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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF PLACER

MEADOW VISTA PROTECTION,

Petitioner and Plaintiff,

v.

CHEVREAU AGGREGATES, INC.;
COUNTY OF PLACER; COUNTY OF
PLACER PLANNING DEPARTMENT;
and DOES 1 through 50, inclusive,

Respondents and Defendants.

Case No.: SCV 19614

Complaint Filed: 7/12/06

PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR SUMMARY
ADJUDICATION OF THIRD CAUSE OF
ACTION FOR DECLARATORY RELIEF

Date: 5/8/07

Time: 8:30 a.m.

Dept.: 4

Trial Date: 6/11/07

The Hon. Charles D. Wachob

1 TO DEFENDANT AND ITS ATTORNEY OF RECORD:

2 PLEASE TAKE NOTICE that on May 8, 2007 at 8:30 a.m. in Department 4 of the above
3 Court, plaintiff Meadow Vista Protection (MVP) will move this Court for summary adjudication
4 of the third cause of action for declaratory relief.¹

5 The motion is made on the grounds that there are no issues of material fact respecting the
6 third cause of action and that plaintiff is entitled to a declaratory judgment in its favor as a matter
7 of law. The governing County Code provides that a conditional use permit lapses if certain
8 criteria for its use are not met. Defendant's permit LDA-786 has not been used in accordance
9 with the provisions of the County Code. Therefore, the permit to produce asphalt at defendant's
10 quarry site has lapsed. Plaintiff is entitled to a declaratory judgment that the use permit has
11 lapsed and that the defendant must obtain a new permit prior to producing asphalt on its property.

12 Plaintiff's motion for summary adjudication is brought pursuant to Code of Civil
13 Procedure section 437c and is based on the separate statement of undisputed material facts, the
14 declarations of Patrick M. Soluri, Fred Blomquist and Angela C. Thompson, the memorandum of
15 points and authorities, plaintiff's documentary evidence submitted herewith, and other
16 documents previously filed in this action.

17 Pursuant to Local Rule 20.2.3, on the afternoon of the court day before each regularly
18 scheduled law and motion calendar, the court will cause to be recorded a tentative ruling on each
19 matter on the next day's calendar. The tentative rulings will be available after 12:00 noon by
20 telephoning a voice-mail message at (530) 886-5288. The tentative ruling shall become the final
21 ruling of the court unless a party advises all other parties and the court of a request for oral

22 ///

23 ///

24 _____
25 ¹ At the time plaintiff scheduled the hearing on its motion for summary adjudication, plaintiff expected defendant to
26 make its own motion for summary adjudication on the same cause of action (the Third). Therefore, plaintiff
27 represented to this Court that the motions should both be heard on May 8, 2007 because they were, in effect, cross
28 motions for summary adjudication. However, based on a meet and confer letter received from defendant's counsel
on February 20, 2007, plaintiff is now advised that defendant's motion for summary adjudication will be limited to
the second cause of action for declaratory relief.

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1 argument. Such request shall be made by calling (530) 889-6529 and leaving a recorded
2 message with the court no later than 4:00 p.m. on the court day preceding the hearing.

