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Retroactive Application of the Civil Rights Act of 1991

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RECENT DEVELOPMENTS

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I. INTRODUCTION

On November 21, 1991, President Bush signed the Civil Rights Act of 1991 (the "Act") into law. The Act contained a general section stating that its provisions should take effect upon enactment.[1] What the Act did not do, however, is indicate whether it should apply to cases pending at the time of its enactment. Since the Act is more favorable to plaintiffs than was its predecessor,[2] plaintiffs whose cases were pending at the time of its enactment have attempted to amend their complaints to benefit from the new Act's provisions.[3] Congress's failure to indicate whether the Act should apply to cases pending at the time of its enactment has forced the courts to make their own judgments on the Act's retroactivity.[4]

The Supreme Court's refusal to clarify its past decisions regarding the retroactive application of legislation complicates the lower courts' analyses of this issue.[5] The Court's past decisions present the lower courts with two completely different starting points for analyzing whether a statute should apply retroactively.[6] The difficulty in applying Supreme Court precedents stems from the fact that the two Supreme Court directives on the subject seem to diametrically oppose one another. Therefore, not only must the lower courts determine what Congress was thinking when it enacted the Civil Rights Act of 1991, the lower courts also must determine what the Supreme Court was thinking

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1. Civil Rights Act of 1991 § 402(a), Pub. L. No. 102-166, 105 Stat. 1071, 1099 (1991).

2. The Act allows Title VII plaintiffs to seek compensatory and punitive damages. Id. § 102, 105 Stat. at 1072-73, codified at 42 U.S.C.A. § 1981a (Supp. 1992). If plaintiffs choose to seek monetary damages, the Act guarantees them the right to trial by jury. Id. The Civil Rights Act of 1964, in contrast, provided for neither compensatory and punitive damages nor a jury trial.

3. Most cases regarding retroactive application of the Act involve plaintiffs who seek to amend their complaints to include claims for monetary damages and demands for jury trials under Section 102 of the new Act. See, for example, *Watkins v. Bessemer State Tech. College*, 782 F. Supp. 581 (N.D. Ala. 1992) (allowing plaintiff to amend complaint to request trial by jury and to claim monetary damages).

4. Many courts have criticized Congress for its failure to reach a definitive decision on the Act's retroactivity. As one court lamented, "The ultimate answer on the retroactivity or non-retroactivity of the Civil Rights Act of 1991 will be long in coming, and only after thousands of judicial hours, which Congress could easily have saved, are spent." *King v. Shelby Medical Center*, 779 F. Supp. 157, 158 (N.D. Ala. 1991).

5. In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), the Court acknowledged that its past decisions on the issue of the retroactive application of statutes were "[i]n apparent tension." Id. at 837. The Court, however, declined the opportunity to clarify its position on the issue.

6. Compare *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (ruling that a strong presumption exists against the retroactive application of statutes) with *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711-16 (1974) (holding that every statute contains a presumption in favor of retroactivity).

when it handed down two apparently irreconcilable lines of analysis on the same subject.

Since the early 1800s, the Supreme Court generally has held that a strong presumption that statutes should not operate retroactively exists and that that presumption is rebuttable only by strong evidence of Congress's intent to the contrary.[7] The Court reaffirmed this presumption as recently as 1988 in *Bowen v. Georgetown University Hospital.*[8]

The Supreme Court, however, also has espoused a presumption in favor of retroactivity that directly opposes its prior presumption against retroactivity. In a line of cases anchored by *United States v. Schooner Peggy*,[9] the Supreme Court has directed that a court should apply the law in existence at the time of its decision.[10] In *Bradley v. School Board of Richmond*,[11] the Court relied on *Schooner Peggy* and its progeny in holding that every statute contains a presumption of retroactivity.[12]

The lower courts must resolve a difficult question at the outset. Should a court adopt *Bowen* and begin its analysis with the presumption that the Act does not apply retroactively, or should it adopt *Bradley* and begin with the presumption that the Act should apply retroactively? The lower courts have had great difficulty reaching a consensus on this issue.[13]

This Recent Development analyzes the retroactive application of the Civil Rights Act of 1991. Part II explores the conflicting presumptions the Supreme Court has created and argues that the Court should clarify retroactivity analysis by rejecting the *Bradley* presumption. Part III discusses the impact a court's choice between *Bowen* and *Bradley*

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7. See, for example, *United States v. Heth*; 7 U.S. (3 Cranch) 399, 413 (1806) (holding that a statute should not apply retroactively unless its text is "so clear, strong, and imperative" that there is no doubt Congress intended retroactive effect); *Murray v. Gibson*, 56 U.S. (15 How.) 421, 423 (1853) (ruling that a statute should not have retroactive effect unless such effect is required by its express language or "by necessary and unavoidable implication"); *United States Fidelity and Guaranty Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) (holding that a statute should only apply retroactively if it is the manifest intent of Congress).

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

9. 5 U.S. (1 Cranch) 103 (1801). The Supreme Court has at different times adopted different interpretations of the scope of *Schooner Peggy*. In *Bradley*, the Court adopted a broad interpretation of *Schooner Peggy* and cited it as holding that a court always should apply the law in effect at the time of its decision. 416 U.S. at 711-12. In *Bonjorno*, however, the Court adopted a more narrow interpretation of the case and cited it as holding only that a change in the law should affect pending cases if its terms require such a result. 494 U.S. at 836-37. If this second, narrow interpretation of *Schooner Peggy* is accurate, then the case is reconcilable with the cases holding that there is a presumption against retroactivity.

10. See *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268 (1969).

11. 416 U.S. 696 (1974).

12. Id. at 711-16. For a discussion of the *Bradley* presumption in favor of retroactivity, see Part II.B.

13. For a list of district courts that have come down on both sides of the retroactivity question, see *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1383-84 (8th Cir. 1992) (appendix).

has on that court's resolution of the Act's retroactivity. Part IV concludes that the Supreme Court should clarify its precedent by rejecting the *Bradley* decision and holding that the Civil Rights Act of 1991 does not apply retroactively.

II. THE SUPREME COURT'S PUZZLING PRECEDENT ON PRESUMPTIONS

If the Supreme Court chooses to resolve the confusion surrounding the retroactive application of the Civil Rights Act of 1991,[14] the difficulty it will encounter will be well deserved because it is self-imposed. In the past two decades, the Court has handed down two distinct and seemingly irreconcilable lines of cases concerning the retroactive application of legislation.[15] On the one hand, the Court stated in *Bowen* that a strong presumption that statutes do not operate retroactively exists.[16] According to the Court, this presumption can be rebutted only if the text or legislative history of the statute in question clearly manifests Congress's intent that the statute apply retroactively.[17]

On the other hand, the Court also held in *Bradley* that all statutes contain a presumption in favor of retroactivity.[18] Even though the Supreme Court decided *Bowen* after *Bradley*, it in no way indicated that its decision overruled *Bradley*. In fact, the *Bowen* Court did not even cite *Bradley* or attempt to distinguish it.[19] The Supreme Court thus has presented lower courts with a conundrum: does the presumption operate in favor of retroactivity or against it? The Court's puzzling precedent on presumptions complicates lower courts' analyses of the retroactivity of the Civil Rights Act of 1991. Since the Court has never repudiated either *Bowen* or *Bradley*, courts across the country continue to apply both decisions.[20]

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14. A writ of certiorari that would have given the Supreme Court an opportunity to resolve the Act's retroactivity was filed on January 7, 1992 in *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990) (affirming judgment for employee), vacated and remanded for further consideration, 111 S.Ct. 1299, rev'd and remanded with instructions to dismiss, 946 F.2d 1340, motion to vacate judgment denied, 952 F.2d 991 (1991). While the petition was granted, the Court merely vacated the judgment and remanded for further consideration in light of the Act. 112 S.Ct. 1255 (1992). As one court has noted: "If there ever was a debate that needed quick resolution by the Supreme Court, the retroactive vs. prospective application of the new Act is it." *Watkins*, 782 F. Supp. at 582.

15. See note 6; Parts II.A and II.B.

16. 488 U.S. at 208.

17. Id. at 208, 213.

18. 416 U.S. at 711-16. Interestingly, even though *Bradley* represented a major deviation from the Court's usual application of the presumption against retroactivity, the decision by the seven participating Justices was unanimous (Justices Marshall and Powell did not participate). Id. at 724.

