

THE WHITE HOUSE

WASHINGTON

9/10/59

Dansia -

Collaborative
process
w/ Unions; Group
in depth evaluation
of senior staff

Money business

From Claire

SES position

Gonzales
Dir of Commerce

Tremendous backlog
Service problems
management problems

June 13 hearing
spot light agency
denial of it

Martin
Cabril - oversight
hearing

Stwe

Briefing materials
Affected groups
Lobbying strategy -
Status of Agency
Transition report

663-4915

Statement Regarding Effect of April 26, 1994, Supreme Court Decision that the Civil Rights Act of 1991 Does Not Apply Retroactively to Cases Arising Prior to Passage of the Act on Nov. 21, 1991.

Since April 1993, the EEOC has taken the position that the full scope of remedies available to victims of discrimination under Section 102 of the Civil Rights Act of 1991 (the Act) is applicable to cases arising prior to or pending on Nov. 21, 1991 -- the effective date of the Act. On Tuesday, April 26, 1994, the Supreme Court ruled in Landgraf v. USI Film Products that the Act is not retroactive and, therefore, compensatory and punitive damages are not available in cases arising prior to the Act's passage.

The decision clearly does not reflect the position advanced by the Commission and the Department of Justice in the amicus brief filed in the case. While the issue was pending before the Court, the Commission issued interim guidance to deal with the charges and litigation in which compensatory and punitive damages may have been applicable. The effect of the Landgraf decision on the EEOC's caseload is as follows.

Federal Sector EEO Complaint Processing

The Commission stayed that portion of appellate orders concerning compensatory damages until the decision in Landgraf was rendered. Between April 1, 1993 and April 25, 1994, 44 appellate decisions were issued that included orders concerning compensatory damages for pre-Act conduct. During this period, the EEOC issued a total of 6,363 appellate decisions. Complainants in those 44 cases will now be advised that compensatory damages are not available due to the Court's decision. (Punitive damages were never available in federal sector EEO complaints.)

Private Sector Title VII Enforcement

Private sector charges filed under Title VII prior to November 21, 1991, in which EEOC determined that compensatory and punitive damages were warranted were either successfully conciliated or conciliation attempts failed. Pursuant to Commission policy, those in which conciliation failed were considered for litigation. EEOC district offices report that litigation recommendations on all such charges have been submitted to the General Counsel. There are no remaining charges in the enforcement process affected by Landgraf.

- continued -

The Office of General Counsel (OGC), which conducts all litigation approved by the Commission, reports that there are 73 cases of a total of 521 in active litigation that will or may be affected by the Landgraf decision. OGC reports 12 lawsuits which were stayed solely pending disposition of Landgraf. These cases will now be dismissed in their entirety or go forward relative to those claims that post-date the Act.

Of the remaining 61 cases in pending litigation, compensatory and punitive damages may have been sought, but no determination regarding relief has yet been made. These cases will proceed without claims for the disallowed damages.

Regarding any future cases considered by the Commission for litigation, compensatory and punitive damages will not be sought for pre-Act conduct.

4/29/94-3:45

3RD CASE of Level 1 printed in FULL format.

BARBARA LANDGRAF, PETITIONER v. USI FILM PRODUCTS ET AL.

LANDGRAF v. USI FILM PRODUCTS ET AL.

No. 92-757

SUPREME COURT OF THE UNITED STATES

1994 U.S. LEXIS 3292

October 13, 1993, Argued
April 26, 1994, Decided

NOTICE: [*1] This preliminary LEXIS version is unedited and subject to revision.

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SYLLABUS:

After a bench trial in petitioner Landgraf's suit under Title VII of the Civil Rights Act of 1964 (Title VII), the District Court found that she had been sexually harassed by a co-worker at respondent USI Film Products, but that the harassment was not so severe as to justify her decision to resign her position. Because the court found that her employment was not terminated in violation of Title VII, she was not entitled to equitable relief, and because Title VII did not then authorize any other form of relief, the court dismissed her complaint. While her appeal was pending, the Civil Rights Act of 1991 (1991 Act or Act) became law, @ 102 of which includes provisions that create a right to recover compensatory and punitive [*2] damages for intentional discrimination violative of Title VII (hereinafter @ 102(a)), and authorize any party to demand a jury trial if such damages are claimed (hereinafter @ 102(c)). In affirming, the Court of Appeals rejected Landgraf's argument that her case should be remanded for a jury trial on damages pursuant to @ 102.

Held: Section 102 does not apply to a Title VII case that was pending on appeal when the 1991 Act was enacted. Pp. 4-43.

(a) Since the President vetoed a 1990 version of the Act on the ground, among others, of perceived unfairness in the bill's elaborate retroactivity provision, it is likely that the omission of comparable language in the 1991 Act was not congressional oversight or unawareness, but was a compromise that made the Act possible. That omission is not dispositive here because it does not establish precisely where the compromise was struck. For example, a decision to reach only cases still pending, and not those already finally decided, might explain Congress' failure to provide in the 1991 Act, as it had in the 1990 bill, that certain sections would apply to proceedings pending on specified preenactment dates. Pp. 4-11.

3RD CASE of Level 1 printed in FULL format.

BARBARA LANDGRAF, PETITIONER v. USI FILM PRODUCTS ET AL.

LANDGRAF v. USI FILM PRODUCTS ET AL.

No. 92-757

SUPREME COURT OF THE UNITED STATES

1994 U.S. LEXIS 3292

October 13, 1993, Argued
April 26, 1994, Decided

NOTICE: [*1] This preliminary LEXIS version is unedited and subject to revision.

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SYLLABUS:

After a bench trial in petitioner Landgraf's suit under Title VII of the Civil Rights Act of 1964 (Title VII), the District Court found that she had been sexually harassed by a co-worker at respondent USI Film Products, but that the harassment was not so severe as to justify her decision to resign her position. Because the court found that her employment was not terminated in violation of Title VII, she was not entitled to equitable relief, and because Title VII did not then authorize any other form of relief, the court dismissed her complaint. While her appeal was pending, the Civil Rights Act of 1991 (1991 Act or Act) became law, @ 102 of which includes provisions that create a right to recover compensatory and punitive [*2] damages for intentional discrimination violative of Title VII (hereinafter @ 102(a)), and authorize any party to demand a jury trial if such damages are claimed (hereinafter @ 102(c)). In affirming, the Court of Appeals rejected Landgraf's argument that her case should be remanded for a jury trial on damages pursuant to @ 102.

Held: Section 102 does not apply to a Title VII case that was pending on appeal when the 1991 Act was enacted. Pp. 4-43.

(a) Since the President vetoed a 1990 version of the Act on the ground, among others, of perceived unfairness in the bill's elaborate retroactivity provision, it is likely that the omission of comparable language in the 1991 Act was not congressional oversight or unawareness, but was a compromise that made the Act possible. That omission is not dispositive here because it does not establish precisely where the compromise was struck. For example, a decision to reach only cases still pending, and not those already finally decided, might explain Congress' failure to provide in the 1991 Act, as it had in the 1990 bill, that certain sections would apply to proceedings pending on specified preenactment dates. Pp. 4-11.

(b) The [*3] text of the 1991 Act does not evince any clear expression of congressional intent as to whether § 102 applies to cases arising before the Act's passage. The provisions on which Landgraf relies for such an expression -- § 402(a), which states that, "except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment," and §§ 402(b) and 109(c), which provide for prospective application in limited contexts -- cannot bear the heavy weight she would place upon them by negative inference: Her statutory argument would require the Court to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message. Moreover, the relevant legislative history reveals little to suggest that Members of Congress believed that an agreement had been tacitly reached on the controversial retroactivity issue or that Congress understood or intended the interplay of the foregoing sections to have the decisive effect Landgraf assigns them. Instead, the history conveys the impression that legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct. Pp. 11-18.

(c) [*4] In order to resolve the question left open by the 1991 Act, this Court must focus on the apparent tension between two seemingly contradictory canons for interpreting statutes that do not specify their temporal reach: the rule that a court must apply the law in effect at the time it renders its decision, see *Bradley v. Richmond*, 416 U. S. 696, 711, and the axiom that statutory retroactivity is not favored, see *Bowen v. Georgetown Univ. Hospital*, 488 U. S. 204, 208. Pp. 18-20.

(d) The presumption against statutory retroactivity is founded upon elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. It is deeply rooted in this Court's jurisprudence and finds expression in several constitutional provisions, including, in the criminal context, the Ex Post Facto Clause. In the civil context, prospectivity remains the appropriate default rule unless Congress has made clear its intent to disrupt settled expectations. Pp. 20-28.

(e) Thus, when a case implicates a federal statute enacted after the events giving rise [*5] to the suit, a court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, there is no need to resort to judicial default rules. Where the statute in question unambiguously applies to preenactment conduct, there is no conflict between the anti-retroactivity presumption and the principle that a court should apply the law in effect at the time of decision. Even absent specific legislative authorization, application of a new statute to cases arising before its enactment is unquestionably proper in many situations. However, where the new statute would have a genuinely retroactive effect -- i.e., where it would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed -- the traditional presumption teaches that the statute does not govern absent clear congressional intent favoring such a result. *Bradley* did not displace the traditional presumption. Pp. 28-36.

(f) Application of the foregoing principles demonstrates that, absent guiding instructions from Congress, § 102 is not the type of provision that should govern [*6] cases arising before its enactment, but is instead subject to the presumption against statutory retroactivity. Section 102(b)(1), which authorizes punitive damages in certain circumstances, is clearly subject to the

presumption, since the very labels given "punitive" or "exemplary" damages, as well as the rationales supporting them, demonstrate that they share key characteristics of criminal sanctions, and therefore would raise a serious question under the Ex Post Facto Clause if retroactively imposed. While the @ 102(a)(1) provision authorizing compensatory damages is not so easily classified, it is also subject to the presumption, since it confers a new right to monetary relief on persons like Landgraf, who were victims of a hostile work environment but were not constructively discharged, and substantially increases the liability of their employers for the harms they caused, and thus would operate "retrospectively" if applied to preenactment conduct. Although a jury trial right is ordinarily a procedural change of the sort that would govern in trials conducted after its effective date regardless of when the underlying conduct occurred, the jury trial option set out in [*7] @ 102(c)(1) must fall with the attached damages provisions because @ 102(c) makes a jury trial available only "if a complaining party seeks compensatory or punitive damages." Pp. 36-43.

968 F. 2d 427, affirmed.

JUDGES: STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined. BLACKMUN, J., filed a dissenting opinion.

OPINIONBY: STEVENS

OPINION: JUSTICE STEVENS delivered the opinion of the Court.

The Civil Rights Act of 1991 (1991 Act or Act) creates a right to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964. See Rev. Stat. @ 1977A(a), 42 U. S. C. @ 1981a(a), as added by @ 102 of the 1991 Act, Pub. L. 102-166, 105 Stat. 1071. The Act further provides that any party may demand a trial by jury if such damages are sought. n1 We granted certiorari to decide whether these provisions apply to a Title VII case that was pending on appeal when the statute was enacted. We hold that they do not.

- - - - -Footnotes- - - - -

n1 See Rev. Stat. @ 1977A(c), 42 U. S. C. @ 1981a(c), as added by @ 102 of the 1991 Act. For simplicity, and in conformity with the practice of the parties, we will refer to the damages and jury trial provisions as @@ 102(a) and (c), respectively.

- - - - -End Footnotes- - - - -

[*8]

I

From September 4, 1984, through January 17, 1986, petitioner Barbara Landgraf was employed in the USI Film Products (USI) plant in Tyler, Texas. She worked the 11 p.m. to 7 a.m. shift operating a machine that produced plastic bags. A fellow employee named John

Williams repeatedly harassed her with inappropriate remarks and physical

contact. Petitioner's complaints to her immediate supervisor brought her no relief, but when she reported the incidents to the personnel manager, he conducted an investigation, reprimanded Williams, and transferred him to another department. Four days later petitioner quit her job.

Petitioner filed a timely charge with the Equal Employment Opportunity Commission (EEOC or Commission). The Commission determined that petitioner had likely been the victim of sexual harassment creating a hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. @ 2000e et seq., but concluded that her employer had adequately remedied the violation. Accordingly, the Commission dismissed the charge and issued a notice of right to sue.

On July 21, 1989, petitioner commenced this action against USI, [*9] its corporate owner, and that company's successor-in-interest. n2 After a bench trial, the District Court found that Williams had sexually harassed petitioner causing her to suffer mental anguish. However, the court concluded that she had not been constructively discharged. The court said:

-----Footnotes-----

n2 Respondent Quantum Chemical Corporation owned the USI plant when petitioner worked there. Respondent Bonar Packaging, Inc., subsequently purchased the operation.

-----End Footnotes-----

"Although the harassment was serious enough to establish that a hostile work environment existed for Landgraf, it was not so severe that a reasonable person would have felt compelled to resign. This is particularly true in light of the fact that at the time Landgraf resigned from her job, USI had taken steps . . . to eliminate the hostile working environment arising from the sexual harassment. Landgraf voluntarily resigned from her employment with USI for reasons unrelated to the sexual harassment in question." App. to Pet. for Cert. B-3-4.

Because the court [*10] found that petitioner's employment was not terminated in violation of Title VII, she was not entitled to equitable relief, and because Title VII did not then authorize any other form of relief, the court dismissed her complaint.

On November 21, 1991, while petitioner's appeal was pending, the President signed into law the Civil Rights Act of 1991. The Court of Appeals rejected petitioner's argument that her case should be remanded for a jury trial on damages pursuant to the 1991 Act. Its decision not to remand rested on the premise that "a court must '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 [v. Richmond School Bd., 416 U. S. 696, 711 (1974)]." 968 F. 2d 427, 432 (CA 5 1992). Commenting first on the provision for a jury trial in @ 102(c), the court stated that requiring the defendant "to retry this case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources. We apply procedural rules to pending cases, but [*11] we do not invalidate procedures followed before the new rule was adopted." 968 F. 2d, at 432-433. The court then characterized the provision for compensatory

and punitive damages in @ 102 as "a seachange in employer liability for Title VII violations" and concluded that it would be unjust to apply this kind of additional and unforeseeable obligation to conduct occurring before the effective date of the Act. Ibid. Finding no clear error in the District Court's factual findings, the Court of Appeals affirmed the judgment for respondents.

We granted certiorari and set the case for argument with Rivers v. Roadway Express, Inc., post, at _____. Our order limited argument to the question whether @ 102 of the 1991 Act applies to cases pending when it became law. 507 U. S. ____ (1993). Accordingly, for purposes of our decision, we assume that the District Court and the Court of Appeals properly applied the law in effect at the time of the discriminatory conduct and that the relevant findings of fact were correct. We therefore assume that petitioner was the victim of sexual harassment violative of Title VII, but that the law did not then authorize any [*12] recovery of damages even though she was injured. We also assume, arguendo, that if the same conduct were to occur today, petitioner would be entitled to a jury trial and that the jury might find that she was constructively discharged, or that her mental anguish or other injuries would support an award of damages against her former employer. Thus, the controlling question is whether the Court of Appeals should have applied the law in effect at the time the discriminatory conduct occurred, or at the time of its decision in July 1992.

II

Petitioner's primary submission is that the text of the 1991 Act requires that it be applied to cases pending on its enactment. Her argument, if accepted, would make the entire Act (with two narrow exceptions) applicable to conduct that occurred, and to cases that were filed, before the Act's effective date. Although only @ 102 is at issue in this case, we therefore preface our analysis with a brief description of the scope of the 1991 Act.

The Civil Rights Act of 1991 is in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964. Section 3(4) expressly identifies as one of the Act's purposes [*13] "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." That section, as well as a specific finding in @ 2(2), identifies Wards Cove Packing Co. v. Atonio, 490 U. S. 642 (1989), as a decision that gave rise to special concerns. n3 Section 105 of the Act, entitled "Burden of Proof in Disparate Impact Cases," is a direct response to Wards Cove.

-Footnotes-

n3 Section 2(2) finds that the Wards Cove decision "has weakened the scope and effectiveness of Federal civil rights protections," and @ 3(2) expresses Congress' intent "to codify" certain concepts enunciated in "Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U. S. 642 (1989)." We take note of the express references to that case because it is the focus of @ 402(b), on which petitioner places particular reliance. See infra, at 12-18.

-End Footnotes-

Other sections of the Act [*14] were obviously drafted with "recent decisions of the Supreme Court" in mind. Thus, @ 101 (which is at issue in Rivers, post, at _____) amended the 1866 Civil Rights Act's prohibition of

racial discrimination in the "making and enforcement [of] contracts," 42 U. S. C. @ 1981 (1988 ed., Supp. III), in response to *Patterson v. McLean Credit Union*, 491 U. S. 164 (1989); @ 107 responds to *Price Waterhouse v. Hopkins*, 490 U. S. 228 (1989), by setting forth standards applicable in "mixed motive" cases; @ 108 responds to *Martin v. Wilks*, 490 U. S. 755 (1989), by prohibiting certain challenges to employment practices implementing consent decrees; @ 109 responds to *EEOC v. Arabian American Oil Co.*, 499 U. S. 244 (1991), by redefining the term "employee" as used in Title VII to include certain United States citizens working in foreign countries for United States employers; @ 112 responds to *Lorance v. AT&T Technologies, Inc.*, 490 U. S. 900 (1989), by expanding employees' rights [*15] to challenge discriminatory seniority systems; @ 113 responds to *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U. S. 83 (1991), by providing that an award of attorney's fees may include expert fees; and @ 114 responds to *Library of Congress v. Shaw*, 478 U. S. 310 (1986), by allowing interest on judgments against the United States.

A number of important provisions in the Act, however, were not responses to Supreme Court decisions. For example, @ 106 enacts a new prohibition against adjusting test scores "on the basis of race, color, religion, sex, or national origin"; @ 117 extends the coverage of Title VII to include the House of Representatives and certain employees of the Legislative Branch; and @@ 301-325 establish special procedures to protect Senate employees from discrimination. Among the provisions that did not directly respond to any Supreme Court decision is the one at issue in this case, @ 102.

Entitled "Damages in Cases of Intentional Discrimination," @ 102 provides in relevant part:

"(a) Right of Recovery. --

"(1) Civil Rights. -- In an action brought by a complaining party under section 706 [*16] or 717 of the Civil Rights Act of 1964 (42 U. S. C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U. S. C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U. S. C. 1981), the complaining party may recover compensatory and punitive damages . . . in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

.....

"(c) Jury Trial. -- If a complaining party seeks compensatory or punitive damages under this section --

"(1) any party may demand a trial by jury."

Before the enactment of the 1991 Act, Title VII afforded only "equitable" remedies. The primary form of monetary relief available was backpay. n4 Title VII's back pay remedy, n5 modeled on that of the National Labor Relations Act, 29 U. S. C. @ 160(c), is a "make-whole" remedy [*17] that resembles

compensatory damages in some respects. See Albemarle Paper Co. v. Moody, 422 U. S. 405, 418-422 (1975). However, the new compensatory damages provision of the 1991 Act is "in addition to," and does not replace or duplicate, the backpay remedy allowed under prior law. Indeed, to prevent double recovery, the 1991 Act provides that compensatory damages "shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964." @ 102(b)(2).

-----Footnotes-----

n4 We have not decided whether a plaintiff seeking backpay under Title VII is entitled to a jury trial. See, e.g., Lytle v. Household Mfg., Inc., 494 U. S. 545, 549 n. 1 (1990) (assuming without deciding no right to jury trial); Teamsters v. Terry, 494 U. S. 558, 572 (1990) (same). Because petitioner does not argue that she had a right to jury trial even under pre-1991 law, again we need not address this question.

n5 "If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable . . ." Civil Rights Act of 1964, @ 706(g), as amended, 42 U. S. C. @ 2000e-5(g) (1988 ed., Supp. III).

-----End Footnotes-----

[*18]

Section 102 significantly expands the monetary relief potentially available to plaintiffs who would have been entitled to backpay under prior law. Before 1991, for example, monetary relief for a discriminatorily discharged employee generally included "only an amount equal to the wages the employee would have earned from the date of discharge to the date of reinstatement, along with lost fringe benefits such as vacation pay and pension benefits." United States v. Burke, 504 U. S. _____, _____ (1992) (slip op., at 9-10). Under @ 102, however, a Title VII plaintiff who wins a backpay award may also seek compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." @ 102(b)(3). In addition, when it is shown that the employer acted "with malice or with reckless indifference to the [plaintiff's] federally protected rights," @ 102(b)(1), a plaintiff may recover punitive damages. n6

-----Footnotes-----

n6 Section 102(b)(3) imposes limits, varying with the size of the employer, on the amount of compensatory and punitive damages that may be awarded to an individual plaintiff. Thus, the sum of such damages awarded a plaintiff may not exceed \$ 50,000 for employers with between 14 and 100 employees; \$ 100,000 for employers with between 101 and 200 employees; \$ 200,000 for employers with between 200 and 500 employees; and \$ 300,000 for employers with more than 500 employees.

-End Footnotes-

[*19]

Section 102 also allows monetary relief for some forms of workplace discrimination that would not previously have justified any relief under Title VII. As this case illustrates, even if unlawful discrimination was proved, under prior law a Title VII plaintiff could not recover monetary relief unless the discrimination was also found to have some concrete effect on the plaintiff's employment status, such as a denied promotion, a differential in compensation, or termination. See Burke, supra, at ___ (slip op., at 10-11). ("The circumscribed remedies available under Title VII [before the 1991 Act] stand in marked contrast not only to those available under traditional tort law, but under other federal anti-discrimination statutes, as well"). Section 102, however, allows a plaintiff to recover in circumstances in which there has been unlawful discrimination in the "terms, conditions, or privileges of employment," 42 U. S. C. @ 2000e-2(a)(1), n7 even though the discrimination did not involve a discharge or a loss of pay. In short, to further Title VII's "central statutory purposes of eradicating discrimination throughout the economy and [*20] making persons whole for injuries suffered through past discrimination," Albemarle Paper Co., 422 U. S., at 421, @ 102 of the 1991 Act effects a major expansion in the relief available to victims of employment discrimination.

-Footnotes-

n7 See Harris v. Forklift Systems, Inc., 510 U. S. ___, ___ (1993) (slip op., at 3) (discrimination in "terms, conditions, or privileges of employment" actionable under Title VII "is not limited to 'economic' or 'tangible' discrimination") (citations and internal quotation marks omitted).

-End Footnotes-

In 1990, a comprehensive civil rights bill passed both Houses of Congress. Although similar to the 1991 Act in many other respects, the 1990 bill differed in that it contained language expressly calling for application of many of its provisions, including the section providing for damages in cases of intentional employment discrimination, to cases arising before its (expected) enactment. n8 The President vetoed the 1990 legislation, however, citing the bill's "unfair retroactivity [*21] rules" as one reason for his disapproval. n9 Congress narrowly failed to override the veto. See 136 Cong. Rec. S16589 (Oct. 24, 1990) (66-34 Senate vote in favor of override).

-Footnotes-

n8 The relevant section of the Civil Rights Act of 1990, S. 2104, 101st Cong., 1st Sess. (1990), provided:

"SEC. 15. APPLICATION OF AMENDMENTS AND TRANSITION RULES.

"(a) APPLICATION OF AMENDMENTS. -- The amendments made by --

"(1) section 4 shall apply to all proceedings pending on or commenced after June 5, 1989 [the date of Wards Cove Packing Co. v. Antonio, 490 U. S. 642];

"(2) section 5 shall apply to all proceedings pending on or commenced after May 1, 1989 [the date of Price Waterhouse v. Hopkins, 490 U. S. 228];

"(3) section 6 shall apply to all proceedings pending on or commenced after June 12, 1989 [the date of Martin v. Wilks, 490 U. S. 755];

"(4) sections 7(a)(1), 7(a)(3) and 7(a)(4), 7(b), 8 [providing for compensatory and punitive damages for intentional discrimination], 9, 10, and 11 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

"(5) section 7(a)(2) shall apply to all proceedings pending on or after June 12, 1989 [the date of Lorance v. AT&T Technologies, Inc., 490 U. S. 900]; and

"(6) section 12 shall apply to all proceedings pending on or commenced after June 15, 1989 [the date of Patterson, v. McLean Credit Union, 491 U. S. 164].