3 DATED: February 22, 2007.

4 Respectfully submitted,

5 RONALD A. ZUMBRUN
6 TIMOTHY V. KASSOUNI
7 ANGELA C. THOMPSON
8 THE ZUMBRUN LAW FIRM

9 By Angela C. Thompson
10 ANGELA C. THOMPSON
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MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
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ADJUDICATION OF THIRD CAUSE OF
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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF FACTS	1
ARGUMENT	1
I. THE PLACER COUNTY ZONING ORDINANCE CONTAINS A MANDATORY LAPSE PROVISION	5
II. CHEVREAUX'S DISCOVERY RESPONSES ADMIT A LAPSE FROM 1976 THROUGH 2001 AND A LAPSE FROM 2001/2002 THROUGH 2006	5
III. CHEVREAUX'S CUP IS PROPERLY SUBJECT TO THE LAPSE ORDINANCE	7
A. The Asphalt Plant Is An Appurtenant Structure Within The Meaning Of The Lapse Ordinance	8
B. The Lapse Ordinance Is A Valid Exercise Of The Police Power	8
C. The Lapse Ordinance Applies Prospectively To Invalidate Chevreaux's CUP	9
1. Application Of The Lapse Ordinance To Chevreaux's CUP Is Not Retroactive	10
IV. INTENT TO ABANDON IS IRRELEVANT TO THE APPLICATION OF THE LAPSE STATUTE	11
V. VESTED RIGHTS HAVE NO EFFECT ON THE APPLICATION OF THE LAPSE STATUTE	13
CONCLUSION	15

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

Cases

-ii-

Statutes

Code of Civil Procedure § 437c.....	4
Placer County Code § 17.02.010	9, 15
Placer County Code § 17.04.020(C).....	3, 5
Placer County Code § 17.04.030	8
Placer County Code § 17.58.140(E).....	5
Placer County Code § 17.58.160 B.....	7, 13
Placer County Code § 17.58.160 B.2.....	2, 15
Placer County Code § 17.58.160 B.2.b.....	8
Placer County Code § 17.58.160 B.2.b.– B.3	5
Placer County Code § 17.58.160 B.3.....	7

1 Plaintiff Meadow Vista Protection (MVP) hereby moves this Court for summary
2 adjudication of the third cause of action for declaratory relief in its Petition for Writ of Mandate
3 and Complaint for Declaratory and Injunctive Relief, Public Nuisance, Private Nuisance and
4 Trespass. The third cause of action seeks a judgment that defendant Chevreux Aggregates, Inc.
5 (Chevreux) cannot continue to maintain and operate an asphalt plant at its quarry site in
6 Meadow Vista, California, without obtaining a new use permit. As the undisputed facts show,
7 Chevreux's use permit authorizing the asphalt plant has long since lapsed. Therefore, under the
8 provisions of the Placer County Zoning Code, the production of asphalt may not commence at
9 the subject site unless Chevreux applies for and obtains a new use permit.

10 INTRODUCTION

11 In 1972, defendant Chevreux applied for and obtained LDA-786, the conditional use
12 permit (CUP) upon which it purports to base its current entitlement to produce asphalt on its
13 property. However, undisputed facts show that this permit has undergone extensive periods of
14 nonuse when no asphalt plant was even present on the property. According to the Placer County
15 Zoning Code, the periods of nonuse mandate a determination of lapse of the CUP.

16 STATEMENT OF FACTS

17 Plaintiff MVP is a California nonprofit corporation. (Undisputed Material Fact (UMF)
18 No. 1.) MVP is a local grass roots organization comprised of residents of the unincorporated
19 Placer County community of Meadow Vista, California, and the surrounding area, as well as
20 nonresident supporters. (UMF No. 2.) MVP was formed in 2005 for the purpose of protecting
21 the interests of its members from activities proposed or conducted in the area that would pose an
22 adverse risk to the health, safety and/or welfare of the greater Meadow Vista area. (UMF No. 3.)

23 Defendant Chevreux Aggregates, Inc. is a California for-profit corporation. (UMF
24 No. 4.) Chevreux commenced an in-stream sand and gravel dredging and processing operation
25 in the Bear River near Lake Combie in approximately 1946 or 1947. (UMF No. 5.) In 1965, an
26 Edward Pruss applied for and obtained conditional use permit (CUP) LD-1030 to commence a
27 "shot rock quarry" operation on APNs 72-020-03 and 72-030-01 in Placer County near Meadow
28

1 Vista, California. (UMF No. 6.) Chevreux acquired Pruss' quarry operation in 1970. (UMF
2 No. 7.) Between 1947 and 1971, Chevreux operated an asphalt plant at the Meadow Vista site
3 on an intermittent basis. Based on these nonconforming operations, Chevreux believed it did
4 not need a CUP to produce asphalt. (UMF No. 8.) Nevertheless, in 1971, Placer County
5 Planning Department determined that a CUP was necessary for the asphalt operation. Chevreux
6 then sought and obtained CUP LDA-691 to "reinstall" an asphalt batch plant at the quarry.
7 (UMF No. 9.)