19. See *Bowen*, 488 U.S. at 208-09.

20. For courts that have adopted the *Bradley* presumption in favor of retroactivity, see *FDIC v. Wright*, 942 F.2d 1089, 1095-96 (7th Cir. 1991); *United States v. Peppertree Apartments*, 942

Because both the legislative history and the text of the Act are ambiguous as to the Act's retroactive effect,[21] a court's decision as to which presumption to adopt becomes crucial. If a court adopts the *Bowen* presumption, it will find that the Act should not apply retroactively.[22] But if it adopts the *Bradley* presumption in favor of retroactivity, it probably will reach the opposite conclusion. True to this prediction, courts that have adopted *Bowen* have held overwhelmingly that the Act's provisions should not apply retroactively,[23] while courts that have adopted *Bradley* have held that the Act should apply retroactively.[24] Therefore, to determine which presumption should prevail, an analysis of the Court's decisions in *Bowen* and *Bradley* is imperative.

A. Bowen v. Georgetown University Hospital: *An Expression of the Court's Hostility Toward Retroactive Legislation*

Bowen's presumption against the retroactive application of legislation is firmly rooted in Supreme Court precedent—*Bowen* itself is merely a restatement of the Court's oft-expressed presumption that statutes should not operate retroactively.[25] Lower courts generally rely on *Bowen* for the proposition that when a statute is silent or ambiguous

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F.2d 1555, 1560-61 (11th Cir. 1991); *Scarboro v. First American Nat'l Bank of Nashville*, 619 F.2d 621, 622 (6th Cir. 1980); *Leake v. Long Island Jewish Medical Center*, 695 F. Supp. 1414, 1416-18 (E.D.N.Y. 1988). For courts that have adopted *Bowen*'s (or a *Bowen*-like) presumption against retroactivity, see *Wagner Seed Co. v. Bush*, 946 F.2d 918, 924 (D.C. Cir. 1991); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1388-92 (10th Cir. 1990); *Nelson v. Ada*, 878 F.2d 277, 280 (9th Cir. 1989) (citing *Bruner v. United States*, 343 U.S. 112, 117 n.8 (1952)).

21. The Act's legislative history shows that Congress was unable to reach an agreement on whether the Act should apply retroactively. Republican members of Congress uniformly expressed the opinion that the Act should not apply retroactively. See 137 Cong. Rec. S15438-85 (Oct. 30, 1991) (statement of Sen. Danforth); 137 Cong. Rec. S15472-78 (Oct. 30, 1991) (statement of Sen. Dole). In contrast, Democratic members of Congress supported retroactive application of the Act. See 137 Cong. Rec. H9526-32 (Nov. 7, 1991) (statement of Rep. Edwards); 137 Cong. Rec. S15485-86 (Oct. 30, 1991) (statement of Sen. Kennedy). The text of the statute is equally ambiguous. The provision that sets forth the Act's effective date states only that the Act becomes effective upon enactment. See note 1 and accompanying text.

22. The *Bowen* presumption against retroactivity may be rebutted only if the Act's text or legislative history indicates the Act should apply retroactively. *Bowen*, 488 U.S. at 208. Since the text and legislative history of the Act do not clearly provide for its retroactive application, the *Bowen* presumption should survive unscathed. See Part III.A.

23. See, for example, *Simons v. Southwest Petro-Chem, Inc.*, 1992 U.S. Dist. LEXIS 1842 (D. Kan.); *Khandelwal v. Compuadd Corp.*, 780 F. Supp. 1077, 1080-81 (E.D. Va. 1992).

24. See, for example, *Graham v. Bodine Elec. Co.*, 782 F. Supp. 74, 75-77 (N.D. Ill. 1992); *Stender*, 780 F. Supp. at 1306-08.

25. For cases holding that there is a strong presumption that statutes should not apply retroactively, see, for example, *The Twenty Per Cent. Cases*, 87 U.S. (20 Wallace) 179 (1873); *Chew Heong v. United States*, 112 U.S. 536 (1884); *Union Pacific Railroad Co. v. Laramie Stock Yards Co.*, 231 U.S. 190 (1913); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928); *Miller v. United States*, 294 U.S. 435 (1935); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141 (1944); *Greene v. United States*, 376 U.S. 149 (1964).

as to its retroactive application, that statute presumptively will not apply retroactively.[26] Although the *Bowen* Court did state that all statutes contain a presumption against retroactivity,[27] the facts of *Bowen* and its holding had nothing to do with retroactive application of a statute that was silent or ambiguous as to its application. *Bowen* did not concern a new statute at all; it addressed an administrative agency's power to promulgate retroactive regulations.[28]

In *Bowen*, Congress delegated to the Secretary of Health and Human Services (the Secretary) the power to promulgate regulations establishing the amounts the government would reimburse health care providers for rendering Medicare services.[29] On June 30, 1981, the Secretary issued regulations that changed the method for computing health care providers' reimbursable expenses.[30] In 1983, the district court invalidated the 1981 regulations on the grounds that the Secretary had violated the Administrative Procedure Act by failing to provide notice and an opportunity for public comment.[31] In 1984, the Secretary, after proper procedure, reissued the same regulations and gave them an effective date of July 1, 1981.[32] By adopting this effective date, the Secretary was applying the regulations retroactively to pre-1984 conduct.

The plaintiffs in *Bowen* argued that the Secretary's retroactive application of the regulations violated both the Administrative Procedure Act and the Medicare Act.[33] The issue before the *Bowen* Court was whether Congress, through the Medicare Act, had authorized the Secretary to promulgate retroactive rules.[34] The Court held that a statute should not be construed as authorizing an administrative agency to

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26. See, for example, *DeVargas*, 911 F.2d at 1384-88; *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 963 n.6 (D.C. Cir. 1990).

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

28. Id. at 205-07.

29. Id. at 205-06.

30. Id. at 206.

31. Id. The Administrative Procedure Act requires that agencies either publish notice of a proposed rulemaking in the Federal Register or provide individuals affected by the rule with actual notice. 5 U.S.C. § 553(b) (1988). Once the agency gives such notice, it must provide interested individuals an opportunity to comment on the proposed rule. Id. § 553(c). The Secretary of Health and Human Services ignored these two requirements when he promulgated the regulation at issue in *Bowen*. 488 U.S. at 206-07.

32. *Bowen*, 488 U.S. at 207.

33. The plaintiffs in *Bowen* were health care providers that had economically benefitted from the invalidation of the 1981 regulation. When the Secretary reissued the 1981 regulation in 1984 and proceeded to apply it retroactively, the Secretary recouped over two million dollars in reimbursements that the plaintiffs had received due to the invalidation of the 1981 rule. Id.

34. The Medicare Act contains no express authorization of retroactive rulemaking by the Secretary. Id. at 209, 213. Both *Bowen* and the controversy surrounding the retroactive application of the Civil Rights Act of 1991 involve the interpretation of statutes in which Congress has not specifically addressed retroactivity.

adopt retroactive rules unless the statute contained an express delegation of that authority from Congress.[35] Since the Medicare Act did not contain such an express grant of authority, the Court invalidated the Secretary's retroactive regulations.[36] In the process of reaching this conclusion, the Court expressed its bias against retroactive legislation and cautioned that legislation should not be construed as having retroactive effect unless its language requires such a result.[37]

Bowen presented the Court with the issue of whether a statute that does not expressly authorize an administrative agency to promulgate retroactive rules should be construed as granting the agency such authority.[38] In *Bowen*, the Court did not hold that statutes that are silent or ambiguous as to their application contain a presumption against retroactivity.[39] Rather, it held that statutes that delegate authority to administrative agencies contain a presumption that they do not also delegate the authority to legislate retroactively.[40]

The *Bowen* decision demonstrates the Court's bias against retroactive legislation. Congress does have the power to legislate retroactively, and if Congress chooses to exercise this power, the Court can do nothing about it.[41] The Court, however, can limit the incidence of retroactive legislation by refusing to imply delegations to administrative agencies of this authority.[42] The Court also can limit retroactive legislation by adopting a presumption that legislation should not apply retroactively unless its terms or legislative history explicitly provide that it should have such effect.[43]

Although *Bowen* does not actually hold that all statutes contain a presumption against retroactivity, the Court's decision does indicate that it may be unwilling to imply retroactivity in the case of a statute that is silent or ambiguous as to its application.[44] *Bowen*, however, is

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35. Id. at 213-14.

