.

37. *See* 416 U.S. at 719.

38. 416 U.S. at 719 (quoting United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801)).

39. 416 U.S. at 720.

40. *See* 416 U.S. at 720.

41. *See* 416 U.S. at 720-21.

42. *See* 416 U.S. at 721.

43. A court could come to an antiretroactivity conclusion under either presumption. Under the *Bradley* presumption, a court could avoid retroactivity through the manifest injustice test. However, a court cannot adhere to *Bradley* without assuming the validity of the *Schooner Peggy* tradition.

manifest injustice would result from retroactive application. Thus, when a court confronts congressional silence, each presumption points in a different direction: *Bowen* presumes prospectivity, while *Bradley* presumes retroactivity. The first presumption relies on a clear statement by Congress, while the second encourages courts to reason through the "manifest injustice" test.

The *Bowen* and *Bradley* holdings create confusion because they find their support in competing conceptions of congressional and judicial roles. Under *Bowen,* the Court is the faithful agent of Congress, unwilling to act without congressional authorization. Under *Bradley,* the Court carries out the legislative purpose by examining the equities involved in a particular case. Unfortunately, the Court has failed to offer any rationales for reconciling these conflicting rules of construction and has instead allowed them to coexist.

Attempts to distinguish the presumptions on the basis of their facts provide little guidance. To begin with, the presumptions are broad statements of legal principles whose wording implies that they are not fact-specific but rather intended to apply to all interpretive problems involving retroactivity.[44] Despite the different contexts in which these cases arise, the Court uses these presumptions without differentiating between administrative and statutory law cases.[45] Furthermore, the Court plucked the principles of *Bradley* and *Bowen* from precedent, without relying on the facts of prior cases as determinative. Not surprisingly, federal courts have largely divorced the holdings from their facts, and opinions often refer to either presumption simply as the *"Bradley"* or *"Bowen"* test.[46] Analysis of the presumptions is all the more difficult because the Court never explained why it chose the presumption it did, nor did it explain how to select between the presumptions. This lack of legal reasoning is one of the pitfalls inherent in a presumption: as a mechanically applied rule, it discourages analysis.

The Court itself recently acknowledged that the two presumptions conflict in *Kaiser Aluminum & Chemical Corp. v. Bonjorno,*[47] suggesting further that there is no principled means of selecting between the presumptions. In *Bonjorno,* the plaintiff attempted to have a

44. "[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley,* 416 U.S. at 711. "[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen,* 488 U.S. at 208.

45. Thus, both *Thorpe,* dealing with administrative regulations, and *Bradley,* dealing with a statute, use the same presumption of retroactivity. *Thorpe* and *Bowen* both concern administrative regulations but use different presumptions. The Court in *Thorpe* noted that its reasoning "has been applied where the change was constitutional, statutory, or judicial." 393 U.S. at 282 (footnotes omitted).

46. *See supra* note 8 (cases interpreting the retroactivity of the Civil Rights Act of 1991, in which courts' decisions hinge on whether they "pick" *Bowen* or *Bradley*).

47. 494 U.S. 827 (1990).

postjudgment interest statute retroactively applied to his federal antitrust judgment. The statute was enacted while the case was on appeal. Noting that the *Bradley* and *Bowen* cases are in "apparent tension,"[48] the Supreme Court nonetheless declined to resolve these contrary presumptions, holding only that "where the congressional intent is clear, it governs."[49] In refusing to apply the amended statute to the pending case, the Court concluded that "the plain language of both the original and amended versions of [the statute] evidence clear congressional intent that [the] amended [statute] is not applicable to judgments entered before its effective date."[50]

In his concurrence, Justice Scalia pointed to the "irreconcilable contradiction"[51] between *Bowen* and *Bradley* and urged the Court to resolve the dispute by abolishing the *Bradley* rule and returning to the age-old tradition of prospective lawmaking.[52] Scalia's argument centered on discrediting the precedential support of the *Bradley/Thorpe* line of cases.[53] He described retroactivity as a policy "contrary to fundamental notions of justice," and thus not within the probable contemplation of legislators.[54]

Overall, the Supreme Court has not only failed to resolve the controversy, but has also failed to dig underneath the weak foundations which uphold the presumptions. Presumptions are supposed to help judges resolve sticky situations, yet these presumptions lead courts into a veritable swamp of confusion. In the end, litigants pay for the confusion, finding themselves subject to federal courts' policy preferences.

B. *Lower Federal Court Interpretations*

The Supreme Court's two conflicting approaches force federal courts faced with the retroactivity dilemma to pick one presumption over the other, yet they have no guidance for choosing between the presumptions. Thus, federal courts possess broad discretion to justify their decisions with a Supreme Court-sanctioned solution. Each of the

48. 494 U.S. at 837.

49. 494 U.S. at 837. The Court explicitly declined to reconcile the two lines of precedent represented by *Bradley* and *Bowen*. 494 U.S. at 837.

50. 494 U.S. at 838. In dissent, Justice White did not find any clear congressional intent and would thus have applied the *Bradley* rule. White did not feel that any manifest injustice would result from applying the statute to the case. "It is difficult to see how manifest injustice could be worked except by refusing to apply [the] amended [statute] to this case," because the Court's approach sanctions the very result Congress intended to prevent. 494 U.S. at 869 (White, J., dissenting).

51. 494 U.S. at 841 (Scalia, J., concurring).

52. Scalia stated that the rule of prospective legislation "has been applied, except for these last two decades of confusion, since the beginning of the Republic and indeed since the early days of the common law." 494 U.S. at 841 (concurring opinion).

53. 494 U.S. at 844-53 (Scalia, J., concurring).

54. 494 U.S. at 855 (Scalia, J., concurring).

presumptions has found adherents in the federal courts, and the *Bonjorno* decision has only magnified the irreconcilable nature of the competing doctrines. Fallout from the Civil Rights Act traces the dual approaches.[55]

The federal courts wrestled with a similar problem in their deliberations over the Civil Rights Restoration Act of 1987,[56] enacted in response to Supreme Court interpretations of four civil rights statutes covering federally funded institutions. These statutes prohibited discrimination under any program or activity receiving federal financial assistance.[57] In *Grove City College v. Bell,*[58] the Supreme Court had held the Title IX ban on sex discrimination in any "program or activity"[59] to be program specific and not applicable to the institution at large.[60] In *Consolidated Rail Corp. v. Darrone,*[61] the Court extended this program-specific interpretation to handicapped discrimination claims brought under the Rehabilitation Act of 1973.[62] As a result, hundreds of federally funded institutions were relieved of liability for discrimination. For instance, if only a college's financial aid office received money, the rest of the institution remained beyond the reach of Title IX.

In the Civil Rights Restoration Act, Congress quickly repudiated this narrow interpretation of Title IX by defining "program or activity" to include all of an institution's operations. Congress found that "certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of" the civil rights laws.[63] As a result, Congress said, "legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation . . . of those laws as previously administered."[64] The Senate Report stated unequivocally that the Act was meant "to overturn the Supreme Court's 1984 decision in *Grove City.*"[65] Congress did not include any provision indicating that the Act should be applied retroactively or prospectively.

---

55. *See infra* section II.C.

56. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified in scattered sections of 20 U.S.C., 29 U.S.C., and 42 U.S.C. (1988)).

57. Age Discrimination Act of 1975, 42 U.S.C. § 6102 (1988); Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1988); Education Amendments of 1972, tit. IX, 20 U.S.C. § 1681(a) (1988); Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000(d) (1988).

58. 465 U.S. 555 (1984).

59. Education Amendments of 1972, § 901, 20 U.S.C. § 1681(a) (1988).

60. *See* 465 U.S. at 570.

61. 465 U.S. 624 (1984).

62. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701-796(i) (1988)).

63. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 2, 102 Stat. 28, 28 (1988).

64. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 2, 102 Stat. 28, 28 (1988).

65. S. REP. No. 64, 100th Cong., 2d Sess. 2, *reprinted in* 1988 U.S.C.C.A.N. 3, 3.

The Second, Fifth, and Eleventh Circuits have followed *Bradley,* holding that the Restoration Act applied retroactively in the absence of manifest injustice.[66] In *Ayers v. Allain,*[67] the plaintiff alleged that Mississippi maintained a racially motivated dual system of education which discriminated against black students. Initially analyzing the case under the narrow *Grove City* standard, the district court found for the defendants and dismissed the plaintiff's claim. After Congress passed the Restoration Act, the Fifth Circuit examined the case and chose to follow the Restoration Act, stating that Congress had repaired the Supreme Court's misreading of congressional intent.[68] The court, in characterizing the congressional action as a return to previous law, looked to the Senate report and statements made during passage of the Act and determined that "[r]etroactive application of a statute is appropriate when Congress enacts the statute to clarify the Supreme Court's interpretation of previous legislation thereby returning the law to its previous posture."[69] The *Ayers* court gave great weight to the underlying purpose of the Restoration Act, which was to overrule the Supreme Court. This understanding thus distinguished the Act from completely "new" legislation, where retroactivity is more problematic.

Faced with the statute's ambiguity, the courts in *Lussier v. Dugger*[70] and *Leake v. Long Island Jewish Medical Center*[71] relied heavily on the words "restore" and "clarify" in the stated purpose of the Act as expressions of Congress' intent to apply the law retroactively.[72] Both courts asserted that these terms reflected Congress' desire to enforce its original intent and to reject the Supreme Court's subsequent interpretation.[73] These arguments implicitly recognize the difference between an overruling statute and a statute regulating new areas. In enacting the Restoration Act, Congress intended to minimize the damage caused by Supreme Court misinterpretations; limiting the effect of mistaken Court decisions on pending cases best fulfilled this goal. Thus, these three circuits determined that retroactive application of the Restoration Act would best further legislative ends without causing unjust results.[74]

---

66. Lussier v. Dugger, 904 F.2d 661 (11th Cir. 1990); Ayers v. Allain, 893 F.2d 732 (5th Cir. 1990); Leake v. Long Island Jewish Medical Ctr., 869 F.2d 131 (2d Cir. 1989).

67. 893 F.2d 732 (5th Cir. 1990).

68. *See* 893 F.2d at 754.

69. 893 F.2d at 754-55.

70. 904 F.2d 661 (11th Cir. 1990).

71. 695 F. Supp. 1414 (E.D.N.Y. 1988), *aff'd.*, 869 F.2d 131 (2d Cir. 1989).

72. 904 F.2d at 666; 695 F. Supp. at 1417. The purpose of the Act is to "restore the broad scope of coverage and to clarify the application of . . . section 504 of the Rehabilitation Act of 1973." Civil Rights Restoration Act of 1987, Pub. L. 100-259, pmbl., 102 Stat. 28, 28 (1988).

73. *See* 904 F.2d at 666; 695 F. Supp. at 1417.

74. The *Leake* court followed the *Bradley* premise, but did not use the manifest injustice test.

The Tenth Circuit is the only circuit that declined to apply the Restoration Act retroactively to a pending case. In *DeVargas v. Mason & Hanger-Silas Mason Co.*,[75] the court found a congressional purpose to overrule *Grove City* but no clear intent to apply the Act retroactively.[76] The court compared the Restoration Act to other congressional amendments in which Congress had expressly specified the Act's applicability to pending cases, and inferred that Congress would have explicitly applied the statute retroactively if it had so intended.[77] Additionally, the court reasoned that the Restoration Act did not revive pre-*Grove City* law but rather was a new law, to which Congress must clearly specify its intentions with regard to retroactive application.[78] Thus, in following the clear statement approach of *Bowen,* the court was not persuaded to apply an overruling law retroactively because that approach "implicitly treats Congress as a court of revision rather than as the law-making branch of the federal government."[79] After struggling to reconcile *Bradley* and *Bowen,* the *DeVargas* court opted to follow the *Bowen* line of cases and agreed with Justice Scalia's argument in *Bonjorno* that the presumption of prospective application of statutes finds extensive support in history.[80]

In keeping with the premises of the clear statement rule endorsed in *Bowen,* the *DeVargas* court ignored legislative history; if Congress did not precisely spell out its intentions, the court would not read them into the statute. In contrast, the other circuits looked to legislative history and the statute's overriding purpose as a guide in order to most accurately implement the spirit of the legislation. These contrasting approaches in statutory construction taken by the federal courts mirror the competing presumptions. A determination of which presumption to apply necessarily reflects a court's approach to statutory construction, which in turn reflects deep-seated notions about the role of courts in a tripartite system. The opposite outcomes among the circuits reveals the unworkability of rules of construction lacking in content — the inevitable consequences of the existing Supreme Court doctrine. Before the Court follows Justice Scalia and adopts a strict antiretroactivity presumption for ambiguous statutes, the Court must determine exactly which values merit protection.