8 In 1972, Chevreux was required to obtain a different CUP, LDA-786, to authorize the
9 relocation of the asphalt plant to a neighboring parcel, APN 72-030-01. This new location was
10 approximately 600 feet northeast of the LDA-691 location. (UMF No. 10.) LDA-786 identified
11 two parcels: APNs 72-030-01 and 72-020-03. APN 72-030-01 has subsequently been
12 renumbered as APN 72-030-61, and APN 72-020-03 has subsequently been divided and
13 renumbered as APNs 72-020-13 and 72-020-14. (UMF No. 11.) LDA-786 was subject to
14 12 conditions of approval. Its continued validity depends in part upon Chevreux's observance
15 of these conditions. (UMF No. 12.)

16 The current Placer County Code § 17.58.160 B.2. provides: "Once a project has been
17 implemented . . . the permit that authorized the use shall remain valid . . . unless one of the
18 following occurs: (b) . . . the use (if no appurtenant structure is required for its operation) is
19 discontinued for more than twelve consecutive months, or (if an appurtenant structure is required
20 for the conditionally-permitted use) the structure is removed from the site for more than twelve
21 consecutive months." (UMF No. 13, Exhibit 35¹.)

22 Placer County Code § 17.58.160 B.2. further provides: "If one of the foregoing events
23 occurs, the permit shall be deemed to have lapsed. No use of land, building or structure for
24 which a permit has lapsed shall be reactivated, re-established or used unless a new permit is first
25 obtained as provided by this subchapter." (UMF No. 14, Exhibit 35.) According to Placer
26

27 ¹ All exhibit references are to Plaintiff's Documentary Evidence in Support of Motion for Summary Adjudication of
28 Third Cause of Action filed concurrently herewith.

1 County Code § 17.04.020(C): "The following general rules of construction shall apply to the
2 interpretation and application of the terms and phrases used in this chapter: . . . (3) 'Shall' is
3 mandatory; 'may' is discretionary." (UMF No. 15, Exhibit 32.)

4 Fresno Paving, Inc. operated an asphalt plant at Chevreaux's LDA-786 site from about
5 1972 until about 1976. (UMF No. 16.) No further asphalt operations were conducted on the site
6 until 2001. (UMF No. 17.) Kiewit Pacific Company received a permit from Placer County Air
7 Pollution Control District (APCD) to operate an asphalt plant on Chevreaux's property from
8 May 2001 through May 2002. (UMF No. 18.) Kiewit Pacific's asphalt plant was completely
9 shutdown in September 2001. The plant was removed from Chevreaux's site in late 2001.
10 (UMF No. 19.) An aerial photograph taken in 1998 reveals that no asphalt plant was present on
11 the site on that date. The area where Kiewit eventually operated is not even cleared of trees in
12 this photograph. (UMF No. 20.) An aerial photograph taken on July 1, 1999 reveals that no
13 asphalt plant was present on the site on that date. (UMF No. 21.) An aerial photograph taken on
14 November 1, 2002 reveals that no asphalt plant was present on the site on that date. The area
15 where Kiewit operated has been cleared of trees and graded in this photograph. (UMF No. 22.)
16 An aerial photograph taken on April 1, 2004 reveals that no asphalt plant was present on the site
17 on that date. (UMF No. 23.)

18 In early 2005, Teichert Aggregates, Inc. (Teichert) located an asphalt plant at
19 Chevreaux's quarry site, but the plant was never fully assembled and never operated due to
20 County concerns regarding the validity of LDA-786. Teichert withdrew its plans to site its plant
21 in Meadow Vista in March 2005. (UMF No. 24.) An aerial photograph taken on August 1, 2005
22 reveals the presence of an asphalt plant (presumably Teichert's) on the site on that date. (UMF
23 No. 25.) An aerial photograph taken on May 1, 2006 reveals that no asphalt plant was present on
24 the site on that date. (UMF No. 26.)