36. Id. at 215-16.

37. Id. at 208.

38. Id. at 208-09.

39. This is the issue that the Civil Rights Act of 1991 raises. In *Bowen*, the regulations at issue were not ambiguous or silent as to their application, but rather expressly provided for their retroactive application. Thus, strictly speaking, the Court's decision in *Bowen* does not indicate how the Court would or should resolve the retroactivity of the Civil Rights Act of 1991.

40. Id. at 208, 215.

41. See *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-30 (1984) (holding that Congress can legislate retroactively if justified by a rational legislative purpose).

42. The Court's refusal to imply delegations of the authority to legislate retroactively shows its hostility to retroactive legislation. If the Court approved of retroactive legislation it most likely would imply the delegation of retroactive authority.

43. For example, the Court takes this approach in *Greene v. United States*, 376 U.S. 149, 160 (1964).

44. This conclusion follows from the Court's admitted hostility toward retroactive legislation. If the Court wants to discourage such legislation, it can do so by refusing to imply retroactive

not the only Supreme Court case that addresses retroactive legislation. In *Bradley v. School Board of Richmond*, the Court held that under certain circumstances it would be willing to imply the retroactive application of legislation.[45] *Bowen*, however, was decided after *Bradley* and seems to stand for the proposition that the Court still believes in the presumption against retroactivity. The question thus becomes: If the Supreme Court has believed in the presumption against retroactivity all along, how did it arrive at its decision in *Bradley*?

B. Bradley v. School Board of Richmond: *A Departure from the Traditional Approach*

On its face, the *Bradley* opinion does not appear to represent a new development in retroactivity analysis. The Court cites numerous cases, dating back to the 1800s, in support of its holding. But despite those citations, *Bradley* represents a sharp departure from the Court's traditional disdain for retroactive legislation, and is a gross expansion of the cases that preceded it.

1. *United States v. Schooner Peggy*: The Court Sets Sail Toward a Presumption of Retroactivity

Bradley has its roots in *United States v. Schooner Peggy*,[46] which concerned the United States' capture of a French ship. The circuit court, overruling the district court, found that the schooner (and her cargo) was the lawful prize of the United States upon capture.[47] While the case was pending on appeal to the Supreme Court, the President signed a convention with France that required the United States to return to France any French property that the United States had captured but had not yet definitively condemned.[48]

Schooner Peggy presented the Court with the issue of whether it

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application. If the Court adopts this stance, then the only statutes that apply retroactively are those whose text or legislative history expressly provide for such application. Congress often has a great deal of difficulty agreeing on the retroactivity of statutes. In fact, Congress so often is unable to decide on acts' retroactivity that the President's Council on Competitiveness has found that the United States' competitiveness could be increased if Congress decided the retroactivity of each act it passes. See Agenda for Civil Justice Reform in America, A Report from the President's Council on Competitiveness (August 1991) ("Agenda for Civil Justice Reform"). Therefore, a requirement that statutes must expressly provide for retroactive effect in order to have such effect would cut back greatly on the incidence of retroactive legislation.

45. 416 U.S. 696, 715-16 (1974). In *Bradley*, the Court demonstrated its willingness to imply retroactive application by adopting a rebuttable presumption in favor of retroactive effect. Id.

46. 5 U.S. (1 Cranch) 103 (1801). Contrast the contemporaneous *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) (taking a different approach and supporting what will become the *Bowen* presumption against retroactivity).

47. 5 U.S. at 104-07.

48. Id. at 107-08.

should apply the convention in its adjudication of the *Schooner Peggy*'s appeal even though the convention was not in effect at the time of the ship's capture nor at the time of the circuit court's adjudication of the case.[49] The Court held that if a relevant law changes before an appellate court disposes of an appeal, then the appellate court should apply the new law retroactively to the appeal.[50]

The actual holding of *Schooner Peggy* is somewhat ambiguous. The convention at issue in that case has been interpreted as expressly providing for its retroactive application.[51] Hence, debate exists as to whether *Schooner Peggy* held only that legislation should apply retroactively to cases on appeal if its terms so expressly provide,[52] or whether *Schooner Peggy* went further to hold that appellate courts should always apply legislation retroactively unless clear evidence of congressional intent to the contrary exists.[53] For many years, Supreme Court decisions did not delineate the scope of *Schooner Peggy*'s holding. In the past several decades, however, the Court has adopted a broad interpretation of *Schooner Peggy* and even has increased its scope.[54]

2. *Thorpe v. Housing Authority Of Durham*: The Birth Of The Presumption Of Retroactivity

The Court first broadened *Schooner Peggy*'s application in *Thorpe v. Housing Authority of Durham*.[55] In *Thorpe*, a tenant sued the City of Durham after the city's Housing Authority evicted the tenant from a public housing project.[56] At the time of the plaintiff's eviction, and at the time that the lower court heard the case, no restrictions existed on the Housing Authority's ability to evict individuals from public housing.[57] Prior to the time the appellate court decided the case, however, the Department of Housing and Urban Development issued a circular

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49. Id.

50. Id. at 110.

51. See *Bradley*, 416 U.S. at 712. The argument in *Bradley* seems to be that since the convention provided for the return of ships not definitively condemned, its terms required application of the convention to cases pending or on appeal because in those cases condemnation was not final or definitive.

52. See *Bonjorno*, 494 U.S. at 836-37. If this is *Schooner Peggy*'s actual holding, the case was in agreement with other Supreme Court cases of the same time period that held that legislation should apply retroactively if its text provides for such application. See, for example, *Heth*, 7 U.S. at 413.

53. Later decisions like *Bradley* depend on this broad interpretation of *Schooner Peggy*. See 416 U.S. at 711-13.

54. See *Thorpe*, 393 U.S. at 281-83 (1969); *Bradley*, 416 U.S. at 711-13.

55. 393 U.S. 268 (1969).

56. Id. at 271.

57. Id. at 271-72.

that required local housing authorities to give tenants notice of the reasons for their evictions.[58] In *Thorpe*, the Supreme Court interpreted *Schooner Peggy* and its progeny as holding that an appellate court always must apply the law in effect at the time of its decision.[59] Even though the rule at issue in *Thorpe* did not expressly state that it should apply retroactively, the Court nevertheless mandated that the appellate court apply the rule retroactively.[60]

Thorpe represents a huge expansion of the *Schooner Peggy* decision since it demands that appellate courts apply statutes retroactively even if their terms do not expressly provide for retroactive application.[61] *Thorpe* represents the birth of the presumption of retroactivity in statutes that are silent or ambiguous as to their application.[62]

The *Schooner Peggy* Court probably neither anticipated nor intended that its decision have such broad effect. In *Schooner Peggy*, the Court cautioned that in disputes between mere private parties, courts should struggle against a statutory construction that would affect the rights of the parties through retroactivity.[63] Apparently, the *Schooner Peggy* Court largely based its decision on the nature of the law and the identity of the parties involved.[64] The *Schooner Peggy* Court's caution against the retroactive application of legislation in private disputes between private individuals indicates that it had no intention of holding that all statutes contain a presumption of retroactivity. Yet, in *Thorpe*, the Court ignored this warning and used *Schooner Peggy* as the foundation for this very conclusion.[65]

The Court in *Thorpe*, however, did limit the applicability of the presumption of retroactivity: only appellate courts can properly invoke the presumption that statutes silent or ambiguous as to their applica-

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58. Id. at 272.

59. Id. at 281-83.

60. See id. at 283-84.

61. See id.

62. Justice Antonin Scalia noted that the "current confusion" on the question of retroactivity began with *Thorpe*. *Bonjorno*, 494 U.S. at 844 (Scalia concurring).

63. 5 U.S. at 110. In *Schooner Peggy*, the United States was a party to the dispute and the subject of the dispute was a matter of national concern. *Schooner Peggy* thus did not present the issue of whether laws should apply retroactively to private disputes between private individuals. See id.

64. It is possible that the *Schooner Peggy* Court held as it did to avoid embarrassing the President in his realm of international affairs.