"(b) TRANSITION RULES. --

"(1) IN GENERAL. -- Any orders entered by a court between the effective dates described in subsection (a) and the date of enactment of this Act that are inconsistent with the amendments made by sections 4, 5, 7(a)(2), or 12, shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

"(3) FINAL JUDGMENTS. -- Pursuant to paragraphs (1) and (2), any final judgment entered prior to the date of the enactment of this Act as to which the rights of any of the parties thereto have become fixed and vested, where the time for seeking further judicial review of such judgment has otherwise expired pursuant to title 28 of the United States Code, the Federal Rules of Civil Procedure, and the Federal Rules of Appellate Procedure, 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." [*22]

n9 See President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632-1634 (Oct. 22, 1990), reprinted in 136 Cong. Rec. S16418, 16419 (Oct. 22, 1990). The President's veto message referred to the bill's "retroactivity" only briefly; the Attorney General's Memorandum to which the President referred was no more expansive, and may be read to refer only to the bill's special provision for reopening final judgments, see n. 8, supra, rather than its provisions covering pending cases. See Memorandum of the Attorney General to the President (October 22, 1990) ("And Section 15 unfairly applies the changes in the law made by S. 2104 to cases already decided") (emphasis added). App. to Brief for Petitioner A-13.

- - - - -End Footnotes- - - - -

The absence of comparable language in the 1991 Act cannot realistically be attributed to oversight or to unawareness of the retroactivity issue. Rather, it seems likely that one of the compromises that made it possible to enact the 1991 version was an agreement not to include the kind of explicit retroactivity command found in the [*23] 1990 bill.

The omission of the elaborate retroactivity provision of the 1990 bill -- which was by no means the only source of political controversy over that

legislation -- is not dispositive because it does not tell us precisely where the compromise was struck in the 1991 Act. The Legislature might, for example, have settled in 1991 on a less expansive form of retroactivity that, unlike the 1990 bill, did not reach cases already finally decided. See n. 8 supra. A decision to reach only cases still pending might explain Congress' failure to provide in the 1991 Act, as it had in 1990, that certain sections would apply to proceedings pending on specific preenactment dates. Our first question, then, is whether the statutory text on which petitioner relies manifests an intent that the 1991 Act should be applied to cases that arose and went to trial before its enactment.

III

Petitioner's textual argument relies on three provisions of the 1991 Act: @ 402(a), 402(b), and 109(c). Section 402(a), the only provision of the Act that speaks directly to the question before us, states:

"Except as otherwise specifically provided, this Act and the amendments made by this Act shall take [*24] effect upon enactment."

That language does not, by itself, resolve the question before us. A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date. n10 Petitioner does not argue otherwise. Rather, she contends that the introductory clause of @ 402(a) would be superfluous unless it refers to @@ 402(b) and 109(c), which provide for prospective application in limited contexts.

-Footnotes-

n10 The history of prior amendments to Title VII suggests that the "effective-upon-enactment" formula would have been an especially inapt way to reach pending cases. When it amended Title VII in the Equal Employment Opportunity Act of 1972, Congress explicitly provided:

"The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter." Pub. L. 92-261, @ 14, 86 Stat. 113.

In contrast, in amending Title VII to bar discrimination on the basis of pregnancy in 1978, Congress provided:

"Except as provided in subsection (b), the amendment made by this Act shall be effective on the date of enactment." @ 2(a), 92 Stat. 2076.

The only Courts of Appeals to consider whether the 1978 amendments applied to pending cases concluded that they did not. See Schwabenbauer v. Board of Ed. of School Dist. of Olean, 667 F. 2d 305, 310 n. 7 (CA2 1981); Condit v. United Air Lines, Inc., 631 F. 2d 1136, 1139-1140 (CA4 1980). See also Jensen v. Gulf Oil Refining & Marketing Co., 623 F.2d 406, 410 (CA5 1980) (Age Discrimination in Employment Act amendments designated to "take effect on the date of enactment of this Act" inapplicable to case arising before enactment); Sikora v. American Can Co., 622 F. 2d 1116, 1119-1124 (CA3 1980) (same). If we assume that Congress was familiar with those decisions, cf. Cannon v. University of Chicago, 441 U. S.

677, 698-699 (1979), its choice of language in @ 402(a) would imply non-retroactivity.

-----End Footnotes-----
[*25]

The parties agree that @ 402(b) was intended to exempt a single disparate impact lawsuit against the Wards Cove Packing Company. Section 402(b) provides:

"(b) CERTAIN DISPARATE IMPACT CASES. --

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."

Section 109(c), part of the section extending Title VII to overseas employers, states:

"(c) APPLICATION OF AMENDMENTS. -- The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act."

According to petitioner, these two subsections are the "other provisions" contemplated in the first clause of @ 402(a), and together create a strong negative inference that all sections of the Act not specifically declared prospective apply to pending cases that arose before November 21, 1991.

Before addressing the particulars of petitioner's argument, we observe that she places extraordinary weight on two comparatively minor and narrow provisions in a long and complex statute. Applying the [*26] entire Act to cases arising from preenactment conduct would have important consequences, including the possibility that trials completed before its enactment would need to be retried and the possibility that employers would be liable for punitive damages for conduct antedating the Act's enactment. Purely prospective application, on the other hand, would prolong the life of a remedial scheme, and of judicial constructions of civil rights statutes, that Congress obviously found wanting. Given the high stakes of the retroactivity question, the broad coverage of the statute, and the prominent and specific retroactivity provisions in the 1990 bill, it would be surprising for Congress to have chosen to resolve that question through negative inferences drawn from two provisions of quite limited effect.

Petitioner, however, invokes the canon that a court should give effect to every provision of a statute and thus avoid redundancy among different provisions. See, e.g., Mackey v. Lanier Collection Agency & Service, Inc., 486 U. S. 825, 837, and n. 11 (1988). Unless the word "otherwise" in @ 402(a) refers to either @ 402(b) or @ 109(c), she contends, the [*27] first five words in @ 402(a) are entirely superfluous. Moreover, relying on the canon "expressio unius est exclusio alterius," see Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 509 U. S. _____, _____ (1993) (slip op., at 5), petitioner argues that because Congress provided specifically for prospectivity in two places (@@ 109(c) and 402(b)), we should infer that it intended the opposite for the remainder of the statute.

Petitioner emphasizes that @ 402(a) begins: "Except as otherwise specifically provided." A scan of the statute for other "specific provisions" concerning effective dates reveals that @@ 402(b) and 109(c) are the most likely candidates. Since those provisions decree prospectivity, and since @ 402(a) tells us that the specific provisions are exceptions, @ 402(b) should be considered as prescribing a general rule of retroactivity. Petitioner's argument has some force, but we find it most unlikely that Congress intended the introductory clause to carry the critically important meaning petitioner assigns it. Had Congress wished @ 402(a) to have such a determinate meaning, it surely would have used language comparable to its reference [*28] to the predecessor Title VII damages provisions in the 1990 legislation: that the new provisions "shall apply to all proceedings pending on or commenced after the date of enactment of this Act." S. 2104, 101st Cong., 1st Sess. @ 15(a)(4) (1990).

It is entirely possible that Congress inserted the "otherwise specifically provided" language not because it understood the "takes effect" clause to establish a rule of retroactivity to which only two "other specific provisions" would be exceptions, but instead to assure that any specific timing provisions in the Act would prevail over the general "take effect on enactment" command. The drafters of a complicated piece of legislation containing more than 50 separate sections may well have inserted the "except as otherwise provided" language merely to avoid the risk of an inadvertent conflict in the statute. n11 If the introductory clause of @ 402(a) was intended to refer specifically to @@ 402(b), 109(c), or both, it is difficult to understand why the drafters chose the word "otherwise" rather than either or both of the appropriate section numbers.

-----Footnotes-----

n11 There is some evidence that the drafters of the 1991 Act did not devote particular attention to the interplay of the Act's "effective date" provisions. Section 110, which directs the EEOC to establish a "Technical Assistance Training Institute" to assist employers in complying with antidiscrimination laws and regulations, contains a subsection providing that it "shall take effect on the date of the enactment of this Act." @ 110(b). That provision and @ 402(a) are unavoidably redundant.

-----End Footnotes-----

[*29]

We are also unpersuaded by petitioner's argument that both @@ 402(b) and 109(c) merely duplicate the "take effect upon enactment" command of @ 402(a) unless all other provisions, including the damages provisions of @ 102, apply to pending cases. That argument depends on the assumption that all those other provisions must be treated uniformly for purposes of their application to pending cases based on preenactment conduct. That thesis, however, is by no means an inevitable one. It is entirely possible -- indeed, highly probable -- that, because it was unable to resolve the retroactivity issue with the clarity of the 1990 legislation, Congress viewed the matter as an open issue to be resolved by the courts. Our precedents on retroactivity left doubts about what default rule would apply in the absence of congressional guidance, and suggested that some provisions might apply to cases arising before enactment while others might not. n12 Compare *Bowen v. Georgetown Univ. Hospital*, 488 U. S. 204 (1988) with *Bradley v. Richmond School Bd.*, 416 U. S. 696 (1974). See also *Bennett v. New Jersey*, 470 U. S. 632 (1985). [*30] The only matters Congress did not

leave to the courts were set out with specificity in @@ 109(c) and 402(b). Congressional doubt concerning judicial retroactivity doctrine, coupled with the likelihood that the routine "take effect upon enactment" language would require courts to fall back upon that doctrine, provide a plausible explanation for both @@ 402(b) and 109(c) that makes neither provision redundant.

-Footnotes-

n12 This point also diminishes the force of petitioner's "expressio unius" argument. Once one abandons the unsupported assumption that Congress expected that all of the Act's provisions would be treated alike, and takes account of uncertainty about the applicable default rule, @@ 109(c) and 402(b) do not carry the negative implication petitioner draws from them. We do not read either provision as doing anything more than definitively rejecting retroactivity with respect to the specific matters covered by its plain language.

-End Footnotes-

Turning to the text of @ 402(b), it seems unlikely that the introductory phrase ("Notwithstanding [*31] any other provision of this Act") was meant to refer to the immediately preceding subsection. Since petitioner does not contend that any other provision speaks to the general effective date issue, the logic of her argument requires us to interpret that phrase to mean nothing more than "Notwithstanding @ 402(a)." Petitioner's textual argument assumes that the drafters selected the indefinite word "otherwise" in @ 402(a) to identify two specific subsections and the even more indefinite term "any other provision" in @ 402(b) to refer to nothing more than @ 402(b)'s next-door neighbor -- @ 402(a). Here again, petitioner's statutory argument would require us to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message concerning the Act's effect on pending cases.

The relevant legislative history of the 1991 Act reinforces our conclusion that @@ 402(a), 109(c) and 402(b) cannot bear the weight petitioner places upon them. The 1991 bill as originally introduced in the House contained explicit retroactivity provisions similar to those found in the 1990 bill. n13 However, the Senate substitute that was agreed upon omitted those explicit [*32] retroactivity provisions. n14 The legislative history discloses some frankly partisan statements about the meaning of the final effective date language, but those statements cannot plausibly be read as reflecting any general agreement. n15 The history reveals no evidence that Members believed that an agreement had been tacitly struck on the controversial retroactivity issue, and little to suggest that Congress understood or intended the interplay of @@ 402(a), 402(b) and 109(c) to have the decisive effect petitioner assigns them. Instead, the history of the 1991 Act conveys the impression that legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct.

-Footnotes-

n13 See, e.g., H. R. 1, 102d Cong., 1st Sess. @ 113 (1991), reprinted in 137 Cong. Rec. H3924-H3925 (Jan. 3, 1991). The prospectivity proviso to the section extending Title VII to overseas employers was first added to legislation that generally was to apply to pending cases. See H. R. 1, 102d Cong., 1st Sess. @ 119(c) (1991), reprinted in 137 Cong. Rec. H3925-H3926 (June 5, 1991). Thus, at the time its language was introduced, the provision that became @ 109(c) was

surely not redundant. [*33]

n14 On the other hand, two proposals that would have provided explicitly for prospectivity also foundered. See 137 Cong. Rec. S3021, S3023 (Mar. 12, 1991); 137 Cong. Rec. H3898, H3908 (June 4, 1991).

n15 For example, in an "interpretive memorandum" introduced on behalf of seven Republican sponsors of S. 1745, the bill that became the 1991 Act, Senator Danforth stated that "the bill provides that, unless otherwise specified, the provisions of this legislation shall take effect upon enactment and shall not apply retroactively." 137 Cong. Rec. S15485 (Oct. 30, 1991) (emphasis added). Senator Kennedy responded that it "will be up to the courts to determine the extent to which the bill will apply to cases and claims that were pending on the date of enactment." Ibid. (citing Bradley v. Richmond School Bd., 416 U. S. 696 (1974)). The legislative history reveals other partisan statements on the proper meaning of Act's "effective date" provisions. Senator Danforth observed that such statements carry little weight as legislative history. As he put it,

"a court would be well advised to take with a large grain of salt floor debate and statements placed in the CONGRESSIONAL RECORD which purport to create an interpretation for the legislation that is before us." 137 Cong. Rec. S15325 (Oct. 29, 1991).

-----End Footnotes-----

[*34]

Although the passage of the 1990 bill may indicate that a majority of the 1991 Congress also favored retroactive application, even the will of the majority does not become law unless it follows the path charted in Article I, @ 7, cl. 2 of the Constitution. See INS v. Chadha, 462 U. S. 919, 946-951 (1983). In the absence of the kind of unambiguous directive found in @ 15 of the 1990 bill, we must look elsewhere for guidance on whether @ 102 applies to this case.

IV

It is not uncommon to find "apparent tension" between different canons of statutory construction. As Professor Llewellyn famously illustrated, many of the traditional canons have equal opposites. n16 In order to resolve the question left open by the 1991 Act, federal courts have labored to reconcile two seemingly contradictory statements found in our decisions concerning the effect of intervening changes in the law. Each statement is framed as a generally applicable rule for interpreting statutes that do not specify their temporal reach. The first is the rule that "a court is to apply the law in effect at the time it renders its decision," Bradley, 416 U. S., at 711. [*35] The second is the axiom that "retroactivity is not favored in the law," and its interpretive corollary that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Bowen, 488 U. S., at 208.

-----Footnotes-----

n16 See 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 (1950). Llewellyn's article identified the apparent conflict between the canon that

"[a] statute imposing a new penalty or forfeiture, or a new liability or disability, or creating a new right of action will not be construed as having a retroactive effect"

and the countervailing rule that

"remedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such construction." Id., at 402 (citations omitted).

- - - - -End Footnotes- - - - -

We have previously noted the "apparent [*36] tension" between those expressions. See Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U. S. 827, 837 (1990); see also Bennett, 470 U. S., at 639-640. We found it unnecessary in Kaiser to resolve that seeming conflict "because under either view, where the congressional intent is clear, it governs," and the prejudgment interest statute at issue in that case evinced "clear congressional intent" that it was "not applicable to judgments entered before its effective date." 499 U. S., at 837-838. In the case before us today, however, we have concluded that the Civil Rights Act of 1991 does not evince any clear expression of intent on @ 102's application to cases arising before the Act's enactment. We must, therefore, focus on the apparent tension between the rules we have espoused for handling similar problems in the absence of an instruction from Congress.

We begin by noting that there is no tension between the holdings in Bradley and Bowen, both of which were unanimous decisions. Relying on another unanimous decision -- Thorpe v. Housing Authority of Durham, 393 U. S. 268 (1969) [*37] -- we held in Bradley that a statute authorizing the award of attorney's fees to successful civil rights plaintiffs applied in a case that was pending on appeal at the time the statute was enacted. Bowen held that the Department of Health and Human Services lacked statutory authority to promulgate a rule requiring private hospitals to refund Medicare payments for services rendered before promulgation of the rule. Our opinion in Bowen did not purport to overrule Bradley or to limit its reach. In this light, we turn to the "apparent tension" between the two canons mindful of another canon of unquestionable vitality, the "maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." Cohens v. Virginia, 6 Wheat. 264, 399 (1821).

A

As JUSTICE SCALIA has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. n17 Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform [*38] their conduct accordingly; settled expectations should not be lightly disrupted. n18 For that reason, 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 appeal." Kaiser, 494 U. S., at 855 (SCALIA, J., concurring). In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

- - - - -Footnotes- - - - -

n17 See Kaiser Aluminum & Chemical Corp. v. Bonjourn, 494 U. S. 827, 842-844, 855-856 (1990) (SCALIA, J., concurring). See also, e.g., Dash v. Van Kleeck, 7 Johns. * 477, * 503 (N. Y. 1811) ("It is a principle of the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect") (Kent, C. J.); Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775 (1936).

n18 See General Motors Corp. v. Romein, 503 U. S. ____, ____ (1992) (slip op., at 9) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions"); Munzer, A Theory of Retroactive Legislation, 61 Texas L. Rev. 425, 471 (1982) ("The rule of law . . . is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance"). See also L. Fuller, The Morality of Law 51-62 (1964) (hereinafter Fuller).

-----End Footnotes-----

[*39]

It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution. The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation. n19 Article I, @ 10, cl. 1 prohibits States from passing another type of retroactive legislation, laws "impairing the Obligation of Contracts." The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a "public use" and upon payment of "just compensation." The prohibitions on "Bills of Attainder" in Art. I, @@ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. See, e.g., United States v. Brown, 381 U. S. 437, 456-462 (1965). The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause "may not suffice" to warrant its retroactive application. Usery v. Turner Elkhorn Mining Co., 428 U. S. 1, 17 (1976).

[*40]

-----Footnotes-----

n19 Article I contains two Ex Post Facto Clauses, one directed to Congress (@ 9, cl. 3), the other to the States (@ 10, cl. 1). We have construed the Clauses as applicable only to penal legislation. See Calder v. Bull, 3 Dall. 386, 390-391 (1798) (opinion of Chase, J.).

-----End Footnotes-----

These provisions demonstrate that retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals. As Justice Marshall observed in his opinion for the Court in Weaver v. Graham, 450 U. S. 24 (1981), the Ex Post Facto Clause not only ensures that

individuals have "fair warning" about the effect of criminal statutes, but also "restricts governmental power by restraining arbitrary and potentially [*41] vindictive legislation." Id., at 28-29 (citations omitted). n20

-Footnotes-

n20 See Richmond v. J. A. Croson Co., 488 U. S. 469, 513-514 (1989) ("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 no wrong been committed") (STEVENS, J., concurring in part and concurring in judgment); James v. United States, 366 U. S. 213, 247, n. 3 (1961) (retroactive punitive measures may reflect "a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons").

James Madison argued that retroactive legislation also offered special opportunities for the powerful to obtain special and improper legislative benefits. According to Madison, "bills of attainder, ex post facto laws, and laws impairing the obligation of contracts" were "contrary to the first principles of the social compact, and to every principle of sound legislation," in part because such measures invited the "influential" to "speculate on public measures," to the detriment of the "more industrious and less informed part of the community." The Federalist No. 44, p. 301 (J. Cooke ed. 1961). See Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 693 (1960) (a retroactive statute "may be passed with an exact knowledge of who will benefit from it").

-End Footnotes-

[*42]

The Constitution's restrictions, of course, are of limited scope. Absent a violation of one of those specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope. n21 Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary. However, a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.

-Footnotes-

n21 In some cases, however, the interest in avoiding the adjudication of constitutional questions will counsel against a retroactive application. For if a challenged statute is to be given retroactive effect, the regulatory interest that supports prospective application will not necessarily also sustain its application to past events. See Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 467 U. S. 717, 730 (1984); Usery v. Turner Elkhorn Mining Co., 428 U. S. 1, 17 (1976). In this case the punitive damages provision may raise a question,

but for present purposes we assume that Congress has ample power to provide for retroactive application of @ 102.

- - - - -End Footnotes- - - - -
[*43]

While statutory retroactivity has long been disfavored, deciding when a statute operates "retroactively" is not always a simple or mechanical task. Sitting on Circuit, Justice Story offered an influential definition in *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (No. 13,156) (CCDNH 1814), a case construing a provision of the New Hampshire Constitution that broadly prohibits "retrospective" laws both criminal and civil. n22 Justice Story first rejected the notion that the provision bars only explicitly retroactive legislation, i.e., "statutes . . . enacted to take effect from a time anterior to their passage[.]" *Id.*, at 767. Such a construction, he concluded, would be "utterly subversive of all the objects" of the prohibition. *Ibid.* Instead, the ban on retrospective legislation embraced "all statutes, which, though operating only from their passage, affect vested rights and past transactions." *Ibid.* "Upon principle," Justice Story elaborated,

- - - - -Footnotes- - - - -

n22 Article 23 of the New Hampshire Bill of Rights provides: "Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes or the punishment of offenses." At issue in the *Society* case was a new statute that reversed a common-law rule by allowing certain wrongful possessors of land, upon being ejected by the rightful owner, to obtain compensation for improvements made on the land. Justice Story held that the new statute impaired the owner's rights and thus could not, consistently with Article 23, be applied to require compensation for improvements made before the statute's enactment. See 22 Fed. Cas., at 766-769.

- - - - -End Footnotes- - - - -

every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . ." *Ibid.* (citing *Calder v. Bull*, 3 Dall. 386 (1798) and *Dash v. Van Kleeck*, 7 Johns. 477 (N. Y. 1811)).

Though the formulas have varied, similar functional conceptions of legislative "retroactivity" have found voice in this Court's decisions and elsewhere. n23

- - - - -Footnotes- - - - -

n23 See, e.g., *Miller v. Florida*, 482 U. S. 423, 430 (1987) ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date' ") (quoting *Weaver v. Graham*, 450 U. S. 24, 31 (1981)); *Union Pacific R. Co., v. Laramie Stock Yards*, 231 U. S. 190, 199 (1913) (retroactive statute gives "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed"); *Sturges v. Carter*, 114 U. S. 511, 519 (1885) (a retroactive statute is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a

new duty, or attaches a new disability"). See also Black's Law Dictionary 1184 (5th ed. 1979) (quoting Justice Story's definition from Society); 2 N. Singer, Sutherland on Statutory Construction @ 41.01, p. 337 (5th rev. ed. 1993) ("The terms 'retroactive' and 'retrospective' are synonymous in judicial usage . . . They describe acts which operate on transactions which have occurred or rights and obligations which existed before passage of the act").

- - - - -End Footnotes- - - - -

[*45]

A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, see Republic Nat. Bank of Miami v. United States, 506 U. S. ___, ___ (1992) (slip op., at 2) (THOMAS, J., concurring in part and concurring in judgment), or upsets expectations based in prior law. n24 Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have "sound . . . instincts," see Danforth v. Groton Water Co., 178 Mass. 472, 476, 59 N. E. 1033, 1034 (1901) (Holmes, J.), and familiar considerations of fair notice, reasonable [*46] reliance, and settled expectations offer sound guidance.

- - - - -Footnotes- - - - -

n24 Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards. See Fuller 60 ("If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever"). Moreover, a statute "is not made retroactive merely because it draws upon antecedent facts for its operation." Cox v. Hart, 260 U. S. 427, 435 (1922). See Reynolds v. United States, 292 U. S. 443, 444-449 (1934); Chicago & Alton R. Co. v. Tranbarger, 238 U. S. 67, 73 (1915).

- - - - -End Footnotes- - - - -

Since the [*47] early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent. Thus, in United States v. Heth, 3 Cranch 399 (1806), we refused to apply a federal statute reducing the commissions of customs collectors to collections commenced before the statute's enactment because the statute lacked "clear, strong, and imperative" language requiring retroactive application, id. at 413 (opinion of Paterson, J.). The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact. Indeed, at common law a contrary rule applied to statutes that merely removed a burden on private rights by repealing a penal provision (whether criminal or civil); such

repeals were understood to preclude punishment for acts antedating the repeal. See, e.g., *United States v. Chambers*, 291 U. S. 217, 223-224 (1934); *Gulf, C. & S. F. R. Co. v. Dennis*, 224 U. S. 503, 506 (1912); *United States v. Tynen*, 11 Wall. 88, 93-95 (1871); [*48] *Norris v. Crocker*, 13 How. 429, 440-441 (1852); *Maryland v. Baltimore & Ohio R. Co.*, 3 How. 534, 552 (1845); *Yeaton v. United States*, 5 Cranch 281, 284 (1809). But see 1 U. S. C. @ 109 (repealing common-law rule).