25 On February 25, 2005, in a memorandum to then Planning Director Fred Yeager, county
26 counsel noted that the County lapse statute might apply to Chevreaux's asphalt permit, and
27
28

1 recommended that more information be sought from Chevreaux regarding its activities. (UMF
2 No. 27.)

3 On March 9, 2005, counsel for Chevreaux responded with a lengthy memorandum, but
4 was not able to provide conclusive evidence that the asphalt plant had operated between 1976
5 through 2001 or after 2002. (UMF No. 28.) Accordingly, on March 22, 2005, in a reply to
6 counsel for Chevreaux, county counsel stated:

7 [T]he issue of lapse [of LDA-786] has never been fully addressed. The fact that
8 the County determined, in 1987, that the permit was valid at that time does not
9 conclusively establish its status almost 20 years later, especially in light of the
10 amendment to the County ordinances in the interim to include new standards
11 concerning lapse. The County is not estopped from looking into the use of the
12 site over time and reviewing that issue should the validity of the permit be
13 otherwise called into question.

14 (UMF No. 29, Exhibit 29.)

15 In a ruling on the demurrer filed by Chevreaux in this matter, this Court held that "[w]ith
16 respect to the ... third cause[] of action for declaratory relief, an actual, justiciable controversy
17 has been alleged as between the parties." (UMF No. 30.)

18 ARGUMENT

19 Code of Civil Procedure section 437c permits a party to move for summary adjudication
20 of an issue where there are no material facts in dispute and the moving party shows that it is
21 entitled to judgment as a matter of law.

22 This motion for summary adjudication is limited to a very narrow issue; namely, whether
23 the Placer County Zoning Ordinance's lapse provision applies to LDA-786, issued in 1972 to
24 authorize the production of asphalt at Chevreaux's quarry site in Meadow Vista. If so, MVP
25 seeks a declaratory judgment that the permit has lapsed due to nonuse, and that Chevreaux must
26 obtain a new permit, subject to the conditions and limitations of the current Placer County Code,
27 in order to produce asphalt on its property in the future.
28

I.

THE PLACER COUNTY ZONING ORDINANCE
CONTAINS A MANDATORY LAPSE PROVISION

The current Placer County Code was adopted in 1995. Section 17.58.140(E) of the Code requires that, upon issuance of a conditional use permit, “the applicant shall diligently proceed to carry out the conditions of approval and implement the permit by establishing the approved use within [24 months].” (Exhibit 34.) However, after the permittee has implemented the CUP and established the approved use(s), “if an appurtenant structure is required for the conditionally-permitted use [and] the structure is removed from the site for more than twelve consecutive months ... the permit *shall* be deemed to have lapsed.” (Placer County Code § 17.58.160 B.2.b.– B.3., emphasis added, Exhibit 35.)

The Code’s rules of construction indicate that this determination of lapse is mandatory: “The following general rules of construction shall apply to the interpretation and application of the terms and phrases used in this chapter: ... ‘*Shall*’ is mandatory; ‘may’ is discretionary. (Placer County Code § 17.04.020(C), emphasis added, Exhibit 32.)

Thus, if the factual elements of the lapse ordinance are present; *i.e.*, if a structure appurtenant to a conditionally permitted use is removed from the subject property for more than 12 consecutive months, the permit lapses. Under the express language of the Code, there is no flexibility that would allow a different result.

II.

CHEVREAU’S DISCOVERY RESPONSES ADMIT A LAPSE FROM
1976 THROUGH 2001 AND A LAPSE FROM 2001/2002 THROUGH 2006

Since at least 2005, the continued validity of LDA-786 has been the subject of suspicion and inquiry, not only by Meadow Vista and local residents, but also by Placer County Planning staff and Placer County Counsel.