65. *Thorpe*, 393 U.S. at 282.

tion should apply retroactively.[66] The Court destroyed this limit in *Bradley v. School Board of Richmond.*[67]

3. The *Bradley* Decision: The Final Expansion

In *Bradley*, the Supreme Court expanded *Schooner Peggy* even further. The plaintiffs in *Bradley* sought to recover attorneys' fees they had incurred in a school desegregation case.[68] The district court awarded the plaintiffs' attorneys' fees even though no statute in effect at the time provided for the recovery of such fees in school desegregation cases.[69] After the district court awarded the fees, Congress passed the Educational Amendments of 1972, which, in part, authorized courts to award such fees in school desegregation cases.[70] The Amendments did not expressly provide for their retroactive application.[71] The issue before the court of appeals was whether it should apply the Educational Amendments retroactively to uphold the district court's award of attorneys' fees. The appellate court refused to apply the Educational Amendments retroactively, thereby negating the award.[72]

The Supreme Court then confronted the same issue and held that the Educational Amendments did indeed have retroactive effect.[73] *Bradley* stands for the proposition that a court should apply the law in effect at the time it renders its decision unless (1) the text or legislative history of the statute at issue indicates that Congress did not intend retroactive application, or (2) doing so would result in manifest injustice.[74]

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66. Id. at 281. This interpretation requires emphasizing the Court's use of "appellate court" in *Thorpe*: "[A]n *appellate* court must apply the law in effect at the time it renders it decision." Id. (emphasis added). Justice Scalia made this argument in *Bonjorno*. 494 U.S. at 849 (Scalia concurring).

67. 416 U.S. 696 (1974).

68. Id. at 705-06. The plaintiffs in *Bradley* brought an action to desegregate the public schools in Richmond, Virginia. Id. at 699.

69. Id. at 705-06. The district court based its award of attorneys' fees on two grounds. First, prior desegregation cases indicated that it may be proper for courts to award attorneys' fees when the evidence shows obstinate noncompliance with the law. The court found that such noncompliance was present in this case. Id. at 706-07. Second, Congress statutorily authorized the recovery of attorneys' fees in certain civil rights actions. The court concluded that the circumstances that supported the award of attorneys' fees in those cases were present to an even greater degree in school desegregation cases. Id. at 708.

70. Id. at 709.

71. Id. at 716 n.23.

72. Id. at 710.

73. Id. at 715-16. In *Bradley*, the text and legislative history of the Educational Amendments were silent as to whether tbey should apply retroactively. Id. at 716 nn.22-23. In applying the Amendments retroactively, the Court continued the course on which it had embarked in *Thorpe*.

74. Id. at 711.

The *Bradley* Court set forth three factors that a court should consider in determining if retroactive application of legislation would result in manifest injustice. First, a court should consider the nature and identity of the parties involved in the dispute.[75] If a case involves a private dispute between private individuals, then the court should be hesitant to apply a statute retroactively.[76] Second, a court should consider the nature of the rights affected by a retroactive application of the statute.[77] If retroactive application of a statute would deprive an individual of a right that has matured or become unconditional, then the court should disfavor such application.[78] Finally, a court should examine the impact of the change in law on individuals' existing rights.[79] If the change in law imposes new and unanticipated obligations on individuals without notice and an opportunity to be heard, then the court should not construe the statute to apply retroactively.[80]

Although the Court made a sweeping generalization that all courts should apply the law in effect at the time of their decisions,[81] *Bradley* actually involved a *Thorpe*-type situation in which the law changed before an appellate court rendered its decision.[82] Therefore, *Bradley* should be interpreted as reaffirming *Thorpe*'s holding that only an appellate court should apply retroactively the law in effect at the time of its decision.[83] Several appellate court decisions after *Bradley*, however, have adopted a broader interpretation of the case and have held that all courts, not just appellate courts, should apply retroactively the law in effect at the time of decision, rather than the law in effect when the suit was filed.[84] In addition, district courts that have considered the retroactivity of the Civil Rights Act of 1991 have cited *Bradley* for the proposi-

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75. Id. at 717-18.

76. Id. This prong of the manifest injustice test finds its support in *Schooner Peggy*'s caution that in "mere private cases between individuals, courts will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of the parties." *Schooner Peggy*, 5 U.S. at 110. The Court in *Bradley* characterized school desegregation litigation as "of a kind different from 'mere private cases between individuals.'" 416 U.S. at 718.

77. 416 U.S. at 720.

78. Id. No such right existed in *Bradley*, according to the Supreme Court. Id.

79. Id.

80. Id. The *Bradley* Court found no increased burden on or change in the substantive obligation of the school board. Id. at 720-21. In general, since individuals never will have notice and an opportunity to be heard in a case of retroactive application, the real issue is whether the statute creates a new, unanticipated obligation.

81. Id. at 711.

82. Compare *Bradley*, 416 U.S. at 709 (change in statute), with *Thorpe*, 393 U.S. at 272 (change in rule).

83. See note 66 and accompanying text.

84. See, for example, *FDIC v. Wright*, 942 F.2d 1089, 1095 (7th Cir. 1991); *United States v. Peppertree Apartments*, 942 F.2d 1555, 1560-61 (11th Cir. 1991); *In re Busick*, 831 F.2d 745, 748 (7th Cir. 1987).

tion that all statutes contain a presumption in favor of retroactivity.[85]

The Supreme Court in *Bradley* probably did not intend to expand *Schooner Peggy* into a strong presumption that all statutes should have retroactive effect. *Schooner Peggy*, *Thorpe*, and *Bradley* were all cases in which the law changed between the decisions of a lower court and an appellate court.[86] Arguably, the Supreme Court only intended the presumption of retroactivity to apply in these circumstances. In *Thorpe*, the Court made no mention of the numeorus cases supporting a presumption against retroactivity.[87] Rather, the Court cited several cases that involved changes in the law that had occurred while appeals were pending, or that were otherwise exceptionable.[88] The Court's failure to distinguish the first set of cases, which contained a presumption against retroactivity, indicates that the Court believed that the circumstances in *Thorpe* were unique and merited a different presumption—one in favor of retroactivity.[89] The Supreme Court has never mentioned the presumption in favor of retroactivity in cases in which the change in law occurred prior to adjudication, except when the change results from judicial decision or repeals a criminal statute.[90] This omission supports the argument that the Court only intended the *Bradley* presumption of retroactivity to apply when the change in law occurred after initial adjudication and before appeal.

Thus, *Bowen* and *Bradley* can be reconciled. Under Supreme Court precedent, the *Bowen* presumption against retroactivity should apply only to those cases in which the change in statutory law occurs before any adjudication of the dispute, while the *Bradley* presumption in favor of retroactivity should apply only to those cases in which the change in statutory law occurs between the decisions of the trial and appellate courts. Interpreting *Bowen* and *Bradley* as addressing two factually distinct situations explains the Supreme Court's failure to distinguish, or even mention, the *Bradley* decision in *Bowen*.

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85. See, for example, *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302, 1306-07 (N.D. Cal. 1992); *Mojica v. Gannett Co.*, 779 F. Supp. 94, 96-97 (N.D. Ill. 1991).

86. See *Schooner Peggy*, 5 U.S. at 107 (change in international agreement pending appeal to the Supreme Court); *Thorpe*, 393 U.S. at 272 (change in rule pending appeal to the Supreme Court); *Bradley*, 416 U.S. at 709 (change in statute pending appeal to court of appeals).

87. See *Thorpe*, 393 U.S. at 281-83. See also *Bonjorno*, 494 U.S. at 845 (Scalia concurring) (stating that *Thorpe* "made no mention of our earlier presumption against retroactive application, and cited none of the numerous cases supporting that rule").

88. *Thorpe*, 393 U.S. at 281-83, especially nn.38-42 (citing *Ziffrin, Inc. v. United States*, 318 U.S. 73 (1943); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); *United States v. Chambers*, 291 U.S. 217 (1934); *Schooner Peggy*, 5 U.S. 103 (1801); *Carpenter v. Wabash R. Co.*, 309 U.S. 23 (1940)). See also *Bonjorno*, 494 U.S. at 846-48 (Scalia concurring) (discussing cases cited in *Thorpe*).

89. *Bonjorno*, 494 U.S. at 845 (Scalia concurring).