The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance. n25 The presumption has not, however, been limited to such cases. At issue in *Chew Heong v. United States*, 112 U. S. 536 (1884), for example, was a provision of the "Chinese Restriction Act" of 1882 barring Chinese laborers from reentering the United States without a certificate prepared when they exited this country. We held that the statute did not bar the reentry of a laborer who had left the United States before the certification requirement was promulgated. Justice Harlan's opinion for the Court observed that the law in effect before the 1882 enactment had accorded laborers a right to re-enter without a certificate, [*49] and invoked the "uniformly" accepted rule against "giving to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature." *Id.*, at 559.

-----Footnotes-----

n25 See, e.g., *United States v. Security Industrial Bank*, 459 U. S. 70, 79-82 (1982); *Claridge Apartments Co. v. Commissioner*, 323 U. S. 141, 164 (1944); *United States v. St. Louis, S. F. & T. R. Co.*, 270 U. S. 1, 3 (1926); *Holt v. Henley*, 232 U. S. 637, 639 (1914); *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U. S. 190, 199 (1913); *Twenty Percent Cases*, 20 Wall. 179, 187 (1874); *Sohn v. Waterson*, 17 Wall. 596, 599 (1873); *Carroll v. Carroll's Lessee*, 16 How. 275 (1854). While the great majority of our decisions relying upon the anti-retroactivity presumption have involved intervening statutes burdening private parties, we have applied the presumption in cases involving new monetary obligations that fell only on the government. See *United States v. Magnolia Petroleum Co.*, 276 U. S. 160 (1928); *White v. United States*, 191 U. S. 545 (1903).

-----End Footnotes-----

[*50]

Our statement in *Bowen* that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result," 488 U. S., at 208, was in step with this long line of cases. n26 *Bowen* itself was a paradigmatic case of retroactivity in which a federal agency sought to recoup, under cost limit regulations issued in 1984, funds that had been paid to hospitals for services rendered earlier, see *id.*, at 207; our search for clear congressional intent authorizing retroactivity was consistent with the approach taken in decisions spanning two centuries.

-----Footnotes-----

n26 See also, e.g., *Greene v. United States*, 376 U. S. 149, 160 (1964); *White v. United States*, 191 U. S. 545 (1903); *United States v. Moore*, 95 U.S. 760, 761 (1878); *Murray v. Gibson*, 15 How. 421, 423 (1854); *Ladiga v. Roland*, 2 How. 581, 589 (1844).

- - - - -End Footnotes- - - - -

[*51]

The presumption against statutory retroactivity had special force in the era in which courts tended to view legislative interference with property and contract rights circumspectly. In this century, legislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments. See *Usery v. Turner Elkhorn Mining Co.*, 428 U. S., at 15-16; *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 436-444 (1934). But while the constitutional impediments to retroactive civil legislation are now modest, prospectivity remains the appropriate default rule. Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning [*52] the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate.

B

Although we have long embraced a presumption against statutory retroactivity, for just as long we have recognized that, in many situations, a court should "apply the law in effect at the time it renders its decision," *Bradley*, 416 U. S., at 711, even though that law was enacted after the events that gave rise to the suit. There is, of course, no conflict between that principle and a presumption against retroactivity when the statute in question is unambiguous. Chief Justice Marshall's opinion in *United States v. Schooner Peggy*, 1 Cranch 103 (1801), illustrates this point. Because a treaty signed on September 30, 1800, while the case was pending on appeal, unambiguously provided for the restoration of captured property "not yet definitively condemned," *id.*, at 107 (emphasis in original), we reversed a decree entered on September 23, 1800, condemning a French vessel that had been seized in American waters. Our application of "the law [*53] in effect" at the time of our decision in *Schooner Peggy* was simply a response to the language of the statute. *Id.*, at 109.

Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive. Thus, in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184 (1921), we held that § 20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing. In remanding the suit for application of the intervening statute, we observed that "relief by injunction operates in futuro," and that the plaintiff had no "vested right" in the decree entered by the trial court. 257 U. S., at 201. See also, e.g., *Hall v. Beals*, 396 U. S. 45, 48 (1969); *Duplex Printing Press Co. v.*

Deering, 254 U. S. 443, 464 (1921).

We have [*54] regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed. Thus, in Bruner v. United States, 343 U. S. 112, 116-117 (1952), relying on our "consistent" practice, we ordered an action dismissed because the jurisdictional statute under which it had been (properly) filed was subsequently repealed. n27 See also Hallowell v. Commons, 239 U. S. 506, 508-509 (1916); The Assessors v. Osbornes, 9 Wall. 567, 575 (1870). Conversely, in Andrus v. Charlestone Stone Products Co., 436 U. S. 604, 607-608, n. 6 (1978), we held that, because a statute passed while the case was pending on appeal had eliminated the amount-in-controversy requirement for federal question cases, the fact that respondent had failed to allege \$ 10,000 in controversy at the commencement of the action was "now of no moment." See also United States v. Alabama, 362 U. S. 602, 604 (1960) (per curiam); Stephens v. Cherokee Nation, 174 U. S. 445, 478 (1899). [*55] Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case." Hallowell, 239 U. S., at 508. Present law normally governs in such situations because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties," Republic Nat. Bank of Miami, 506 U. S., at ___ (slip op., at 2) (THOMAS, J., concurring).

-----Footnotes-----

n27 In Bruner, we specifically noted:

"This jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication. Compare United States v. St. Louis S. F. & T. R. Co., 270 U. S. 1, 3 (1926), with Smallwood v. Gallardo, 275 U. S. 56, 61 (1927)." 343 U. S., at 117, n. 8.

-----End Footnotes-----

Changes in procedural rules may often be applied in suits arising [*56] before their enactment without raising concerns about retroactivity. For example, in Ex parte Collett, 337 U. S. 55, 71 (1949), we held that 28 U. S. C. @ 1404(a) governed the transfer of an action instituted prior to that statute's enactment. We noted the diminished reliance interests in matters of procedure. Id., at 71. n28 Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive. Cf. McBurney v. Carson, 99 U. S. 567, 569 (1879). n29

-----Footnotes-----

n28 While we have strictly construed the Ex Post Facto Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case. See, e.g., Dobbert v. Florida, 432 U. S. 282, 293-294 (1977); see also Collins v. Youngblood, 497 U. S. 37 (1990); Beazell v. Ohio, 269 U. S. 167 (1925). [*57]

n29 Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of complaint would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial. Our orders approving amendments to federal procedural rules reflect the common-sense notion that the applicability of such provisions ordinarily depends on the posture of the particular case. See, e.g., Order Amending Federal Rules of Criminal Procedure, 495 U. S. 969 (1990) (amendments applicable to pending cases "insofar as just and practicable"); Order Amending Federal Rules of Civil Procedure, 456 U. S. 1015 (1982) (same); Order Amending Bankruptcy Rules and Forms, 421 U. S. 1021 (1975) (amendments applicable to pending cases "except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice"). Contrary to JUSTICE SCALIA's suggestion, post, at 5-6, we do not restrict the presumption against statutory retroactivity to cases involving "vested rights." (Neither is Justice Story's definition of retroactivity, quoted supra, at 24, so restricted.) Nor do we suggest that concerns about retroactivity have no application to procedural rules.

- - - - -End Footnotes- - - - -

[*58]

Petitioner relies principally upon *Bradley v. Richmond School Bd.*, 416 U. S. 696 (1969), and *Thorpe v. Housing Authority of Durham*, 393 U. S. 268 (1969), in support of her argument that our ordinary interpretive rules support application of @ 102 to her case. In *Thorpe*, we held that an agency circular requiring a local housing authority to give notice of reasons and opportunity to respond before evicting a tenant was applicable to an eviction proceeding commenced before the regulation issued. *Thorpe* shares much with both the "procedural" and "prospective-relief" cases. See supra, at 29-31. Thus, we noted in *Thorpe* that new hearing procedures did not affect either party's obligations under the lease agreement between the housing authority and the petitioner, 393 U. S., at 279, and, because the tenant had "not yet vacated," we saw no significance in the fact that the housing authority had "decided to evict her before the circular was issued," id. at 283. The Court in *Thorpe* viewed the new eviction procedures as "essential to remove [*59] a serious impediment to the successful protection of constitutional rights." Id., at 283. n30 Cf. *Youakim v. Miller*, 425 U. S. 231, 237 (1976) (per curiam) (citing *Thorpe* for propriety of applying new law to avoiding necessity of deciding constitutionality of old one).

- - - - -Footnotes- - - - -

n30 *Thorpe* is consistent with the principle, analogous to that at work in the common-law presumption about repeals of criminal statutes, that the government should accord grace to private parties disadvantaged by an old rule when it adopts a new and more generous one. Cf. *DeGurules v. INS*, 833 F. 2d 861, 862-863 (CA9 1987). Indeed, *Thorpe* twice cited *United States v. Chambers*, 291 U. S. 217 (1934), which ordered dismissal of prosecutions pending when the National Prohibition Act was repealed. See *Thorpe*, 393 U. S., at 281, n. 38; id., at 282, n. 40.

- - - - -End Footnotes- - - - -

[*60]

Our holding in *Bradley* is similarly compatible with the line of decisions disfavoring "retroactive" application of statutes. In *Bradley*, the District Court had awarded attorney's fees and costs, upon general equitable principles, to parents who had prevailed in an action seeking to desegregate the public schools of Richmond, Virginia. While the case was pending before the Court of Appeals, Congress enacted § 718 of the Education Amendments of 1972, which authorized federal courts to award the prevailing parties in school desegregation cases a reasonable attorney's fee. The Court of Appeals held that the new fee provision did not authorize the award of fees for services rendered before the effective date of the amendments. This Court reversed. We concluded that the private parties could rely on § 718 to support their claim for attorney's fees, resting our decision "on the principle 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." 416 U. S., at 711.

Although that language suggests a categorical presumption [*61] in favor of application of all new rules of law, we now make it clear that *Bradley* did not alter the well-settled presumption against application of the class of new statutes that would have genuinely "retroactive" effect. Like the new hearing requirement in *Thorpe*, the attorney's fee provision at issue in *Bradley* did not resemble the cases in which we have invoked the presumption against statutory retroactivity. Attorney's fee determinations, we have observed, are "collateral to the main cause of action" and "uniquely separable from the cause of action to be proved at trial." *White v. New Hampshire Dept. of Employment Security*, 455 U. S. 445, 451-452 (1982). See also *Hutto v. Finney*, 437 U. S. 678, 695, n. 24 (1978). Moreover, even before the enactment of § 718, federal courts had authority (which the District Court in *Bradley* had exercised) to award fees based upon equitable principles. As our opinion in *Bradley* made clear, it would be difficult to imagine a stronger equitable case for an attorney's fee award than a lawsuit in which the plaintiff parents would otherwise have to bear the [*62] costs of desegregating their children's public schools. See 416 U. S., at 718 (noting that the plaintiffs had brought the school board "into compliance with its constitutional mandate") (citing *Brown v. Board of Education*, 347 U. S. 483, 494 (1954)). In light of the prior availability of a fee award, and the likelihood that fees would be assessed under pre-existing theories, we concluded that the new fee statute simply "did not impose an additional or unforeseeable obligation" upon the school board. *Bradley*, 416 U. S., at 721.

In approving application of the new fee provision, *Bradley* did not take issue with the long line of decisions applying the presumption against retroactivity. Our opinion distinguished, but did not criticize, prior cases that had applied the anti-retroactivity canon. See 416 U. S., at 720 (citing *Greene v. United States*, 376 U. S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U. S. 141, 164 (1944), and *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U. S. 190, 199 (1913)). [*63] The authorities we relied upon in *Bradley* lend further support to the conclusion that we did not intend to displace the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment. See *Kaiser*, 494 U. S., at 849-850 (SCALIA, J., concurring). *Bradley* relied on *Thorpe* and on other precedents that are consistent with a presumption against statutory retroactivity, including decisions involving explicitly retroactive statutes, see 416 U. S., at 713, n. 17 (citing, inter alia, *Freeborn v. Smith*, 2 Wall. 160 (1865)); n31 the retroactive application of intervening judicial decisions, see 416 U. S., at 713-714, n. 17 (citing, inter alia, *Patterson v. Alabama*, 294 U.

S. 600, 607 (1935)), n32 statutes altering jurisdiction, 416 U. S., at 713, n. 17 (citing, inter alia, United States v. Alabama, 362 U. S. 602 (1960)), and repeal of a criminal statute, 416 U. S., at 713, n. 17 [*64] (citing United States v. Chambers 291 U. S. 217 (1934)). Moreover, in none of our decisions that have relied upon Bradley or Thorpe have we cast doubt on the traditional presumption against truly "retrospective" application of a statute. n33

-----Footnotes-----

n31 In Bradley, we cited Schooner Peggy for the "current law" principle, but we recognized that the law at issue in Schooner Peggy had expressly called for retroactive application. See 416 U. S., at 712, n. 16 (describing Schooner Peggy as holding that Court was obligated to "apply the terms of the convention," which had recited that it applied to all vessels not yet "definitively condemned") (emphasis in convention).

n32 At the time Bradley was decided, it was by no means a truism to point out that rules announced in intervening judicial decisions should normally be applied to a case pending when the intervening decision came down. In 1974, our doctrine on judicial retroactivity involved a substantial measure of discretion, guided by equitable standards resembling the Bradley "manifest injustice" test itself. See Chevron Oil Co. v. Huson, 404 U. S. 97, 106-107 (1971); Linkletter v. Walker, 381 U. S. 618, 636 (1965). While it was accurate in 1974 to say that a new rule announced in a judicial decision was only presumptively applicable to pending cases, we have since established a firm rule of retroactivity. See Harper v. Virginia Dept. of Taxation, 509 U. S. ____ (1993); Griffith v. Kentucky, 479 U. S. 314 (1987). [*65]

n33 See, e.g., National Treasury Employees Union v. Von Raab, 489 U. S. 656, 661-662, and n. 1 (1989) (considering intervening regulations in injunctive action challenging agency's drug testing policy under Fourth Amendment) (citing Thorpe); Goodman v. Lukens Steel Co., 482 U. S. 656, 662 (1987) (applying rule announced in judicial decision to case arising before the decision and citing Bradley for the "usual rule . . . that federal cases should be decided in accordance with the law existing at the time of the decision"); Saint Francis College v. Al-Khazraji, 481 U. S. 604, 608 (1987) (in case involving retroactivity of judicial decision, citing Thorpe for same "usual rule"); Hutto v. Finney, 437 U. S., at 694, n. 23 (relying on "general practice" and Bradley to uphold award of attorney's fees under statute passed after the services had been rendered but while case was still pending); Youakim, 425 U. S., at 237 (per curiam) (remanding for reconsideration of constitutional claim for injunctive relief in light of intervening state regulations) (citing Thorpe); Cort v. Ash, 422 U. S. 66, 77 (1975) (stating that Bradley warranted application of intervening statute transferring to administrative agency jurisdiction over claim for injunctive relief); Hamling v. United States, 418 U. S. 87, 101-102 (1974) (reviewing obscenity conviction in light of subsequent First Amendment decision of this Court) (citing Bradley); California Bankers Assn. v. Shultz, 416 U. S. 21, 49, n. 21 (1974) (in action for injunction against enforcement of banking disclosure statute, citing Thorpe for proposition that Court should consider constitutional question in light of regulations issued after commencement of suit); Diffenderfer v. Central Baptist Church, 404 U. S. 412, 414 (1972) (citing Thorpe in holding that intervening repeal of a state tax exemption for certain church property rendered "inappropriate" petitioner's request for injunctive relief based on the Establishment Clause); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U. S. 402, 419 (1971) (refusing to

remand to agency under Thorpe for administrative findings required by new regulation because administrative record was already adequate for judicial review); Hall v. Beals, 396 U. S. 45, 48 (1969) (in action for injunctive relief from state election statute, citing Thorpe as authority for considering intervening amendment of statute).

- - - - -End Footnotes- - - - -

[*66]

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

V

We now ask whether, given the absence of guiding instructions from Congress, @ 102 of the Civil Rights Act of 1991 is the type of provision that should govern cases arising before its enactment. As we observed supra, at 15, there is no special reason to think that all the diverse provisions of the Act must be treated uniformly for such purposes. To the contrary, we understand the instruction that the provisions are to "take [*67] effect upon enactment" to mean that courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and pre-enactment conduct.

Two provisions of @ 102 may be readily classified according to these principles. The jury trial right set out in @ 102(c)(1) is plainly a procedural change of the sort that would ordinarily govern in trials conducted after its effective date. If @ 102 did no more than introduce a right to jury trial in Title VII cases, the provision would presumably apply to cases tried after November 21, 1991, regardless of when the underlying conduct occurred. n34 However, because @ 102(c) makes a jury trial available only "if a complaining party seeks compensatory or punitive damages," the jury trial option must stand or fall with the attached damages provisions.

- - - - -Footnotes- - - - -

n34 As the Court of Appeals recognized, however, the promulgation of a new jury trial rule would ordinarily not warrant retrial of cases that had previously been tried to a judge. See n. 29, supra. Thus, customary practice would not support remand for a jury trial in this case.

- - - - -End Footnotes- - - - -

[*68]

Section 102(b)(1) is clearly on the other side of the line. That subsection authorizes punitive damages if the plaintiff shows that the defendant "engaged in a discriminatory practice or discriminatory practices with malice or with

reckless indifference to the federally protected rights of an aggrieved individual." The very labels given "punitive" or "exemplary" damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question. See Turner Elkhorn, 428 U. S., at 17 (Court would "hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness"); De Veau v. Braisted, 363 U. S. 144, 160 (1960) ("The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts"). See also Louis Vuitton S. A. v. Spencer Handbags Corp., 765 F. 2d 966, 972 (CA2 1985) (retroactive application of punitive treble damages provisions of Trademark Counterfeiting Act of [*69] 1984 "would present a potential ex post facto problem"). Before we entertained that question, we would have to be confronted with a statute that explicitly authorized punitive damages for preenactment conduct. The Civil Rights Act of 1991 contains no such explicit command.

The provision of @ 102(a)(1) authorizing the recovery of compensatory damages is not easily classified. It does not make unlawful conduct that was lawful when it occurred; as we have noted, supra, at 6-8, @ 102 only reaches discriminatory conduct already prohibited by Title VII. Concerns about a lack of fair notice are further muted by the fact that such discrimination was in many cases (although not this one) already subject to monetary liability in the form of backpay. Nor could anyone seriously contend that the compensatory damages provisions smack of a "retributive" or other suspect legislative purpose. Section 102 reflects Congress' desire to afford victims of discrimination more complete redress for violations of rules established more than a generation ago in the Civil Rights Act of 1964. At least with respect to its compensatory damages provisions, then, @ 102 is not in a category in which objections [*70] to retroactive application on grounds of fairness have their greatest force.

Nonetheless, the new compensatory damages provision would operate "retrospectively" if it were applied to conduct occurring before November 21, 1991. Unlike certain other forms of relief, compensatory damages are quintessentially backward-looking. Compensatory damages may be intended less to sanction wrongdoers than to make victims whole, but they do so by a mechanism that affects the liabilities of defendants. They do not "compensate" by distributing funds from the public coffers, but by requiring particular employers to pay for harms they caused. The introduction of a right to compensatory damages is also the type of legal change that would have an impact on private parties' planning. n35 In this case, the event to which the new damages provision relates is the discriminatory conduct of respondents' agent John Williams; if applied here, that provision would attach an important new legal burden to that conduct. The new damages remedy in @ 102, we conclude, is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent.

-----Footnotes-----

n35 As petitioner and amici suggest, concerns of unfair surprise and upsetting expectations are attenuated in the case of intentional employment discrimination, which has been unlawful for more than a generation. However, fairness concerns would not be entirely absent if the damages provisions of @ 102 were to apply to events preceding its enactment, as the facts of this case illustrate. Respondent USI's management, when apprised of the wrongful conduct

of petitioner's coworker, took timely action to remedy the problem. The law then in effect imposed no liability on an employer who corrected discriminatory work conditions before the conditions became so severe as to result in the victim's constructive discharge. Assessing damages against respondents on a theory of respondeat superior would thus entail an element of surprise. Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past. Cf. Weaver, 450 U. S., at 28-30 (Ex Post Facto Clause assures fair notice and governmental restraint, and does not turn on "an individual's right to less punishment"). The new damages provisions of § 102 can be expected to give managers an added incentive to take preventive measures to ward off discriminatory conduct by subordinates before it occurs, but that purpose is not served by applying the regime to pre-enactment conduct.

- - - - -End Footnotes- - - - -

[*71]

In cases like this one, in which prior law afforded no relief, § 102 can be seen as creating a new cause of action, and its impact on parties' rights is especially pronounced. Section 102 confers a new right to monetary relief on persons like petitioner who were victims of a hostile work environment but were not constructively discharged, and the novel prospect of damages liability for their employers. Because Title VII previously authorized recovery of backpay in some cases, and because compensatory damages under § 102(a) are in addition to any backpay recoverable, the new provision also resembles a statute increasing the amount of damages available under a preestablished cause of action. Even under that view, however, the provision would, if applied in cases arising before the Act's effective date, undoubtedly impose on employers found liable a "new disability" in respect to past events. See Society for Propagation of the Gospel, 22 F. Cas., at 767. The extent of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored. n36 Neither in Bradley itself, nor in any case before or [*72] since in which Congress had not clearly spoken, have we read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment. See Winfree v. Northern Pacific R. Co., 227 U. S. 296, 301 (1913) (statute creating new federal cause of action for wrongful death inapplicable to case arising before enactment in absence of "explicit words" or "clear implication"); United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co., 209 U. S. 306, 314-315 (1908) (construing statute restricting subcontractors' rights to recover damages from prime contractors as prospective in absence of "clear, strong and imperative" language from Congress favoring retroactivity). n37

- - - - -Footnotes- - - - -

n36 The state courts have consistently held that statutes changing or abolishing limits on the amount of damages available in wrongful death actions should not, in the absence of clear legislative intent, apply to actions arising before their enactment. See, e.g., Dempsey v. State, 451 A. 2d 273 (R. I. 1982) ("Every court which has considered the issue . . . has found that a subsequent change as to the amount or the elements of damage in the wrongful-death statute to be substantive rather than procedural or remedial, and thus any such change must be applied prospectively"); Kleibrink v. Missouri-Kansas-Texas R. Co., 224 Kan. 437, 444, 581 P. 2d 372, 378 (1978) (holding, in accord with the "great weight of authority," that "an increase, decrease or repeal of the statutory

maximum recoverable in wrongful death actions is not retroactive" and thus should not apply in a case arising before the statute's enactment) (emphasis in original); Bradley v. Knutson, 62 Wis. 2d 432, 436, 215 N. W. 2d 369, 371 (1974) (refusing to apply increase in cap on damages for wrongful death to misconduct occurring before effective date; "statutory increases in damages limitations are actually changes in substantive rights and not mere remedial changes"); State ex. rel St. Louis-San Francisco R. Co. v. Buder, 515 S. W. 2d 409, 411 (Mo. 1974) (statute removing wrongful death liability limitation construed not to apply to preenactment conduct; "an act or transaction, to which certain legal effects were ascribed at the time they transpired, should not, without cogent reasons, thereafter be subject to a different set of effects which alter the rights and liabilities of the parties thereto"); Mihoy v. Proulx, 113 N. H. 698 701, 313 A. 2d 723, 725 (1973) ("To apply the increased limit after the date of the accident would clearly enlarge the defendant's liability retrospectively. In the absence of an express provision, we cannot conclude that the legislature intended retrospective application"). See also Fann v. McGuffy, 534 S. W. 2d 770, 774, n. 19 (Ky. 1975); Muckler v. Buchl, 150 N. W. 2d 689, 697 (Minn. 1967). [*73]

n37 We have sometimes said that new "remedial" statutes, like new "procedural" ones, should presumptively apply to pending cases. See, e.g., Ex parte Collett, 337 U. S., at 71, and n. 38 ("Clearly, § 1404(a) is a remedial provision applicable to pending actions"); Beazell, 269 U. S., at 171 (Ex Post Facto Clause does not limit "legislative control of remedies and modes of procedure which do not affect matters of substance"). While that statement holds true for some kinds of remedies, see supra, at 29 (discussing prospective relief), we have not classified a statute introducing damages liability as the sort of "remedial" change that should presumptively apply in pending cases. "Retroactive modification" of damage remedies may "normally harbor much less potential for mischief than retroactive changes in the principles of liability," Hastings v. Earth Satellite Corp., 628 F. 2d 85, 93 (CADC), cert. denied, 449 U. S. 905 (1980), but that potential is nevertheless still significant.