1 It is undisputed that there have been several periods of time greater than one year where
2 no asphalt was produced at the Chevreaux site and where no asphalt plant was present at the site.
3 The longest of these periods was 25 years, from 1976 through 2001. (UMF Nos. 16, 17.)
4 Chevreaux has admitted in discovery responses that the most recent asphalt production project
5 ended in 2002.² (UMF No. 18.) And though Teichert temporarily sited an asphalt plant at
6 Chevreaux's quarry in early 2005, the plant was never fully assembled and never operated.
7 Teichert withdrew its plans to site the plant at Chevreaux's quarry in March of 2005. (UMF No.
8 24.) Thus, no asphalt plant was fully present at Chevreaux's quarry site from 2001 until its
9 current plant was placed there, a lapse of nearly five years.

10 Though Chevreaux and its counsel have been given several opportunities to explain or
11 justify these lapses in asphalt production, they are consistently unable to do so. In February of
12 2005, Placer County Counsel asked Chevreaux's counsel to provide a chronology of
13 Chevreaux's historical asphalt production. She did so, in a memorandum dated March 9, 2005.
14 (UMF No. 28.) However, much of the so-called "evidence" of production was anecdotal at best,
15 and County Counsel was not convinced. In a reply memorandum dated March 22, 2005, County
16 Counsel stated:

17 [T]he issue of lapse has never been fully addressed. The fact that the County
18 determined, in 1987, that the permit was valid at that time does not conclusively
19 establish its status almost 20 years later, *especially in light of the amendment to*
20 *the County ordinances in the interim to include new standards concerning*
21 *lapse*. The County is not estopped from looking into the use of the site over time
22 and reviewing that issue should the validity of the permit be otherwise called into
23 question.

24 (UMF No. 29, emphasis added.)

25 Similarly, in its responses to MVP's discovery requests, Chevreaux is able to identify
26 *only two* periods of operation between 1972 and the present. (UMF Nos. 16-18.) These two time
27 periods account for only *six* of the intervening 35 years since the permit was issued.

28 ² Undisputed facts show that this project actually ceased production and was removed from the site in 2001, but its
APCD Temporary Permit to Operate was effective through May of 2002. MVP assumes this is the basis for that
date in Chevreaux's discovery responses.

1 A. The Asphalt Plant Is An Appurtenant Structure
2 Within The Meaning Of The Lapse Ordinance

3 A CUP will lapse if “an appurtenant structure ... required for the conditionally-permitted
4 use ... is removed from the site for more than twelve consecutive months.” (Placer County Code
5 § 17.58.160 B.2.b.) Placer County Code § 17.04.030 defines “structure” to mean “any artifact
6 constructed or erected, the use of which requires attachment to the ground, or over one hundred
7 twenty (120) square feet in area or over six feet in height.” (Exhibit 33.)

8 Chevreux’s mining operations facilitate the use of an asphalt plant onsite. The asphalt
9 plant is portable and may be removed from the site. When it is present and operating onsite, it is
10 affixed to a concrete foundation. The asphalt plant is necessary to the production of asphalt
11 permitted in Chevreux’s CUP. In other words, the asphalt plant is required for Chevreux to
12 perform the conditionally permitted use. (Placer County Code § 17.58.160 B.2.b.) It is thus an
13 “appurtenant structure” within the meaning of the County Code.

14 Because the asphalt plant—i.e., the “appurtenant structure”—has been removed from the
15 site far in excess of the twelve consecutive month period, for two separate time periods, the CUP
16 issued to Chevreux permitting the use has lapsed, according to the express language of the
17 statute.

18 B. The Lapse Ordinance Is A Valid Exercise Of The Police Power

19 “[I]t is the purpose of zoning to crystallize present uses and conditions and eliminate
20 nonconforming uses as rapidly as is consistent with proper safeguards for those affected.”
21 (*County of Orange v. Goldring* (1953) 121 Cal.App.2d 442, 446.) Consistent with this purpose
22 is the rule that “landowners have no vested right in existing or anticipated zoning regulations.”
23 (*Tahoe Keys Property Owners’ Association v. State Water Resources Control Board* (1994)
24 23 Cal.App.4th 1459, 1484 (*Tahoe Keys*).)

