SUPREME COURT OF THE UNITED STATES

No. 92–938

MAURICE RIVERS AND ROBERT C. DAVISON, PETITIONERS *v.* ROADWAY EXPRESS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[April 26, 1994]

JUSTICE BLACKMUN, dissenting.

For the reasons stated in my dissent in *Landgraf* v. *USI Film Products*, *ante*, p. ___, I also dissent in this case. Here, just as in *Landgraf*, the most natural reading of the Civil Rights Act of 1991, 105 Stat. 1071, and this Court's precedents is that §101 applies to cases pending on appeal on the statute's enactment date, at least where application of the new provision would not disturb the parties' vested rights or settled expectations. This is such a case.

In 1986, when respondent Roadway Express, Inc., discharged petitioners Maurice Rivers and Robert C. Davison from their jobs as garage mechanics, 42 U. S. C. §1981, which gives all persons the same right to "make and enforce contracts,"[1] was widely understood to apply to the discriminatory enforcement and termination of employment contracts. See *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 459–460 (1975) ("Although this Court has not specifically so held, it is well settled among the Federal Courts of Appeals—and we now join them—that §1981 affords a federal remedy against discrimination in private employment on the basis of race"). This understanding comports with §101 of the Civil Rights Act of 1991, 105 Stat. 1072,

[1]Until the 1991 amendment, §1981 stated: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ."

providing that "the term `make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." The majority seemingly accepts petitioners' argument that if this Court were to apply §101 to their case, "respondent has no persuasive claim to unfair surprise, because, at the time the allegedly discriminatory discharge occurred, the Sixth Circuit precedent held that §1981 could support a claim for discriminatory contract termination." *Ante*, at 10, n. 9.

Nonetheless, applying a new, supercharged version of our traditional presumption against retroactive legislation, the Court concludes that petitioners, whose claim was pending when this Court announced *Patterson* v. *McLean Credit Union*, 491 U. S. 164 (1989), are bound by that decision, which limited §1981 to contract formation. *Patterson*'s tenure was —or surely should have been—brief, as §101 was intended to overrule *Patterson* and to deny it further effect. The Court's holding today, however, prolongs the life of that congressionally repudiated decision. See *Estate of Reynolds* v. *Martin*, 985 F. 2d 470, 475–476 (CA9 1993) (denying application of §101 to cases pending at its enactment would allow repudiated decisions, including *Patterson*, to "live on in the federal courts for . . . years").

Although the Court's opinions in this case and in *Landgraf* do bring needed clarity to our retroactivity jurisprudence, they do so only at the expense of stalling the intended application of remedial and restorative legislation. In its effort to reconcile the "apparent tension," *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 loses sight of the core purpose of its retroactivity doctrine, namely, to respect and effectuate new laws to the extent consistent with congressional intent and with the vested rights and settled expectations of the parties. In *Bradley*, a unanimous Court applied an intervening statute allowing reasonable attorney's fees for school-desegregation plaintiffs to a case pending on appeal on the statute's effective date. The Court observed that the statute merely created an "additional basis or source for the Board's potential obligation to pay attorneys' fees." 416 U. S., at 721.[2]

[2]Here, of course, §101 creates a basis or source—in

Just as the school board in *Bradley* was on notice that it could be liable for attorney's fees, the employer in this case was on notice—from the prevailing interpretation of §1981–that it could be liable for damages for a racially discriminatory contract termination. Indeed, in this case, the employer's original liability stemmed from the very provision that petitioners now seek to enforce.

In *Bowen*, by contrast, the Court unanimously interpreted authorizing statutes not to permit the Secretary of Health and Human Services retroactively to change the rules for calculating hospitals' reimbursements for past services provided under Medicare. Although *Bowen* properly turned on the textual analysis of the applicable statutes, neither citing *Bradley* nor resorting to presumptions on retroactivity, its broad dicta disfavored the retroactive application of congressional enactments and administrative rules. See 488 U. S., at 208. *Bowen* is consistent, however, with the Court's analysis in *Bennett* v. *New Jersey*, 470 U. S. 632 (1985), appraising the "[p]ractical considerations," *id.*, at 640, that counsel against retroactive changes in federal grant programs and noting that such changes would deprive recipients of "fixed, predictable standards." *Ibid.* *Bowen* also accords with *Bradley*'s concern for preventing the injustice that would result from the disturbance of the parties' reasonable reliance. Thus, properly understood, *Bradley*

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addition to Title VII—for the prohibition on racial discrimination in the enforcement of employment contracts. Title VII makes it illegal for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e-2(a)(1).

establishes a presumption that new laws apply to pending cases in the absence of manifest injustice, and *Bowen* and *Bennett* stand for the corresponding presumption against applying new laws when doing so would cause the very injustice *Bradley* is designed to avoid.[3]

Applying these principles here, "[w]hen a law purports to restore the status quo in existence prior to an intervening Supreme Court decision, the application of that law to conduct occurring prior to the decision would obviously not frustrate the expectations of the parties concerning the legal consequences of their actions at that time." *Gersman* v. *Group Health Ass'n, Inc.*, 975 F. 2d 886, 907 (CADC 1992) (dissenting opinion). While §101 undoubtedly expands the scope of §1981 to prohibit conduct that was not illegal under *Patterson*,[4] in the present context §101 provides a remedy for conduct that was recognized as illegal when it occurred, both under §1981 and under Title VII. Thus, as far as respondent Roadway is concerned, the law in effect when it dismissed petitioners' claim differs little from the law as amended by the Civil Rights Act of 1991, and application of §101 in this case would neither

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[3]An inquiry into the vested rights and settled expectations of the parties is fairer and more sensitive than a mechanical reliance on a substance/procedure dichotomy. See *Gersman* v. *Group Health Ass'n, Inc.*, 975 F. 2d 886, 906 (CADC 1992) (Wald, J., dissenting); *Mozee* v. *American Commercial Marine Service Co.*, 963 F. 2d 929, 940–941 (CA7 1992) (Cudahy, J., dissenting from denial of rehearing).

[4]Not all conduct proscribed by §101 was also unlawful under Title VII or other civil rights laws. For example, §101, unlike Title VII, see 42 U. S. C. §2000e(b), applies to small employers, and even outside the employment context, see, *e.g.*, *Runyon* v. *McCrary*, 427 U. S. 160 (1976).

alter the expectations of the parties nor disturb previously vested rights. Because I believe that the most faithful reading of our precedents makes this the appropriate inquiry, I would reverse the judgment of the Court of Appeals and remand the case for further proceedings.