The *Lussier* court touched on the manifest injustice exception and found that no injustice would result from retroactive application of the Act. 904 F.2d at 666.

75. 911 F.2d 1377 (10th Cir. 1990).

76. *See* 911 F.2d at 1385.

77. *See* 911 F.2d at 1385 & n.7.

78. *See* 911 F.2d at 1388.

79. 911 F.2d at 1388. This criticism fails to explain or even recognize the extreme deference courts give to explicitly retroactive statutes. *See infra* notes 89-92 and accompanying text.

80. *See* 911 F.2d at 1390. Since the court opted to follow the *Bowen* presumption, it did not have to balance the "manifest injustice" factors of *Bradley.*

C. *Retroactivity and the Flaws of the Clear Statement Rule*

"The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student."[81] This assertion reflects a historical bias against retroactive legislation which stretches from the Roman Code to the English jurisprudence of Coke and Blackstone and on into the American legal tradition.[82] The American legal system evolved from the assumption that courts find the law made by the legislature.[83] This strict dichotomy, in which courts discover the past and legislatures regulate the future, disfavors retroactive laws. However, as this section demonstrates, courts accept retroactivity in a wide array of situations, and its implementation often contributes to values central to the rule of law.

With the experience of tyranny behind them, the Framers of the Constitution feared the excesses of legislative power.[84] As a result, they drafted express prohibitions against ex post facto laws and bills of attainder[85] and forbade the states from impairing existing contractual obligations.[86] The Framers did not, however, forbid retroactive federal statutes,[87] and in fact courts regularly uphold explicit retroactive provisions[88] such as those found in the original version of the Civil Rights Act of 1990.[89] When Congress speaks clearly about its intent to apply a law retroactively, courts defer and the traditional resistance to retroactivity disappears. Through the years, opponents of explicitly

---

81. United States v. Security Indus. Bank, 459 U.S. 70, 79 (1982).

82. *See generally* Ray H. Greenblatt, *Judicial Limitations on Retroactive Civil Legislation,* 51 NW. U. L. REV. 540 (1956) (providing a brief history of the bias against retroactive legislation).

83. ESKRIDGE & FRICKEY, *supra* note 13, at 241-43.

84. James Madison warned that "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." THE FEDERALIST NO. 48, at 147 (Roy P. Fairfield ed., 2d ed. 1981).

85. U.S. CONST. art. I, § 9, cl. 3. ("No bill of Attainder or ex post facto Law shall be passed."). Bills of attainder are special acts of the legislature which impose punishment upon a specific person without any conviction arising out of a judicial proceeding; ex post facto laws inflict punishment on a person for an act which was innocent when committed. *See* BLACK'S LAW DICTIONARY 127, 580 (6th ed. 1990).

86. U.S. CONST. art. I, § 10.

87. *See supra* note 10.

88. *See infra* notes 89-92 and accompanying text.

89. As a constitutional matter, courts have approved of retroactivity as a helpful legislative tool in a wide variety of situations. Retroactive curative laws are regularly upheld. These laws "repair the consequences of legal accident or mistake" by ratifying prior official conduct or by fixing an error in an administrative system. 2 NORMAN J. SINGER, SUTHERLAND'S STATUTORY CONSTRUCTION § 41.01 (4th ed. 1986); Hochman, *supra* note 9, at 704. By permitting the legislature to correct statutory errors, courts fulfill the expectations of parties operating under the law and ensure that government runs smoothly. Courts similarly defer to emergency legislation, where lawmakers are considered to be in the best position to promote public welfare during a crisis, such as wartime or economic depression. *Id.* at 698-700. Finally, tax legislation is often retroactive. *See generally id.* at 706-11. Outside of these regularly accepted contexts for retroactivity, the Court has also approved of retroactive laws which affect economic and social policy. *See infra* note 92.

retroactive provisions have challenged retroactive laws with the Due Process Clause, but to little avail.[90] Currently, the Court uses a minimal rationality standard[91] in cases of explicit retroactivity, a low level of scrutiny which nearly all retroactive laws overcome.[92]

Despite the deference given to these explicitly retroactive laws, the *Bowen* presumption remains hostile to retroactivity in the context of ambiguous statutes. Justice Scalia's attacks on the *Bradley* presumption, along with the Court's recent intimations of antiretroactivity sentiment, suggest that the presumption of retroactivity may soon be severely limited, if not extinguished. Thus, a discussion of the values embodied in *Bowen* is particularly appropriate and timely.

The *Bowen* approach cannot be justified on constitutional or policy grounds. Although *Bowen*'s clear-statement rule is cloaked in the guise of neutrality — making it appear as if the Court is taking a purely hands-off approach — the imposition of the rule is itself a policy choice to avoid resolving statutory dilemmas. Such a policy creates a conundrum in which Congress leaves the issue to the courts, and the courts give back to Congress a task which it cannot complete.[93] The two branches pass the issue back and forth, without ever assessing its validity, impact, or necessity. "[W]hen Congress is unable to address a problem that arises within a statutory scheme and the Court continues to 'remand' the problem to Congress by operating in the clear-statement model, a substantive decision results without either institution's explicitly confronting the choices implicated in that decision."[94] In contrast, *Bradley* is not a clear-statement rule because its presumption can be thwarted by manifest injustice as well as by congressional intent. Although its presumption may be troubling,[95] *Bradley*'s manifest injustice rule allows case-by-case adjudication, exactly the approach a clear-statement rule seeks to avoid.

---

90. "Since the New Deal era, retroactive statutes have become quite common, and in the overwhelming majority of cases they have withstood constitutional challenges." ESKRIDGE & FRICKEY, *supra* note 13, at 275.

91. "[R]etroactive legislation does have to meet a burden not faced by legislation that has only future effects.... But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 11.9 (3d ed. 1986) (quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984)).

92. *See R.A. Gray & Co.*, 467 U.S. 717, 728 (1984) ("[T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively."); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976) ("[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."); *see also* Thomas v. Carnegie-Illinois Steel Corp., 174 F.2d 711, 713 (3d Cir. 1949); Battaglia v. General Motors Corp., 169 F.2d 254, 260-61 (2d Cir. 1948) (federal court decisions upholding retroactive application of the Portal-to-Portal Act).

93. Institutional limits on Congress mean that statutes often contain unresolved issues. *See infra* notes 210-14 and accompanying text.

94. Note, *supra* note 19, at 905.

95. *See infra* text accompanying note 234. This Note argues against using any presumption to resolve the retroactivity issue in the Civil Rights Act of 1991.

Courts typically invoke clear-statement rules to ensure that Congress deliberates issues which contain potential constitutional concerns.[96] By forcing Congress to provide definitive guidance, a clear-statement rule allows courts to avoid interpretive searches into statutory meaning when they feel that a law perches precariously near constitutional limits.[97] However, retroactive laws usually pass rational basis review,[98] reaffirming that retroactivity does not inherently pose a substantial threat to constitutional norms. Thus, constitutional due process concerns do not explain the disparity between the extreme deference given to explicit retroactivity and the resistance pitted against retroactive application of ambiguous statutes.[99]

The lack of a constitutional underpinning suggests that equity concerns really underlie the *Bowen* presumption. Perhaps this standard seeks to guard against potentially unfair results of retroactive laws, which can disrupt settled expectations, deprive parties of notice, and target vulnerable groups.[100] These are indeed valid concerns, but they simply do not arise in every statute.[101] In fact, the *Bradley* presumption probably arose as an implicit recognition that, in some situations, retroactivity contains none of these risks and can serve legislative goals. Furthermore, these potential inequities can just as easily result from prospective laws, which can upset settled expectations, and retroactive judicial decisions, which may punish past behavior the defendant thought proper.[102]

Moreover, the *Bowen* presumption 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 laws. With some statutes, however, retroactivity "can . . . actually serve the cause of legality. . . . [I]t can serve to heal infringements of the principle that like cases should receive like treatment."[103] For these statutes, the *Bowen* presumption uncritically sanctions harsh results. When a court applies the clear statement rule to an ambiguous statute *without justifi-*

96. William V. Luneburg, *Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction,* 58 IND. L.J. 211, 220 (1982).

97. *Id.* at 217.

98. *See supra* note 92 and accompanying text.

99. Nor do separation-of-powers concerns underlie the presumption against retroactivity. In the absence of any presumptions, courts interpret ambiguous statutes. Congressional silence is not to be understood as an endorsement of a particular position. There is therefore no difference between having no presumptions and having two conflicting presumptions.

100. These objections to retroactivity are set forth and questioned in Bryant Smith, *Retroactive Laws and Vested Rights,* 6 TEXAS L. REV. 409, 417-20 (1928).

101. The Civil Rights Act of 1991 is one such example. *See infra* section III.C.

102. *See infra* notes 239-46 and accompanying text.

103. LON L. FULLER, THE MORALITY OF LAW 211 (rev. ed. 1969).

cation, it avoids its judicial responsibility to interpret statutes.[104] By refusing to engage in substantial interpretation, the Court may undermine legislative enactments.[105]

II. THE CIVIL RIGHTS ACT OF 1991: OVERRULING THE SUPREME COURT

When interpreting federal statutes, the Supreme Court frequently reminds lawmakers that if they do not like a decision, they are free to rewrite the statute.[106] Congress has increasingly overruled Court decisions it finds unfavorable, and each Congress since 1975 has overruled an average of twelve Supreme Court decisions interpreting federal statutes.[107] Congress is often explicit about its motives, claiming to be restoring, amending, or clarifying existing laws.[108] The Civil Rights Acts of 1990 and 1991 represent the most recent congressional disapproval of the Court's interpretation of federal statutes. Retroactivity may potently diminish the impact of Supreme Court interpretations, and Congress debated its application to the Civil Rights Act throughout the two years preceding the Act's passage. Section II.A describes the enactment of the Civil Rights Act, with a focus on retroactivity issues. Section II.B demonstrates that traditional and textual methods of statutory interpretation fail to resolve the retroactivity issue. Section II.C analyzes the lower federal courts' approaches in deciding whether the Civil Rights Act applies to pending cases. This Part demonstrates that Congress' ambiguity, along with the conflicting Supreme Court doctrine, has led to contradictory outcomes among the federal courts.

A. *Passage of The Civil Rights Act*

During the 1989 term, the Supreme Court issued a rapid-fire succession of decisions which chipped away at the rights and remedies of

---

104. *Id.* at 94.

105. [T]he "clear statement" principle usually fails as a useful tool of construction because it cannot demonstrate why the legislature would have wanted the court to hesitate just because the subject matter of the law is "sensitive." Likely it thinks that making hard decisions in sensitive areas is what courts are for.

Frank H. Easterbrook, *Statutes' Domains,* 50 U. CHI. L. REV. 533, 545 (1983) (footnote omitted).

106. *See, 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."). *Patterson* is one of the decisions overruled by the Civil Rights Act. In contrast, only the herculean task of constitutional amendment can overturn constitutional decisions.

107. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Decisions,* 101 YALE L.J. 331, 338 (1991).

108. *See, e.g.,* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, pmbl., 102 stat. 28, 28; *see also* Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, § 101, 104 Stat. 978, 978 (1990) ("The Congress finds that, as a result of the decision of the Supreme Court . . . legislative action is necessary to restore the original congressional intent in passing and amending the [ADEA].").

plaintiffs in employment discrimination actions.[109] In those decisions, the Court consistently chose narrow interpretations of Title VII[110] and section 1981.[111] The decisions ignited a massive lobbying effort by civil rights groups to mitigate the effect of the rulings.[112] Riding this momentum, Senator Edward Kennedy and Representative Augustus Hawkins introduced the Civil Rights Act of 1990 in both the Senate and House on February 7, 1990.[113] Almost immediately, the Bush administration opposed the legislation, characterizing it as a "quota bill" and suggesting that the Act's proposed damage remedies would lead to excessive litigation.[114]

In the 1990 Act, Congress openly expressed its hostility to the Court's interpretations, declaring that "in a series of recent decisions addressing employment discrimination claims under federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections [and that the Act would] restor[e] the civil rights protections that were dramatically limited by those decisions."[115] Congress further expressed its disapproval by making the

---

109. *See supra* note 1; *see also* Constance Baker Motley, *The Supreme Court, Civil Rights Legislation, and* Deja Vu, 76 CORNELL L. REV. 643 (1991):

> Although the Court in each of these cases modestly claimed only to be following precedent, history, or the plain meaning of the statutes before it, the Court succeeded in the course of less than one month, in reshaping the civil rights landscape for those already facing a steep incline in the road to fairness.

Id. at 655; *cf. infra* note 115 (cases overruled by Congress). *But see* Patterson v. McLean Credit Union, 491 U.S. 164, 188 (1989) ("Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public, sphere.").