25 As such, it is well settled in this state that a municipality acts well within its police
26 powers when it enacts zoning regulations aimed at phasing out nonconforming uses. (*Gage*,
27 *supra*, 127 Cal.App.2d at p. 459; see *Davidson v. County of San Diego* (1996) 49 Cal.App.4th
28

1 639, 648 [finding that “[i]t is well settled in California that public entities may impair vested
2 rights where necessary to protect the health and safety of the public”]; Placer County Code
3 § 17.02.010 [declaring the purpose of the zoning regulations to support a growing population and
4 manage land use to accommodate the county’s future growth and further “to protect and promote
5 the public health, safety, peace, comfort, convenience and general welfare”].) It is equally settled
6 that abrogation of nonconforming uses must comply with certain constitutional safeguards.
7 (*Goldring, supra*, 121 Cal.App.2d at p. 446.)

8 However, inherent in the constitutional protections afforded nonconforming uses is the
9 requirement that there be *some continuing use* in which a landowner can claim rights. (*HFH,*
10 *Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 516 [noting that “[a] purchaser of land merely
11 acquires a right to continue a *use* instituted before the enactment of a more restrictive zoning”],
12 emphasis in original.)

13 In this case, Chevreaux has simply failed to *use* its property for the operations permitted
14 under its 1972 CUP. Because Chevreaux has failed to use the site for the conditionally permitted
15 use, and has removed the necessary asphalt plant from the site for exceedingly long periods of
16 time, Chevreaux may not avoid operation of the Lapse Ordinance as validly enacted by the
17 County. (See *Gage, supra*, 127 Cal.App.2d at p.459.)

18 C. The Lapse Ordinance Applies Prospectively to Invalidate Chevreaux’s CUP

19 “As a general rule, land use regulation must be prospective in nature because the state is
20 constitutionally limited in the extent to which it may, through land use regulation, affect prior
21 existing uses.” (*Tahoe Keys, supra*, 23 Cal.App.4th at pp. 1483-1484.)

22 The asphalt plant required for Chevreaux’s permitted use of the site has been removed
23 from the site in excess of twelve consecutive months, on two separate occasions, since the
24 enactment of the county’s Lapse Ordinance in 1995. Thus, the Ordinance properly applies to
25 those relevant time periods, i.e., from 1995 through 2001 and from 2001 through 2005 or 2006.
26 The date on which the CUP issued is irrelevant to this determination.

1. Application Of The Lapse Ordinance To Chevreaux's CUP Is Not Retroactive

A statute is said to operate retroactively when it "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..." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 269; *Fernandez-Vargas v. Gonzales* (2006) 126 S.Ct. 2422, 2428.) Thus, "[s]tatutes are disfavored as retroactive when their application '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*.'" (*Id.* at pp. 2427-2428, quoting *Landgraf, supra*, 511 U.S. at p. 280, emphases added.)

Here, the Lapse Ordinance properly applies to Chevreaux's discontinued use and removal of the asphalt plant for periods *after* 1995, when the Ordinance was enacted. The Lapse Ordinance concerns itself only with Chevreaux's actions, or failure to act, from that time forward. Therefore, Chevreaux is not being punished or subjected to new liabilities on the basis of pre-1995 activities, but rather, it is Chevreaux's continuing conduct that is within the scope of the Lapse Ordinance. As such, retroactivity is not a concern.

In *Fernandez-Vargas, supra*, 126 S.Ct. 2422, an illegal alien challenged his deportation under immigration laws enacted after he had entered the country. Under prior laws, an alien in Fernandez-Vargas' position would be entitled to apply for relief from deportation, whereas under the newly enacted laws no such relief was obtainable. Fernandez-Vargas asserted that application of the new laws to him was retroactive because it imposed new hardships not previously imposed on persons similarly situated. (*Id.* at p. 2427.) The Court disagreed.