90. Id. at 850 (Scalia concurring).

So, under this reading of *Bowen* and *Bradley*, the identity of the court before which a case is pending at the time of the new law's enactment determines which presumption should apply. However, the existence of two separate presumptions whose applicability depends upon whether the change in law occurs before or after initial adjudication of the dispute is problematic because it leads to illogical results. For example, a plaintiff who has won a tort judgment could be nonsuited if the legislature enacts a statute abolishing the tort while the case is on appeal.[91] In contrast, a plaintiff who brings suit after the statute's enactment would be allowed to proceed to judgment despite the existence of the statute, because the tort was actionable when it occurred.[92]

Different treatment of these two plaintiffs is illogical and unfair as there is no reason to apply different presumptions depending on the identity of the court before which the case is pending at the time of the new legislation's enactment. The Court never has enunciated any justification for these dual presumptions, but the argument may be that appellate courts should not be forced to apply laws that are no longer in effect. This argument, however, applies with equal vigor to trial courts. No meaningful reason exists for the Court's requirement that one court apply outdated law while the other is allowed to disregard it.

Any meaningful evaluation of a law's potential retroactivity must focus on the individuals, not the courts, involved. While the courts are interchangeable, the individuals affected by various retroactive applications may not be. An examination of the two plaintiffs described above illustrates the unfair results created by the *Bowen/Bradley* dichotomy. The first plaintiff suffered an injury, brought a lawsuit, and received a judgment while tort liability still existed. All the second plaintiff did

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91. See id. at 854 (Scalia concurring). In this situation, the *Bradley* presumption of retroactivity would apply since the change in law occurred while the case was on appeal. The presumption would be determinative as long as (1) the statute did not explicitly state that it should not apply retroactively, and (2) retroactive application would not result in manifest injustice. *Bradley*, 416 U.S. at 711. Retroactive application of the statute in the hypothetical would not result in manifest injustice. Although the statute would not pass muster under the first prong of the three-part manifest injustice test as set forth in *Bradley* because the case involves a dispute between private individuals, since the other two prongs are met, a court would be unlikely to find that manifest injustice had resulted. Retroactive application satisfies the second prong of the test because the statute does not deprive individuals of a vested right. See *Memorial Hosp. v. Heckler*, 706 F.2d 1130 (11th Cir. 1983) (holding that there is no vested right to a lower court judgment pending on appeal). Finally, retroactive application does not run afoul of the third prong because the statute does not create new or unanticipated obligations. Since the statute does not explicitly provide that it should apply only prospectively, and since retroactive application of the statute would not result in manifest injustice, the statute would have retroactive effect under *Bradley*.

92. See *Bonjorno*, 494 U.S. at 854 & n.2 (Scalia concurring). In this scenario, the *Bowen* presumption against retroactivity would apply since the case was not pending before an appellate court at the time of the new law's enactment. This presumption would be determinative because the text and legislative history of the statute do not clearly provide for retroactive application.

while tort liability existed was suffer an injury. Yet, the *Bowen/Bradley* dichotomy mandates that the court deny the first plaintiff recovery while allowing the second plaintiff's case to proceed to judgment. In effect, the *Bowen/Bradley* dichotomy penalizes the first plaintiff for bringing a timely suit and recovering a lawful judgment. Since the *Bowen/Bradley* dichotomy inevitably leads to irrational and arbitrary results, the Court should adopt one presumption to apply in all circumstances.

C. The Battle of the Presumptions

The Court should reverse *Bradley* and reaffirm the presumption against retroactivity. *Bradley* rests on a weak precedential foundation and directly contradicts numerous cases holding that all statutes contain a presumption against retroactivity. In addition, retroactive application of legislation offends fundamental notions of justice and fair play.[93] Courts should not judge individuals against standards that did not exist at the time of their conduct[94]—the Constitution itself expresses these sentiments through its prohibition of the retroactive application of punitive laws.[95]

Even the Court's decisions that espouse a presumption in favor of retroactivity acknowledge the dangers of retroactive legislation. In fact, the Court never has made the leap of holding that all statutes that are silent or ambiguous as to their application should apply retroactively. Rather, the Court has tempered retroactive application first by holding that the presumption of retroactivity applies only to appellate courts,[96] and later by holding that the presumption should not apply if retroactive application would result in manifest injustice.[97]

The existence of these limitations, however, does not justify the retroactive application of legislation. Even in cases in which retroactive legislation would not result in manifest injustice as defined in *Bradley*, retroactive application nonetheless will result in a more subtle variety of injustice by judging individuals against standards not in existence at the time of their conduct. Thus, the Court should remain true to its traditional precedent and further the interests of justice by adopting the *Bowen* presumption against retroactivity.

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93. See id. at 855-56 (Scalia concurring).

94. "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." Id. at 855 (Scalia concurring).

95. U.S. Const., Art. I, § 9, cl. 3.

96. See note 66 and accompanying text.

97. See *Bradley*, 416 U.S. at 711.

III. Lower Court Confusion Regarding Retroactivity of the Civil Rights Act of 1991

The combination of Congress's refusal to decide the retroactivity of the Civil Rights Act of 1991[98] and the Supreme Court's inability to provide the lower courts with a workable standard for analyzing retroactivity has caused the lower courts considerable difficulty. Not surprisingly, courts across the country have reached vastly different conclusions on the Act's retroactivity. A court's choice between the *Bowen* or *Bradley* presumptions is determinative not only of the mode of analysis the court will follow, but also of the conclusion the court will reach.

A. *The* Bowen *Courts*

Under *Bowen*, the Civil Rights Act of 1991 should not apply retroactively unless its text or legislative history demonstrates Congress's clear intent that the Act have such application.[99] Every court that has adopted *Bowen* has concluded that neither the Act's text nor its legislative history provide the clear evidence of Congress's intent that is necessary to hold that the Act has retroactive effect.[100]

1. The Act's Language as Ambiguous

Section 402(a) of the Act generally states that the Act's provisions take effect upon enactment unless specific sections of the Act provide otherwise.[101] Section 102, which establishes the rights to compensatory and punitive damages and to a trial by jury, does not include a specific effective date.[102] Thus, Section 402(a) is the only section that directly addresses the retroactivity of Section 102. Most courts agree that Section 402(a) neither supports nor refutes retroactive application of the Act.[103] Some *Bowen* courts have not looked beyond these sections and

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98. The President's Council on Competitiveness has recommended that Congress resolve the issue of retroactivity in every statute it passes in order to avoid litigation on the subject. See Agenda for Civil Justice Reform (cited in note 44).

99. *Bowen*, 488 U.S. at 208-09.

100. See, for example, *West v. Pelican Management Services Corp.*, 782 F. Supp. 1132, 1133-36 (M.D. La. 1992); *Simons v. Southwest Petro-Chem, Inc.*, 1992 U.S. Dist. LEXIS 1842, *7-*9 (D. Kan.); *Johnson v. Rice*, 1992 U.S. Dist. LEXIS 830, *4 (S.D. Ohio); *Burchfield v. Derwinski*, 782 F. Supp. 532, 535-36 (D. Colo. 1992); *Khandelwal v. Compuadd Corp.*, 780 F. Supp. 1077, 1078-80 (E.D. Va. 1992)

101. See note 1 and accompanying text.

102. See Civil Rights Act of 1991 § 102, 105 Stat. at 1072-74.

103. See *Khandelwal*, 780 F. Supp. at 1078; *Hansel v. Public Service Co. of Colorado*, 778 F. Supp. 1126, 1132 (D. Colo. 1991). For an example of an act in which Congress explicitly provided for retroactive application, see the Longshore and Harbor Workers' Compensation Act Amendments of 1984 § 28(a), Pub. L. No. 98-426, 98 Stat. 1639, 1655 (1984) (stating that "the amendments made by this Act shall be effective on the date of enactment of this Act and shall apply both with respect to claims filed after such date and to claims pending on such date").

therefore have concluded that the text of the Act does not provide strong evidence that Congress intended the Act to apply retroactively.[104] Other language exists, however, that may express Congress's intent as to the retroactive application of the Act. Several provisions establish different effective dates to apply in certain limited situations. First, Section 402(b) provides that the Act shall not apply to disparate impact cases[105] in which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.[106] Second, Section 109(c) explicitly states that amendments to Section 109[107] shall not apply to conduct that occurred before the Act's enactment.[108] Section 402(b) and Section 109(c) thus specifically delineate certain instances in which the Act will not operate retroactively. The mere presence of these sections provides some support for the argument that Congress intended the rest of the Act to apply retroactively.[109]

The *Bowen* courts, however, have downplayed the significance of Sections 402(b) and 109(c). These courts emphasize that Congress enacted both sections to address the Act's application to certain landmark cases.[110] The *Bowen* courts argue that Congress enacted Section 402(b) for the *sole* purpose of ensuring that the disparate impact provisions of the Act would not apply to the defendant in *Wards Cove Packing Co., Inc. v. Antonio*.[111] Similarly, they assert that Congress included Section 109(c) in the Act solely to prevent a reopening of *EEOC v. Arabian American Oil Company*.[112] Therefore, the *Bowen* courts have concluded that Sections 402(b) and 109(c) do not demonstrate Congress's intent as

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104. See, for example, *Burchfield*, 782 F. Supp. at 535.