110. 42 U.S.C. § 2000e to 2000e-17 (1988). Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.

111. 42 U.S.C. § 1981 (1988). § 1981 states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

112. *See Bush Vetoes Job Bias Bill; Override Fails,* 1990 CONG. Q. ALMANAC 462 [hereinafter *Bush Vetoes Job Bias Bill*].

113. *See supra* note 2. In addition to overruling the objectionable Supreme Court decisions, both the 1990 and 1991 Acts amend Title VII by allowing women and religious minority plaintiffs to seek compensatory and punitive damages for intentional discrimination (racial minorities already have this remedy under § 1981) and providing the option of jury trials for plaintiffs seeking these damages. The 1991 Act places caps on the amount of these damages that may be awarded. Legislation has been introduced to overturn the caps. *See infra* note 132.

114. *See Bush Vetoes Job Bias Bill, supra* note 112, at 466.

115. S. 2104, 101st Cong., 2d Sess. § 2, *reprinted in* 136 CONG. REC. S1019 (daily ed., Feb. 7, 1990). In recent years, Congress has increasingly resorted to overruling Court opinions it finds unfavorable. See, for example, the following civil rights statutory interpretations and overruling statutes: Public Employees Ret. Sys. v. Betts, 492 U.S. 158 (1989), *overruled by* Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified at 29 U.S.C.A. § 621 (West Supp. 1992)); Dellmuth v. Muth, 491 U.S. 223 (1989), *overruled by* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C.A. § 1401 (West Supp. 1992)); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985), *overruled by* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003,

bill's provisions retroactive to actions pending or initiated on the dates of the applicable Supreme Court rulings and by permitting the reopening of final judgments.[116]

Senators and Representatives challenged and debated[117] the 1990 bill's explicit retroactive provisions. The polarization of views hinged largely on how one characterized the Act. Supporters of the retroactive provisions described the Act as restoring existing rights to unlucky plaintiffs whose claims fell under the Supreme Court decisions.[118] In contrast, opponents of retroactivity tended to portray the Act as a major rewriting of civil rights law which should thus only apply prospectively.[119] In his veto message, President Bush specifically attacked the bill's "unfair retroactivity rules," without elaborating further.[120]

---

100 Stat. 1807, 1845 (codified at 42 U.S.C. § 2000d-7 (1988)); Smith v. Robinson, 468 U.S. 992 (1984), *overruled by* Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 2, 100 Stat. 796, 796 (codified as amended at 20 U.S.C. § 1415 (Supp. II 1990)); Grove City College v. Bell, 465 U.S. 555 (1984), *overruled by* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3, 102 Stat. 28, 28 (1988) (codified at 20 U.S.C. § 1687 (1988)); City of Mobile v. Bolden, 446 U.S. 55 (1980), *overruled by* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973 (1988)); United Air Lines v. McMann, 434 U.S. 192 (1977), *overruled by* Age Discrimination Act Amendments of 1978, Pub. L. No. 95-256, § 2, 92 Stat. 189, 189 (codified as amended at scattered sections of 29 U.S.C.A. (West Supp. 1992)); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *overruled by* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (1988)); Alyeska Pipeline Serv. Co. v. Wilderness Socy., 421 U.S. 240 (1975), *overruled by* Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C.A. § 1988 (West Supp. 1992)).

116. Section 15(a) provided that certain provisions of the Act "shall apply to all proceedings pending on or commenced after" the dates on which the Supreme Court issued the relevant opinions. Section 15(b) vacated court orders entered between the dates of the Supreme Court opinions and the Act's enactment which were based on Supreme Court standards. Section 15(c) retroactively tolled the statute of limitations for claims not filed because of the prevailing Supreme Court standards. H.R. CONF. REP. No. 856, 101st Cong., 2d Sess. 9-10, *reprinted in* 136 CONG. REC. H9554 (daily ed. Oct. 12, 1990).

117. *See, e.g.*, 136 CONG. REC. H6771-72 (daily ed. Aug. 2, 1990) (statement of Rep. Goodling); 136 CONG. REC. S9932-33 (daily ed. July 18, 1990) (statement of Sen. Murkowski); 136 CONG. REC. S9840-41 (daily ed. July 17, 1990) (statement of Sen. Kassebaum); 136 CONG. REC. S3144-47 (daily ed. Mar. 26, 1990) (statement of Sen. Hatch).

118. "[T]he legislation is restorative in purpose," H.R. CONF. REP. No. 856, 101st Cong., 2d Sess. 23, *reprinted in* 136 CONG. REC. H9558 (daily ed. Oct. 12, 1990).

119. "[The Act] chang[es] the rules of the game midstream" 136 CONG. REC. H6766 (daily ed. Aug. 3, 1990) (statement of Rep. Johnson).

120. President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, *supra* note 4, at 1634, *reprinted in* 136 CONG. REC. at S16,458.

Throughout the process, Congress narrowly fended off attacks on the retroactive provisions. The House Judiciary Committee barely defeated, by an 18 to 18 vote, a proposal by Rep. Carlos Moorhead, R.-Calif., to remove all retroactivity provisions. *Bush Vetoes Job Bias Bill, supra* note 112, at 469. Moorhead argued that a "major revision of civil rights laws should be prospective." *House Judiciary Committee Approves Omnibus Civil Rights Bill, 24-12,* DAILY REP. FOR EXECUTIVES (BNA), July 26, 1990, at A-9. Nonetheless, the Conference Report upheld the retroactivity provisions, explaining that "[t]he Supreme Court decisions overturned by this bill repudiated well-settled case law which protected American workers against employment discrimination. In the past year, hundreds of discrimination victims have had their claims dismissed, or their rights and remedies otherwise impaired, as a direct result of the application of these decisions." H.R.

Ultimately, the Senate failed — by one vote — to overrule the presidential veto.[121] The Civil Rights Act resurfaced and passed in 1991, the result of a lengthy series of compromises between civil rights advocates and leaders of business.[122] In the 1991 Act, retroactivity remained one of the numerous topics Congress considered in the negotiations with the Administration. Initially, the House version of the 1991 bill, H.R. 1, tied retroactive provisions to the dates of the Supreme Court decisions they overruled.[123] In an effort to make the bill palatable to the administration, Representative Brooks introduced a modified version of H.R. 1.[124] This modified version added explicit antiquota language[125] and precluded retroactive application to closed cases in the absence of manifest injustice.[126] Under the modified ver-

---

CONF. REP. NO. 856, 101st Cong., 2d Sess. 23-24, *reprinted in* 136 CONG. REC. H9552, H9558 (daily ed. Oct. 12, 1990).

121. *See* 136 CONG. REC. S16,589 (daily ed. Oct. 24, 1990) (recording vote of 66 to 34); *Bush Vetoes Job Bias Bill, supra* note 112, at 469.

122. The Preamble was less strongly worded than the 1990 Preamble, but the sentiment was the same. In the Act, Congress finds that

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;
(2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and
(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

[The purposes of the Act are]

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;
(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the 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 provide adequate protection to victims of discrimination.

Pub. L. No. 102-166, §§ 2-3, 105 Stat. 1071, 1071 (1991).

123. H.R. 1, 102d Cong., 1st Sess. § 15 (1991).

124. H.R. 1, 102d Cong., 1st Sess., *reprinted in* 137 CONG. REC. H3922-28 (daily ed. June 5, 1991).

125. Section 111 stated that

Nothing in the amendments made by this Act shall be construed . . . to require, encourage, or permit an employer to adopt hiring or promotion quotas on the basis of race, color, religion, sex, or national origin, and the use of such quotas shall be deemed to be an unlawful employment practice under such title . . . .

H.R. 1, 102d Cong., 1st Sess., § 111(a)(2), *reprinted in* 137 CONG. REC. H3922, H3924 (daily ed. June 5, 1991).

This provision did not assuage conservative interests. Attorney General Dick Thornburgh said, "Nothing has changed. The president will veto any legislation which has undergone only cosmetic changes and which still forces quotas." Joan Biskupic, *Democrats Scramble for Cover Under GOP "Quota" Attacks,* 49 CONG. Q. 1378 (1991). The provision was ultimately dropped in the enacted Senate bill.

126. Section 113 of the Brooks substitute set forth the application of amendments and transition rules. Overruling amendments were tied to dates of the applicable Supreme Court decisions. Final judgments

as to which the rights of any of the parties thereto have become fixed and vested, where the

sion, the bill applied retroactively to cases still under review.[127] Although the House passed the bill 273 to 158, supporters were unable to secure the 290 votes necessary to ensure a veto-proof margin.[128] The effort then shifted to the Senate, where the search for a compromise position continued. Senator Danforth, a moderate Republican, spearheaded the endeavor by introducing a version designated S. 1745[129] and served as a mediator between the Senate and the Administration. S. 1745 retained most of the key provisions from the House bill.[130] Somewhat surprisingly, the Administration reversed itself and embraced the new version.[131] The Act passed in the Senate on October 30 and in the House on November 8.[132] President Bush signed the Act into law on November 21, 1991.[133]

The final version of the 1991 Act itself contained no reference to

---

time for seeking further judicial review of such judgment has otherwise expired . . . shall be vacated in whole or in part if justice requires, pursuant to rule 60(b)(6) of the Federal Rules of Civil Procedure or other appropriate authority, and consistent with the constitutional requirements of due process of law.

H.R. 1, 102d Cong., 1st Sess. § 113(b)(3), *reprinted in* 137 CONG. REC. H3922, H3925 (daily ed. June 5, 1991).

127. H.R. 1, 102d Cong., 1st Sess. § 113(b)(1), *reprinted in* 137 CONG. REC. H3922, H3925 (daily ed. June 5, 1991).

128. 137 CONG. REC. D696 (daily ed. June 5, 1991).

129. S. 1745, 102d Cong., 2d Sess., *reprinted in* 137 CONG. REC. S15,503-12 (daily ed. Oct. 30, 1991).

130. The damage remedies and the jury trial option remained. Compared to H.R. 1, S. 1745 makes it easier for employers to defend themselves, caps damage remedies, and leaves the meaning of *business necessity* and *job-relatedness* under *Griggs* undefined.

131. The President approved of S. 1745, promising before its passage, "I will enthusiastically sign this bill." *White House Announces Civil Rights Compromise Ending Two-Year Dispute,* DAILY REP. FOR EXECUTIVES (BNA), Oct. 28, 1991, at A-20 [hereinafter *White House.*].

132. In addition to overruling the 1989 Supreme Court cases, the 1991 Act also overrules two 1991 Court decisions. By overruling EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991), Congress expanded the Act's reach to American employees working for U.S. employers overseas; by overruling West Virginia Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138 (1991), the Act allows winning plaintiffs to recover the costs of hiring expert witnesses. The 1991 Act also extends its reach to cover House and Senate employees. Pub. L. No. 102-166, §§ 301-325, 105 Stat. 1071, 1088-99 (1991) (codified at 2 U.S.C.A. §§ 1201-1224 (West Supp. 1992)). Finally, the Act establishes a glass ceiling commission to examine the barriers faced by minorities and women in attaining management and upper-level positions. Pub. L. No. 102-166, §§ 201-10, 105 Stat. 1081, 1081-87 (1991).

Since passage, the Senate Labor Committee has proposed overturning the damage caps for women, disabled people, and religious minorities. The Committee has also approved a bill to apply the Act to the Ward's Cove Packing Co., the company specifically exempted from any potential retroactive application in the 1991 Act. Albert R. Karr, *Senate Panel Votes to End Lid on Damages,* WALL ST. J., Mar. 12, 1992, at A3, A4.

133. President Bush claimed a victory and denied that the administration had buckled under congressional pressure: "We didn't cave. We worked out in a spirit of compromise a negotiated settlement where I can say to the American people, 'This is not a quota bill.' " *White House, supra* note 131, at A-20. Senator Kennedy praised Bush for dropping the quota issue: "The administration retreated. They finally stopped playing the quota card." *Id.* Senator Wirth attributed the White House's about-face to the fallout from the Clarence Thomas confirmation hearings and the Louisiana primary in which David Duke, a former Klansman, mounted an attention-getting campaign. *Id.* Another suggested reason for the turnabout was that Senate Republicans who wanted the bill passed by the 1992 elections threatened to overrule Bush if a

retroactivity and stated only that "the amendments made by this Act shall take effect upon enactment."[134] This intentionally vague section[135] has spawned massive confusion because it fails to resolve which cases fall under the Act's ambitious reach.[136] On November 21, 1991, the "date of enactment,"[137] hundreds of cases were headed to trial, in the midst of trial, pending appeal, pending remand, and generally winding their way through the system.[138] Some of the cases were based on facts arising before 1989, and others arose during the window of time when the Supreme Court standards were law.[139] As the next section demonstrates, however, nothing in the legislative history or the statutory language indicates the proper judicial response to this dilemma.