The Court in *Fernandez-Vargas* engaged in a lengthy discussion regarding the disfavored status of retroactive laws. (*Fernandez-Vargas, supra*, 126 S.Ct. at pp. 2427-2428.) However, the Court concluded that application of the new laws to Fernandez-Vargas was not retroactive because the new laws did not address *past conduct*, but rather Fernandez-Vargas' *continued conduct* in remaining in the country and thereby committing a continuing violation. (*Id.* at pp. 2431-2432.)

1 Similarly in the present case, we are not concerned with Chevreaux's conduct before the
2 enactment of the Lapse Ordinance in 1995, but rather we must focus upon Chevreaux's decision
3 to continue such conduct after 1995. The continuous absence of the asphalt plant from the site
4 after 1995 is thus within the scope of the Lapse Ordinance, and retroactivity is not a concern to
5 such application. In other words, the Ordinance is not reaching back to impose liabilities on
6 Chevreaux's pre-1995 conduct. It is Chevreaux's continuing failure to reinstate the asphalt plant
7 after 1995 that is subject to the Lapse Ordinance.

8 In *Fernandez-Vargas*, the Court recognized that, not only was it the alien's current and
9 continuing conduct that was subject to the new laws, but that the alien also had ample warning to
10 avoid the new laws by applying for relief before the new laws took effect. (*Fernandez-Vargas*,
11 *supra*, 126 S.Ct. at p. 2432.) In the present case, Chevreaux, too, had ample time to correct its
12 situation by resuming operations on the site by reintroducing the asphalt plant. However,
13 Chevreaux's failure to reinstate the asphalt plant within 12 months from the time the Lapse
14 Ordinance took effect properly subjects Chevreaux to operation of the Ordinance.

15 Accordingly, Chevreaux's post-1995 failure to reinstate the asphalt plant, and the
16 continuous absence of the plant after that time, caused Chevreaux's CUP to lapse pursuant to the
17 Ordinance.

18 IV.

19 INTENT TO ABANDON IS IRRELEVANT
20 TO THE APPLICATION OF THE LAPSE STATUTE

21 The legal principle of abandonment requires a subjective intent on the part of the property
22 owner to abandon his interest: "[A]bandonment hinges upon the intent of the owner to forego all
23 future conforming uses of his property, and the trier of fact must find the conduct demonstrating
24 the intent 'so decisive and conclusive as to indicate a clear intent to abandon' ... ¶ [T]he
25 trier of fact, before decreeing an abandonment, must find that the owner's conduct clearly and
26 convincingly demonstrates the necessary intent." (*Gerhard v. Stephens* (1968) 68 Cal.2d 864,
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1 889-890, quoting *Smith v. Worn* (1892) 93 Cal. 206, 213.) However, in *Gerhard* and other cases
2 applying its rule, the property interest at issue was a fee estate.

3 The case of *Hansen Brothers Enterprises, Inc. v. Board of Supervisors of Nevada County*
4 (1996) 12 Cal.4th 533 also discussed abandonment, but is distinguishable from *Gerhard* in that it
5 involved a nonconforming use. A nonconforming use is “a lawful use existing on the effective
6 date of the zoning restriction and continuing since that time in nonconformance to the
7 ordinance.” (*City of Los Angeles v. Gage, supra*, 127 Cal.App.2d at p. 453.) The *Hansen* court
8 discussed the relation of discontinuance of a use to abandonment, but ultimately did not make a
9 ruling on that basis because the court concluded there had been no discontinuance of the
10 nonconforming use.

11 Nonetheless, even if *Hansen* is construed to require subjective intent to abandon before
12 discontinuance of activity deprives a landowner of a particular use, *Hansen’s* express language
13 limits its holding to nonconforming uses: “[A]bandonment of a nonconforming use ordinarily
14 depends upon a concurrence of two factors: (1) An intention to abandon; and (2) an overt act, or
15 failure to act, which carries the implication the owner does not claim or retain any interest in the
16 right to the nonconforming use.” (*Hansen Brothers, supra*, 12 Cal. 4th at p. 569.) There is a
17 stronger public policy to allow prior lawful uses to continue, thus it is understandable that the
18 courts have added an intent requirement to abandon a nonconforming use.