-----End Footnotes-----
 [*74]

It will frequently be true, as petitioner and amici forcefully argue here, that retroactive application of a new statute would vindicate its purpose more fully. n38 That consideration, however, is not sufficient to rebut the presumption against retroactivity. Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal. A legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute. Indeed, there is reason to believe that the omission of the 1990 version's express retroactivity provisions was a factor in the passage of the 1991 bill. Section 102 is plainly not the sort of provision that must be understood to operate retroactively because a contrary reading would render it ineffective.

-----Footnotes-----

n38 Petitioner argues that our decision in Franklin v. Gwinnett County Pub. Schools, 503 U. S. _____ (1992), supports application of § 102 to her case. Relying on the principle that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal

courts may use any available remedy to make good the wrong,' " Id., at ___ (slip op., at 5) (quoting Bell v. Hood, 327 U. S. 678, 684 (1946)), we held in Franklin that the right of action under Title IX of the Education Act Amendments of 1972 included a claim for damages. Petitioner argues that Franklin supports her position because, if she cannot obtain damages pursuant to @ 102, she will be left remediless despite an adjudged violation of her right under Title VII to be free of workplace discrimination. However, Title VII of the Civil Rights Act of 1964 is not a statute to which we would apply the "traditional presumption in favor of all available remedies." Id., at ___ (slip op., at 11). That statute did not create a "general right to sue" for employment discrimination, but instead specified a set of "circumscribed remedies." See Burke, 504 U. S., at ___ (slip op., at 10). Until the 1991 amendment, the Title VII scheme did not allow for damages. We are not free to fashion remedies that Congress has specifically chosen not to extend. See Northwest Airlines, Inc. v. Transport Workers, 451 U. S. 77, 97 (1981).

- - - - -End Footnotes- - - - -
 [*75]

The presumption against statutory retroactivity is founded upon sound considerations of general policy and practice, and accords with long held and widely shared expectations about the usual operation of legislation. We are satisfied that it applies to @ 102. Because we have found no clear evidence of congressional intent that @ 102 of the Civil Rights Act of 1991 should apply to cases arising before its enactment, we conclude that the judgment of the Court of Appeals must be affirmed.

It is so ordered.

CONCURBY: SCALIA

CONCUR: JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgments.

I

I of course agree with the Court that there exists a judicial presumption, of great antiquity, that a legislative enactment affecting substantive rights does not apply retroactively absent clear statement to the contrary. See generally Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U. S. 827, 840 (1990) (SCALIA, J., concurring). The Court, however, is willing to let that clear statement be supplied, not by the text of the law in question, but by individual legislators who participated in the enactment of the law, and even legislators [*76] in an earlier Congress which tried and failed to enact a similar law. For the Court not only combs the floor debate and committee reports of the statute at issue, the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, see ante, at 16-18, but also reviews the procedural history of an earlier, unsuccessful, attempt by a different Congress to enact similar legislation, the Civil Rights Act of 1990, S. 2104, 101st Cong., 1st Sess. (1990), see ante, at 9-11, 18.

This effectively converts the "clear statement" rule into a "discernible legislative intent" rule -- and even that understates the difference. The Court's rejection of the floor statements of certain Senators because they are "frankly partisan" and "cannot plausibly be read as reflecting any general agreement" ante, at 17, reads like any other exercise in the soft science of

legislative historicizing, n1 undisciplined by any distinctive "clear statement" requirement. If it is a "clear statement" we are seeking, surely it is not enough to insist that the statement can "plausibly be read as reflecting general agreement"; the statement must clearly reflect general agreement. No legislative history can do [*77] that, of course, but only the text of the statute itself. That has been the meaning of the "clear statement" retroactivity rule from the earliest times. See, e. g., *United States v. Heth*, 3 Cranch 399, 408 (1806) (Johnson, J.) ("Unless, therefore, the words are too imperious to admit of a different construction, [the Court should] restrict the words of the law to a future operation"); *id.*, at 414 (Cushing, J.) ("It [is] unreasonable, in my opinion, to give the law a construction, which would have such a retrospective effect, unless it contained express words to that purpose"); *Murray v. Gibson*, 15 How. 421, 423 (1854) (statutes do not operate retroactively unless "required by express command or by necessary and unavoidable implication"); *Schwab v. Doyle*, 258 U. S. 529, 537 (1922) ("a statute should not be given a retrospective operation unless its words make that imperative"); see also *Bonjorno*, *supra*, at 842-844 (concurring opinion) (collecting cases applying the clear statement test). I do not deem that clear rule to be changed by the Court's dicta regarding legislative [*78] history in the present case.

-----Footnotes-----

n1 In one respect, I must acknowledge, the Court's effort may be unique. There is novelty as well as irony in his supporting the judgment that the floor statements on the 1991 Act are unreliable by citing Senator Danforth's floor statement on the 1991 Act to the effect that floor statements on the 1991 Act are unreliable. See *ante*, at 17, n. 15.

-----End Footnotes-----

The 1991 Act does not expressly state that it operates retroactively, but petitioner contends that its specification of prospective-only application for two sections, §§ 109(c) and 402(b), implies that its other provisions are retroactive. More precisely, petitioner argues that since § 402(a) states that "except as otherwise specifically provided, [the 1991 Act] shall take effect upon enactment"; and since §§ 109(c) and 402(b) specifically provide that those sections shall operate only prospectively; the term "shall take effect upon enactment" in § 402(a) must mean retroactive effect. The short response to this refined and subtle argument [*79] is that refinement and subtlety are no substitute for clear statement. "Shall take effect upon enactment" is presumed to mean "shall have prospective effect upon enactment," and that presumption is too strong to be overcome by any negative inference derived from §§ 109(c) and 402(b). n2

-----Footnotes-----

n2 Petitioner suggests that in *Pennsylvania v. Union Gas Co.*, 491 U. S. 1 (1989), the Court found the negative implication of language sufficient to satisfy the "clear statement" requirement for congressional subjection of the States to private suit, see *Atascadero State Hospital v. Scanlon*, 473 U. S. 234, 242 (1985). However, in that case it was the express inclusion of States in the definition of potentially liable "persons," see 42 U. S. C. § 9601(21), as reinforced by the limitation of States' liability in certain limited circumstances, see § 9601(20)(D), that led the Court to find a plain statement of liability. See 491 U. S., at 11 (noting the "cascade of plain language"

supporting liability); 491 U. S., at 30 (SCALIA, J., concurring in part and dissenting in part)). There is nothing comparable here.

- - - - -End Footnotes- - - - -

[*80]

II

The Court's opinion begins with an evaluation of petitioner's argument that the text of the statute dictates its retroactive application. The Court's rejection of that argument cannot be as forceful as it ought, so long as it insists upon compromising the clarity of the ancient and constant assumption that legislation is prospective, by attributing a comparable pedigree to the nouveau Bradley presumption in favor of applying the law in effect at the time of decision. See *Bradley v. Richmond School Bd.*, 416 U. S. 696, 711-716 (1974). As I have demonstrated elsewhere and need not repeat here, *Bradley* and *Thorpe v. Housing Authority of Durham*, 393 U. S. 268 (1969), simply misread our precedents and invented an utterly new and erroneous rule. See generally *Bonjorno*, 494 U. S., at 840 (SCALIA, J., concurring).

Besides embellishing the pedigree of the Bradley-Thorpe presumption, the Court goes out of its way to reaffirm the holdings of those cases. I see nothing to be gained by overruling them, but neither do I think the indefensible should needlessly be defended. And [*81] *Thorpe*, at least, is really indefensible. The regulation at issue there required that "before instituting an eviction proceeding local housing authorities . . . should inform the tenant . . . of the reasons for the eviction . . ." *Thorpe*, supra, at 272, and n. 8 (emphasis added). The Court imposed that requirement on an eviction proceeding instituted eighteen months before the regulation issued. That application was plainly retroactive and was wrong. The result in *Bradley* presents a closer question; application of an attorney's fees provision to ongoing litigation is arguably not retroactive. If it were retroactive, however, it would surely not be saved (as the Court suggests) by the existence of another theory under which attorney's fees might have been discretionarily awarded, see ante, at 33-34.

III

My last, and most significant, disagreement with the Court's analysis of this case pertains to the meaning of retroactivity. The Court adopts as its own the definition crafted by Justice Story in a case involving a provision of the New Hampshire Constitution that prohibited "retrospective" laws: a law is retroactive only if it "takes away or impairs [*82] vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (No. 13,516) (CCNH 1814) (Story, J.).

One might expect from this "vested rights" focus that the Court would hold all changes in rules of procedure (as opposed to matters of substance) to apply retroactively. And one would draw the same conclusion from the Court's formulation of the test as being "whether the new provision attaches new legal consequences to events completed before its enactment" -- a test borrowed directly from our ex post facto Clause jurisprudence, see, e.g., *Miller v. Florida*, 482 U. S. 423, 430 (1987), where we have adopted a substantive-procedural line, see *id.*, at 433 ("no ex post facto violation

occurs if the change in law is merely procedural"). In fact, however, the Court shrinks from faithfully applying the test that it has announced. It first seemingly defends the procedural-substantive distinction [*83] that a "vested rights" theory entails, ante, at 31 ("because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive"). But it soon acknowledges a broad and ill defined (indeed, utterly undefined) exception: "Whether a new rule of trial procedure applies will generally depend upon the posture of the case in question." Ante, at 31, n.29. Under this exception, "a new rule concerning the filing of complaints would not govern an action in which the complaint had already been filed," *ibid.*, and "the promulgation of a new jury trial rule would ordinarily not warrant retrial of cases that had previously been tried to a judge," ante, at 37, n.34. It is hard to see how either of these refusals to allow retroactive application preserves any "vested right." "'No one has a vested right in any given mode of procedure.'" *Ex parte Collett*, 337 U. S. 55, 71 (1949), quoting *Crane v. Hahlo*, 258 U. S. 142, 147 (1922).

The seemingly random exceptions to the Court's [*84] "vested rights" (substance-vs.-procedure) criterion must be made, I suggest, because that criterion is fundamentally wrong. It may well be that the upsetting of "vested substantive rights" was the proper touchstone for interpretation of New Hampshire's constitutional prohibition, as it is for interpretation of the United States Constitution's *ex post facto* Clauses, see ante, at 31, n. 28. But I doubt that it has anything to do with the more mundane question before us here: absent clear statement to the contrary, what is the presumed temporal application of a statute? For purposes of that question, a procedural change should no more be presumed to be retroactive than a substantive one. The critical issue, I think, is not whether the rule affects "vested rights," or governs substance or procedure, but rather what is the relevant activity that the rule regulates. Absent clear statement otherwise, only such relevant activity which occurs after the effective date of the statute is covered. Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their effective date. But other statutes [*85] have a different purpose and therefore a different relevant retroactivity event. A new rule of evidence governing expert testimony, for example, is aimed at regulating the conduct of trial, and the event relevant to retroactivity of the rule is introduction of the testimony. Even though it is a procedural rule, it would unquestionably not be applied to testimony already taken -- reversing a case on appeal, for example, because the new rule had not been applied at a trial which antedated the statute.

The inadequacy of the Court's "vested rights" approach becomes apparent when a change in one of the incidents of trial alters substantive entitlements. The opinion classifies attorney's fees provisions as procedural and permits "retroactive" application (in the sense of application to cases involving pre-enactment conduct). See ante, at 33-34. It seems to me, however, that holding a person liable for attorney's fees affects a "substantive right" no less than holding him liable for compensatory or punitive damages, which the Court treats as affecting a vested right. If attorney's fees can be awarded in a suit involving conduct that antedated the fee-authorizing statute, it is because [*86] the purpose of the fee award is not to affect that conduct, but to encourage suit for the vindication of certain rights -- so that the retroactivity event is the filing of suit, whereafter encouragement is no longer needed. Or perhaps because the purpose of the fee award is to facilitate suit

-- so that the retroactivity event is the termination of suit, whereafter facilitation can no longer be achieved.

The "vested rights" test does not square with our consistent practice of giving immediate effect to statutes that alter a court's jurisdiction. See, e. g., Bruner v. United States, 343 U. S. 112, 116-117, and n. 8 (1952); Hallowell v. Commons, 239 U. S. 506 (1916); cf. Ex parte McCardle, 7 Wall. 506, 514 (1869); Insurance Co. v. Ritchie, 5 Wall. 541, 544-545 (1867); see also King v. Justices of the Peace of London, 3 Burr. 1456, 97 Eng. Rep. 924 (K. B. 1764). The Court explains this aspect of our retroactivity jurisprudence by noting that "a new jurisdictional rule will often not involve 'retroactivity' [*87] in Justice Story's sense because it 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" Ante, at 30, quoting Hallowell, supra, at 508. That may be true sometimes, but surely not always. A jurisdictional rule can deny a litigant a forum for his claim entirely, see Portal-to-Portal Act of 1947, 61 Stat. 84, as amended, 29 U. S. C. §§ 251-262, or may leave him with an alternate forum that will deny relief for some collateral reason (e. g., a statute of limitations bar). Our jurisdiction cases are explained, I think, by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power -- so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised. Thus, applying a jurisdiction-eliminating statute to undo past judicial action would be applying it retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively.

Finally, statutes eliminating previously available forms of prospective relief provide another challenge to the [*88] Court's approach. Courts traditionally withhold requested injunctions that are not authorized by then-current law, even if they were authorized at the time suit commenced and at the time the primary conduct sought to be enjoined was first engaged in. See, e. g., American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184 (1921); Duplex Printing Press Co. v. Deering, 254 U. S. 443, 464 (1921). The reason, which has nothing to do with whether it is possible to have a vested right to prospective relief, is that "obviously, this form of relief operates only in futuro," Deering, *ibid.* Since the purpose of prospective relief is to affect the future rather than remedy the past, the relevant time for judging its retroactivity is the very moment at which it is ordered. n3

- - - - -Footnotes- - - - -

n3 A focus on the relevant retroactivity event also explains why the presumption against retroactivity is not violated by interpreting a statute to alter the future legal effect of past transactions -- so-called secondary retroactivity, see Bowen v. Georgetown Univ. Hospital, 488 U. S. 204, 219-220 (1988) (SCALIA, J., concurring) (citing McNulty, Corporations and the Intertemporal Conflict of Laws, 55 Calif. L. Rev. 12, 58-60 (1967)); cf. Cox v. Hart, 260 U. S. 427, 435 (1922). A new ban on gambling applies to existing casinos and casinos under construction, see ante, at 25, n. 24, even though it "attaches a new disability" to those past investments. The relevant retroactivity event is the primary activity of gambling, not the primary activity of constructing casinos.

- - - - -End Footnotes- - - - -

[*89]

I do not maintain that it will always be easy to determine, from the statute's purpose, the relevant event for assessing its retroactivity. As I have suggested, for example, a statutory provision for attorney's fees presents a difficult case. Ordinarily, however, the answer is clear -- as it is in both *Landgraf* and *Rivers*. Unlike the Court, I do not think that any of the provisions at issue is "not easily classified," ante, at 38. They are all directed at the regulation of primary conduct, and the occurrence of the primary conduct is the relevant event.

DISSENTBY: BLACKMUN

DISSENT: JUSTICE BLACKMUN, dissenting.

Perhaps from an eagerness to resolve the "apparent tension," see *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U. S. 827, 837 (1990), between *Bradley v. Richmond School Bd.*, 416 U. S. 696 (1974), and *Bowen v. Georgetown University Hospital*, 488 U. S. 204 (1988), the Court rejects the "most logical reading," *Kaiser*, at 838, of the Civil Rights Act of 1991, 105 Stat. 1071 (Act), and resorts to a presumption against retroactivity. This approach seems to me to pay insufficient [*90] fidelity to the settled principle that the "starting point for interpretation of a statute 'is the language of the statute itself,'" *Kaiser*, at 835, quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980), and extends the presumption against retroactive legislation beyond its historical reach and purpose.

A straightforward textual analysis of the Act indicates that @ 102's provision of compensatory damages and its attendant right to a jury trial apply to cases pending on appeal on the date of enactment. This analysis begins with @ 402(a) of the Act, 105 Stat. 1099: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." Under the "settled rule that a statute must, if possible, be construed in such fashion that every word has operative effect," *United States v. Nordic Village, Inc.*, 503 U. S. _____ (1992) (slip op. 6), citing *United States v. Menasche*, 348 U. S. 528, 538-539 (1955), @ 402(a)'s qualifying clause, "except as otherwise specifically provided," cannot be dismissed as mere surplusage or an [*91] "insurance policy" against future judicial interpretation. Cf. *Gersman v. Group Health Ass'n, Inc.*, 975 F. 2d 886, 890 (CAD 1992). Instead, it most logically refers to the Act's two sections "specifically providing" that the statute does not apply to cases pending on the date of enactment: (a) @ 402(b), 105 Stat. 1099, which provides, in effect, that the Act did not apply to the then pending case of *Wards Cove Packing Co. v. Atonio*, 490 U. S. 642 (1989), and (b) @ 109(c), 105 Stat. 1078, which states that the Act's protections of overseas employment "shall not apply with respect to conduct occurring before the date of the enactment of this Act." Self-evidently, if the entire Act were inapplicable to pending cases, @@ 402(b) and 109(c) would be "entirely redundant." *Kungys v. United States*, 485 U. S. 759, 778 (1988) (plurality opinion). Thus, the clear implication is that, while @ 402(b) and @ 109(c) do not apply to pending cases, other provisions -- including @ 102 -- do. n1 "Absent a clearly expressed legislative intention to the contrary, [this] language must . . . be regarded [*92] as conclusive." *Kaiser*, 494 U. S., at 835, quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). The legislative history of the Act, featuring a welter of conflicting and "some frankly partisan" floor statements, ante, at 17, but no committee report, evinces no such contrary legislative intent. n2 Thus, I see no reason to dismiss as "unlikely," ante, at 14, the most natural reading of the

statute, in order to embrace some other reading that is also "possible," *ibid.*

-Footnotes-

n1 It is, of course, an "unexceptional" proposition that "a particular statute may in some circumstances implicitly authorize retroactive [application]." *Bowen v. Georgetown University Hospital*, 488 U. S. 204, 223 (1988) (concurring opinion) (emphasis added).

n2 Virtually every Court of Appeals to consider the application of the 1991 Act to pending cases has concluded that the legislative history provides no reliable guidance. See, e.g., *Gersman v. Group Health Ass'n, Inc.*, 975 F. 2d 886 (CA9 1992); *Mozee v. American Commercial Marine Service Co.*, 963 F. 2d 929 (CA7 1992).

The absence in the Act of the strong retroactivity language of the vetoed 1990 legislation, which would have applied the new law to final judgments as well as to pending cases, see H.R. 4000, 101st Cong., 2d Sess., @ 15(b)(3) (1990) (providing that "any final judgment entered prior to the date of the enactment of this Act as to which the rights of any of the parties thereto have become fixed and vested . . . shall be vacated in whole or in part if justice requires" and the Constitution permits), is not instructive of Congress' intent with respect to pending cases alone. Significantly, Congress also rejected language that put pending claims beyond the reach of the 1990 or 1991 Act. See 136 Cong. Rec. H6747 (daily ed. Aug. 3, 1990) (Michel-LaFalce amendment to 1990 Act) ("The Amendments made by this Act shall not apply with respect to claims arising before the date of enactment of this Act."); *id.*, at H6768 (Michel-LaFalce amendment rejected); 137 Cong. Rec. S3023 (daily ed. Mar. 12, 1991) (Sen. Dole's introduction of S. 611, which included the 1990 Act's retroactivity provision); *id.*, at H3898, H3908-3909 (daily ed. June 4, 1991) (introduction and defeat of Michel substitute for H.R. 1).

-End Footnotes-

[*93]

Even if the language of the statute did not answer the retroactivity question, it would be appropriate under our precedents to apply @ 102 to pending cases. n3 The well-established presumption against retroactive legislation, which serves to protect settled expectations, is grounded in a respect for vested rights. See, e.g., *Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 774, 784 (1936) (retroactivity doctrine developed as an "inhibition against a construction which . . . would violate vested rights"). This presumption need not be applied to remedial legislation, such as @ 102, that does not proscribe any conduct that was previously legal. See *Sampeyreac v. United States*, 7 Pet. 222, 238 (1833) ("Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed"); *Hastings v. Earth Satellite Corp.*, 628 F. 2d 85, 93 (CA9 1980) ("Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously [*94] was known"), cert. denied, 449 U. S. 905 (1980); 1 J. Kent, *Commentaries on American Law* * 455- * 456 (1854) (Chancellor Kent's objection to a law "affecting and changing vested rights" is "not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights").

-Footnotes-

n3 Directly at issue in this case are compensatory damages and the right to jury trial. While there is little unfairness in requiring an employer to compensate the victims of intentional acts of discrimination, or to have a jury determine those damages, the imposition of punitive damages for pre-enactment conduct represents a more difficult question, one not squarely addressed in this case and one on which I express no opinion.

-End Footnotes-

At no time within the last generation has an employer had a vested right to engage in or to permit sexual harassment; " 'there is no such thing as a vested right to do wrong.' " *Freeborn v. Smith*, 2 Wall. 160, 175 (1865). [*95] See also 2 N. Singer, *Sutherland on Statutory Construction* @ 41.04, p. 349 (4th ed. 1986) (procedural and remedial statutes that do not take away vested rights are presumed to apply to pending actions). Section 102 of the Act expands the remedies available for acts of intentional discrimination, but does not alter the scope of the employee's basic right to be free from discrimination or the employer's corresponding legal duty. There is nothing unjust about holding an employer responsible for injuries caused by conduct that has been illegal for almost 30 years.

Accordingly, I respectfully dissent.

Claire said that they are telling the press that they are assessing the likely impact of the decision and that it is not consistent with the position that they advocated,

She does not have much support over there from the career people and is unable to put anything ~~there~~ more together until Thursday.

So we have nothing else to give the Press Office at this point to supplement the short statement prepared by Justice.

The Department of Justice

[This is the statement that was sent to the White House press office. It is not an official Justice Department statement that we are releasing.]

Today's Supreme Court decision on Civil Rights:

We are disappointed with today's Supreme Court decision. The view that the Civil Rights Act of 1991 does not apply to cases pending when the law was enacted is one with which this administration clearly differed.

Donsia - Here is what
Justice sent to the
W.H. press office. They
are not going to release
an independant press release
S

Memorandum

TO: Marvin Krislov

FROM: Neera Tanden

RE: *Gilmer* and the Protection From Coercive Employment Act

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)

Facts: Gilmer was required by his employer, Interstate/Johnson Lane Corp. to register as a securities representative with the New York Stock Exchange. His registration application contained an agreement to arbitrate any controversy arising out of a registered representative's employment or termination of employment, pursuant to NYSE rules. Interstate/Johnson Lane Corp. terminated Gilmer's employment at age 62. Thereafter, he filed a charge with the EEOC and then brought suit in the District Court, alleging that he had been discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA). Interstate/Johnson moved to compel arbitration, relying on the agreement in Gilmer's registration application and the Federal Arbitration Act (FAA).

Holding: The Supreme Court held that an ADEA claim can be subjected to compulsory arbitration pursuant to a securities registration application.