Pursuant to the Bush administration's wishes, the Justice Department and the Equal Employment Opportunity Commission (EEOC) have consistently opposed retroactive application of the Act.[140] Interestingly, however, the administration has not always been adamantly

---

showdown occurred. Joan Biskupic, *Senate Passes Sweeping Measure to Overturn Court Rulings*, 49 CONG. Q. 3200, 3201 (1991).

134. Pub. L. No. 102-166, § 402(a), 105 Stat. 1099 (1991). In a controversial move, Congress exempted the Wards Cove Packing Co. (the defendants in the case Congress overruled) from the effective date provision and thus, from any future litigation. Pub. L. No. 102-166, § 402(b), 105 Stat. 1099 (1991).

135. *See infra* notes 213-14 and accompanying text.

136. *See* cases cited *supra* note 8.

137. *See generally* President's Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701-02 (Nov. 21, 1991) (announcing the signing of S. 1745).

138. It can take years for a Title VII case to get through the system. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978), a case that began in 1965, prompted the court to state: "The length of litigation in complex Title VII class actions often rivals that of even the most notorious antitrust cases. In the instant case, we encounter another judicial paleolithic museum piece." 576 F.2d at 1168.

139. The Act could be construed to cover a number of variations. Another layer of complexity arises because the "date of enactment" draws an arbitrary line among causes of action. Clearly the Act applies to causes of action arising after November 21, 1991, but whether it applies to cases filed after the date of enactment that are based on pre-November 21 facts is unclear. Suppose an employee is allegedly fired on the basis of race on November 20, the day before enactment, and files a claim two months later. Which law applies, the *Wards Cove* test enunciated by the Supreme Court or the *Griggs* standard restored by the Act?

To resolve the retroactivity question, courts have three options. First, a court could apply the Act only to cases based on facts arising after November 21. Second, a court could apply the Act to all cases filed after November 21, regardless of when the cause of action arose. Third, a court could apply the Act to cases filed before November 21 and still pending on that day.

140. The EEOC issued a policy directive stating that the agency would only apply the Act to cases arising after November 21, 1991. *See supra* note 8. The Justice Department has argued against applying the law retroactively in cases accusing the government of discrimination against federal employees. Robert Pear, *Agency Prohibits Use of New Law in Old Bias Cases*, N. Y. TIMES, Dec. 31, 1991, at A1. The Department submitted a brief opposing retroactivity in Van Meter v. Barr, 778 F. Supp. 83 (D.D.C. 1991) — the first official government interpretation of the Act's effective date provision. Justice Department Brief on Issue of Retroactivity of 1991 Civil Rights Act, *Barr* (No. 91-0027), *cited in, Civil Rights Law Not Retroactive, DOJ Asserts*, DAILY LAB. REP. (BNA), Dec. 4, 1991, at F-1 [hereinafter *Justice Dept. Brief*].

The EEOC has come under attack for its position. *EEOC Performance, Restrictive Stand on 1991 Act Attacked on Capital Hill*, DAILY LAB. REP. (BNA), Apr. 29, 1992, at A-3.

opposed to retroactivity. Rather, government attorneys have argued for retroactive application of at least six similarly ambiguous statutes, winning millions of dollars for the government in the process.[141] In *United States v. Peppertree Apartments,*[142] a housing fraud case, the government successfully relied on *Bradley* in the Eleventh Circuit to argue that the Housing and Community Development Act should apply retroactively. The government won double damages as a result. When the case reached the Supreme Court, however, the government rescinded its previous position favoring retroactivity so as not to jeopardize its stance on the 1991 Act.[143] With hundreds of Civil Rights Act cases pending across the country, the government was unwilling to defend its position and in a short brief abandoned its claim.[144] The Court vacated the appellate court judgment.[145] Not surprisingly, civil rights attorneys accused the government of taking contradictory positions, "depending on whether endorsing or repudiating *Bradley* will result in the preferred outcome."[146] The retroactivity issue will likely be resolved in the context of one of the cases interpreting the Civil Rights Act of 1991.

B. *The Impossible Search for Statutory Meaning*

Both the *Bowen* and *Bradley* presumptions hinge on congressional intent. In the absence of intent, *Bowen* presumes prospectivity, while *Bradley* presumes retroactivity.[147] Thus, any court examining the Civil Rights Act must undertake a search for intent, under which either presumption may be rebutted. Under the traditional method of statutory construction, courts attempt to discern the intention of the enacting legislature by looking to the plain language of the statute, the

141. Marcus, *supra* note 8, at A21 (listing the following statutes: Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as listed in 8 U.S.C. § 1101 (Supp. II 1990)); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C. (Supp. II 1990)); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3601-3617 (1988)); Housing and Community Development Act of 1987, Pub. L. No. 100-242, 101 Stat. 1815 (codified in scattered sections of 12 U.S.C. and 42 U.S.C. (1988)); False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified at scattered sections of 18 U.S.C. and 31 U.S.C. (1988)); Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as listed at 42 U.S.C. § 9601 (1988))).

142. 942 F.2d 1555 (11th Cir. 1991), *vacated sub nom.* Bailes v. United States, 112 S. Ct. 1755 (1992).

143. Linda Greenhouse, *Court Avoids Decision on Time Limits of Laws,* N.Y. TIMES, Apr. 28, 1992, at A17.

144. *Id.*

145. Bailes v. United States, 112 S. Ct. 1755 (1992).

146. Marcus, *supra* note 8, at A21 (quoting an *amicus curiae* certiorari brief filed by the NAACP Legal Defense and Education Fund in *Bailes*).

147. The *Bradley* test will also consider manifest injustice resulting from its presumption of retroactivity.

legislative history, and legislative purposes.[148] Recently, Justice Scalia has revived discourse over the textual method of statutory construction, under which courts ignore legislative history and derive meaning purely from the statute's words.[149] As this section demonstrates, neither of these methods of interpretation aids in resolving the confusion engendered by section 402 of the Civil Rights Act. Congress simply could not decide whether to apply the Act either retroactively or prospectively.

1. *Statutory Language*

"[W]here the congressional intent is clear, it governs."[150] Despite differences in their theoretical groundings, both the traditional means of statutory interpretation and the textualist approach look first to the plain meaning of a statute's words to divine congressional intent.[151] A purposely ambiguous statute like the Civil Rights Act confounds this search for plain meaning. Judges have attacked the effective date provision of the Civil Rights Act for its vague and inconclusive language[152] but have nonetheless been able to select the presumption of their choice by finding no clear congressional intent compelling the opposite result. Both proponents and opponents of retroactively applying the Civil Rights Act to pending cases can draw suggestive inferences from the statutory text. Ultimately, both sets of arguments fail because they rely on finding intent, and none exists on the retroactivity issue.

Opponents of retroactivity claim that if Congress wanted retroac-

148. *See, e.g.*, Griffen v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982) ("Our task is to give effect to the will of Congress."). Under the traditional approach, a court will first attempt to discern legislative intent from the statute's words. The court will then look to legislative history to give content to the language and to either confirm or rebut the implications of the plain meaning. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626 (1990).

149. A textualist interpreter looks to the statutory language and relies on the common understanding of the words, as well as a comparison of the wording with that found in similar statutes. *See e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 452-55 (1987) (Scalia, J., concurring). Textualism arises from a formalist critique which argues for restraint of the judiciary through constrained interpretive methods. Under this view, "if unelected judges exercise much discretion in these cases [through the use of legislative history], democratic government is threatened." Eskridge, *supra* note 148, at 646. *See generally* Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160. Several federal judges have also furthered the textualist position. *See, e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POLY. 59 (1988); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371.

150. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 837 (1990).

151. Each of the two approaches finds support in *Cardoza-Fonesca*, 480 U.S. at 421, in which the majority used the traditional approach while Scalia, in his concurrence, relied solely on the text and steadfastly refused to look to legislative history. Scalia relied on the "venerable principle that if the language of a statute is clear, that language must be given effect — at least in the absence of a patent absurdity." 480 U.S. at 452.

152. *See, e.g.*, King v. Shelby Medical Ctr., 779 F. Supp. 157, 158 (N.D. Ala. 1991) (calling the problem a "tragi-comedy of confusion" and deriding Congress for avoiding the issue).

tive application of the statute, Congress would have explicitly said so.[153] This line of argument maintains that Congress knows how to make its laws retroactive when it wants to.[154] However, Congress also knows how to make its laws strictly prospective and has done so on numerous occasions.[155] It is difficult to glean anything meaningful from these contentions since Congress knowingly left the matter to the courts.[156]

Alternatively, proponents of retroactivity point out that the Act specifically exempts certain provisions from retroactive treatment.[157] Section 109(c), which extends the reach of the Act overseas, states that its provisions "shall not apply with respect to conduct occurring before the date of . . . enactment."[158] Also, section 402(b), the controversial exemption for the defendants in the *Wards Cove* case, specifically protects the company from retroactive application of the Act and insulates it from any potential lawsuits.[159] Under general principles of construction, a statute should not be construed as redundant.[160] If the whole Act is prospective, these exemptions would be superfluous; thus, these exemptions suggest that the rest of the Act is retroactive. In rebuttal, opponents maintain that these provisions merely ensure that congressional intent is not mistaken as to these specified parties, and further that these sections reflect an overall antiretroactivity bias. For instance, the Department of Justice argued that "Congress was simply trying to assuage the *Wards Cove* defendants who, for whatever reason, feared that the Act would engender further litigation of their case."[161]

---

153. *See, e.g.*, Khandelwal v. Compuadd Corp., 780 F. Supp. 1077, 1078 (E.D. Va. 1992) ("If Congress intended the remainder of the Act to apply retroactively, it would have stated so.").

154. *See, e.g.*, Local Government Antitrust Act of 1984, Pub. L. No. 98-544, § 6, 98 Stat. 2750, 2751 (making § 6 retroactive to 30 days before the statute's enactment); Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 28, 98 Stat. 1639, 1655 (the amendments of the act apply to claims pending on the date of enactment).

155. *See, e.g.*, Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5114 (1990) ("The amendments made by this section shall apply to civil actions commenced on or after the date of the enactment of this Act."); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 2(b), 92 Stat. 2076, 2076 (containing a postponed effective date for existing fringe benefit and insurance programs).

156. "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." 137 CONG. REC. S15,485 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy).

157. *See e.g.*, Stender v. Lucky Stores, Inc., 780 F. Supp. 1302, 1304 (N.D. Cal. 1992).

158. Pub. L. No. 102-166, § 109(c), 105 Stat. 1071, 1078 (1991).

159. This section states, "Notwithstanding any other provision of this Act, nothing in this act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983." Pub. L. No. 102-166, § 402(b), 105 Stat. 1071, 1099 (1991). The Senate Labor Committee has since approved legislation to overturn this provision and thereby make the Act available to Wards Cove Packing Co. employees. *See supra* note 132.

160. Kungys v. United States, 485 U.S. 759, 778 (1988).

161. *See Justice Dept. Brief, supra* note 140, at 11.

Yet another analysis compares the ambiguous language of Section 402 of the 1991 Civil Rights Act with the deleted explicit retroactivity provisions of the 1990 version. On the one hand, the deletion signals that Congress disapproved of retroactive application of the Act to pending cases. On the other hand, that Congress failed to expressly deny retroactivity implies that it sanctioned retroactivity in certain instances.

As becomes clear, the problem with these strategic textual arguments is that both sides have valid contentions. The textual clues prove little. Congress not only lacked unanimous intent but very simply did not know what it wanted. There is no intent to be found — other than the intent to leave the problem to the courts.

2. *Legislative History*

Congress knew that the Act's application to pending cases remained unresolved. In fact, senators and representatives went to great lengths to put their own spin on the matter into the legislative history. In the House, Representative Edwards stated that "[t]he intent of the sponsors is that this language be given its normal effect, and that the provisions of the bill be applied to pending cases."[162] In the Senate, Senators Dole and Danforth supported the administration's position and each submitted a memorandum of law into the *Congressional Record* arguing against retroactivity.[163] Senator Kennedy, however, responded to these memoranda by asserting that he only agreed to be a cosponsor of the bill with the understanding 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."[164] Kennedy characterized the bill as a "restoration of a prior rule," and cited cases which applied restored rules retroactively.[165] As a result of these contrary pronouncements, federal courts may support either view after an obligatory search through the legislative history.[166]

President Bush also attempted to inject his own voice into the legislative history. In his presidential signing statement, Bush said that Dole's interpretive memorandum covers all technical matters, such as the effective date, and "will be treated as authoritative interpretive guidance by all officials in the executive branch."[167] His endorsement of the Dole view does not add to the legislative history, but it may swing

162. 137 CONG. REC. H9530 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards).