105. A disparate impact claim arises when employment policies, regardless of intent, weigh more heavily on one group than on another. See, for example, *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32 (1971).

106. Civil Rights Act of 1991 § 402(b), 105 Stat. at 1099.

107. Section 109 protects extraterritorial employment. Id. § 109, 105 Stat. at 1077.

108. Id. § 109(c), 105 Stat. at 1078.

109 See, for example, *Stender*, 780 F. Supp. at 1304; *Graham v. Bodine Elec. Co.*, 782 F. Supp. 74, 75-76 (N.D. Ill. 1992).

110. See, for example, *Maddox v. Norwood Clinic, Inc.*, 783 F. Supp. 582, 584-85 (N.D. Ala. 1992).

111. 490 U.S. 642 (1989). *Wards Cove* is the only case that meets the Section 402(b) prerequisites. *Maddox*, 783 F. Supp. at 584. *Wards Cove* involves an Alaskan company that spent approximately two decades defending a disparate impact challenge. Id. at 647-49. The legislative history of the Civil Rights Act of 1991 explicitly states that Section 402(b) was enacted to "eliminate every shadow of a doubt as to any possibility of retroactive application" to *Wards Cove*. 137 Cong. Rec. S15953 (Nov. 5, 1991) (statement of Sen. Murkowski). See also 137 Cong. Rec. S15478 (Oct. 30, 1991) (statement of Sen. Dole).

112. 111 S.Ct. 1227 (1991). In *Arabian American Oil*, the Court held that Title VII does not apply to employment in foreign countries. Section 109 of the Act legislatively overrules this case by establishing the applicability of Title VII to employment in foreign countries. Commentators have referred to Section 109(c), which provides that the section should not apply retroactively, as the "*Arabian American* exception." See *Maddox*, 783 F. Supp. at 584.

to the general application of the Act, but only demonstrate that Congress did not intend the Act to apply to these two specific cases.[113]

The *Bowen* courts are correct: even if Sections 402(b) and 109(c) do provide a scintilla of evidence that Congress intended the Act to apply retroactively, they do not provide the strong evidence of congressional intent necessary to rebut the *Bowen* presumption against retroactivity.[114] The *Bowen* courts find support for their argument that Congress did not intend the Act to apply retroactively in Section 102(a), which provides that a complaining party shall have the right to seek compensatory and punitive damages and demand a trial by jury.[115] The Act defines "complaining party" as either a person who is "seeking to bring" an action under Section 102(a) or a person who "may bring an action" under either Title VII of the Civil Rights Act or Title I of the Americans with Disabilities Act of 1991.[116]

Since the Act defines "complaining party" as an individual who may bring an action in the future, some courts have interpreted this language to mean that the Act will not apply in actions that were commenced prior to its enactment.[117] These courts, however, seem to be straining to find some evidence of a congressional intent that the Act should apply only prospectively. The fact is that evidence of this sort does not exist.[118] At any rate, the lower courts' arguments along these lines are superfluous since *Bowen* does not require that courts justify their holdings that legislation should not apply retroactively with evidence of a congressional intent against retroactivity.[119] Under *Bowen*, the Act should not operate retroactively unless the legislative history evidences intent in favor of retroactivity.

2. The Legislative History as Party Politics

The legislative history of the Act only confuses the issue of retroactivity. In fact, Congressmen themselves have directed courts to ignore their statements on the subject of retroactivity since they provide no

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113. Senator Dole, one of the sponsors of the Act, cautions courts not to interpret Section 402(b) as supporting general retroactive application of the Act. See 137 Cong. Rec. S15953.

114. *Maddox*, 783 F. Supp. at 584-85.

115. See note 2. These sections are now codified at 42 U.S.C.A. § 1981a (Supp. 1992).

116. 42 U.S.C.A. § 1981a(d)(1) (Supp. 1992).

117. See *Van Meter v. Barr*, 778 F. Supp. 83, 85 (D.D.C. 1991).

118. The legislative history of the Act clearly indicates that Congress did not reach an agreement that the Act should only apply prospectively. In fact, Congress did not reach any agreement on the issue of the Act's application. For a discussion of Congress's inahility to reach agreement on the issue of retroactivity, see J. Stephen Poor, *Rights Act's Retroactivity Still Disputed*, Nat'l L. J. 19, 22-23 (Jan. 27, 1992).

119. *Bowen* requires only that a court find that no clear congressional intent that the Act apply retroactively exists, not that the court find evidence that Congress intended that the Act should not apply retroactively. 488 U.S. at 208-09.

meaningful evidence of congressional intent.[120] In fact, statements of various members of Congress cannot reflect Congress's intent as an institution because those remarks are hopelessly in conflict.[121] Retroactivity apparently was the one aspect of the Act upon which Congress could not agree.[122]

Some *Bowen* courts have looked beyond the rhetoric and analyzed the political climate in which Congress enacted the Civil Rights Act of 1991.[123] The Act's 1990 predecessor explicitly applied to cases pending on the date of its enactment.[124] President Bush vetoed the bill,[125] although both the House and the Senate had approved it.[126] The 1991 House version of the Act originally included a similar provision establishing the Act's applicability to cases pending on the date of its enactment.[127] The Senate, however, removed this provision.[128] The Act, as signed by President Bush, does not expressly provide for its application to pending cases.[129] Therefore, one can infer that Congress sacrificed the retroactivity of the Act in order to obtain the President's support.

The procedural history of the Act, coupled with Congress's inability to reach agreement on the issue, indicates that Congress did indeed compromise on retroactivity in order to secure the Act's passage.[130]

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120. Senator Danforth stated that the legislative history contained only inconsistent and conflicting statements from the members of Congress and thus a court should consider only the language of the statute and the appropriate rules of statutory interpretation in deciding the Act's retroactivity. 137 Cong. Rec. S15325 (Oct. 29, 1991), and S15483 (Oct. 30, 1991).

121. Contrast statements in favor of retroactivity, 137 Cong. Rec. H9526-32 (Nov. 7, 1991) (statement of Rep. Edwards); 137 Cong. Rec. S15485-86 (Oct. 30, 1991) (statement of Sen. Kennedy) with statements opposing retroactivity, 137 Cong. Rec. S15472-78 (Oct. 30, 1991) (statement of Sen. Dole); 137 Cong. Rec. S15483-85 (Oct. 30, 1991) (statement of Sen. Danforth). Courts have noted that "one can find what seems to be an equal number of opinions supporting both prospective and retroactive application of the Act." *Maddox*, 783 F. Supp. at 585.

122. The Senate's principal sponsors of the Act, Senators Danforth and Kennedy, issued an interpretive memorandum in which they agreed on every aspect of the Act except its retroactivity. 137 Cong. Rec. S15483-86 (Oct. 30, 1991).

123. See, for example, *Maddox*, 783 F. Supp. at 585.

124. Section 15 of S.2104, the conference version of the bill, provided for application of the Act to proceedings pending on the date of enactment. See 136 Cong. Rec. H10691 (Oct. 19, 1990) (bill's enrollment in the House); 136 Cong. Rec. S16239 (Oct. 19, 1990) (bill's enrollment in the Senate).

125. See 136 Cong. Rec. S16457. Among the reasons the President cited for his veto was the bill's "unfair retroactivity rules." 136 Cong. Rec. S16562 (Oct. 24, 1990).