Reasoning: Since the FAA manifests a liberal policy favoring arbitration and since neither the text nor the legislative history of the ADEA explicitly precludes arbitration, Gilmer is bound by his agreement to arbitrate. The Court found that there is no inconsistency between the important social policies furthered by the ADEA and enforcing agreements to arbitrate age discrimination claims.

The Court also held that arbitration will not undermine the EEOC's role in ADEA enforcement, since an ADEA claimant is free to file an EEOC charge even if he is precluded from instituting a suit, the EEOC has independent authority to investigate age discrimination, and the ADEA does not indicate that Congress intended that the EEOC be involved in all disputes

In addition, the Court found that compulsory arbitration does not improperly deprive claimants of the judicial forum provided for by the ADEA because Congress did not explicitly preclude arbitration or other nonjudicial claims resolutions.

Protection from Coercive Employment Act, Sponsor - Feingold, D-WI

This bill amends the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Rehabilitation Act of 1973 and smaller statutes to

prohibit employers from requiring employees to submit claims relating to employment discrimination to mandatory arbitration.

Synopsis

The Protection From Coercive Employment Act specifically addresses the Supreme Court's decision in *Gilmer* and would reverse its outcome. The Court bases much of its reasoning on the fact that neither the text nor the legislative history of the ADEA explicitly precludes arbitration. By specifically prohibiting efforts to require employees to submit claims relating to employment discrimination to arbitration, the bill would preclude a decision similar to *Gilmer* in the future.

FYI

The language used to amend all the acts is roughly similar to that of the Civil Rights Act of 1964:

"(c) It shall be an unlawful employment practice for an employer to -

"(1) fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because the individual refuses to submit any claim under this title to mandatory arbitration; or

"(2) make the submission of such claims to mandatory arbitration a condition the hiring, continued employment, or compensation, or a term, condition, or privilege of employment of the individual."

2ND REFERENCE of Level 1 printed in FULL format.

FULL TEXT OF BILLS

103RD CONGRESS; 2ND SESSION
IN THE SENATE OF THE UNITED STATES
AS INTRODUCED IN THE SENATE

S. 2012

1994 S. 2012;

103 S. 2012

SYNOPSIS:

A BILL

To amend the Civil Rights Act of 1964 and other civil rights laws to prohibit employers from requiring employees to submit claims relating to employment discrimination to mandatory arbitration.

DATE OF INTRODUCTION: APRIL 13, 1994

DATE OF VERSION: APRIL 15, 1994 -- VERSION: 1

SPONSOR(S):

Mr. FEINGOLD INTRODUCED THE FOLLOWING BILL; WHICH WAS READ TWICE AND REFERRED TO THE COMMITTEE ON LABOR AND HUMAN RESOURCES

TEXT:

* Be it enacted by the Senate and House of Representatives of the United*
States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Protection From Coercive Employment Agreements Act".

SEC. 2. CIVIL RIGHTS ACT OF 1964.

(a) IN GENERAL.-Section 704 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-3) is amended by adding at the end the following:

"(c) It shall be an unlawful employment practice for an employer to-

"(1) fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because the individual refuses to submit any claim under this title to mandatory arbitration; or

"(2) make the submission of such claim to mandatory arbitration a condition of the hiring, continued employment, or compensation, or a term, condition, or privilege of employment, of the individual."

(b) FEDERAL GOVERNMENT EMPLOYMENT.-Section 717(a) of such Act (42 U.S.C. 2000e-16(a)) is amended by striking the period and inserting the following: ", including any unlawful employment practice described in section 704(c)."

SEC. 3. AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

(a) IN GENERAL.-Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended by inserting after subsection (f) the following:

"(g) It shall be unlawful for an employer to-

"(1) fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to the

1994 S. 2012; 103 S. 2012 APRIL 15, 1994

-- VERSION: 1

compensation, terms, conditions, or privileges of employment of the individual, because the individual refuses to submit any claim under this Act to mandatory arbitration; or

"(2) make the submission of such claim to mandatory arbitration a condition of the hiring, continued employment, or compensation, or a term, condition, or privilege of employment, of the individual."

(b) FEDERAL GOVERNMENT EMPLOYMENT.-Section 15(a) of such Act (29 U.S.C. 633a(a)) is amended by striking the period and inserting the following: ", including any unlawful practice described in section 4(g).".

SEC. 4. AMERICANS WITH DISABILITIES ACT OF 1990.

Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended-

(1) in subsection (b)-

(A) at the end of paragraph (6), by striking "and";

(B) in paragraph (7), by striking the period and inserting "and"; and

(C) by adding at the end the following:

"(8) conducting an act prohibited by subsection (c).";

(2) by redesignating subsections (c) and (d) as subsections (d) and (e), respectively; and

(3) by inserting after subsection (b) the following:

"(c) PROHIBITION ON REQUIRED SUBMISSION TO MANDATORY ARBITRATION.-No covered entity shall discriminate against a qualified individual with a disability-

"(1) in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment, because the individual refuses to submit any claim under this title to mandatory arbitration; or

"(2) by making the submission of such claim to mandatory arbitration a condition of the eligibility to apply for employment, hiring, advancement, continued employment, employee compensation, or job training, or a term, condition, or privilege of employment, of the individual."

SEC. 5. REHABILITATION ACT OF 1973.

(a) EMPLOYMENT BY DEPARTMENTS, AGENCIES, AND INSTRUMENTALITIES.-Section 501(b) of the Rehabilitation Act of 1973 (29 U.S.C. 791(b)) is amended by inserting after the first sentence the following: "Such plan shall include provisions prohibiting the department, agency, or instrumentality from conducting any discrimination prohibited under section 102(c) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112(c)) with respect to a claim under this section."

(b) EMPLOYMENT UNDER FEDERAL CONTRACTS.-Section 503(a) of the Rehabilitation Act of 1973 (29 U.S.C. 793(a)) is amended by inserting after the first sentence the following: "Such contract shall include provisions prohibiting the party from conducting any discrimination prohibited under section 102(c) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112(c)) with respect to a claim under this section."

SEC. 6. REVISED STATUTES.

Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended-

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting after subsection (a) the following:

"(b) With respect to contracts relating to employment between such a person and another individual or entity, no such individual or entity

shall-

"(1) fail or refuse to hire or to discharge the person, or otherwise to discriminate against the person with respect to the compensation, terms, conditions, or privileges of employment of the person, because the person refuses to submit any claim under this section to mandatory arbitration; or

"(2) make the submission of such claim to mandatory arbitration a condition of the hiring, continued employment, or compensation, or a term, condition, or privilege of employment, of the person."

1ST REFERENCE of Level 1 printed in FULL format.

Copyright (c) 1994 Mead Data Central, Inc.

Bill Tracking Report

103rd Congress
2nd Session

U. S. Senate

S 2012

103 Bill Tracking S. 2012; 1994 Bill Tracking S. 2012;

DATE-INTRO: April 13, 1994

LAST-ACTION-DATE: April 13, 1994

FINAL STATUS: Pending

SPONSOR: Senator Russell Feingold D-WI

TOTAL-COSPONSORS: 0 Cosponsors: 0 Democrats / 0 Republicans

SYNOPSIS: A bill to amend the Civil Rights Act of 1964 and other civil rights laws to prohibit employers from requiring employees to submit claims relating to employment discrimination to mandatory arbitration.

ACTIONS: Committee Referrals:

04/13/94 Senate Labor and Human Resources Committee

Legislative Chronology:

1st Session Activity:

2nd Session Activity:

04/13/94 140 Cong Rec S 4266 Referred to the Senate Labor and Human Resources Committee

BILL-DIGEST: (from the CONGRESSIONAL RESEARCH SERVICE)

Short title as introduced :

Protection from Coercive Employment Agreements Act

CRS Index Terms:

Civil rights

Commercial arbitration

Discrimination in employment

Bill Tracking Report S 2012

Federal employees
Government contractors
Government employees
Industrial arbitration
Labor
Law
Public contracts

CO-SPONSORS:

2ND CASE of Level 1 printed in FULL format.

ROBERT D. GILMER, PETITIONER v. INTERSTATE/JOHNSON LANE
CORPORATION

GILMER v. INTERSTATE/JOHNSON LANE CORP.

No. 90-18

SUPREME COURT OF THE UNITED STATES

500 U.S. 20; 111 S. Ct. 1647; 1991 U.S. LEXIS 2529; 114 L.
Ed. 2d 26; 59 U.S.L.W. 4407; 55 Fair Empl. Prac. Cas. (BNA)
1116; 56 Empl. Prac. Dec. (CCH) P40,704; 91 Cal. Daily Op.
Service 3498; 91 Daily Journal DAR 5501

January 14, 1991, Argued
May 13, 1991, Decided

PRIOR HISTORY: [**1]

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

DISPOSITION: 895 F. 2d 195, affirmed.

SYLLABUS: Petitioner Gilmer was required by respondent, his employer, to register as a securities representative with, among others, the New York Stock Exchange (NYSE). His registration application contained, inter alia, an agreement to arbitrate when required to by NYSE rules. NYSE Rule 347 provides for arbitration of any controversy arising out of a registered representative's employment or termination of employment. Respondent terminated Gilmer's employment at age 62. Thereafter, he filed a charge with the Equal Employment Opportunity Commission (EEOC) and brought suit in the District Court, alleging that he had been discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA). Respondent moved to compel arbitration, relying on the agreement in Gilmer's registration application and the Federal Arbitration Act (FAA). The court denied the motion, based on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 -- which held that an employee's suit under Title VII of the Civil Rights Act of 1964 is not foreclosed [**2] by the prior submission of his claim to arbitration under the terms of a collective-bargaining agreement -- and because it concluded that Congress intended to protect ADEA claimants from a waiver of the judicial forum. The Court of Appeals reversed.

Held: An ADEA claim can be subjected to compulsory arbitration. Pp. 24-35.

(a) Statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. See, e. g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614. Since the FAA manifests a liberal federal policy favoring arbitration, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, and since neither the text nor the legislative history of the ADEA explicitly precludes arbitration, Gilmer is bound by his agreement to arbitrate unless he can show an inherent conflict between arbitration and the ADEA's underlying purposes. Pp. 24-26.

500 U.S. 20, *; 111 S. Ct. 1647;
 1991 U.S. LEXIS 2529, **2; 114 L. Ed. 2d 26, ***

(b) There is no inconsistency between the important social policies furthered by the ADEA and enforcing agreements to arbitrate age discrimination claims. While arbitration focuses on specific disputes [**3] between the parties involved, so does judicial resolution of claims, yet both can further broader social purposes. Various other laws, including antitrust and securities laws and the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), are designed to advance important public policies, but claims under them are appropriate for arbitration. Nor will arbitration undermine the EEOC's role in ADEA enforcement, since an ADEA claimant is free to file an EEOC charge even if he is precluded from instituting suit; since the EEOC has independent authority to investigate age discrimination; since the ADEA does not indicate that Congress intended that the EEOC be involved in all disputes; and since an administrative agency's mere involvement in a statute's enforcement is insufficient to preclude arbitration, see, e. g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477. Moreover, compulsory arbitration does not improperly deprive claimants of the judicial forum provided for by the ADEA: Congress did not explicitly preclude arbitration or other nonjudicial claims resolutions; the ADEA's flexible approach to [**4] claims resolution, which permits the EEOC to pursue informal resolution methods, suggests that out-of-court dispute resolution is consistent with the statutory scheme; and arbitration is consistent with Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts, since arbitration also advances the objective of allowing claimants a broader right to select the dispute resolution forum. Pp. 27-29.

(c) Gilmer's challenges to the adequacy of arbitration procedures are insufficient to preclude arbitration. This Court declines to indulge his speculation that the parties and the arbitral body will not retain competent, conscientious, and impartial arbitrators, especially when both the NYSE rules and the FAA protect against biased panels. Nor is there merit to his argument that the limited discovery permitted in arbitration will make it difficult to prove age discrimination, since it is unlikely that such claims require more extensive discovery than RICO and antitrust claims, and since there has been no showing that the NYSE discovery provisions will prove insufficient to allow him a fair opportunity to prove his claim. His argument that arbitrators will not [**5] issue written opinions, resulting in a lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, and a stifling of the law's development, is also rejected, since the NYSE rules require that arbitration awards be in writing and be made available to the public; since judicial decisions will continue to be issued for ADEA claimants without arbitration agreements; and since Gilmer's argument applies equally to settlements of ADEA claims. His argument that arbitration procedures are inadequate because they do not provide for broad equitable relief is unpersuasive as well, since arbitrators have the power to fashion equitable relief; since the NYSE rules do not restrict the type of relief an arbitrator may award and provide for collective relief; since the ADEA's provision for the possibility of collective action does not mean that individual attempts at conciliation are barred; and since arbitration agreements do not preclude the EEOC itself from seeking class-wide and equitable relief. Pp. 30-32.

(d) The unequal bargaining power between employers and employees is not a sufficient reason to hold that arbitration agreements are [**6] never enforceable in the employment context. Cf., e. g., *Rodriguez de Quijas*, supra, at 484. Such a claim is best left for resolution in specific cases. Here,

500 U.S. 20, *; 111 S. Ct. 1647;
 1991 U.S. LEXIS 2529, **6; 114 L. Ed. 2d 26, ***

there is no indication that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause. Pp. 32-33.

(e) Gilmer's reliance on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, and its progeny, is also misplaced. Those cases involved the issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims, not the enforceability of an agreement to arbitrate statutory claims. The arbitration in those cases occurred in the context of a collective-bargaining agreement, and thus there was concern about the tension between collective representation and individual statutory rights that is not applicable in this case. And those cases were not decided under the FAA. Pp. 33-35.

COUNSEL: John T. Allred argued the cause and filed a brief for petitioner.

James B. Spears, Jr., argued the cause for respondent. With him on the brief was Robert S. Phifer. *

* Briefs of amici curiae urging reversal were filed for the American Association of Retired Persons by Cathy Ventrell-Monsees and Robert L. Liebross; and for the American Federation of Labor et al. by Laurence Gold and Marsha S. Berzon.

Briefs of amici curiae urging affirmance were filed for the Center for Public Resources, Inc., by Jay W. Waks; for the Chamber of Commerce of the United States of America by Peter G. Nash, Dixie L. Atwater, Michael J. Murphy, and Stephen A. Bokat; for the Equal Employment Advisory Council et al. by Robert E. Williams, Douglas S. McDowell, Ann Elizabeth Reesman, and Donald L. Goldman; for the Lawyers' Committee for Civil Rights Under Law by Alan E. Kraus, Nicholas deB. Katzenbach, Robert F. Mullen, David S. Tatel, Thomas J. Henderson, and Richard T. Seymour; and for the Securities Industry Association, Inc., by A. Robert Pietrzak and William J. Fitzpatrick. [*7]

JUDGES: White, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Blackmun, O'Connor, Scalia, Kennedy, and Souter, JJ., joined. Stevens, J., filed a dissenting opinion, in which Marshall, J., joined, post, p. 36.

OPINIONBY: WHITE

OPINION: [*23] [***35] JUSTICE WHITE delivered the opinion of the Court.

The question presented in this case is whether a claim under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. @ 621 et seq., can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application. The Court of Appeals held that it could, 895 F. 2d 195 (CA4 1990), and we affirm.

I

Respondent Interstate/Johnson Lane Corporation (Interstate) hired petitioner Robert Gilmer as a Manager of Financial Services in May 1981. As required by his employment, Gilmer registered as a securities representative with several stock exchanges, including the New York Stock Exchange (NYSE). See App. 15-18. His registration application, entitled "Uniform Application for Securities

500 U.S. 20, *23; 111 S. Ct. 1647;
1991 U.S. LEXIS 2529, **7; 114 L. Ed. 2d 26, ***35

Industry Registration or Transfer," provided, among other things, [**8] that Gilmer "agree[d] to arbitrate any dispute, claim or controversy" arising between him and Interstate "that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register." Id., at 18. Of relevance to this case, NYSE Rule 347 provides for arbitration of "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative." App. to Brief for Respondent 1.

Interstate terminated Gilmer's employment in 1987, at which time Gilmer was 62 years of age. After first filing an age discrimination charge with the Equal Employment Opportunity Commission (EEOC), Gilmer subsequently brought suit in the United States District Court for the Western District of North Carolina, alleging that Interstate had discharged him because of his age, in violation of the [*24] ADEA. In response to Gilmer's complaint, Interstate filed in the District Court a motion to compel arbitration of the ADEA claim. In its motion, Interstate relied upon the arbitration agreement [***36] in Gilmer's registration application, as well as the Federal [**9] Arbitration Act (FAA), 9 U. S. C. @ 1 et seq. The District Court denied Interstate's motion, based on this Court's decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), and because it concluded that "Congress intended to protect ADEA claimants from the waiver of a judicial forum." App. 87. The United States Court of Appeals for the Fourth Circuit reversed, finding "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements." 895 F. 2d, at 197. We granted certiorari, 498 U.S. 809 (1990), to resolve a conflict among the Courts of Appeals regarding the arbitrability of ADEA claims. n1

-----Footnotes-----

n1 Compare the decision below with Nicholson v. CPC Int'l Inc., 877 F. 2d 221 (CA3 1989):

-----End Footnotes-----

II

The FAA was originally enacted in 1925, 43 Stat. 883, and then reenacted [**10] and codified in 1947 as Title 9 of the United States Code. Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-220, and n. 6 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510, n. 4 (1974). Its primary substantive provision states that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of [*25] any contract." 9 U. S. C. @ 2. The FAA also provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, @ 3, and for orders compelling arbitration when one party has failed, neglected, or refused to comply [**11] with an arbitration

500 U.S. 20, *25; 111 S. Ct. 1647;
1991 U.S. LEXIS 2529, **11; 114 L. Ed. 2d 26, ***36

agreement, @ 4. These provisions manifest a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). n2

-----Footnotes-----

n2 Section 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U. S. C. @ 1. Several amici curiae in support of Gilmer argue that that section excludes from the coverage of the FAA all "contracts of employment." Gilmer, however, did not raise the issue in the courts below; it was not addressed there; and it was not among the questions presented in the petition for certiorari. In any event, it would be inappropriate to address the scope of the @ 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. The FAA requires that the arbitration clause being enforced be in writing. See 9 U. S. C. @@ 2, 3. The record before us does not show, and the parties do not contend, that Gilmer's employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate. The lower courts addressing the issue uniformly have concluded that the exclusionary clause in @ 1 of the FAA is inapplicable to arbitration clauses contained in such registration applications. See, e. g., *Dickstein v. DuPont*, 443 F. 2d 783 (CA1 1971); *Malison v. Prudential-Bache Securities, Inc.*, 654 F. Supp. 101, 104 (WDNC 1987); *Legg, Mason & Co. v. Mackall & Coe, Inc.*, 351 F. Supp. 1367 (DC 1972); *Tonetti v. Shirley*, 219 Cal. Rptr. 616, 618, 173 Cal. App. 3d 1144 (1985); see also *Stokes v. Merrill Lynch, Pierce, Fenner & Smith*, 523 F. 2d 433, 436 (CA6 1975). We implicitly assumed as much in *Perry v. Thomas*, 482 U.S. 483 (1987), where we held that the FAA required a former employee of a securities firm to arbitrate his statutory wage claim against his former employer, pursuant to an arbitration clause in his registration application. Unlike the dissent, see post, at 38-41, we choose to follow the plain language of the FAA and the weight of authority, and we therefore hold that @ 1's exclusionary clause does not apply to Gilmer's arbitration agreement. Consequently, we leave for another day the issue raised by amici curiae.

-----End Footnotes-----

[**12]

[*26] [***37] It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years we have held enforceable arbitration agreements relating to claims arising under the Sherman Act, 15 U. S. C. @@ 1-7; @ 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. @ 78j(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. @ 1961 et seq.; and @ 12(2) of the Securities Act of 1933, 15 U. S. C. @ 771(2). See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). In these cases we recognized that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution [**13] in an arbitral, rather than a judicial, forum." *Mitsubishi*, 473 U.S., at 628.

500 U.S. 20, *26; 111 S. Ct. 1647;
1991 U.S. LEXIS 2529, **13; 114 L. Ed. 2d 26, ***37

Although all statutory claims may not be appropriate for arbitration, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Ibid. In this regard, we note that the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims. See McMahon, 482 U.S., at 227. If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an "inherent conflict" between arbitration and the ADEA's underlying purposes. See *ibid.* Throughout such an inquiry, it should be kept in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." Moses H. Cone, 460 U.S., at 24.

III

Gilmer concedes that nothing in the text of the ADEA or its legislative history explicitly precludes arbitration. He [*27] argues, however, that compulsory arbitration [**14] of ADEA claims pursuant to arbitration agreements would be inconsistent with the statutory framework and purposes of the ADEA. Like the Court of Appeals, we disagree.

A

Congress enacted the ADEA in [***38] 1967 "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U. S. C. @ 621(b). To achieve those goals, the ADEA, among other things, makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." @ 623(a)(1). This proscription is enforced both by private suits and by the EEOC. In order for an aggrieved individual to bring suit under the ADEA, he or she must first file a charge with the EEOC and then wait at least 60 days. @ 626(d). An individual's right to sue is extinguished, however, if the EEOC institutes an action against the employer. @ 626(c)(1). [**15] Before the EEOC can bring such an action, though, it must "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." @ 626(b); see also 29 CFR @ 1626.15 (1990).

As Gilmer contends, the ADEA is designed not only to address individual grievances, but also to further important social policies. See, e. g., *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983). We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims. It is true that arbitration focuses on specific disputes between the parties involved. [*28] The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes. The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but, as noted above, claims under those statutes are appropriate for arbitration. "[S]o long as the prospective [**16] litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its

500 U.S. 20, *28; 111 S. Ct. 1647;
1991 U.S. LEXIS 2529, **16; 114 L. Ed. 2d 26, ***38

remedial and deterrent function." Mitsubishi, supra, at 637.

We also are unpersuaded by the argument that arbitration will undermine the role of the EEOC in enforcing the ADEA. An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action. Indeed, Gilmer filed a charge with the EEOC in this case. In any event, the EEOC's role in combating age discrimination is not dependent on the filing of a charge; the agency may receive information concerning alleged violations of the ADEA "from any source," and it has independent authority to investigate age discrimination. See 29 CFR @@ 1626.4, 1626.13 (1990). Moreover, nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes. Such disputes can be settled, for example, without any EEOC involvement. See, e. g., Coventry v. United States Steel Corp., 856 F. 2d 514, 522 [***39] (CA3 1988); [**17] Moore v. McGraw Edison Co., 804 F. 2d 1026, 1033 (CA8 1986); Runyan v. National Cash Register Corp., 787 F. 2d 1039, 1045 (CA6), cert. denied, 479 U.S. 850 (1986). n3 Finally, the mere involvement of an administrative [*29] agency in the enforcement of a statute is not sufficient to preclude arbitration. For example, the Securities Exchange Commission is heavily involved in the enforcement of the Securities Exchange Act of 1934 and the Securities Act of 1933, but we have held that claims under both of those statutes may be subject to compulsory arbitration. See Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

-----Footnotes-----

n3 In the recently enacted Older Workers Benefit Protection Act, Pub. L. 101-433, 104 Stat. 978, Congress amended the ADEA to provide that "[a]n individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary." See @ 201. Congress also specified certain conditions that must be met in order for a waiver to be knowing and voluntary. Ibid.

-----End Footnotes-----

[**18]

Gilmer also argues that compulsory arbitration is improper because it deprives claimants of the judicial forum provided for by the ADEA. Congress, however, did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA. "[I]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." Mitsubishi, 473 U.S., at 628. Moreover, Gilmer's argument ignores the ADEA's flexible approach to resolution of claims. The EEOC, for example, is directed to pursue "informal methods of conciliation, conference, and persuasion," 29 U. S. C. @ 626(b), which suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress. In addition, arbitration is consistent with Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts, see 29 U. S. C. @ 626(c)(1) (allowing suits to be brought "in any court of [**19] competent jurisdiction"), because arbitration agreements, "like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." Rodriguez de Quijas,

500 U.S. 20, *29; 111 S. Ct. 1647;
 1991 U.S. LEXIS 2529, **19; 114 L. Ed. 2d 26, ***39

supra, at 483.