163. 137 CONG. REC. S15,483, S15,485 (daily ed. Oct. 30, 1991) (interpretive memorandum submitted by Sen. Danforth); *see also* 137 CONG. REC. S15,472, S15,478 (daily ed. Oct. 30, 1991) (interpretive memorandum submitted by Sen. Dole).

164. 137 CONG. REC. S15,485 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy).

165. *Id.*

166. The federal courts have largely used these statements merely to point out that the issue is unclear. *See infra* section II.C.

167. President's Statement on Signing the Civil Rights Act of 1991, *supra* note 137, at 1702.

the balance for courts fed up with the congressional confusion.[168]

In the end, the only clear meaning which comes out of the enactment provision is that Congress could not come to a consensus. The "declarations and counter-declarations"[169] in the legislative history fail to guide courts convincingly in either direction. Whether a court construes statutes by looking at "plain meaning" or by relying on extrinsic aids such as legislative history, the application of the Act to pending cases remains ambiguous. Thus, attempts to divine meaning from these weak inferences will avoid the underlying and most meaningful issue: why should or should not the Act be applied retroactively?

C. *Cases Interpreting the Civil Rights Act*

The first federal appellate court to address the retroactivity issue declined to apply the Act to pending cases. In *Vogel v. City of Cincinnati,*[170] a split Sixth Circuit panel stated that "[w]e . . . shall not attempt to interpret the substantive provisions of the 1991 Act; rather we shall apply the law that was in effect prior to the 1991 Act."[171] In *Vogel,* the court affirmed summary judgment against a white male who brought a reverse discrimination suit against the Cincinnati police department. The plaintiff claimed that the department's affirmative action policy, enacted pursuant to a consent decree negotiated between the police and the Department of Justice, discriminated against him in favor of minority and women candidates.[172] Although the plaintiff eventually joined a later recruit class, he sued for back pay, retroactive seniority, and other benefits.[173] The court felt it had to address the retroactivity question as a "preliminary matter."[174]

In reaching its decision, the court first acknowledged that retroactivity was an open question and briefly recited the applicable case law of *Bradley, Bowen,* and *Bonjorno.*[175] The Court found that the language and legislative history of the Act were unclear and that, as a result, district courts were divided on the issue.[176] The court chose to

168. Most commentators do not believe that Presidential Signing Statements should play a role in judicial decisionmaking, and traditionally they have had no role. *See generally* Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power,* 24 HARV. J. ON LEGIS. 363 (1987); William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique,* 66 IND. L.J. 699 (1991); Brad Waites, Note, *Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements,* 21 GA. L. REV. 755 (1987).

169. Van Meter v. Barr, 778 F. Supp. 83, 84 (D.D.C. 1991).

170. 959 F.2d 594 (6th Cir. 1992).

171. 959 F.2d at 597.

172. *See* 959 F.2d at 596.

173. *See* 959 F.2d at 597.

174. 959 F.2d at 597.

175. *See* 959 F.2d at 597.

176. *See* 959 F.2d at 598.

follow the EEOC policy statement in which the Commission decided it would not seek damages under the Act for events occurring before November 21, 1991.[177] The court stated that an agency's construction of a statute it administers is entitled to deference and that the EEOC's decision "appears reasonable."[178]

The court also reasoned that prospective application of the Act was consistent with a recent Sixth Circuit case which had applied *Bowen*.[179] The court recognized that the Circuit had often cited *Bradley* as the controlling provision, but stated that *Bradley* should be narrowly construed and not applied in contexts where " 'substantive rights and liabilities' . . . would be affected."[180] Without any explanation, the court announced that "clearly, retroactive application of the 1991 Act would affect 'substantive rights and liabilities' of the parties to this action."[181] The court then applied pre-1991 law and determined that Vogel lacked standing to enforce the consent decree collaterally.[182] The concurring judge declined to join the holding on the retroactivity of the Act because the issue had not been raised, briefed, or argued by the parties.[183] Whether application of the 1991 Act would have changed the court's ultimate resolution of the issue, or even why the court felt compelled to address the retroactivity question, remains unclear. Regardless, the court's reasoning fails to justify its conclusion.

Several courts dealing with retroactive application of ambiguous statutes have grasped onto a substance/procedure distinction.[184] The *Vogel* court's assertion that "substantive rights and liabilities" would

177. *See* 959 F.2d at 598.

178. 959 F.2d at 598. Few courts have relied so heavily on the EEOC directive. *See, e.g.*, Sofferin v. American Airlines, 785 F. Supp. 780, 785 (N.D. Ill. 1992); Thompson v. Johnson & Johnson Management Info. Ctr., 783 F. Supp. 893, 897 (D.N.J. 1992) (both citing the EEOC guideline as support, but not relying on it exclusively). Many courts have not addressed the EEOC guideline at all, most likely because it addresses only the government's position on applying the new damage provisions to pending claims, and not the entire Act. *Civil Rights Amendments Aren't Retroactive, EEOC Says*, 60 U.S.L.W. 2418, 2418 (1992). Furthermore, the EEOC chose to follow *Bowen* without any justification other than the fact that it is the Court's more recent holding. However, this argument is not persuasive because in *Bonjorno*, a case decided after *Bowen*, the Court acknowledged the validity of both *Bradley* and *Bowen*. *See supra* notes 47-49 and accompanying text. The EEOC conceded that "it could also be argued that, in light of the public concerns inherent to Civil Rights Act litigation, requiring employers to pay unforseen damages for unlawful discrimination is not manifestly unjust." *EEOC Declares 1991 Civil Rights Act Does Not Apply to Pre-Act Conduct*, DAILY LAB. REP. (BNA), Jan. 2, 1992, at A-8.

179. *See* 959 F.2d at 598.

180. 959 F.2d at 598.

181. 959 F.2d at 598.

182. *See* 959 F.2d at 598.

183. *See* 959 F.2d at 601 (Ryan, J., concurring in part and dissenting in part).

184. For cases outside the context of the Civil Rights Act see, for example, FDIC v. 232, Inc., 920 F.2d 815 (11th Cir. 1991) (applying a statute retroactively because it affects purely procedural rights); Birnholz v. 44 Wall St. Fund., Inc., 880 F.2d 335 (11th Cir. 1989) (same); Kruso v. ITT Corp., 872 F.2d 1416 (9th Cir. 1989) (same).

be affected by application of the Civil Rights Act reflects this approach. These courts have seized on some language in the Supreme Court's retroactivity opinions to infer a substance/procedure distinction,[185] under which substantive changes in the law are applied prospectively while procedural or remedial changes are applied retroactively. The courts may be using this distinction as a shorthand way of balancing the potential dangers of retroactivity, tying these dangers to substantive laws while minimizing them for procedural laws.

However, this approach suffers from shortcomings. No consensus has emerged on what comprises substance or procedure, revealing the lack of content in the distinction.[186] For instance, in characterizing provisions of the Civil Rights Act, one court stated, "[t]here can be no dispute that a right to seek compensatory damages in a jury trial is a major substantive provision,"[187] while another court stated, "compensatory damages and jury trial, are not substantive rights . . . these rights are remedies and procedural rights."[188] The lack of content to the distinction leaves courts without adequate guidance on how to characterize a particular interest and allows policy preferences to determine outcomes. Consequently, similar cases end up with opposite results, making the entire doctrine unpredictable. Courts must grope to distinguish between objectionable and acceptable effects of retroactivity. The substance/procedure distinction blurs the analysis.[189]

The Eighth Circuit also applied the law prospectively in *Fray v. Omaha World Herald Co.*[190] but under different reasoning than the court in *Vogel.* In 1987, the plaintiff brought suit alleging that the defendant discriminated against her on the basis of race and sex between 1984 and 1986. While the case was awaiting trial, the Supreme Court decided *Patterson v. McLean Credit Union.*[191] Under that deci-

185. *Bradley* states that it will not apply a statute retroactively where "to do so would infringe upon or deprive a person of a right that had matured or become unconditional." Bradley v. School Bd., 416 U.S. 696, 720 (1974). In another case, *Bennett v. New Jersey,* the Court held that a determination of whether funds from a federal grant program were misused should be made under standards of law that existed at the time. Distinguishing *Bradley,* the Court noted the presumption for prospectivity, "that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." 470 U.S. 632, 639 (1985).

186. In *Bonjorno,* Scalia particularly disdained drawing the line in this manner:

> I suppose it would be possible to distinguish between statutes that alter "substantive rights and liabilities" directly, and those that do so only by retroactively adding a procedural requirement, the failure to comply with which alters the "substantive rights and liabilities" — but I fail to see the sense in such a distinction.

Kaiser Aluminum & Chem. Co. v. Bonjorno, 494 U.S. 827, 853 (1990) (Scalia, J., concurring).

187. Khandelwal v. Compuadd Corp., 780 F. Supp. 1077, 1080 n.5 (E.D. Va. 1992).

188. United States v. Department of Mental Health, 785 F. Supp. 846, 853 (E.D. Cal. 1992).

189. *See infra* Part III. This Note's proposed framework allows courts to address their valid concerns while avoiding the use of artificial labels.

190. 960 F.2d 1370 (8th Cir. 1992).

191. 491 U.S. 164 (1989).

sion, section 1981 claims only apply to the making and enforcement of contracts, and not to later employment practices.[192] Relying on *Patterson,* the defendant moved for summary judgment. The district court denied the motion and the section 1981 claim was tried before a jury, which awarded the plaintiff damages. The case was pending appeal when the 1991 Act took effect. After a lengthy analysis of *Bradley* and *Bowen,* and an acknowledgement that the effective date provision is unclear, the appellate court nonetheless avoided choosing between the presumptions by finding evidence of congressional intent to apply the law prospectively.[193] The court found it dispositive of legislative intent that the 1991 Act eliminated the explicit retroactive provisions of the vetoed 1990 bill.[194]

The dissenting judge attacked the finding of a clear congressional directive, stating that the elimination of the 1990 Act's explicit retroactivity provision "is dispositive merely of Congress'[ ] intent to leave the retroactivity decision to the courts."[195] Rather than choosing between the presumptions, the dissent felt that the court should reconcile the presumptions as much as possible.[196] *Bradley* and *Bowen* share a common thread, the dissent argued, because both are based on an overriding concern for fairness.[197] Thus, the dissent engaged in a fairness analysis which stressed that all the alleged discriminatory conduct occurred before the Court's 1989 decision: "Until the Supreme Court decided *Patterson* in 1989, there was every indication that the conduct that formed the basis of [the employee's] complaint was actionable under section 1981."[198] The defendant had continual notice that section 1981 could apply to its conduct, and thus the 1991 Act simply restored the rights of the parties as they stood when the lawsuit began.[199] Even the majority conceded, "In these circumstances, retroactive application of [section] 101 to this pending case would neither alter the rights and expectations of the parties nor disturb previously vested rights."[200]

As the *Vogel* court noted, the district courts are split on the retro-

192. 491 U.S. at 171.

193. "Therefore, whether we apply the traditional [*Bowen*] principle of presumptive nonretroactivity, which we think is the better rule, or the conflicting *Bradley* test, we conclude that § 101 of the Act, overruling *Patterson,* should not be retroactively applied to pending cases or other pre-enactment conduct." 960 F.2d at 1378.

194. *See* 960 F.2d at 1377.

195. 960 F.2d at 1379 (Heaney, J., dissenting).

196. *See* 960 F.2d at 1380 (Heaney, J., dissenting).

197. *See* 960 F.2d at 1381 (Heaney, J., dissenting).

198. 960 F.2d at 1381-82 (Heaney, J., dissenting).

199. *See* 960 F.2d at 1382 (Heaney, J., dissenting).

200. 960 F.2d at 1378.

activity issue.[201] *Mojica v. Gannett Co.*[202] and *Khandelwhal v. Compuadd Corp.*,[203] typify the district courts' divergent views. As these representative cases demonstrate, the district courts have generally been scrupulous in examining the statute's language and legislative history, as well as in citing the conflicting precedents of *Bradley, Bowen,* and *Bonjorno.* Yet, when it comes to selecting a presumption, courts generally fall back on either following their circuit's retroactivity precedent[204] or simply choosing what seems the "better rule."[205] As a result, the current case law lacks any sort of uniformity or certainty, while putting litigants at the mercy of individual federal court policy preferences. Applying the Civil Rights Act of 1991 in this arbi-

---

201. *See supra* note 8. The cases have arisen on motions to amend by plaintiffs and on summary judgment motions by defendants.