126. See 136 Cong. Rec. S15327 (Oct. 16, 1990) (Senate's approval of the bill); 136 Cong. Rec. H9984 (Oct. 17, 1990) (House's approval of the bill).

127. See H.R. Rep. No. 1, 102d Cong., 1st Sess. S113 (1991).

128. See *Maddox*, 783 F. Supp. at 585 (noting that the provision was removed).

129. See note 1 and accompanying text. Congress avoided the issue of retroactivity by stating ambiguously that the Act should become effective on its date of enactment. See also notes 101 through 119 and accompanying text.

130. See *Maddox*, 783 F. Supp. at 585. Some courts have interpreted the President's refusal to sign the bill and Congress's subsequent enactment of a compromise bill as providing clear evi-

Since Congress itself could not garner the support to pass the Act with a provision calling for retroactivity, courts should not step in and interpret the Act as having this effect.[131]

The Act's legislative history clearly indicates that Congress, as a whole, did not have strong intent as to whether the Act should have retroactive application. The *Bowen* courts, therefore, are correct in concluding that the language of the Act did not provide clear evidence of a strong congressional intent that the statute have retroactive effect.[132]

3. The Inevitable Conclusion

Once a court adopts the *Bowen* presumption against retroactivity, holding that the Act should not apply retroactively is a foregone conclusion. The ambiguous text and the convoluted legislative history of the Act do not provide the clear evidence of congressional intent required to rebut the *Bowen* presumption. However, if a court adopts the *Bradley* presumption, it will reach a very different conclusion.

B. The Bradley *Courts*

Under *Bradley*, the Civil Rights Act of 1991 should apply retroactively unless (1) the text or legislative history of the Act provides otherwise, or (2) retroactive application of the Act would result in manifest injustice.[133] Thus, like their counterparts that adopt the *Bowen* presumption, *Bradley* courts must engage in an in-depth analysis of the Act's text and legislative history. Courts that have adopted *Bradley* generally have concluded that the Civil Rights Act of 1991 should apply retroactively.[134]

1. Text as Expressive of Retroactive Intent

Courts adopting *Bradley* do not have to find evidence of Congress's retroactive intent in order to apply the Civil Rights Act of 1991 retroactively. Instead, the courts only need to find an absence of evidence indi-

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dence that Congress intended the Act to apply only prospectively. See, for example, *Fray*, 960 F.2d at 1378 (stating that "any other conclusion simply ignores the realities of the legislative process").

131. If courts interpret the Act as applying retroactively, then it will have retroactive application "despite the fact that there was [sic] not sufficient votes available to push a statute having express retroactive effect through the various checks and balances that the Constitution has established for our legislative process." *West*, 782 F. Supp. at 1137. It is not the function of the courts to achieve that which the legislature could not itself achieve. Id.

132. The language of the Act could not provide strong evidence of a clear congressional intent if this intent did not in fact exist.

133. See *Bradley*, 416 U.S. at 711.

134. See, for example, *Joyner v. Monier Roof Tile, Inc.*, 784 F. Supp. 872, 878-79 (S.D. Fla. 1992); *Bristow v. Drake Street, Inc.*, 1992 U.S. Dist. LEXIS 499 (N.D. Ill.); *Goldsmith v. City of Atmore*, 782 F. Supp. 106, 107-08 (S.D. Ala. 1992).

cating that Congress did not intend the Act to apply retroactively.[135] Nevertheless, the *Bradley* courts often interpret the language of the Act as directly expressing Congress's intent that the Act apply retroactively.

The *Bradley* courts place great significance on Sections 402(a) and 109(c).[136] They argue that if a court interprets the Act as having general prospective effect, then these provisions become meaningless.[137] The Supreme Court has warned that courts should hesitate to interpret a statute in a way that renders any of its provisions superfluous.[138] Therefore, the *Bradley* courts have concluded that the Act should be interpreted as applying retroactively in order to render each and every one of its provisions meaningful.[139]

The argument that Sections 402(b) and 109(c) evidence Congress's intent that the Act apply retroactively has two problems. First, Congress apparently enacted the above sections only to ensure the Act's nonapplication to two specific cases.[140] Congress, unable to reach a consensus on the retroactivity of the Act, was forced to leave the decision to the courts, and Congress had no way of knowing how the courts would resolve the issue.[141] Therefore, Congress probably included Sections 402(b) and 109(c) so that even if the courts decided the Act should have retroactive effect, it would not apply to *Wards Cove*[142] and *Arabian American Oil.*[143] Thus, Sections 402(b) and 109(c) probably indicate only that Congress could not reach an agreement on the issue of general retroactivity, not that Congress intended the Act to apply retroactively.

The second problem is that the first exception to the *Bradley* presumption revolves around an actual congressional intent. That is, the *Bradley* courts' analyses of Sections 402(b) and 109(c) are attempts to ascertain the actual intent of Congress.[144] Yet the *Bradley* courts' inter-

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

136. See, for example, *Mojica v. Gannett Co.*, 779 F. Supp. 94, 97 (N.D. Ill. 1991) (stating that these provisions are evidence that the statute should not be interpreted as applying only prospectively). See Part III.A.1 for a discussion of Sections 402(b) and 109(c).

137. See, for example, *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302, 1304 (N.D. Cal. 1992). That is, if the entire Act applies only prospectively, then there is no reason to carve out certain instances in which the Act would not apply retroactively.

138. See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988).

139. See, for example, *Stender*, 780 F. Supp. at 1304.

140. See notes 106-13 and accompanying text.

141. See *King v. Shelby Medical Center*, 779 F. Supp. 157, 157 (N.D. Ala. 1991). Congressional uncertainty as to how the Supreme Court would resolve the issue of retroactivity is understandable considering the existence of the *Bowen/Bradley* dichotomy. See *Fray*, 960 F.2d at 1377 (finding that Congress was not certain how courts would resolve the retroactivity issue, and therefore "hedged their bets").

142. See note 111 and accompanying text.

143. See note 112 and accompanying text.

144. See, for example, *Stender*, 780 F. Supp. at 1304.

pretation of these sections as indicative of Congress's intent contradicts overwhelming evidence that no actual congressional intent exists.[145] Since the courts' analyses of the Act's language should be no more than attempts to divine actual congressional intent, these courts should not use statutory canons to create intent where none exists.

2. Legislative History as Ambiguous

Both the *Bradley* and *Bowen* courts agree that the statements of various members of Congress establish only that Congress could not reach an agreement on the issue of retroactivity.[146] The legislative debates, therefore, do not provide sufficient evidence to rebut the *Bradley* presumption of retroactivity because they do not contain a clear statement of Congress's intent that the Act apply only prospectively.

Some *Bradley* courts have looked beyond the political proselytzing of Congress to the purposes behind the Act's enactment.[147] Congress enacted the Civil Rights Act of 1991 in response to recent Supreme Court decisions restricting the scope of civil rights statutes.[148] Many *Bradley* courts, therefore, have characterized the Act as remedial or restorative.[149] When Congress enacts legislation in response to a disfavored Supreme Court interpretation of previous legislation, thereby returning the law to its original state, some courts have held that the new legislation should be applied retroactively.[150] The *Bradley* courts thus argue that the remedial nature of the Act supports its retroactive

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145. The Act's legislative history indicates that Congress was deeply divided on the subject of the Act's retroactivity. See note 121.

146. See, for example, *Goldsmith*, 782 F. Supp. at 106-07.

147. See, for example, *Graham*, 782 F. Supp. at 76; *Stender*, 780 F. Supp. at 1305-06.

148. See Civil Rights Act of 1991 § 3, 105 Stat. at 1071. The Act legislatively overrules several recent Supreme Court decisions. For example, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989), held that an employer can avoid liability for intentional discrimination in mixed motive cases if the employer can show that it would have taken the same action even if its discriminatory motive were absent. Section 107 of the Act legislatively overrules this holding by providing that an employer is liable whenever race, color, religion, sex, or national origin was a motivating factor in an employment decision, even if other factors contributed to the decision. Similarly, Section 108 of the Act overrules *Martin v. Wilks*, 490 U.S. 755 (1989), by providing that individuals cannot challenge a consent decree if they had a reasonable opportunity to object to the decree or if their interests were adequately represented by another party. Section 101 of the Act overrules *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), by abolishing limits on the scope of 42 U.S.C. § 1981 created by the Court in *Patterson*. And Section 113 of the Act overrules *West Virginia Univ. Hosp. v. Casey*, 111 S.Ct. 1138 (1991), by allowing recovery of expert witness fees as a component of attorneys' fees.