[*30] B

In arguing that arbitration is inconsistent with the ADEA, Gilmer also raises a host of challenges to the adequacy of arbitration procedures. Initially, we note that in our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas*, supra, at 481. Consequently, we address these arguments only briefly.

Gilmer first speculates that [***40] arbitration panels will be biased. However, "[w]e decline to indulge [**20] the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators." *Mitsubishi*, supra, at 634. In any event, we note that the NYSE arbitration rules, which are applicable to the dispute in this case, provide protections against biased panels. The rules require, for example, that the parties be informed of the employment histories of the arbitrators, and that they be allowed to make further inquiries into the arbitrators' backgrounds. See 2 CCH New York Stock Exchange Guide para. 2608, p. 4314 (Rule 608) (1991) (hereinafter 2 N. Y. S. E. Guide). In addition, each party is allowed one peremptory challenge and unlimited challenges for cause. *Id.*, para. 2609, at 4315 (Rule 609). Moreover, the arbitrators are required to disclose "any circumstances which might preclude [them] from rendering an objective and impartial determination." *Id.*, para. 2610, at 4315 (Rule 610). The FAA also protects against bias, by providing that courts may overturn arbitration decisions "[w]here there was evident partiality or corruption in the arbitrators." 9 U. S. C. [*31] @ 10 [**21] (b). There has been no showing in this case that those provisions are inadequate to guard against potential bias.

Gilmer also complains that the discovery allowed in arbitration is more limited than in the federal courts, which he contends will make it difficult to prove discrimination. It is unlikely, however, that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as RICO and antitrust claims. Moreover, there has been no showing in this case that the NYSE discovery provisions, which allow for document production, information requests, depositions, and subpoenas, see 2 N. Y. S. E. Guide para. 2619, pp. 4318 -- 4320 (Rule 619); Securities and Exchange Commission Order Approving Proposed Rule Changes by New York Stock Exchange, Inc., Nat. Assn. of Securities Dealers, Inc., and the American Stock Exchange, Inc., Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, 54 Fed. Reg. 21144, 21149-21151 (1989), will prove insufficient to allow ADEA claimants such as Gilmer a fair opportunity to present their claims. Although those procedures might not be as extensive [**22] as in the federal courts, by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, supra, at 628. Indeed, an important counterweight to the reduced discovery in NYSE arbitration is that arbitrators are not bound by the rules of evidence. See 2 N. Y. S. E. Guide para. 2620,

500 U.S. 20, *31; 111 S. Ct. 1647;
1991 U.S. LEXIS 2529, **22; 114 L. Ed. 2d 26, ***40

p. 4320 (Rule 620).

A further alleged deficiency of arbitration is that arbitrators often will not issue written opinions, resulting, Gilmer contends, in a lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law. The NYSE rules, however, do require that all arbitration awards be in writing, and that the awards contain the names of the parties, a summary of [***41] the issues in controversy, and a [*32] description of the award issued. See id., paras. 2627(a), (e), at 4321 (Rule 627(a), (e)). In addition, the award decisions are made available to the public. See id., para. 2627(f), at 4322 (Rule 627(f)). Furthermore, judicial decisions addressing [**23] ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements. Finally, Gilmer's concerns apply equally to settlements of ADEA claims, which, as noted above, are clearly allowed. n4

-----Footnotes-----

n4 Gilmer also contends that judicial review of arbitration decisions is too limited. We have stated, however, that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute" at issue. Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232 (1987).

-----End Footnotes-----

It is also argued that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions. As the court below noted, however, arbitrators do have the power to fashion equitable relief. 895 F. 2d, at 199-200. Indeed, the NYSE rules applicable here do not restrict [**24] the types of relief an arbitrator may award, but merely refer to "damages and/or other relief." 2 N. Y. S. E. Guide para. 2627(e), p. 4321 (Rule 627(e)). The NYSE rules also provide for collective proceedings. Id., para. 2612(d), at 4317 (Rule 612(d)). But "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." Nicholson v. CPC Int'l Inc., 877 F. 2d 221, 241 (CA3 1989) (Becker, J., dissenting). Finally, it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.

C

An additional reason advanced by Gilmer for refusing to enforce arbitration agreements relating to ADEA claims is [*33] his contention that there often will be unequal bargaining power between employers and employees. Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment [**25] context. Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we nevertheless held in Rodriguez de Quijas and McMahon that agreements to arbitrate in that context are enforceable. See 490 U.S., at 484; 482 U.S., at 230. As discussed above, the FAA's purpose

500 U.S. 20, *33; 111 S. Ct. 1647;
 1991 U.S. LEXIS 2529, **25; 114 L. Ed. 2d 26, ***41

was to place arbitration agreements on the same footing as other contracts. Thus, arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. @ 2. "Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Mitsubishi*, 473 U.S., at 627. [***42] There is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application. As with the claimed procedural inadequacies discussed above, this claim [**26] of unequal bargaining power is best left for resolution in specific cases.

IV

In addition to the arguments discussed above, Gilmer vigorously asserts that our decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and its progeny -- *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), and *McDonald v. West Branch*, 466 U.S. 284 (1984) -- preclude arbitration of employment discrimination claims. Gilmer's reliance on these cases, however, is misplaced.

In *Gardner-Denver*, the issue was whether a discharged employee whose grievance had been arbitrated pursuant to [*34] an arbitration clause in a collective-bargaining agreement was precluded from subsequently bringing a Title VII action based upon the conduct that was the subject of the grievance. In holding that the employee was not foreclosed from bringing the Title VII claim, we stressed that an employee's contractual rights under a collective-bargaining agreement are distinct from the employee's statutory Title VII rights:

"In submitting his grievance to arbitration, an employee seeks to vindicate [**27] his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence." 415 U.S., at 49-50.

We also noted that a labor arbitrator has authority only to resolve questions of contractual rights. *Id.*, at 53-54. The arbitrator's "task is to effectuate the intent of the parties" and he or she does not have the "general authority to invoke public laws that conflict with the bargain between the parties." *Id.*, at 53. By contrast, "in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process." *Id.*, at 54. We further expressed concern that in collective-bargaining arbitration "the interests of the individual employee may be subordinated to the collective interests [**28] of all employees in the bargaining unit." *Id.*, at 58, n. 19. n5

-----Footnotes-----

n5 The Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), also expressed the view that arbitration was inferior to the judicial process for resolving statutory claims. *Id.*, at 57-58. That "mistrust of the arbitral process," however, has been undermined by our recent arbitration decisions. *McMahon*, 482 U.S., at 231-232. "[W]e are well past the time when judicial

500 U.S. 20, *34; 111 S. Ct. 1647;
1991 U.S. LEXIS 2529, **28; 114 L. Ed. 2d 26, ***42

suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-627 (1985).

-----End Footnotes-----

[*35] [***43] Barrentine and McDonald similarly involved the issue whether arbitration under a collective-bargaining agreement precluded a subsequent [*29] statutory claim. In holding that the statutory claims there were not precluded, we noted, as in *Gardner-Denver*, the difference between contractual rights under a collective-bargaining agreement and individual statutory rights, the potential disparity in interests between a union and an employee, and the limited authority and power of labor arbitrators.

There are several important distinctions between the *Gardner-Denver* line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important [*30] concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements." *Mitsubishi*, 473 U.S., at 625. Therefore, those cases provide no basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claim.

V

We conclude that Gilmer has not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act. Accordingly, the judgment of the Court of Appeals is

Affirmed.

DISSENTBY: STEVENS

DISSENT: [*36] JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

Section 1 of the Federal Arbitration Act (FAA) states:

"[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U. S. C. @ 1.

The Court today, in holding that the FAA compels enforcement of arbitration clauses even when claims of age discrimination are at issue, skirts [*31]

500 U.S. 20, *36; 111 S. Ct. 1647;
 1991 U.S. LEXIS 2529, **31; 114 L. Ed. 2d 26, ***43

the antecedent question whether the coverage of the Act even extends to arbitration clauses contained in employment contracts, regardless of the subject matter of the claim at issue. In my opinion, arbitration clauses contained in employment [***44] agreements are specifically exempt from coverage of the FAA, and for that reason respondent Interstate/Johnson Lane Corporation cannot, pursuant to the FAA, compel petitioner to submit his claims arising under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. @ 621 et seq., to binding arbitration.

I

Petitioner did not, as the majority correctly notes, ante, at 25, n. 2, raise the issue of the applicability of the FAA to employment contracts at any stage of the proceedings below. Nor did petitioner raise the coverage issue in his petition for writ of certiorari before this Court. It was amici who first raised the argument in their briefs in support of petitioner prior to oral argument of the case. See Brief for American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae; Brief for American Association of Retired Persons as Amicus Curiae; [**32] Brief for Lawyers' Committee for Civil Rights Under Law as Amicus Curiae 17-18.

Notwithstanding the apparent waiver of the issue below, I believe that the Court should reach the issue of the coverage of the FAA to employment disputes because resolution of the [*37] question is so clearly antecedent to disposition of this case. On a number of occasions, this Court has considered issues waived by the parties below and in the petition for certiorari because the issues were so integral to decision of the case that they could be considered "fairly subsumed" by the actual questions presented. See, e. g., *Teague v. Lane*, 489 U.S. 288, 300 (1989) ("The question of retroactivity with regard to petitioner's fair cross section claim has been raised only in an amicus brief. Nevertheless, that question is not foreign to the parties, who have addressed retroactivity with respect to petitioner's Batson claim. Moreover, our sua sponte consideration of retroactivity is far from novel" (citations omitted)); *Batson v. Kentucky*, 476 U.S. 79, 84-85, n. 4 (1986) (notwithstanding petitioner's seemingly deliberate [**33] failure to raise the equal protection issue, "[w]e agree with the State that resolution of petitioner's claim properly turns on application of equal protection principles and express no view on the merits of any of petitioner's Sixth Amendment arguments"); *Mapp v. Ohio*, 367 U.S. 643, 646, n. 3 (1961) ("Although appellant chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that *Wolf* be overruled, the amicus curiae, who was also permitted to participate in the oral argument, did urge the Court to overrule *Wolf*"). See also R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* @ 6.26 (6th ed. 1986) (describing rule concerning need for presenting questions below and in petition for certiorari, and deviations from rule).

Only this Term, the Court has on at least two occasions decided cases on grounds not argued in any of the courts below or in the petitions for certiorari. In *Arcadia v. Ohio Power Co.*, 498 U.S. 73 (1990), we decided the case on an issue that not only was not raised below or in any of the [***45] papers in this Court, but that also [**34] was not raised at any point during oral argument before the Court. "In our view, however," the decided question was "antecedent to these [issues presented] and ultimately dispositive of the present dispute." *Id.*, at [*38] 77. Similarly, in *McCleskey v. Zant*, 499

500 U.S. 20, *38; 111 S. Ct. 1647;
1991 U.S. LEXIS 2529, **34; 114 L. Ed. 2d 26, ***45

U.S. 467 (1991), the Court issued a decision on a question which the parties had not argued below and evidently had not anticipated would be at issue in this Court, "since respondent did not even mention Sykes or cause-and-prejudice in its brief or at oral argument, much less request the Court to adopt this standard." Id., at 522-523 (Marshall, J., dissenting).

In my opinion the considerations in favor of reaching an issue not presented below or in the petition for certiorari are more compelling in this case than in the cited cases. Here the issue of the applicability of the FAA to employment contracts was adequately briefed and raised by the amici in support of petitioner. More important, however, is that respondent and its amici had full opportunity to brief and argue the same issue in opposition. See Brief [*35] for Respondent 42-50; Brief for Securities Industry Association, Inc., as Amicus Curiae 18-20; Brief for Equal Employment Advisory Council et al. as Amici Curiae 14-16. Moreover, the Court amply raised the issue with the parties at oral argument, at which both sides were on notice and fully prepared to argue the merits of the question. Finally, as in Arcadia, the issue whether the FAA even covers employment disputes is clearly "antecedent . . . and ultimately dispositive" of the question whether courts and respondent may rely on the FAA to compel petitioner to submit his ADEA claims to arbitration.

II

The Court, declining to reach the issue for the reason that petitioner never raised it below, nevertheless concludes that "it would be inappropriate to address the scope of the @ 1 exclusion because the arbitration clause being

enforced here is not contained in a contract of employment. . . . Rather, the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate." Ante, at 25, n. 2. In my [*39] opinion the Court too narrowly construes the scope of the exclusion contained [*36] in @ 1 of the FAA.

There is little dispute that the primary concern animating the FAA was the perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities. The Act was drafted by a committee of the American Bar Association (ABA), acting upon instructions from the ABA to consider and report upon "the further extension of the principle of commercial arbitration." Report of the Forty-third Annual Meeting of the ABA, 45 A. B. A. Rep. 75 (1920). At the Senate Judiciary Subcommittee hearings on the proposed bill, the chairman of the ABA committee responsible for drafting the bill assured the Senators that the bill "is not intended [to] be an act referring to labor disputes, at all. It is purely an act to [*37] give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this." Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923). At the same hearing, Senator Walsh [*37] stated:

"The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says, 'These are our terms. All right, take it or leave

500 U.S. 20, *39; 111 S. Ct. 1647;
1991 U.S. LEXIS 2529, **37; 114 L. Ed. 2d 26, ***46

it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all." Ibid.

[*40] Given that the FAA specifically was intended to exclude arbitration agreements between employees and employers, I see no reason to limit this exclusion from coverage to arbitration clauses contained in agreements entitled "Contract of Employment." In this case, the parties conceded at oral argument that Gilmer had no "contract of employment" as such with respondent. Gilmer was, however, required as a condition of his employment to become a registered representative of several stock exchanges, including the New York Stock Exchange (NYSE). Just because his agreement to arbitrate any "dispute, claim or controversy" with his employer that arose out of the employment relationship was contained in his application for registration before the NYSE rather than in a specific contract of employment with his employer, I do not think that Gilmer can be compelled pursuant to the FAA to arbitrate his employment-related dispute. Rather, in my opinion the exclusion in @ 1 should be interpreted to cover any agreements by the employee to arbitrate disputes with the employer arising out of the employment relationship, particularly where such agreements to arbitrate are conditions of employment.

My reading of the scope of the exclusion contained in @ 1 is supported by early judicial interpretations of the FAA. As of 1956, three Courts of Appeals had held that the FAA's exclusion of "contracts of employment" referred not only to individual contracts of employment, but also to collective-bargaining agreements. See *Lincoln Mills of Ala. v. Textile Workers Union of America*, 230 F. 2d 81 (CA5 1956), rev'd, 353 U.S. 448 (1957); [*39] *United Electrical, Radio & Machine Workers of America v. Miller Metal Products, Inc.*, 215 F. 2d 221 (CA4 1954); *Amalgamated Assn. of Street, Electric R. and Motor Coach Employees of America v. Pennsylvania Greyhound Lines, Inc.*, 192 F. 2d 310 (CA3 1951). Indeed, the application of the FAA's exclusionary clause to arbitration provisions in collective-bargaining agreements was one of the issues raised in the petition for certiorari and [*41] briefed at great length in *Lincoln Mills* and its companion cases, *Goodall-Sanford, Inc. v. Textile Workers*, 353 U.S. 550 (1957), and *General Electric Co. v. Electrical Workers*, 353 U.S. 547 (1957). Although the Court decided the enforceability of the arbitration provisions in the collective-bargaining agreements by reference to @ 301 of the Labor Management Relations Act, 1947, 29 U. S. C. @ 185, it did not reject the Courts of Appeals' holdings that the arbitration provisions would not otherwise be enforceable pursuant to the FAA since they were specifically [*40] excluded under @ 1. In dissent, Justice Frankfurter perceived a

"rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective-bargaining agreements in the silent treatment given that Act by the Court's opinion. If an Act that authorizes the federal courts to enforce arbitration provisions in contracts generally, but specifically denies authority to decree that remedy for 'contracts of employment,' were available, the Court would hardly spin such power out of the empty darkness of @ 301. I would make this rejection explicit, recognizing that when Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts." *Textile Workers v. Lincoln Mills*, 353 U.S., at 466.

500 U.S. 20, *41; 111 S. Ct. 1647;
1991 U.S. LEXIS 2529, **40; 114 L. Ed. 2d 26, ***47

III

Not only would I find that the FAA does not apply to employment-related disputes between employers and employees in general, but also I would hold that compulsory arbitration conflicts with the congressional purpose animating the ADEA, in particular. As this Court previously has noted, authorizing the courts to [*41] issue broad injunctive relief is the cornerstone to eliminating discrimination in society. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975). The ADEA, like Title VII of the Civil Rights Act of 1964, authorizes [*42] courts to award broad, class-based injunctive relief to achieve the purposes of the Act. 29 U. S. C. @ 626(b). Because commercial arbitration is typically limited to a specific dispute between the particular parties and because the available remedies in arbitral forums generally do not provide for class-wide injunctive relief, see *Shell, ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 Texas L. Rev. 509, 568 (1990), I would conclude that an essential purpose of the ADEA is frustrated by compulsory arbitration of employment discrimination claims. Moreover, as Chief Justice Burger explained:

"Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to [*42] contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 750 (1981) (dissenting opinion).

[***48] In my opinion the same concerns expressed by Chief Justice Burger with regard to compulsory arbitration of Title VII claims may be said of claims arising under the ADEA. The Court's holding today clearly eviscerates the important role played by an independent judiciary in eradicating employment discrimination.

IV

When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship. In recent years, however, the Court [*43] "has effectively rewritten the statute," n1 and abandoned its earlier view that statutory claims were not appropriate subjects for arbitration. See *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646-651 (1985) [*43] (Stevens, J., dissenting). Although I remain persuaded that it erred in doing so, n2 the Court has also put to one side any concern about the inequality of bargaining power between an entire industry, on the one hand, and an individual customer or employee, on the other. See ante, at 32-33. Until today, however, the Court has not read @ 2 of the FAA as broadly encompassing disputes arising out of the employment relationship. I believe this additional extension of the FAA is erroneous. Accordingly, I respectfully dissent.

- - - - -Footnotes- - - - -

500 U.S. 20, *43; 111 S. Ct. 1647;
1991 U.S. LEXIS 2529, **43; 114 L. Ed. 2d 26, ***48

n1 See Perry v. Thomas, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting);
id., at 494 (O'Connor, J., dissenting); Southland Corp. v. Keating, 465 U.S. 1,
36 (1984) (O'Connor, J., dissenting) ("[T]oday's exercise in judicial
revisionism goes too far").

n2 See Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 252-253
(1987) (Blackmun, J., concurring in part and dissenting in part); id., at 268
(Stevens, J., concurring in part and dissenting in part); Rodriguez de Quijas v.
Shearson/American Express, Inc., 490 U.S. 477, 486 (1989) (Stevens, J.,
dissenting).

-----End Footnotes-----

[**44]

56TH CASE of Level 1 printed in FULL format.

ROBERT D. GILMER, Plaintiff-Appellee, v.
INTERSTATE/JOHNSON LANE CORPORATION, formerly known as
Interstate Securities Corporation, Defendant-Appellant

GILMER v. INTERSTATE/JOHNSON LANE CORP.

No. 88-1796

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

895 F.2d 195; 1990 U.S. App. LEXIS 1522; 52 Fair Empl. Prac.
Cas. (BNA) 26; 52 Empl. Prac. Dec. (CCH) P39,601

Argued: November 2, 1989
February 6, 1990, Decided

SUBSEQUENT HISTORY: Rehearing and Rehearing In Banc Denied March 28, 1990,
Reported at 1990 U.S. App. LEXIS 7370.

PRIOR HISTORY:

[**1]

Appeal from the United States District Court for the Western District of North
Carolina, at Charlotte. James B. McMillan, Senior District Judge.
CA-88-396-M-C-C.

COUNSEL: James Bernard Spears, Jr. (Robert S. Phifer, HAYNSWORTH, BALDWIN,
MILES, JOHNSON, GREAVES AND EDWARDS, P.A., on brief) for Appellant.

W. R. Loftis, Jr. (John T. Allred, Robin E. Shea, PETREE, STOCKTON &
ROBINSON, on brief) for Appellee.

JUDGES: Widener and Wilkinson, Circuit Judges, and Young, Senior United States
District Judge for the District of Maryland, sitting by designation.

OPINIONBY: WILKINSON

OPINION: [*196] WILKINSON, Circuit Judge:

The question before us is whether an agreement between an individual employee
and his employer compelling arbitration of all claims arising out of
employment is enforceable when the claim against the employer is one for
violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29
U.S.C. §§ 621 et seq. (1982 & Supp. 1986). The district court ruled that such an
arbitration agreement is not enforceable in the face of a claim arising under
the ADEA. Because we find no congressional intent to preclude enforcement of
arbitration agreements in the ADEA's text, its legislative history, or its
underlying purposes, see Shearson/American Express, Inc. v. McMahon,
482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987), we reverse the judgment
of the district court.

I.

895 F.2d 195, *196; 1990 U.S. App. LEXIS 1522, **2;
52 Fair Empl. Prac. Cas. (BNA) 26; 52 Empl. Prac. Dec. (CCH) P39,601

Robert D. Gilmer was hired by Interstate/Johnson Lane in May 1981 as a manager of financial services. As required for his employment, Gilmer registered as a securities representative with the New York Stock Exchange.

Gilmer's application for his securities registration contained an arbitration clause pursuant to which he agreed to the arbitration of any disputes between himself and his employer arising out of his employment or the termination of his employment. n1

-----Footnotes-----

n1 Paragraph 5 of Gilmer's securities registration application provided: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register. . . ." Rule 347 of the New York Stock Exchange states:

Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

-----End Footnotes-----

[**3]

In November 1987, Gilmer's employment was terminated. In August 1988, he brought suit against Interstate in federal court alleging that his termination violated the ADEA. Interstate filed a motion to compel arbitration as authorized under the Federal Arbitration Act, 9 U.S.C. @@ 1 et seq. The district court denied the motion, ruling that arbitration procedures are inadequate for the final resolution of rights created by the ADEA and that Congress intended to protect ADEA plaintiffs from waiver of the judicial forum.

Interstate appeals. 28 U.S.C. @ 1292(a)(1).

II.

In a trilogy of recent cases, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985), Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987), and Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989), the Supreme Court has endorsed arbitration as an effective and efficient means of dispute resolution. n2 The Court has emphasized that the Federal Arbitration Act (FAA) "establishes a federal policy favoring arbitration," McMahon, 107 S. Ct. at 2337 (quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)), [**4] which "is at bottom a policy guaranteeing the enforcement of private contractual arrangements," Mitsubishi, 473 U.S. at 625. Under the FAA, enforcement of an arbitration agreement is equally appropriate whether the parties have agreed to arbitrate rights created by contract or by statute, since "[by] agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Id. at 628. An arbitration [*197] agreement is unenforceable only if Congress has evinced an intention to preclude waiver of the judicial forum for a

895 F.2d 195, *197; 1990 U.S. App. LEXIS 1522, **4;
52 Fair Empl. Prac. Cas. (BNA) 26; 52 Empl. Prac. Dec. (CCH) P39,601

particular statutory right, or if the agreement was procured by fraud or use of excessive economic power. See *id.* at 627-28; McMahon, 107 S. Ct. at 2337.

-----Footnotes-----

n2 The dissenting opinion mentions none of these three cases (or other related decisions). It is astonishing to believe that it would ignore entirely the Supreme Court's recent pronouncements on the very subject of this case.

-----End Footnotes-----

The McMahon Court established the framework for determining whether an arbitration agreement is enforceable under the FAA. The Court ruled that the Act standing [**5] alone mandates enforcement of arbitration agreements, but that Congress can override this mandate by indicating that it is precluding waiver of the judicial forum for the particular statutory right at issue. The burden is on the party opposing arbitration to show that Congress intended to preclude waiver. Congressional intent is to be deduced from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes. McMahon, 107 S. Ct. at 2337-38 (citing Mitsubishi, 473 U.S. at 628, 632-37).