202. 779 F. Supp. 94 (N.D. Ill. 1991). *Mojica* was the first district court case to hold that the Act applied retroactively. In that case, a Hispanic female disc jockey sued her employer for violations of Title VII based on sex and national origin. The plaintiff had originally filed suit in 1990, and later amended her complaint in light of the Civil Rights Act, adding requests for compensatory and punitive damages and a jury trial.

The court addressed the inconclusive legislative history and the inconsistent precedents on retroactivity and decided to follow a prior Seventh Circuit opinion which applied *Bradley* by finding that no prejudice would result. The circuit court opinion reasoned that "[a]ny tension between the two lines of precedent is negated because, under *Bradley,* a statute will not be deemed to apply retroactively if it would threaten manifest injustice by disrupting vested rights." 779 F. Supp. at 96-97 (quoting FDIC v. Wright, 942 F.2d 1089, 1095 n.6 (7th Cir. 1991)).

The court then looked for any congressional intent to rebut the presumption of retroactivity. The court cited the Restoration Act cases and found that when Congress overrules Court "interpretations of an existing statute [there is] some support for applying the new amendments retroactively." 779 F. Supp. at 97. Although this factor was not conclusive, it provided evidence that Congress did not intend purely prospective application. 779 F. Supp. at 97. The *Wards Cove* exception was additional evidence against concluding that the statute is to be applied prospectively. 779 F. Supp. at 97. On the basis of these inferences, along with the inconclusive language and legislative history, the court determined that the presumption of retroactivity remained. 779 F. Supp. at 97-98. The court then addressed the three manifest injustice factors of *Bradley* and found that no injustice would result from applying the Act retroactively. 779 F. Supp. at 98-99.

203. 780 F. Supp. 1077 (E.D. Va. 1992). The court in *Khandelwal* found that the Act applied prospectively. The plaintiff filed suit against his former employer, alleging that he had been discriminatorily discharged on the basis of national origin in violation of Title VII. After enactment of the 1991 Act, he sought leave of the court to amend his original complaint in order to include the newly available remedies. In denying the plaintiff's motion to amend, the court stated, "[i]t is obvious that no provision of the new Act conveys a clear indication that Congress intended the Act to apply retroactively." 780 F. Supp. at 1078. The court rejected the plaintiff's claim that the *Wards Cove* and foreign corporation exemptions from retroactivity would be meaningless if the Act were to be applied prospectively. 780 F. Supp. at 1079. Instead, the court said that if Congress wanted to intend retroactivity it would have clearly indicated that purpose. 780 F. Supp. at 1078. Finding the legislative history and precedent anything but clear, the court chose to follow *Bowen* because it is "the better rule." 780 F. Supp. 1081. The court stated that the *Bowen* rule best preserved the division between courts and legislatures, that it was a more recent decision and thus more accurately reflected current Court sentiment, and that over 180 years of precedent supported it. *See* 780 F. Supp. at 1081. Compelled by "plain logic" and persuasive case authority, the Court applied the Act prospectively. *See* 780 F. Supp. 1082.

204. *See, e.g.,* Conerly v. CVN Cos., 785 F. Supp. 801, 804-05 (D. Minn. 1992); Cook v. Foster Forbes Glass, 783 F. Supp. 1217, 1221 (E.D. Mo. 1992) (both following Eighth Circuit's choice of *Bowen* as the better rule in Simmons v. Lockhart, 931 F.2d 1226, 1230 (8th Cir. 1991)).

205. *See* Khandelwal v. Compuadd Corp., 780 F. Supp. 1077, 1082 (E.D. Va. 1992) (choosing *Bowen*).

trary and patchwork manner undermines the federal statutory mandate for a national antidiscrimination policy.

III. A Framework for Resolving Retroactivity Issues in the Civil Rights Act of 1991

This Part proposes a framework for courts to use in determining whether the Civil Rights Act should apply to pending cases. In order to discern the law in the absence of specific congressional directives, courts need a principled basis for making retroactivity decisions, rather than contradictory canons of construction. A principled approach recognizes the legitimate dangers of retroactivity but acknowledges that these dangers are not always present. Such an approach also captures the norms favored by principled decisionmaking — those of efficiency and fairness.

Section III.A argues that the federal courts have the authority to fill in the gaps left by the Civil Rights Act and therefore do not need to demand clear statements from Congress. Section III.B proposes a principled approach to resolving indeterminate questions of retroactive application. This approach requires courts to assess the effects of retroactivity inherent in a specified statutory scheme. Section III.C then analyzes the Civil Rights Act according to this framework and concludes that because the Civil Rights Act does not implicate any dangers of retroactivity, the Act should apply to cases pending on the date of the statute's enactment.

A. *Judicial Authority To Fill in Statutory Gaps*

On the issue of the Civil Rights Act's retroactive applicability, Congress clearly and knowingly left a gap in the statute.[206] As part of the hurried compromise process, Congress left many issues unresolved and in so doing delegated decisionmaking authority to the courts.[207] This is a common legislative result because "[a]ll statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved."[208] Courts often act as gap fillers by giving meaning to ambiguous provisions. In

206. "Congress deliberately and expressly failed to agree on the question. . . . Therefore, Congress left the issue to be determined by the federal courts, each side believing and hoping that their respective views on the applicable presumption would prevail." United States. v. Department of Mental Health, 785 F. Supp. 846, 850 (E.D. Cal. 1992) (applying the Act retroactively). "If anything, the legislative history of the Act shows merely that Congress decided not to decide." Cook v. Foster Forbes Glass, 783 F. Supp. 1217, 1219 (E.D. Mo. 1992) (applying the Act prospectively).

207. "As a political compromise necessary to the enactment of the 1991 Act Congress simply left this [retroactivity] matter for the courts to determine." *Department of Mental Health,* 785 F. Supp. at 851. Many other provisions were ambiguous and thus implicitly left for the courts to resolve, the most controversial being the definition of *business necessity* in § 105, the provision intended to overrule Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

208. Easterbrook, *supra* note 105, at 540.

fact, as statutes have become an integral part of this country's regulatory scheme, courts have grown increasingly enmeshed in the interpretation and resolution of statutory gaps.[209]

The clear statement rule for retroactivity, beyond being unjustifiable on constitutional due process grounds,[210] fails to recognize inherent limits in legislative reality and demands that Congress reach an accord which may be impossible. Although it would be preferable for Congress to clearly state each and every one of its intentions, the institutional limits on Congress prevent legislators from writing statutes with the meticulous specificity that would eliminate ambiguities.[211] Many statutory gaps are unconscious and result from congressional neglect, ambiguous language,[212] or unforeseen consequences. In contrast, the gap left by the Civil Rights Act results from a conscious decision by Congress to duck the issue and thereby leave resolution to the federal courts.[213] Congress knew that its silence would force the issue to the judiciary.[214] Legislators' numerous attempts to get their views in the legislative history reveal that Congress knew the courts would eventually deal with the issue.

Congress' delegation makes sense because retroactivity is a court-created doctrine, developed through cases such as *Bradley* and *Bowen*.[215] The incremental development of the common law has provided conflicting presumptions on retroactive application of ambiguous statutes.[216] In general, presumptions should embody background

---

209. *See* ESKRIDGE & FRICKEY, *supra* note 13, at 569.

210. *See supra* notes 90-99 and accompanying text.

211. *See* ESKRIDGE & FRICKEY, *supra* note 13, at 569.

212. "[U]nlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision." Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 528 (1947). "[T]here is a limit, inherent in the nature of language, to the guidance which general language can provide." H.L.A. HART, THE CONCEPT OF LAW 123 (1961).

213. Courts regularly make decisions through the development of the federal common law. "From the outset, our system has recognized a role for federal common law, and only the scope of that role has been open to question." Martha A. Field, *Sources of Law: The Scope of Federal Common Law,* 99 HARV. L. REV. 881, 907 (1986). For further commentary on the scope of the federal common law, see Larry Kramer, *The Lawmaking Power of the Federal Courts,* 12 PACE L. REV. (forthcoming 1992), and Thomas W. Merrill, *The Common Law Powers of Federal Courts,* 52 U. CHI. L. REV. 1 (1985).

The strongest case for the federal courts to develop common law occurs when "Congress has given the courts power to develop substantive law." Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981); *see also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (establishing the principle that Congress can delegate lawmaking power to the federal courts). According to Merrill, a delegation of judicial lawmaking "takes place when Congress or the framers of the Constitution have conferred power on the federal courts to fashion federal rules of decision in order to round out or complete a Constitutional or statutory scheme." Merrill, *supra,* at 40. Under this theory, courts would be rounding out provisions of the Civil Rights Act pursuant to a congressional delegation.

214. *See supra* section II.B.

215. *See supra* section I.A.

216. *See supra* section I.A.

assumptions against which lawmakers operate.[217] To rebut these assumptions and break with the status quo, legislators must provide explicit directives.

In the Civil Rights Act, however, Congress knew that two contradictory background assumptions operated in the face of congressional silence. Some representatives and senators urged courts to invoke *Bradley,*[218] while others hoped that *Bowen* would be the operative presumption.[219] There is a background assumption neither of retroactivity nor prospectivity, and thus both presumptions have lost their effectiveness as interpretive tools. Neither side in the retroactivity debate could garner enough votes to prevail, yet the presumptions allow a particular view to win merely by default. By providing lawmakers with conflicting signals, courts must defer to Congress' wishes and unravel the doctrine. Rather than applying the existing presumptions, courts should give content to the ambiguous provision by using the proposed analysis.

Courts regularly accept gap-filling responsibilities in the face of silence resulting from congressional oversight. This gap-filling role becomes even more compelling when Congress has consciously delegated the decisionmaking authority to the courts. Interpretation of ambiguous statutes does not entail unwarranted judicial discretion. Rather, in an "age of statutes,"[220] courts regularly settle statutory ambiguities by filling in gaps inevitably left by the legislature. The Supreme Court has acknowledged the judicial role in filling statutory gaps: "We often must legislate interstitially to iron out inconsistencies within a statute or to fill gaps resulting from legislative oversight or to resolve ambiguities resulting from a legislative compromise."[221] Judges should be able to "fill[ ] the open spaces in the law"[222] and make a "fresh choice between open alternatives."[223]

The need for judicial resolution of statutes recurs time and again. Almost all complex modern day statutes contain ambiguous provi-

217. William V. Luneburg, *Retroactive and Administrative Rulemaking,* 1991 DUKE L.J. 106, 136.

218. *See supra* note 162 (statement of Rep. Edwards).

219. *See supra* note 163 (statements of Senators Danforth and Dole).

220. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

221. U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 354 (1971) (footnote omitted); *see also* Maine v. Thiboutot, 448 U.S. 1, 14 (1980) (Powell, J., dissenting) ("When the language does not reflect what history reveals to have been the true legislative intent, we have readily construed the Civil Rights Acts to include words that Congress inadvertently omitted."); Cass v. United States, 417 U.S. 72, 83 (1974) ("In resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process." (quoting Schmid v. United States, 436 F.2d 987, 992 (Ct. Cl. 1971)); *cf.* Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J. dissenting) ("[J]udges do and must legislate, but they can do so only interstitially").

222. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921).

223. HART, *supra* note 212, at 125.

sions that the judiciary must eventually resolve. Statutes as varied as RICO,[224] section 1983,[225] the Sherman Act,[226] and Title VII[227] demand judicial intervention and expertise to resolve the definition of terms, burdens and methods of proof, possible defenses, and other unsettled issues. Courts have not declined to resolve these open questions by sending these issues back to Congress and thereby curtailing the interpretive process. Instead, they have used their decisionmaking authority to give content to these statutes.[228]

Like most statutory interpretation cases, the decisions overruled by the Act resulted from the Court's gap-filling role. The Supreme Court did not demand clear statements when assessing Title VII, the law amended by the Act. Rather, the court interpreted, analyzed, and resolved tough statutory questions under its judicial authority.[229] As Professor Sunstein notes, "[m]uch of the law of Title VII is an unavoidable, and legitimate, norm-ridden exercise in developing gap-filling rules."[230] The Civil Rights Act of 1991 demands no less. By relying on a clear-statement rule, the judiciary may adversely affect the development of the law: "[I]n a system of law whose moral growth over time is grounded on the concept of reasoned elaboration, the failure of articulation presages moral stagnation of the law."[231] A court should not decline to exercise judicial discretion in interpreting the Civil Rights Act, as the statute is meant to overturn the Title VII interpretations of an activist Court.[232]

B. *An Approach for Resolving Retroactivity Dilemmas*

This section proposes a solution to the retroactivity dilemma. The proposed approach does not select either of the presumptions as determinative. The weaknesses of the clear-statement rule expressed in *Bowen* have already been exposed.[233] Several courts have seized on the *Bradley* rule because it does not mandate a result and allows a court to employ the "manifest injustice" test to alleviate fairness concerns. However, each presumption relies on a legal fiction to attribute to legislators an intent they do not have, a fiction dramatically illustrated by the Civil Rights Act. The Supreme Court never illuminated

224. 18 U.S.C. §§ 1961-1968 (1988).