149. See, for example, *Graham*, 782 F. Supp. at 76; *Stender*, 780 F. Supp. at 1306 (drawing parallel to Civil Rights Restoration Act of 1987, which, while silent as to retroactivity, has been applied retroactively).

150. See *Lussier v. Dugger*, 904 F.2d 661, 665-66 (11th Cir. 1990); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987); *Leake v. Long Island Jewish Medical Center*, 695 F. Supp. 1414, 1417-18 (E.D.N.Y. 1988), aff'd, 869 F.2d 130 (2d Cir. 1989) (per curiam).

application.[151]

Although this argument has some force, it is irrelevant in the *Bradley* analysis of retroactivity. *Bradley* courts do not have the burden of proving that the Act should apply retroactively. Rather, the courts need only find that there is no evidence that the Act should not apply retroactively and that retroactive application of the Act would not be manifestly unjust.[152] The remedial nature of the Act does not directly influence either of these determinations. Since neither the legislative history nor the plain language of the Act evidence a congressional intent that the Act should not apply retroactively, the manifest injustice test becomes dispositive.

3. The Manifest Injustice Test

In *Bradley*, the Supreme Court set forth three factors courts should evaluate in determining whether the retroactive application of a statute would result in manifest injustice.[153] The first prong addresses the nature and identity of the parties involved in the underlying dispute.[154] Retroactive application of the Act does not necessarily run afoul of the Supreme Court's caution that courts should hesitate to apply a law retroactively in a mere private dispute between private individuals. Courts have indicated that retroactive application of legislation in a dispute between private parties does not result in manifest injustice if the subject of the dispute is a matter of public concern.[155] Congress enacted the Civil Rights Act of 1991 in order to promote equality and provide a remedy for discrimination.[156] Since achieving equality and remedying discrimination are of importance to the general public, claims brought under the Act are a matter of public concern.[157] Because parties to a lawsuit brought under the Act find themselves embroiled in a dispute of public concern, the first prong of the *Bradley* test favors retroactive application.[158]

Under the second prong, courts must consider the nature of the individual rights that a retroactive application of the Act would affect.[159] Courts should avoid retroactive application of the Act if it would

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151. See *Graham*, 782 F. Supp. at 76; *Stender*, 780 F. Supp. at 1305-06.

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

153. See notes 76-80 and accompanying text.

154. *Bradley*, 416 U.S. at 717-18.

155. See, for example, *In re Busick*, 831 F.2d 745, 748-49 (7th Cir. 1987) (finding that manifest injustice would result from retroactive application in this "routine private dispute," but that it may not in a private dispute involving a significant public concern).

156. See Civil Rights Act of 1991 §§ 2, 3, 105 Stat. at 1071.

157. See *Mojica*, 779 F. Supp. at 98.

158. Id.

159. *Bradley*, 416 U.S. at 720.

deprive an individual of matured or unconditional rights.[160] *Bradley* courts consistently have held that retroactive application of the Civil Rights Act of 1991 would not deprive individuals of any unconditional rights: a defendant in a civil rights case does not have an unconditional right to a bench trial as opposed to a jury trial.[161] Nor does a defendant have an unconditional right to immunity from compensatory or punitive damages.[162] The unconditional rights that Civil Rights defendants do enjoy, the Act does not infringe upon. For example, retroactive application of the Act would not deprive defendants of their rights to introduce all admissable evidence and fully present their cases at trial.[163] Because retroactive application of the Act does not deprive individuals of vested rights, the second prong of the *Bradley* test favors retroactive application of the Act as well.

Finally, under the third prong, courts should consider the nature of the individual rights a retroactive operation of the Act would affect.[164] If retroactive application of the Act would impose new and unanticipated obligations on individuals, then courts should not apply the Act retroactively.[165] The provisions of the Civil Rights Act of 1991 that establish the availability of compensatory and punitive damages as well as trial by jury do not impose new obligations upon defendants;[166] they provide plaintiffs with an additional remedy for conduct that was already prohibited under the Act's predecessor.[167] Therefore, the third prong of the *Bradley* test also supports retroactive application of the Act.

Since retroactive application of the Civil Rights Act of 1991 would neither contradict Congress's clear intent nor result in manifest injustice, *Bradley* courts conclude that the Act should apply retroactively. Thus, the *Bowen* and *Bradley* courts, like Congress, are unable to agree on the Act's retroactivity. The *Bowen* and *Bradley* courts will continue to clash until the Supreme Court steps in and provides the lower courts with a clear mandate.

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160. Id.

161. See, for example, *Goldsmith*, 782 F. Supp. at 107-08; *Long v. Carr*, 784 F. Supp. 887, 891 (N.D. Ga. 1992).

162. See *Mojica*, 779 F. Supp. at 1307-08.

163. See *Long*, 784 F. Supp. at 891.

164. *Bradley*, 416 U.S. at 720.

165. See id. at 720-21.

166. See *Mojica*, 779 F. Supp. at 99.

167. See *Long*, 784 F. Supp. at 891.

IV. Conclusion: A Call for Action

The Supreme Court must resolve the conflict between *Bowen* and *Bradley*.[168] Lower courts should not be forced to waste precious judicial resources attempting to make fine distinctions in reconciling these two cases when the Supreme Court could easily resolve any confusion. The Supreme Court should clarify its position on retroactivity by laying the *Bradley* presumption of retroactivity to rest.

The only explanation for the Supreme Court's continued unwillingness to settle this conflict must be that the Court is interpreting *Bowen* and *Bradley* as applying in two factually distinct circumstances.[169] Bearing in mind the Court's application of these two decisions, *Bradley*, if retained at all, should be confined to cases in which the change in law occurs between the decision of the trial court and the appellate court. Such a solution, however, would be unsatisfactory. The Supreme Court should not continue to avoid resolution of the conflicting presumptions by confining each to its own arena. The Court must confront the issue head on and choose one presumption that will apply in all determinations of legislative retroactivity.

Fairness and traditional Supreme Court precedent dictate that the *Bowen* presumption should prevail. The *Bradley* presumption in favor of retroactivety makes retroactive legislation the norm rather than the exception,[170] in spite of the fact that retroactive legislation never has played this role in our society. Rather, this country since its birth rightfully has viewed retroactive legislation suspiciously.[171]

Given the disfavored status of retroactive legislation, Congress should have the burden of enacting legislation with explicit retroactive language if it wants such legislation to apply retroactively. Courts should not help Congress to do that which it cannot do for itself—if Congress cannot garner enough political support to ensure that a statute will have retroactive effect, then the statute should not apply retro-

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168. Some commentators have argued that courts should determine retroactivity issues based on an assessment of the particular effects of retroactive application of specific schemes. See Michele A. Estrin, Note, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 Mich. L. Rev. 2035, 2077 (1992). Such an approach eliminates the need for a clarification of the *Bowen/Bradley* dichotomy. The Supreme Court should not adopt this approach, however, because it would require lower courts to make an in-depth inquiry into the policies underlying a statute before deciding on the statute's retroactivity. Scarce judicial resources are better preserved by providing courts with a presumption concerning retroactivity.

169. See *Bonjorno*, 494 U.S. at 849-54 (Scalia concurring).

170. Under the traditional reading of *Bradley*, all statutes have potential retroactive application. Any statute enacted by Congress that does not explicitly define its application as prospective will apply retroactively unless such application would be manifestly unjust.

171. See *Bonjorno*, 494 U.S. at 855-56 (Scalia concurring).

actively. The *Bowen* presumption against retroactivity achieves this result.

Once the Court adopts the *Bowen* presumption against retroactivity, the retroactive application of the Civil Rights Act of 1991 will no longer be an issue. The Act's text and legislative history simply do not evidence the strong retroactive intent necessary to rebut the *Bowen* presumption. Therefore, as most courts following *Bowen* have concluded, the Civil Rights Act of 1991 should not apply retroactively.

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