We find nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements. Arbitration is nowhere mentioned in the text of the statute, and "[this] silence in the text is matched by silence in the statute's legislative history." McMahon, 107 S. Ct. at 2344. Nor is there any statement on the part of Congress to indicate that a federal judicial forum is the only appropriate forum for vindication of the rights created by the ADEA. Moreover, we see no conflict between arbitration and the underlying purposes of the ADEA which would preclude [**6] arbitration of ADEA claims.

The Third Circuit majority in *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989), which refused to enforce arbitration of an ADEA claim, conceded that in the statutory language and legislative history of the ADEA it could "find no direct reference to arbitration" and that it was therefore forced to "draw inferences from Congress' actions." *Id.* at 225. Courts should be reluctant, however, to imply in a statute an intention to preclude enforcement of arbitration agreements where Congress has not expressed one, particularly in light of the countervailing intention expressed by Congress in the FAA. Gilmer has nonetheless advanced numerous arguments why we should do so, and we shall proceed to address them.

III.

Gilmer argues, in reliance upon *Nicholson*, that congressional intent to preclude waiver of the judicial forum can be surmised from the role Congress has established for the Equal Employment Opportunity Commission (EEOC) in the enforcement of the ADEA. The ADEA empowers the EEOC to investigate age discrimination claims and to bring enforcement actions to ensure compliance with the statute's provisions. 29 U.S.C. @ 626(a), (b). The [**7] EEOC is authorized to inspect places of employment, to question employees, and to impose recordkeeping and reporting requirements on employers. 29 U.S.C. @ 626(a). It may also endeavor to effect voluntary compliance with ADEA provisions through informal methods of conciliation, conference, and persuasion. 29

895 F.2d 195, *197; 1990 U.S. App. LEXIS 1522, **7;
52 Fair Empl. Prac. Cas. (BNA) 26; 52 Empl. Prac. Dec. (CCH) P39,601

U.S.C. @ 626(b). Gilmer contends, again by reference to Nicholson, that if arbitration agreements are enforced, the EEOC will no longer be able to function as a protector of employee rights under the ADEA. He argues that since filing a charge with the EEOC is not a prerequisite for arbitral action as it is for judicial action under the ADEA, an employee who is required to adhere to his agreement and proceed to arbitration will no longer file a charge. Thus, he maintains, the EEOC will be deprived of the charge both as an incentive to undertake conciliation and as notification in case it wishes to institute an enforcement action.

We disagree. The EEOC's continued effectiveness is not now, nor has it ever been, dependent on its participation in the resolution of all claims under the ADEA. For example, it is well-settled that an individual may voluntarily settle his ADEA [*8] claims without EEOC involvement. See Moore v. [*198] McGraw Edison Co., 804 F.2d 1026, 1033 (8th Cir. 1986); Runyan v. National Cash Register Corp., 787 F.2d 1039, 1044-45 (6th Cir. 1986). Arbitration can achieve much the same vindication of individual rights and relief of agency dockets as voluntary, non-supervised settlements. See Coventry v. United States Steel Corp., 856 F.2d 514, 522 n. 8 (3d Cir. 1988). Of course, nothing about the arbitral process would preclude an individual from filing a general charge against his employer with the EEOC which the EEOC would be empowered to investigate, conciliate, or enforce through litigation. We do not think, however, that implementation of the statutory purpose is dependent upon the EEOC's involvement in each and every allegation of age discrimination. For example, if the ADEA complainant prevails at arbitration, the EEOC may indeed be deprived of a charge; however, it is difficult to see what difference EEOC involvement would have made in the vindication of that litigant's rights.

Further, we think it clear that Congress contemplated that entities other than the EEOC and federal courts would play important roles in remedying age discrimination. [*9] See Mathis v. Allied Wholesale Distributors, Inc., 680 F. Supp. 1545, 1547 (M.D.Ga. 1988) (state courts possess concurrent jurisdiction over ADEA suits). The premise of the Federal Arbitration Act is the availability to parties of multiple forums rather than the imposition upon them of a single forum. If litigants believe that arbitration offers a prompter, more expert, and less expensive way to resolve their differences, Congress has decreed that such an option be open to them. See Mitsubishi, 473 U.S. at 628. We are reluctant to conclude that the mere fact of administrative involvement in a statutory scheme of enforcement operates as an implicit exception to the presumption of arbitral availability under the FAA. The availability of arbitration under the securities acts in Rodriguez and McMahon indicates that arbitrability is not precluded by the presence of an agency with statutory powers of enforcement, see 15 U.S.C. @@ 77t, 78u (Securities and Exchange Commission (SEC) right to bring enforcement actions). While there are, of course, differences between the role of the SEC under the securities acts and that of the EEOC under the ADEA, namely the filing of [*10] a charge as a precondition to a lawsuit under the latter statute, these differences do not rise to the level of an affirmative congressional expression of waiver preclusion. As we have noted, the roles of arbitration and the EEOC are harmonious because neither the filing of an individual charge nor an action of agency enforcement is in any way forbidden by the election of arbitration.

Gilmer also contends that congressional intent to preclude waiver can be found in the funding statute for the EEOC. He points to language in the

895 F.2d 195, *198; 1990 U.S. App. LEXIS 1522, **10;
52 Fair Empl. Prac. Cas. (BNA) 26; 52 Empl. Prac. Dec. (CCH) P39,601

statute directing "[that] none of the funds may be obligated or expended by the Commission to give effect to any policy or practice pertaining to unsupervised waivers under the Age Discrimination in Employment Act." P.L. No. 100-459, 102 Stat. 2186, 2216 (1988); see also P.L. No. 100-202, 101 Stat. 1329, 1329-31 (1987). We find nothing in this statement to indicate, however, that Congress intended to preclude waiver of a procedural right such as forum selection; instead, we think Congress was referring to waiver of the substantive rights guaranteed by the ADEA. Even if Congress were prohibiting disbursement of EEOC funds to encourage arbitration of ADEA claims, [*11] we would be hesitant to find congressional intent to preclude entirely the enforcement of arbitration agreements in a source with so attenuated a connection to the ADEA as the EEOC funding statute.

Even if the statutory enforcement powers of the EEOC would not be impaired, Gilmer argues that arbitration is inconsistent with the ADEA's placement of initial adjudicatory authority in a court rather than an agency. He points, by way of Nicholson, to the fact that Congress declined to adopt for the ADEA an enforcement scheme modeled after the National Labor Relations Act (NLRA), instead choosing a scheme modeled after the Fair Labor Standards Act (FLSA). He argues that this choice indicates a congressional preference for the resolution of ADEA disputes [*199] in a judicial, rather than an arbitral, forum.

We again disagree. The enforcement model based on the NLRA which Congress rejected provided for the resolution of age discrimination claims in agency proceedings with judicial review available through petition to the federal courts of appeals. See 113 Cong.Rec. 2795 (1967), reprinted in EEOC, Legislative History of the Age Discrimination in Employment Act 69 (1981) [hereinafter [*12] ADEA History]. The enforcement model based on the FLSA which Congress ultimately adopted authorized the Secretary of Labor (later the EEOC) to enforce the ADEA through investigation, conciliation, and, if necessary, through enforcement actions brought in the courts. See H.R.Rep.No. 805, 90th Cong., 1st Sess. 5-6 (1967), reprinted in ADEA History at 78-79; U.S.Code & Admin.News 1967, p. 2213; Sen.Rep. No. 723, 90th Cong., 1st Sess. 5, 13-14 (1967), reprinted in ADEA History at 109, 117-18. However, this choice of courts over agencies as the initial forum for the resolution of ADEA disputes says nothing about Congress' attitude toward arbitration. Unlike either courts or agencies, arbitration is a forum selected by mutual agreement of the parties. Congress' choice of an enforcement scheme in which ADEA suits are brought in a judicial forum simply does not manifest an intention to prevent parties from reaching a private contractual agreement to submit their disputes to arbitration.

Gilmer next argues that the broader remedial powers possessed by courts over arbitrators indicate a congressional intent to preclude waiver. He asserts that arbitrators do not command [*13] the power to award broad equitable relief which courts possess under 29 U.S.C. @ 626(b) (empowering courts "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter"). He emphasizes in particular that arbitrators lack the power to issue injunctive relief to prevent employers from engaging in future acts of discrimination, and that class actions cannot be maintained in arbitration.

We are unconvinced. Arbitrators enjoy broad equitable powers. They may grant whatever remedy is necessary to right the wrongs within their jurisdiction. Arbitrators may, for instance, order reinstatement or promotion of an employee

895 F.2d 195, *199; 1990 U.S. App. LEXIS 1522, **13;
52 Fair Empl. Prac. Cas. (BNA) 26; 52 Empl. Prac. Dec. (CCH) P39,601

adversely affected by age discrimination. See Nicholson, 877 F.2d at 240 (Becker, J., dissenting). Of course, the question of the full extent of an arbitrator's powers is not before us. However, any lack of congruence which may exist between the remedial powers of a court and those of an arbitrator is hardly fatal to arbitration. So long as arbitrators possess the equitable power to redress individual claims of discrimination, there is no reason to reject their role in the resolution of ADEA disputes. That arbitrators may lack [**14] the full breadth of equitable discretion possessed by courts to go beyond the relief accorded individual victims does not deny the utility of this alternative means of resolving disputes. In enacting the FAA and the ADEA, Congress must have been aware of the respective spheres of judicial and arbitral authority and it expressed no intention that the latter be displaced. See Rodriguez v. United States, 480 U.S. 522, 107 S. Ct. 1391, 1393, 94 L. Ed. 2d 533 (1987) (in passing a statute, Congress is presumed to act "with full awareness" of existing legislation).

We are similarly unpersuaded by Gilmer's contention that the ADEA's provision of a right to jury trial indicates a congressional intent to preclude waiver. The ADEA provides only that a litigant be entitled to a jury trial should he desire it; it does not mandate that every ADEA trial be a trial by jury. ADEA litigants plainly are permitted to waive trial by jury. See Washington v. New York City Bd. of Estimate, 709 F.2d 792, 797-99 (2d Cir. 1983); Scharnhorst v. Independent School Dist. #710, 686 F.2d 637, 641 (8th Cir. 1982). If that waiver is permitted, we fail to see how the preference of parties for an arbitral forum has somehow been silently [**15] proscribed.

Nor could Gilmer successfully contend that the ADEA's provision of liquidated damages for willful violations, 29 U.S.C. @ 626(b), evinces an intent to preclude [*200] waiver of the judicial forum. In Mitsubishi and McMahon, the Supreme Court rejected arguments that arbitration would vitiate the treble damages provisions in the Clayton Act and the Racketeer Influenced and Corrupt Organizations Act. See Mitsubishi, 473 U.S. at 635-37; McMahon, 107 S. Ct. at 2344-45. While recognizing that the treble damages provisions are primarily compensatory in nature, the Court emphasized that those provisions, like that for liquidated damages under the ADEA, play an important role in deterrence. See Mitsubishi, 473 U.S. at 635-36 (Clayton Act); McMahon, 107 S. Ct. at 2345 (RICO statute); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985) (ADEA). In fact, it would be the unusual statute whose remedial provisions did not serve both compensatory and deterrent purposes. This mixing of compensatory and deterrent functions in the remedial provisions of a statute in no way interferes with an arbitrator's ability to effectuate the purposes of a statute. [**16] There is no reason, for example, why an arbitrator of an ADEA dispute cannot award liquidated damages should he or she find a willful violation of the statute. "[So] long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." Mitsubishi, 473 U.S. at 637. Even if arbitration were somehow thought to impinge on the ability of the ADEA's liquidated damages provision to fulfill its role as a deterrent to willful violations of the statute, it certainly would not interfere with the ordinary, run-of-the-mill ADEA case which does not implicate the liquidated damages remedy. See McMahon, 107 S. Ct. at 2345.

895 F.2d 195, *200; 1990 U.S. App. LEXIS 1522, **16;
52 Fair Empl. Prac. Cas. (BNA) 26; 52 Empl. Prac. Dec. (CCH) P39,601

Gilmer also argues that the arbitration agreement should not be enforced because it constituted a prospective waiver. This plainly is not the law. Prospective waiver of the judicial forum lies at the heart of the FAA, where it is not only permitted but encouraged. In addition, prospective waivers were clearly approved in *Mitsubishi*, *McMahon*, and *Rodriguez*. In all three cases, the Court enforced arbitration agreements which were entered into [**17] before the cause of action at issue arose. See *Mitsubishi*, 473 U.S. at 617-18; *McMahon*, 107 S. Ct. at 2335-36; *Rodriguez*, 109 S. Ct. at 1918-19. If, however, Gilmer means that prospective waivers must be examined to determine whether they were knowing and voluntary, then this certainly is true. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n. 15, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974). However, Gilmer has never asserted that his waiver was anything other than knowing and voluntary, nor is there anything to lead us to that conclusion.

Our holding is further buttressed by the fact that it is well-established that federal courts need not always be the forum for the resolution of ADEA claims. The grant of concurrent jurisdiction to state and federal courts in the ADEA allows ADEA claimants to bring their claims in state court in the first instance. See *Mathis*, 680 F. Supp. at 1547; *Jacobi v. Highpoint Label, Inc.*, 442 F. Supp. 518, 520 (M.D.N.C. 1977). Thus, Congress clearly did not intend that all ADEA disputes be resolved in federal court; rather, it contemplated a more flexible scheme for the resolution of individual ADEA claims. In fact, Congress' grant of concurrent jurisdiction over [**18] ADEA suits may evince an affirmative intent, apart from that contained in the FAA, to permit waiver of the judicial forum. In *Rodriguez*, the Court noted that congressional legislation providing for concurrent jurisdiction constituted an "explicit authorization for complainants to waive [federal court procedural] protections by filing suit in state court." 109 S. Ct. at 1920. The Court went on to declare that "arbitration agreements, which are in effect, a specialized kind of forum-selection clause," should not be prohibited . . . since they, like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." *Id.* at 1921 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 [*201,] 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974)). The grant of concurrent jurisdiction in the ADEA evidences, if anything, a congressional intent to provide a broad right of forum selection, including the right to elect arbitration.

Finally, there is no reason to suppose that ADEA claims are inherently ill-suited to arbitration. They involve in the main simple, factual inquiries. In ruling that antitrust and [**19] RICO claims were not beyond the ken of arbitrators, the Supreme Court brushed aside objections that such statutory claims were too complex for arbitrators to handle: See *McMahon*, 107 S. Ct. at 2344. ADEA disputes are, to put it mildly, no more generically complex than claims pressed under the Sherman Act and RICO. That a proof scheme has evolved to establish a case of age discrimination should not delude courts into thinking that the ultimate question in ADEA cases is of a type which only federal judges are capable of resolving. In fact, ADEA disputes are often presented to the jury as requiring resolution of a single question of ultimate fact involving assessment of credibility and of disputed rationales for employer action. We have noted that "[in] cases of this type, the best charge may simply be one that emphasizes that plaintiff must prove, by a preponderance of the evidence, that he was discharged because of his age. . . ." *Nelson v. Green Ford, Inc.*, 788 F.2d 205, 209 (4th Cir. 1986) (quoting *Loeb v. Textron*, 600 F.2d 1003,

895 F.2d 195, *201;; 1990 U.S. App. LEXIS 1522, **19;
52 Fair Empl. Prac. Cas. (BNA) 26; 52 Empl. Prac. Dec. (CCH) P39,601

1018 (1st Cir. 1979)). Whether a particular employee was maltreated on account of his age is a straightforward factual matter that is [**20] well within the capabilities of an arbitrator, and the presumption of arbitrability in the FAA must therefore apply.

IV.

Gilmer points to three cases decided before the Supreme Court's recent trilogy and argues that those cases are controlling here. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974), the Court held that an employee required to arbitrate under a collective-bargaining agreement was entitled to a trial de novo on his Title VII claim despite having lost at arbitration. Gilmer argues that because Title VII and the ADEA are similar statutory schemes proscribing discrimination in employment, prospective waiver of the judicial forum should be prohibited under the ADEA just as it is under Title VII. Gilmer also cites *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981), holding that a claimant under the FLSA was not barred by the unfavorable decision of an arbitrator, and *McDonald v. City of West Branch*, 466 U.S. 284, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984), holding that an arbitrator's decision on a @ 1983 claim has no res judicata or collateral estoppel effect. Gilmer notes that these three cases were all cited with approval by the Court in *Atchison, Topeka & Santa Fe Railway [**21] Co. v. Buell*, 480 U.S. 557, 94 L. Ed. 2d 563, 107 S. Ct. 1410 (1987), a post-Mitsubishi case, and that they therefore survive *Mitsubishi*.

We find these cases inapposite. First, none of the three even mention the FAA. Therefore, the Court's analysis was not governed by the "federal policy favoring arbitration" requiring that [courts] rigorously enforce agreements to arbitrate." *McMahon*, 107 S. Ct. at 2337 (quoting *Cone Memorial Hospital*, 460 U.S. at 24, and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985)). The cases also question the adequacy of arbitral factfinding procedures and the competence of arbitrators to resolve complex legal questions. See *Gardner-Denver*, 415 U.S. at 57-58; *Barrentine*, 450 U.S. at 743-45; *McDonald*, 466 U.S. at 290-91. In its more recent trilogy of cases, however, the Court explicitly rejected such arguments. In *Mitsubishi*, it stated that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." 473 U.S. at 626-27. In *McMahon*, it emphasized that "the streamlined procedures of arbitration [**22] do not entail any consequential [*202] restriction on substantive rights." 107 S. Ct. at 2340. Just last term in *Rodriguez*, the Court declared that "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants . . . has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." 109 S. Ct. at 1920. Any reluctance to entrust statutory claims to the arbitral process because of the adequacy of arbitral procedures or the competence of arbitrators is clearly no longer well-founded.

Second, *Gardner-Denver*, *Barrentine*, and *McDonald* all involved arbitration under collective bargaining agreements. In all three cases, the Court stressed that the statutory schemes at issue were intended to provide individuals with some minimum level of protection, and that that protection might be lost if a

895 F.2d 195, *202; 1990 U.S. App. LEXIS 1522, **22;
52 Fair Empl. Prac. Cas. (BNA) 26; 52 Empl. Prac. Dec. (CCH) P39,601

union represented the employee in the grievance proceeding and thus controlled the employee's arbitration. See McDonald, 466 U.S. at 291 n. 10. It noted that in arbitration under a collective bargaining agreement, "the interests of the individual employee may be subordinated [**23] to the collective interests of all employees in the bargaining unit." Gardner-Denver, 415 U.S. at 58 n. 19; see also Barrentine, 450 U.S. at 742; McDonald, 466 U.S. at 291. Gardner-Denver also recognized, however, that an individual possesses greater authority over his cause of action when he pursues his claim independent of union control. See 415 U.S. at 52. Thus, concern about the divergent interests of employee and union simply does not exist where, as in Gilmer's case, the individual employee has agreed to arbitration of his employment disputes and will be able to press his ADEA claims in arbitration in his individual capacity.

The Court was also troubled in the three earlier cases by the fact that an arbitrator acting under the authority of a collective bargaining agreement might lack the power to invoke legislation in conflict with the bargain between the parties. See Gardner-Denver, 415 U.S. at 53; Barrentine, 450 U.S. at 744; McDonald, 466 U.S. at 290-91. This concern is likewise nonexistent where arbitration proceeds according to an individual arbitration agreement. Without restrictions like those imposed by the terms of a collective bargaining [**24] agreement, an arbitrator will be free to invoke any relevant statute. Moreover, judicial review of the arbitrator's decision, though limited, is "sufficient to ensure that arbitrators comply with the requirements of the statute." McMahon, 107 S. Ct. at 2340. For the foregoing reasons we think it clear that Gardner-Denver, Barrentine, and McDonald do not control our decision here.

V.

Gilmer complains that a reversal in this case would conflict with the holding of the Third Circuit in Nicholson v. CPC Int'l, Inc., 877 F.2d 221 (3d Cir. 1989). We acknowledge that our holding is not in accord with that of the Third Circuit. We find the reasoning of the majority opinion in Nicholson unpersuasive, and therefore we have respectfully chosen not to follow it. Instead, we are in agreement with Judge Becker's dissent in that case that Congress did not intend to preclude waiver of the judicial forum by ADEA claimants.

Our holding reflects nothing more than the view that courts should not strain to find in statutes what Congress has not put there. We find no congressional intent to preclude waiver of the judicial forum in the text, the legislative history, or the underlying [**25] purposes of the ADEA. We recognize that the ADEA embodies without question an important federal policy in prohibiting age discrimination. So too, however, do the Securities Act of 1933 and the Securities Exchange Act of 1934 represent, inter alia, an important federal policy in protecting investors from fraudulent securities transactions. Likewise, the Sherman Act reflects an important federal policy in preventing excessive concentration in relevant markets. Nonetheless, arbitration of claims under these statutes is clearly encouraged. [*203] See Mitsubishi; McMahon; Rodriguez.

Courts cannot determine whether arbitration agreements are to be enforced by making subjective judgments as to the relative importance of various federal statutes. Rather, Congress must provide clear guidance if it wishes federal

895 F.2d 195, *203; 1990 U.S. App. LEXIS 1522, **25;
52 Fair Empl. Prac. Cas. (BNA) 26; 52 Empl. Prac. Dec. (CCH) P39,601

courts to refrain from enforcing arbitration agreements when violations of a particular statutory right are alleged. Without such affirmative guidance in the ADEA, we are reluctant to set aside a coordinate federal statute such as the Arbitration Act.

We remain sensitive to the fact that the context in which this case arises differs somewhat from the contexts of *Mitsubishi*, *McMahon*, [**26] and *Rodriguez*. Whereas the statutes in those cases were primarily commercial in focus, the ADEA is a civil rights statute. Moreover, the complainants in those cases were securities customers and persons injured by antitrust violations, not employees who are allegedly victims of discrimination in the workplace. Although the beneficiaries of statutory protections may vary, the principles of statutory interpretation do not. As the ADEA is devoid of any congressional statement of intent to preclude waiver of the judicial forum, we reverse the judgment of the district court and remand the case with directions to enter an order compelling arbitration of plaintiff's claim.

REVERSED.

DISSENTBY: WIDENER

DISSENT: WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

I do not believe there is any distinction of significance between this case and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974). I think *Alexander* is persuasive and would follow that case here.

In *Alexander*, the collective bargaining agreement, which bound both the plaintiff-employee and his employer, specifically provided against racial discrimination and for arbitration of all claims with respect to employment.

Plaintiff [**27] was discharged and claimed the discharge was on account of racial discrimination. Through his union, he pursued the matter to arbitration and lost, while at the same time he was pursuing his statutory claim under Title VII of the Civil Rights Act of 1964. The district court dismissed plaintiff's case, holding that plaintiff was bound by the arbitration decision and was, thus, precluded from suing his employer under Title VII. That decision was affirmed by the court of appeals. The Supreme Court, however, reversed.

The reasoning of the Court may be briefly abstracted as follows:

While Title VII does not speak expressly to the relationship between federal courts and the arbitration provisions of union contracts, it does vest federal courts with plenary powers to enforce the statutory requirements and it specifies with precision the jurisdictional prerequisites for filing a Title VII case.

415 U.S. at 47.

"There is no suggestion in the statutory scheme that a prior arbitral decision either forecloses individuals' rights to sue or divests federal courts of jurisdiction."

895 F.2d 195, *203; 1990 U.S. App. LEXIS 1522, **27;
52 Fair Empl. Prac. Cas. (BNA) 26; 52 Empl. Prac. Dec. (CCH) P39,601

415 U.S. at 47.

"In addition, legislative enactments in this area have long evinced a general intent to [**28] accord parallel or overlapping remedies against discrimination."

415 U.S. at 47 (naming EEOC, state and local agencies, and the federal courts).

"In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a law suit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respective appropriate forums."

415 U.S. at 49-50.

The Court also rejected the arguments now made by the majority, that arbitration is as effective a remedy as is the judgment of a court; that Gilmer has waived his [*204] rights under the ADEA; and that access to the state courts under the ADEA is a reason to enforce an exclusive remedy of arbitration and deny access to the federal courts. Of course, it is at once apparent that access to the state courts would also be denied under the majority decision.