225. 42 U.S.C. § 1983 (1988).

226. 15 U.S.C. §§ 1-7 (1988).

227. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

228. *See, e.g.*, cases cited *supra* note 1.

229. *See, e.g.*, cases cited *supra* note 1.

230. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 422 (1989).

231. Note, *supra* note 19, at 905.

232. *See generally* Symposium, *The United States Supreme Court's 1988 Term Civil Rights Cases*, 64 TUL. L. REV. 1341 (1990).

233. *See supra* section I.C.

any method of deciding between the presumptions, most likely because no rational dividing line exists. Moreover, the Court variably applied the presumptions without justification, and the lack of legal reasoning has left lower courts adrift.

A preferable analysis would approach the Civil Rights Act without any false and preconceived notions about legislative intent. Instead of providing a presumption, this approach requires courts to make a reasoned judgment. Under this Note's proposed framework, a court must determine whether applying the statute at issue to a given case implicates any of the dangers of retroactivity: unsettling expectations, depriving parties of notice, or targeting vulnerable groups.[234] If these concerns arise, a court should decline to apply a statute to pending cases. If these concerns fail to materialize, a court should apply the law to pending cases.

The predictable effects of this approach are that statutes regulating new areas will usually be applied prospectively, while statutes which overrule court decisions are more likely to be applied retroactively. This schism results because statutes regulating new areas may carry with them more of the potential dangers of retroactivity than a statute like the Civil Rights Act, which restores expectations. Accordingly, in their deliberations over the Restoration Act, the federal courts recognized that restorative statutes were less likely to raise serious retroactivity concerns.[235]

This proposal is not a radical restructuring of retroactivity precedent. It recognizes the legitimate dangers of retroactivity addressed by *Bowen,* while concurrently allowing the deliberative approach of *Bradley.* This method simply eliminates the irreconcilable conflict between *Bradley* and *Bowen* by allowing courts to reach the heart of the retroactivity debate. In other words, rather than engaging in a useless debate over which presumption to apply, courts focus on actual objections to retroactivity and whether these objections inhere in a particular statute. This inquiry will lead to well-reasoned and inherently more just opinions.[236]

C. *The Civil Rights Act in Action*

This section analyzes the 1991 Civil Rights Act according to the proposed framework. This analysis reveals not only that the risks of retroactive lawmaking are absent in the Civil Rights Act, but also that retroactive application of the Act promotes the dual goals of efficiency and fairness.

---

234. *See supra* note 100 and accompanying text.

235. *See supra* section I.B.

236. Courts will not necessarily agree in their conclusions, but the decisions will be better-reasoned as judges confront the real issues implicated by retroactive statutes.

1. *The Civil Rights Act Does Not Implicate the Dangers of Retroactivity*

a. *The Act restores expectations.* By attaching new consequences to past acts, retroactivity can upset reliance interests.[237] However, our system does not insulate all reliance interests since "the legal order must constantly change to fit new factual conditions or new conceptions of the common good."[238] Both judicial decisionmaking and prospective lawmaking also inevitably alter expectations. Yet the American legal system does not protect all interests from change, because to do so would freeze the law forever.[239] Thus, where the impact of a retroactive law ranges no further than that accepted for prospective laws or judicial decisions, the law fits within the reasonable limits of our system.

Prospective laws can alter preexisting legal relations by creating new rights and duties. Even purely prospective application of the Civil Rights Act will require employers to conform their actions to its mandates.[240] This may require a restructuring of hiring, firing, and promotion practices, along with other workplace norms. Yet this disruption is rightly accepted as necessary to effectuate national policy. One commentator has noted the disparity in treatment between retroactive and prospective laws: "The guardians of expectations can neither locate the dividing line nor satisfactorily explain why only those expectations under attack from the retroactive side are deserving of protection."[241] The degree of the disruption, not whether the disruption comes from a retroactive law, should be the determinative factor.

---

237. "To say that one has relied on a law is to say that, at some previous moment or moments, one made choices on the basis of that law." W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking,* 48 CAL. L. REV. 216, 225 (1960).

238. *Id.* at 226.

239. FULLER, *supra* note 103, at 60.

240. It could be argued that prospective laws do not make a person legally liable for actions without notice. However, economic legislation such as a new tax law can have vast consequences on prior investments, in essence "punishing" the person who made decisions based on past standards:

> Consider the following: I purchase a house in 1980, carefully considering how much I can afford in monthly payments and choosing a house that my budget can tolerate. My calculations are premised on the continued availability of tax deductions for both my mortgage interest payments and my property taxes. In 1986, a tax reform package is enacted under which these deductions will no longer be available. Certainly, most of us would not regard such legislation as retroactive, notwithstanding its effect on my past transaction. If, however, the tax reform requires me to file amended returns dating back to 1983 and to pay taxes on previously deducted interest, most of us would concur in the judgment that this was retroactive legislation. Can this dichotomy be rationalized?

Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity,* 1987 AM. B. FOUND. RES. J. 379, 435 (footnotes omitted).

241. *Id.* at 441. But see Justice Scalia's concurrence in *Bonjorno:* "The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." Kaiser Aluminum & Chem. Co. v. Bonjorno, 494 U.S. 827, 855 (1990).

Furthermore, retroactivity is the norm in judicial decisionmaking, where court decisions regularly apply to past, completed acts. The assumption that judicial decisions apply retroactively arises from a conception that courts simply find preexisting law in analyzing statutes — because the law always existed, there is no retroactivity involved in applying the law to past actions.[242] This conception has been largely discredited;[243] in fact, most of the academic discourse on judicial retroactivity has focused on finding exceptions to judicial retroactivity through prospective decisionmaking.[244] Thus, the same objections aimed at retroactive statutes can also to varying degrees be leveled at judicial retroactivity. The "individual who is affected by judge-made law has no notice of what is coming and suffers without redress."[245]

When Congress restores the unsettling effects of unexpected judicial decisions, it provides stability and continuity to the law, while engaging in a valuable dialogue with the judiciary.

> Judicial rule-making does include a retroactive element analogous to that present in legislation when the effect of a decision is to overrule past decisions or widely accepted lay or administrative interpretations of the law. The overruled interpretations provide a status quo upon which reliance may have been based. The unsettling effect can be quite pronounced in those relatively infrequent cases in which the court's decision is almost totally unexpected. In these situations, retroactive legislation designed to restore the status quo may be appropriate.[246]

Finding the line between reasonable and unreasonable disruption of expectation interests ultimately turns on Congress' judgment. After factfinding, analysis, and considerable deliberation, Congress determined that amendments to Title VII were necessary to restore prior understandings of the statute. As long as Congress' determination that the Act restores interests has a rational basis, courts should defer to Congress. Despite many ambiguities in the Civil Rights Act,[247] the

242. *See* Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility,* 28 HASTINGS L.J. 533, 534-35 (1977).

243. "The insistence that judges could simply find the true and timeless rule, uninfluenced by evolving moral values and social policies, now seems anachronistic." *See, e.g.,* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies,* 104 HARV. L. REV. 1731, 1759 (1991). Courts may apply a decision prospectively if there was substantial reliance on the overruled decision, if the purposes can be effectuated without retroactive application, or if retroactivity would burden the administration of justice. Annotation, *Prospective or Retroactive Operation of Overruling Decision,* 10 A.L.R. 3d 1371, 1384 (1966).

244. These commentators argue that in certain circumstances the Court should apply its decisions prospectively. *See* Fallon & Meltzer, *supra* note 243; Traynor, *supra* note 242; Note, *Prospective Overruling and Retroactive Application in the Federal Courts,* 71 YALE L.J. 907 (1962).

245. Smith, *supra* note 100, at 419.

246. Slawson, *supra* note 237, at 245.

247. The application of the Act to pending cases is only one of many controversial issues arising out of ambiguous provisions in the Act. *See Ambiguities in Civil Rights Law Still Must be Resolved by Courts,* DAILY LAB. REP. (BNA), Dec. 11, 1991, at C-1.

overriding purpose of the law is clear. Congress minces no words in noting that the Act will "respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes."[248] Congress specifically attacks the *Wards Cove* decision by stating that it "weakened the scope and effectiveness of Federal civil rights protections"[249] and that as a result additional legislation is necessary to protect against discrimination. The Act is thus a direct rebuff of Supreme Court interpretations.

Like most broadly written statutes, Title VII lends itself to divergent interpretations. Its ambiguities suggest that courts will rarely agree on the interpretation of a given provision or that Congress, if Congress can even be said to possess a single intent, will always feel that courts are getting it exactly right. However, Congress has the last word on the interpretation of its statutes, and its overruling of statutory decisions serves as a check on the courts.[250] Accordingly, Congress' perception of court interpretations should accordingly be given considerable weight. Although the controversial Court decisions fell on the possible spectrum of interpretations, they generally fell on an extreme end. Even the conservative opponents of the Civil Rights Act proposed an alternative bill which would have overruled two of the more unexpected Court decisions.[251] Given a choice between reading the provisions expansively or narrowly, the Court generally took the more restrictive view.[252] As in all problems of interpretation, the Court had choices, and it exercised its legitimate authority by choosing options which generally aided defendants. In Congress' judgment, these choices strayed too far afield from the underlying spirit of Title VII.

In overruling the 1989 decisions, Congress restored the values and understandings developed over twenty-five years of federal court interpretations. These long-standing expectation interests and their subsequent reaffirmance by Congress outweigh the interests which arose during the two-year break from the past. Essentially a windfall gain

248. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (1991). *See supra* note 122.

249. Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071 (1991). *See supra* note 122.

250. Judicial review and congressional overruling are, in the normal course of events, constructive measures to correct the inevitable goofs both branches commit. . . . In these circumstances, the natural process of checks and balances provides a quick injection to cure the malady: Congress passes a law to state what it means more precisely.

Mikva & Bleich, *supra* note 12, at 731.

251. In 1990, the Administration proposed a bill which would have overruled *Patterson* and *Lorance*. S. 2166, 101st Cong., 2d Sess. (1990) (Senate version); H.R. 4081, 101st Cong., 2d Sess. (1990) (House version).

252. "Each decision created practical difficulties for plaintiffs seeking relief for workplace discrimination under either title VII or section 1981." William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 614 (1991).

for employers, those decisions disrupted expectations to a far greater degree than the restorative Civil Rights Act. The Act does not unsettle expectations to a degree above and beyond that tolerated in a dynamic system of laws.

The Court's opinion in *Wards Cove* made it extremely difficult for employees to press and prevail on a disparate impact claim. In explaining its reasoning, the Court admitted that "some of our earlier decisions can be read as suggesting [the law was] otherwise" but that such a reading was in error.[253] One commentator observed wryly, "of course the 'error' had been committed by Congress, both plaintiffs' and defendants' Title VII attorneys, the Equal Employment Opportunity Commission, every lower federal court, and the leading commentators."[254] In the continuing dialogue between the Court and Congress, retroactivity can restore "settled" expectations by diminishing the effect of Court decisions which stray too far from statutory purposes.

b. *Retroactive application of the Act does not deprive parties of notice.* Employers may claim that without notice of the change in Supreme Court doctrine, they were unable to plan their conduct accordingly. However, this argument fails to acknowledge that the substantive right not to be discriminated against never wavered. The Court did not sanction discrimination, but limited methods and burdens of proof, and generally reduced the effectiveness of the laws.[255] The Court made successfully bringing and winning a discrimination action harder, but it did not make discrimination legal. Notice is only a bar to retroactive laws if people would have changed their behavior in light of the new rule. It is difficult to believe that employers knowingly engaged in discriminatory behavior in reliance on the 1989 standards and, if true, impossible to endorse. One district court rejected a defendant's attempt to avoid retroactive application of the Act by noting, "the court finds it unlikely defendant would have acted differently

253. Wards Cove Packing Co., v. Atonio, 490 U.S. 642, 660 (1989).

254. Charles S. Ralston, *Court vs. Congress: Judicial Interpretation of the Civil Rights Acts and Congressional Response*, 8 YALE L. & POLY. REV. 205, 213 (1990) (footnote omitted).

255. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding that § 1981, prohibiting discrimination in contracts, applies only to hiring decisions and not to postformation actions); Lorance v. AT&T Technologies, 490 U.S. 900 (1989) (holding that the deadline for filing a challenge to a seniority system begins to run when the practice is adopted and not when workers are adversely impacted); Martin v. Wilks, 490 U.S. 755 (1989) (holding that third parties challenging an affirmative action consent decree can bring a collateral action to challenge the settlement); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (overruling Griggs v. Duke Power Co., 401 U.S. 424 (1971) by shifting the burden of proof to employees in disparate impact cases to show that an employer's practice is not a business necessity); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that an employer is not liable for making a biased employment decisions as long as the same decision would have been made without the discriminatory factors).

had it known its full potential liability."[256] Another district court stated that even if the defendant would have changed its behavior, "[t]he law has never countenanced that an employer 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."[257] Since Title VII was enacted, employers have been on continual notice that discriminatory practices are subject to lawsuits.

In many cases, the actions forming the basis of discrimination claims occurred before 1989.[258] To deprive plaintiffs of the Act's remedies and restored legal standards would give defendants an unwarranted windfall gain. Applying the Act retroactively to pending cases will actually protect the interests that arose before 1989 and that are attached to cases still winding through the system. For such cases, it is impossible to argue that retroactive application disturbs expectation interests or deprives parties of notice. "[T]here is little injustice in retroactively depriving a person of a right, however valuable, which was created contrary to his bona fide expectations at the time he entered the transaction from which the right arose."[259] Furthermore, many alleged discriminatory acts, such as sexual harassment and failure to promote, continue over extended periods of time, making it impossible to pinpoint the exact moment of a statutory violation. These employment practices may have overlapped from the pre-1989 period into 1989-1991 period. Applying the overruled standards to these cases would allow employers to escape liability for long-term discriminatory practices merely because some of their actions occurred during the window of time when the Supreme Court standards were in effect.

---

256. Graham v. Bodine Elec. Co., 782 F. Supp. 74, 77 (N.D. Ill. 1992) (applying the Act retroactively). *But see* Sofferin v. American Airlines, 785 F. Supp. 780 (N.D. Ill. 1992):

> If [the defendant] is proven to have committed the discriminatory actions . . . it could be liable for thousands of dollars in punitive and compensatory damages not previously recoverable . . . . Applying such a change to the parties in this case would create substantial liabilities that could not have been anticipated in 1985 and 1986, even by the most visionary.

Id. at 787.

257. Robinson v. Davis Memorial Goodwill Indus., No. 91-1085, 1992 U.S. Dist. LEXIS 5331, at *23 (D.D.C. Apr. 20, 1992).

258. *See, e.g.*, Fray v. Omaha World Herald Co., 960 F.2d 1370, 1372 (8th Cir. 1992) (discussed *supra* notes 190-200 and accompanying text); Stender v. Lucky Stores, Inc., 780 F. Supp. 1302 (N.D. Cal. 1992):

> [T]he 1991 Civil Rights Act has simply returned the law to the position that is was in when this complaint was filed in 1988, when Lucky designed its first affirmative action plan . . . when the E.E.O.C. issued its Determination finding reasonable cause to believe Lucky had engaged in classwide discrimination, and when discovery began in this case.

Id. at 1308; *see also* Conerly v. CVN Cos., 785 F. Supp. 801 (D. Minn. 1992) (prospective application); Cook v. Foster Forbes Glass, 783 F. Supp. 1217 (E.D. Mo. 1992) (prospective application); Thompson v. Johnson & Johnson Management Info. Ctr., 783 F. Supp. 893 (D.N.J. 1992) (prospective application); Graham v. Bodine Elec. Co., 782 F. Supp. 74 (N.D. Ill. 1992) (retroactive application); Mojica v. Gannett Co., 779 F. Supp. 94 (N.D. Ill. 1991) (retroactive application); .

259. Hochman, *supra* note 9, at 720.

The Act does go beyond the scope of the original Title VII by providing additional damage remedies and a jury trial option. Yet objections to these provisions are unavailing because employers do not have an entrenched right to preserve particular procedures or remedies. The rules in a heavily regulated area are constantly subject to change. The Supreme Court has stated, "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."[260] The amendments to Title VII in the Act serve to strengthen an existing statutory scheme; for this reason, defendants have no "unconditional right to limit plaintiffs to a particular type of remedy."[261] One district court specifically rejected a challenge to the "new" provisions in the Civil Rights Act in a suit alleging discrimination in failure to promote on the basis of national origin.

> [R]etroactive application of [the Act] will not affect existing rights or give rise to new unanticipated obligations imposed upon any party without notice or an opportunity to be heard. The parties retain their due process rights to fully litigate the issues, the only difference is that [plaintiff] will now be entitled to a jury trial on the issues of intentional discrimination and compensatory damages (a right long guaranteed in most litigation by the Constitution and jealously guarded in the law) and to be fully compensated for any harm she suffered by reason of discrimination. By the same token, Defendant retains all its rights not to be subjected to liability, unless and until [plaintiff] . . . bear[s] the burden of proof . . . .[262]

Finally, employers were on notice that the Court's decisions engendered a huge amount of controversy. Almost immediately after the decisions were announced, Congress introduced legislation to overturn the decisions, and activity on Capitol Hill was widely publicized.[263] The 1989 decisions were in question almost immediately after the Court issued them, putting employers on notice that the law was still unsettled and subject to change.

---

260. Federal Hous. Admin. v. Darlington, Inc., 358 U.S. 84, 91 (1958) (Douglas, J.). *But see Thompson*, 783 F. Supp. at 897 ("In the instant case, plaintiff's claim . . . addresses conduct that the [law] did not proscribe at the time the conduct occured.").

261. 780 F. Supp. at 1307-08; *see also* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 486 n.16 (1981); New York Cent. R.R. v. White, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."); Hammond v. United States, 786 F.2d 8, 12 (1st Cir. 1986) ("This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained.").

262. United States v. Department of Mental Health, 785 F. Supp. 846, 854 (E.D. Cal. 1992). *But see* Sofferin v. American Airlines, Inc., 785 F. Supp. 780, 784 (N.D. Ill. 1992) ("[T]he Act went well beyond the bounds of Supreme Court case law. . . . By adding these [provisions], Congress destroyed a court's ability to construe the Act as remedial and therefore its retroactive applicability.").

263. *See supra* notes 112-13 and accompanying text. Commentators have stated that "Fairness concerns are greatly attenuated when the persons retroactively deprived of . . . rights had no reasonable expectation that they would be able to keep them." ESKRIDGE & FRICKEY, *supra* note 13, at 276.

c. *The Act Does Not Target Vulnerable Groups.* One objection to retroactive laws is that lawmakers can use them to burden certain groups unfairly. Justice Stevens addressed the concern that retroactive laws could target specific groups and individuals in *City of Richmond v. J.A. Croson Co.:*

> Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens. It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had not wrong been committed.[264]

These concerns fail to surface in the Civil Rights Act, which applies to employers at large and does not target any specific group or industry.[265] While cause for suspicion would certainly arise if the Act targeted a vulnerable group, the nation's employers hardly qualify as a defenseless entity. Employers expressed a strong voice during the shaping of the Act, and their lobbyists played an integral role in compromise negotiations.[266] Additionally, the President and conservative members of Congress pushed a probusiness agenda and on the retroactivity issue continue to do so, along with the EEOC and the Department of Justice.[267] Overall, Congress granted business concerns extensive consideration and allowed them a central role in shaping the Act.[268]

2. *Applying the Civil Rights Act to Pending Cases Promotes Fairness and Efficiency*

Finally, application of the Act to pending cases best achieves fairness and efficiency. Courts presently must decide who should bear the costs of congressional indecision, plaintiffs or defendants. Congress

264. 488 U.S. 469, 513-14 (1989) (Stevens, J., concurring in part and concurring in the judgment) (footnote omitted).

265. The only targeting was aimed at the Wards Cove Packing Company, and it received a special interest exemption from the entire Act. *See supra* note 134.

266. For instance, in shaping the modified version of H.R. 1, concessions were made to make the bill "more palatable to President Bush, congressional Republicans, and the business community." *Revised Civil Rights Bill Will Cap Damages, Prohibit Job Quotas,* DAILY REP. FOR EXECUTIVES (BNA), May 22, 1991 at A-16. Initially, the Business Roundtable, representing 200 major corporations, attempted to negotiate with civil rights groups. Joan Biskupic, *Job Discrimination Legislation Roils Business Community,* 49 CONG. Q. 989 (1991). In response, small businesses joined with the White House to pressure the Business Roundtable to end the negotiations. "Small business and administration aides countered that the bigger companies, better equipped to handle stepped-up antidiscrimination rules, were sacrificing the interests of their smaller brethren." *Id.* The talks were called off.

267. *See supra* note 140 and accompanying text.

268. This is most vividly seen in the special interest exemption for the *Wards Cove* defendants, proposed by the Senators from Alaska to protect a business in their state. Civil Rights Act of 1991, Pub. L. No. 102-166, § 402(b), 105 Stat. 1071, 1099 (1991).

clearly meant to protect plaintiffs who utilize the Civil Rights Act and effectuate the national policy against workplace discrimination. Yet to disallow retroactivity imposes costs of congressional inaction on the very class of parties most entitled to protection and least likely to be able to shoulder the cost.

The Supreme Court has previously sanctioned placing the costs of retroactive legislation on employers. In *Usery v. Turner Elkhorn Mining Co.*,[269] the Court upheld federal mine legislation that required mine operators to pay disability benefits to miners afflicted with black lung disease, including miners who had left employment before the passage of the law. The Court supported retroactive liability as "a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor."[270] Such an approach is eminently fair for the Civil Rights Act. It places the costs on the beneficiaries of discriminatory behavior.

Moreover, to deny retroactive application of the Act to pending cases would also mean that, for years to come, two different standards would apply to discrimination claims. Representative Edwards revealed this anomaly: "[O]ne set of decisions would explicate law as Congress has enacted it, and the other would further develop fine points of the law under *Wards Cove, Patterson, Lorance, Price Waterhouse,* etc., long after Congress has repudiated these decisions."[271] Promulgating unnecessary standards would be a tremendous waste of judicial resources. Courts would spend time researching and refining rejected legal standards rather than developing institutional expertise in applying the current law. It is more efficient for courts to focus on carrying out the purpose of the Civil Rights Act than to keep repeating the mistakes that Congress overruled. To effectuate the statutory purpose, courts should concentrate on interpreting the existing law and not on belaboring interpretations that Congress rejected.

CONCLUSION

When Congress enacted the Civil Rights Act of 1991, it overruled several Supreme Court interpretations of Title VII. Congress ham-

269. 428 U.S. 1 (1976).

270. 428 U.S. at 18. The Court also occasionally invokes a canon of construction that instructs courts to interpret civil rights questions on behalf of disadvantaged groups. This canon insures that "regulatory statutes are not defeated in the implementation process." Sunstein, *supra* note 230, at 483. This canon is most commonly used in the interpretation of statutes affecting Native Americans. *See* ESKRIDGE & FRICKEY, *supra* note 13, at 655 (citing Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)). Also, faced with ambiguous statutes, the Court has sanctioned this interpretive norm by creating implied rights on behalf of minorities. Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (interpreting the Voting Rights Act); Sunstein, *supra* note 230, at 484 (citing Cannon v. University of Chicago, 441 U.S. 677, 687-717 (1979) (interpreting Title IX)).

271. 137 CONG. REC. H9530-31 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards).

mered out its policy against workplace discrimination during two years of extensive negotiation, and debates over applying the Act to past and pending cases remained particularly controversial. Although the 1990 Act contained an explicit retroactivity provision, Congress dropped this provision during the compromise process. Knowing the courts would ultimately address the issue, Congress sacrificed statutory specificity in order to ensure the bill's passage. Courts, however, have been equally incapable of reaching a consensus on the Act's applicability.

The confusion is an inevitable result of the Supreme Court's schizophrenic doctrine. Two competing canons of construction govern retroactivity — one presumes retroactivity while the other presumes prospectivity. Thus, precedent fails to provide a workable framework for interpreting statutes that are ambiguous as to their retroactive application. Rather than resolving the tension between the presumptions, courts should focus on the potential effects of retroactive statutes. Under this approach, courts screen for the potential dangers of retroactivity, ensuring that a statute does not unduly upset settled expectations, deprive parties of notice, or target vulnerable groups.

The Civil Rights Act of 1991 does not implicate any of the concerns that make retroactivity potentially undesirable. The Act restores prior understandings of Title VII while promoting the goals of fairness and efficiency. When Congress enacted the Restoration Act of 1987 to clarify prior legislation, the majority of courts deferred to the legislative intent and applied the new Act retroactively to pending cases. Like the Restoration Act, the Civil Rights Act of 1991 remedies restrictive court interpretations of civil rights laws. The Civil Rights Act of 1991 reaffirms the principles embodied in Title VII, and only retroactive application of the Act can fulfill the Court's obligation to effectuate legislative intent by eradicating discrimination from the American workplace.