While there are many reasons [**29] a remedy by way of arbitration is not as effective as the judgment of a court such as those mentioned in Alexander at pp. 57-58: a different fact-finding process; not as complete a record; the usual rules of evidence do not apply; and lack of compulsory process, etc.; one ADEA right mentioned by the district court in this case is sufficient to determine the outcome even if that be necessary. That is the right of trial by jury which is preserved under the ADEA. 29 U.S.C. @ 626(c)(2). The suggestion that this right may be waived as a justification for its non-existence in arbitration proceedings is reasoning which I do not follow. Neither do I accept it.

Likewise, the suggestion by the majority that the availability of a remedy in the state courts under the ADEA is a reason to enforce arbitration was rejected by Alexander at p. 47. The Court relied upon the general intent of legislative enactments in the field of civil rights to accord parallel or overlapping remedies against discrimination and mentioned as parallel remedies in Title VII cases the EEOC, state and local agencies, and the federal courts. The fact that access to the state courts has been provided under the ADEA [**30] is no more than another parallel or overlapping remedy, in my opinion.

The Court, in Alexander at pp. 51, et seq., explicitly decided that "there can be no prospective waiver of an employee's rights under Title VII." 415 U.S. at 51. I think this proposition must be held to apply to rights under the ADEA and that there can be no prospective waiver thereof, contrary to the majority holding.

The suggestion the majority makes to the effect that the Federal Arbitration Act requires the enforcement of the arbitration provision in this case, while

895 F.2d 195, *204; 1990 U.S. App. LEXIS 1522, **30;
52 Fair Empl. Prac. Cas. (BNA) 26; 52 Empl. Prac. Dec. (CCH) P39,601

it did not in Gardner-Denver, for the principal reason that it was not considered in Gardner-Denver, also, I think, does not bear scrutiny. With that as a starting point, the majority reasons that "the Court's analysis was not governed by the federal policy favoring arbitration' requiring that [courts] rigorously enforce agreements to arbitrate."

While it is true that the Federal Arbitration Act was not explicitly mentioned in Alexander, it is doing a disservice to the Court, I think, to imply that it was unaware of a federal policy favoring arbitration. Indeed, Alexander referred to United Steelworkers of America v. Enterprise [**31] Wheel and Car Company, 363 U.S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960), one of the famous Steelworkers Trilogy which provided explicitly that "a major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 578, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960). So any public policy reason to enforce arbitration to the exclusion of the consideration of the claim by the federal courts was stronger in Alexander than it is here, being a part of the national labor policy. If that policy was not strong enough in Alexander to require the literal enforcement of an arbitration provision to the exclusion of a statutory right, certainly any policy deferring to an alternate forum for disputes resolution does not rise so high.

To sum it up, the plaintiff, Gilmer, meets the jurisdictional prerequisites for filing a case under the ADEA. The ADEA does not foreclose his right to sue or divest the federal courts of jurisdiction. Since Alexander holds that a collective bargaining agreement to arbitrate does not displace the federal courts of their jurisdiction in a Title VII case, a private agreement to arbitrate [**32] should not be held to displace the federal courts of their jurisdiction under the ADEA.

I would affirm the order appealed from.

1. SUBJECT: Policy Guidance: Application of the Age Discrimination in Employment Act of 1967 (ADEA) and the Equal Pay Act of 1963 (EPA) to American firms overseas, their overseas subsidiaries, and foreign firms.
2. PURPOSE: This Policy Guidance is intended to provide information on the handling of cases where the employer is an American firm or its subsidiary operating overseas or a foreign firm operating in the United States or overseas.
3. ORIGINATORS: ADEA and Title VII/EPA Divisions.
4. EFFECTIVE DATE: Upon receipt.
5. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4 § a(5), this Notice will remain in effect until rescinded or superseded.
6. INSTRUCTIONS: This Notice supplements the instructions in § 605 of Volume II of the Compliance Manual, Jurisdiction. Insert behind page 605-24.

I. Introduction

This policy guidance applies to cases alleging employment discrimination by an American firm's overseas operations; a foreign subsidiary of a foreign firm organized or incorporated under laws of the United States; a foreign firm doing business in this country but not organized or incorporated in the United States; and a foreign firm not organized, incorporated, or doing business in the United States.

In investigating cases under this policy guidance, the Commission's responsibility is to assure equality of employment opportunity and to enforce equal employment rights in those situations where federal fair employment laws apply.

A. Extraterritorial Application of the ADEA

In 1984, the ADEA was amended by Public Law 98-459 to broaden the definition of "employee." Section 11(f) of the Act provides in pertinent part that:

...[T]he term "employee" includes any individual who is a citizen of the United States

DISTRIBUTION:

EEOC FORM 106, MAR 87

CM: Holders

employed by an employer¹ in a workplace in a foreign country.

Congress amended the ADEA because it wanted to insure that the citizens of the United States who are employed overseas by American firms² or their subsidiaries enjoy similar protections as citizens and aliens employed in the United States. The House Report states that:

.... the amendment is carefully worded to apply only to citizens of the United States who are working for U.S. corporations or their subsidiaries. It does not apply to foreign nationals working for such corporations in a foreign workplace and it does not apply to foreign companies which are not controlled by U.S. firms. H.R. Rep. No. 98-1037, 98th Cong., 2d Sess. 28 (1984).

Section 4(h) of the ADEA provides that:

- (1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.
- (2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer. 29 U.S.C. § 623(h), as amended.

¹ Section 11(b) of the ADEA states that,

The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, that prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State; and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

² The term "firm" is used throughout the policy guidance as a "short hand" reference for all such entities satisfying the § 11 definition of "employer" in the ADEA.

As amended, the ADEA reaches employers that are controlled by American firms, through a presumption that the subordinate business's discriminatory actions are in fact the actions of the American firm. 129 Cong. Rec. S. 17,018 (daily ed. Nov. 18, 1983) (statement by Senator Grassley).

In determining whether an American employer controls a foreign firm, the Act provides that the following factors be considered:

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the:

- (A) interrelation of operations,
- (B) common management,
- (C) centralized control of labor relations, and
- (D) common ownership or financial control, of the employer and the corporation. 29 U.S.C. § 623 (h)(3), as amended.

Congress also noted the need to limit the reach of the ADEA in other countries when it stated in § 4(f)(1) of the Act that:

It shall not be unlawful for an employer, employment agency or labor organization --

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section... where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;.... (emphasis added) 29 U.S.C. § 623 (f)(1), as amended; see also H.R. Rep. No. 98-1037, 98th Cong., 2d Sess. 28-9 (1984).

As a result of the above referenced changes to the ADEA, it is clear that the Act may have extraterritorial application in a number of circumstances. The changes are not retroactive to cases predating their enactment. Wolf v. J.I. Case Co., 617 F. Supp. 858, 39 EPD ¶ 35,845 (E.D. Wis. 1985).

As to alleged age discrimination occurring in the United States, absent a treaty or other foreign policy concern, the ADEA applies to a foreign as well as domestic employer. Since a foreign employer enjoys the benefits and protections of United States law when employing individuals in the United States, it is the Commission's position that such an employer is subject to the

Act. See Commission Decision No. 84-2, CCH Employment Practices Guide ¶ 6840.

B. Extraterritorial Application of the EPA

The EPA, as an amendment to the FLSA, is coextensive with the coverage of the FLSA. The FLSA provides that the Act "shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country." 29 U.S.C. § 213(f).

There are no cases specifically examining the extraterritorial application of the EPA,³ but there is case law interpreting § 213(f) with respect to the minimum wage provisions of the FLSA. In addition, case law addressing the extraterritorial application of the ADEA, prior to 1984, may be used in interpreting the EPA since the ADEA incorporates, by reference, § 213(f) of the FLSA and the EPA was not amended to extend extraterritorially as was the ADEA.

Both FLSA and ADEA cases will, therefore, be examined in this discussion. Although the FLSA, including the EPA, cannot be applied extraterritorially, some cases present a question of fact as to whether a person is employed within the territorial boundaries of the United States. Under some circumstances, the FLSA applies to United States citizens and aliens who perform the duties of their employment both in the United States and in a foreign country within the same workweek. Wirtz v. Healy, 227 F. Supp. 123 (N.D. Ill. 1964). In Healy, the court held that tour escorts who performed services both in the United States and in several foreign countries within the same workweek were entitled to the protection of the minimum wage provisions of the FLSA. The court concluded that "when a tour escort... spends part of a workweek with a tour in the United States, it makes no difference where the remainder of such work is performed; the tour escort is entitled to the benefits of the Act for the entire week." 227 F. Supp. at 129. The court did hold, however, that the tour escort was exempt from the Act's coverage during any workweek in which the employee performed his or her work "exclusively" in a foreign country.

The Healy decision, read alone, would imply that the FLSA, and thus the EPA, would cover any charging party who worked in the United States for any part of his or her employment. Subsequent cases have, however, limited or clarified Healy so that the employee will only be covered by the FLSA if the employee's "work station," or "employment base," is found to be the United

³ Cf. Bryant v. International School Services, 502 F. Supp. 472, 481-482, 24 EPD ¶ 31,440 (D.N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3d Cir. 1982) (court noted, without discussion, that the EPA does not apply outside the jurisdiction of the United States).

States.⁴ Hodgson v. Union de Permissionarios Circulo Rojo, S. de R.L., 331 F. Supp. 1119, 1121-22 (S.D. Tex. 1971); Wolf v. J. I. Case Co., 617 F. Supp. 858, 39 EPD ¶ 35,845 (D.C. Wisc. 1985). The Hodgson court held that Mexican bus drivers (employed by a Mexican bus company which was arguably a subsidiary of an American bus company) were not protected by the minimum wage provisions of the FLSA although they spent part of each workweek driving in the United States. The court determined that the drivers performed only "a minor part of their duties in the United States" and that the extraterritorial application of the FLSA would violate "the sovereignty of another nation by interfering with that nation's regulation of its internal economic affairs...." 331 F. Supp. at 1121. Similarly, in Wolf, a United States citizen was hired by a United States corporation to work in France. Despite the employee's numerous business trips to the United States, requiring a total of 30-34 days per year of performing services for the employer in the United States, the employee's "employment base" was foreign and the employment was exempt from ADEA coverage (prior to the 1984 Amendment extending coverage to U.S. citizens employed by American companies abroad).

Following the "employment base" rationale, the court in Thomas v. Brown and Root, Inc., 745 F.2d 279, 35 EPD ¶ 34,673 (4th Cir. 1984), determined that a United States citizen who worked in the United States for the first three years of his employment, in Scotland thereafter and in Rotterdam for the three years preceding his discharge, was not covered by the ADEA because all of the alleged discrimination, i.e., his discharge, had taken place overseas. The "work station" concept was more fully developed in Pfeiffer v. Wm. Wrigley, Jr. Co., 755 F.2d 554, 33 EPD ¶ 34,282 (7th Cir. 1985), wherein the court held that a United States citizen who was hired in the United States by a subsidiary of a United States corporation for a position in Germany was not covered by the pre-1984 ADEA.⁵ "Pfeiffer was

⁴ Although Healy did not specifically discuss the concept of "work station" or "employment base," it did examine the same factors which later courts used to define these terms. For example, the court stressed that the tour escorts began and ended their duties, with respect to all tours, in Chicago, Illinois. 227 F. Supp. at 126. Furthermore, upon completion of each tour, the tour escort prepared a final report which was forwarded to the company's office in Chicago. 227 F. Supp. at 123. Since the tours involved travel throughout the United States, Canada and Europe, it would have been difficult for the court to identify a specific country, other than the United States, which could be considered the "home base" of operations. The court's decision arguably implies that the tour escorts' "work station" was Chicago.

⁵ Again, the discussion of ADEA cases in this section pertains to the Act before the 1984 amendments and, thus, is believed useful in EPA analysis. Part I, Section A should be

employed overseas -- lived and worked there -- continuously throughout his entire period of employment by Wrigley, and this made his work station foreign and deprived him of the protections of the Act." 755 F.2d at 559. The court did note, however, that if the plaintiff had been transferred from the United States to a foreign country and fired because of his age immediately thereafter, the ADEA "may" have applied since the "work station" would arguably have been the United States, and the transfer, for the purpose of termination, may have constituted the discriminatory act. 755 F.2d at 559.

All other courts which have examined the extraterritorial application of the pre-1984 ADEA have determined that "[i]t is the employee's place of employment which governs the ADEA's applicability," irrespective of the parties' nationality. Helm v. South African Airways, 44 FEP 261, 267 (S.D.N.Y. 1987); Lopez v. Pan Am World Services, 813 F.2d 1118, 43 EPD ¶ 37,005 (11th Cir. 1987), rehearing en banc denied, 819 F.2d 1150; DeYoreo v. Bell Helicopter Textron, Inc., 785 F.2d 1282, 39 EPD ¶ 36,072 (5th Cir. 1986); Belanger v. Keydril Co., 596 F. Supp. 823, 36 EPD ¶ 35,137 (E.D. La. 1984), aff'd., 772 F.2d 902 (5th Cir. 1985); Ralis v. RFE/RL, Inc., 770 F.2d 1121, 37 EPD ¶ 35,490 (D.C. Cir. 1985); Zahourek v. Arthur Young and Co., 750 F.2d 827, 35 EPD ¶ 34,849 (10th Cir. 1984); Cleary v. U.S. Lines, Inc., 728 F.2d 607, 31 EPD ¶ 33,473 (3d Cir. 1984). In summary, Congress limited the reach of the EPA to the United States. Unlike the ADEA, the EPA's coverage has not been extended to include employment occurring outside the territorial confines of the United States.⁶

Note that where the EPA cannot be applied to a United States employer overseas, Title VII might provide an alternative basis for a claim of sex discrimination. See EEOC Policy Guidance Notice 915.033, "Application of Title VII to American Companies Overseas, Their Subsidiaries and to Foreign Companies," issued September 2, 1988.

II. Limits on the Application of the ADEA and EPA

A. Conflict of Laws Considerations

The Commission's ability to process a case against a particular employer may involve conflict of laws considerations which could limit the Commission's exercise of apparent authority

Footnote 5 continued...

consulted with respect to the current extraterritorial application of the ADEA.

⁶ Absent a treaty or other conflict of laws concern, the EPA applies to foreign employers where the alleged discrimination occurs in the U.S.

over the matter. Specifically, the extraterritorial application of the ADEA and the EPA may conflict with foreign or international laws or offer the respondent a choice as to which law will govern. If such an issue arises, the Guidance Division should be contacted and it will then coordinate with the Department of State.

B. Treaty Agreements Affecting the ADEA and EPA

1. Agreements and Treaties Between the United States and Other Nations - An agreement, e.g., a protocol agreement,⁷ multinational convention, or treaty negotiated between the United States and another sovereign nation, may confer special privileges or immunities on foreign firms or their operations in the United States and reciprocal rights on American firms operating in the other nation.

2. FCN Treaties - A Friendship, Commerce and Navigation (FCN) treaty⁸ is a commercial agreement between two countries. A FCN treaty grants jurisdiction to one country over a foreign employer. Under the terms of a FCN treaty, each signatory grants legal status to the other party's firm enabling each to conduct business in the other's country on a comparable basis with the country's domestic firms. In some cases, a FCN treaty may be the

⁷ See Commission Decision No. 86-6, CCH Employment Practices Guide ¶ 6866.

⁸ In Sumitomo Shoji America, Inc. v. Avigliano, 457 U.S. 176, 29 EPD § 32,782 (1982), a Title VII case, the U.S. Supreme Court was faced with a foreign-owned business incorporated and operated in the U.S. under a FCN treaty. The Court held that, under the terms of the FCN treaty and its history, the employer was a company of the U.S.; not Japan, and was subject to the requirements of Title VII. In reaching its decision, the Court in Sumitomo said that a FCN treaty must be construed broadly; where two constructions of the treaty are possible, the least restrictive interpretation is preferable; and the various subparts are to be given a reasonable construction with a view towards providing a fair operation of the treaty. Id. at 185. The treaty is to be given its plain meaning. However, if the language of the treaty is at all ambiguous, great weight must be accorded to the interpretations of the treaty terms by the State Department, the agency charged with negotiating and enforcing the treaty. Id. at 180-8; see also Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

The Commission adopted the Supreme Court's Sumitomo decision in Commission Decision No. 86-2, CCH Employment Practices Guide ¶ 6860. The Commission said that a foreign-owned company which is incorporated in the U.S. under a FCN treaty between the U.S. and Japan is subject to the requirements of Title VII. It is the Commission's position that the same principle would apply to ADEA and EPA cases.

basis of a respondent's challenge to the Commission's authority to process an ADEA or EPA case.⁹

III. Investigating and Processing ADEA and EPA Cases Involving the Foregoing Issues

In investigating cases raising the foregoing issues on the application of the ADEA or the EPA, the following factors should be considered:

- (1) The status of the employee filing the charge or complaint;
- (2) The status of the employer; and
- (3) The impact of a treaty or other conflict of laws concerns.

A. Status of the Employee

1. ADEA - Both citizens and aliens working in the United States are generally protected by the ADEA. Charges or complaints filed by U.S. citizens employed by American or American-controlled firms outside the United States are also covered by the ADEA. See the discussion of the ADEA, Part I, Section A. U.S. citizens working outside the United States for foreign firms (not controlled by an American firm) are not protected by the ADEA. Similarly, aliens working outside the United States for foreign or U.S. firms are not protected by the ADEA.

2. EPA - Both citizens and aliens working in the United States are generally protected by the EPA. The Commission lacks the authority to process an EPA case filed by an employee alleging wage discrimination if complainant's workplace is located entirely outside the United States. This is the case whether the employer is a United States or foreign firm. If a complainant's "work station" or "employment base" is found to be the United States, however, the Commission has the authority to process the case. Note also that Title VII may be an alternative basis for a sex discrimination claim overseas where the claim cannot be processed under the EPA. See Part I, Section B of the extraterritorial application of the EPA.

B. The Status of the Employer

1. ADEA - American employers are covered by the ADEA. The definition of such an employer includes foreign subsidiaries

⁹ In MacNamara v. Korean Air Lines, 863 F.2d 1135 (3d Cir. 1988), the Third Circuit held that while the applicable FCN Treaty allowed a foreign corporation to favor its own citizens when making personnel decisions, it did not shelter a foreign entity from allegations of discrimination on bases such as race, national origin, and age.

controlled by U.S. firms and other companies controlled by U.S. firms. See Part I, Section (A) for discussion of the ADEA.

(a) An employer operating outside the United States may be subject to the ADEA in the following situations:

- the employer is a U.S. firm;
- the employer, e.g., a foreign branch of a U.S. firm, is a joint employer with a U.S. firm;
- the employer is incorporated in a foreign country but is controlled by a United States employer.

Example - While living in France, CP, a United States citizen, submits an application to TYZ, a French corporation controlled by an American parent corporation, TELL-CON, Inc. TYZ is TELL-CON's agent for employment matters in the field of polymer science. TYZ has never recruited, interviewed, or hired anyone over the age of 40 for the position of polymer science engineer despite having received hundreds of applications from qualified applicants each year. TYZ automatically rejects all applications from such individuals pursuant to a policy of maintaining a young polymer science department. A foreign firm owned or controlled by an American employer must also follow the provisions of the ADEA with respect to employees or applicants who are U.S. citizens. Failure to do so could result in liability for both the controlling firm and its subsidiary.

The situation in the example can be characterized as either an integrated enterprise or as a joint employer relationship. These concepts are discussed in detail in Commission Policy Guidance 87-8 dated May 6, 1987. Title VII Commission Decisions discussing these approaches can also be found in Exhibit 603-A of § 603.

One court decision discussing the joint employer/integrated enterprise concept specifically in the context of a foreign subsidiary of an American parent is Lavrov v. NCR, 591 F. Supp. 102, 35 FEP Cases 988 (S.D. Ohio 1984). In Lavrov, a Title VII case, the court set out the same factors contained in 29 U.S.C. § 623(h)(3) of the ADEA as the considerations to be taken into account when deciding whether the activities of an American parent corporation and its subsidiary are separable: the degree of (1) interrelated operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. All four criteria need not be present in a particular case. When the activities of the two entities become inseparable from one

another, the joint employer/integrated enterprise theory may be applicable.

(b) The ADEA applies to an employer that is a foreign firm operating inside the United States unless a treaty is involved. See Part III Section C(2).

Example - Arthur, a 55 year old resident alien of the U.S., works for a foreign corporation operating in Ohio. Arthur files a charge with the Commission because his foreign employer has a firm policy requiring all persons over 56 to retire. Arthur should obtain relief since the ADEA generally covers the employment practices of a foreign employer inside the United States.

(c) The ADEA does not apply to an employer that is a foreign firm operating outside the United States unless the foreign firm is controlled by a United States firm. See Part I, Section A.

2. EPA - The EPA does not cover individuals employed overseas, unless the employee's "work station" or "employment base" is found to be the United States. See Part I, Section B, for discussion of the EPA.

Example - Ann is a U.S. citizen working overseas for an American firm in Sweden. Ann discovers that John, who possesses the same academic credentials and work experience as Ann and who was hired on the same day as Ann is making \$10,000 more per year than Ann. If Ann files an EPA claim against her American employer, the investigator should dismiss that claim. An American employer's overseas workplace is not covered under the EPA. (Ann may, however, have a valid Title VII claim. See Policy Guidance Notice 915.033, "Application of Title VII to American Companies Overseas, Their Subsidiaries and to Foreign Companies," issued September 2, 1988.)

C. Treaty or Other Conflict of Laws Concern

1. General - If the respondent raises a provision of a treaty as a defense to a charge where, e.g., an individual (citizen or alien) is working in the United States for a foreign firm, the respondent should be requested to produce a copy of the treaty. Below is an example of how a Friendship, Commerce and Navigation (FCN) treaty might involve an employer. Also see discussion of FCN treaties in Part II, Section B.

2. FCN Treaty and Firm Incorporated in the United States - Under the terms of one type of FCN treaty, each signatory grants legal status to the other party's firms so they can conduct business in the other party's country on a comparable basis with its own domestic firms.

Example - The United States is a party to a FCN treaty with the Republic of Mali, a West African country. XYZ corporation is a wholly owned, U.S. incorporated subsidiary of a Republic of Mali corporation operating in Ohio. The treaty provides that:

...Corporations constituted under applicable laws and regulations within the territories of either Party shall be deemed companies thereof....

In the example above, the treaty is identical to the one in Sumitomo Shoji America, Inc. v. Avigliano. See supra n. 8. It is the Commission's position that the ADEA would apply to the employer.¹⁰ Under the terms of the treaty, the nationality of a corporation is determined by its place of incorporation rather than the location of its controlling entity. However, for a definitive determination of coverage to be made, it must first be determined that this was indeed the intent of the parties in negotiating the treaty. This can be done by calling the Guidance Division which will in turn contact the State Department for information. (See next paragraph).

When a charge is filed against a firm of a nation other than Japan and a FCN treaty is raised as a defense, the Guidance Division, Office of Legal Counsel, should be contacted for instructions on how to proceed. The Guidance Division will contact the State Department for a legal opinion on the intent of the signatories to the treaty, i.e., the State Department's interpretation of the treaty's provisions on which country's laws will apply. If the State Department finds that the treaty's intent is for United States law to apply based on place of incorporation or for some other reason, then the Commission will rely on that legal opinion and instruct the field office to process the case. If the State Department advises the Commission that coverage does not exist under the treaty, then the Commission will generally defer to this advice. However, if there is reason to believe that the State Department objects to the Commission's processing of the case on other than strictly legal grounds, the Guidance Division will obtain instructions from the Commission on how to proceed with the case. Applying the same

¹⁰ When assessing a treaty for Sumitomo applicability, careful inspection of the treaty in question is required to insure that it is indeed identical to the one analyzed in Sumitomo. See also n. 9.

rationale as in Sumitomo, Japanese entities that are incorporated or registered in the United States are subject to the ADEA and the EPA to the same extent as American companies; there is no need to contact Guidance.

3-3-89

Date

Approved:



Clarence Thomas
Chairman