19 In this case, we are not dealing with a fee estate or a nonconforming use. Chevreux’s
20 asphalt operation is based on a conditional use permit to conduct an asphalt operation on its
21 property. Prior to obtaining its permit, Chevreux attempted to convince the County that no such
22 permit was needed, based on a nonconforming use theory. (UMF No. 8.) Nevertheless, the
23 County required Chevreux to obtain a conditional use permit. (UMF No. 9.) This permit is
24 thus subject to the lapse statute, and Chevreux’s subjective intent regarding abandonment of the
25 asphalt operation is irrelevant.

26 Moreover, the very terms of the Placer County lapse statute indicate that its application is
27 not affected by the subjective intent of the permit holder. When Chevreux discontinued the
28

1 specific use for 12 consecutive months it forfeited the permission it had previously received to
2 conduct its asphalt operations. Placer County Code § 17.58.160 B. specifically provides: “[i]t
3 shall be the responsibility of the applicant *alone* to monitor the time limits and make diligent
4 progress on the approved project, so as to avoid permit expiration.” (Exhibit 35, emphasis
5 added.) Because Chevreaux's authorization to conduct its activity is conditioned upon its due
6 diligence and its use of the specific activity, its intent is irrelevant. Chevreaux had constructive,
7 if not actual, notice that it had to be diligent. Since Chevreaux's due diligence was a condition of
8 the permit, there is no reason for this Court to read into the statute a requirement of subjective
9 intent to abandon the use.

10 V.

11 VESTED RIGHTS HAVE NO EFFECT ON
12 THE APPLICATION OF THE LAPSE STATUTE

13 Even if a permittee's rights in a permit may be vested, lapse statutes nevertheless apply.
14 For example, in *Lakeview Development Corp. v. City of South Lake Tahoe* (9th Cir. 1990)
15 915 F.2d 1290, the developer of a two-phase project lost a vested right to complete the project by
16 not timely processing the second phase of the development. As in the case at bar, a new land use
17 regulation was adopted which applied prospectively to the project. The developer did virtually
18 nothing to proceed with the development of phase two for almost 10 years after completing
19 phase one. When the developer objected to the application of the new regulation to its project,
20 the court was unsympathetic. The court rejected the developer's argument that the right to
21 develop phase two had vested with phase one. “Lakeview chose not to develop ... Unit Two ...
22 on schedule” (*Id.* at p. 1298.) To hold otherwise would suggest that Lakeview's right to
23 complete phase two “[was] vested forever.” (*Ibid.*)

24 In *Stokes v. Board of Permit Appeals* (1997) 52 Cal.App.4th 1348, the court concluded
25 that the discontinued use of a bathhouse for seven years defeated any claim of vested rights the
26 landowner could claim in the prior use. The court in *Stokes* discussed the effect of the
27 discontinued use in light of a zoning ordinance similar to the one enacted in Placer County. The
28

1 ordinance at issue in *Stokes* provided that any vested rights in a nonconforming use of property
2 will lapse if the use has been discontinued for a period of three years or if there is evidence of a
3 clear intent to abandon the use. (*Id.* at p. 1354.)

4 The court in *Stokes* determined that the fact that the bathhouse had remained vacant and
5 inactive for at least seven continuous years “establish[ed] more than a temporary vacancy, but
6 rather an intentional decision to abandon the premises.” (*Stokes, supra*, 52 Cal.App.4th at p.
7 1354.) In so doing, the court disregarded the petitioner’s assertions that no clear evidence of any
8 intent to abandon the property existed.³ (*Ibid.*)

9 The present case involves discontinuance of a conditionally-permitted use for two
10 separate and distinct periods. The first involved a continuous 25 year period in which the asphalt
11 plant remained absent from the site between 1976 and 2001. Although the exceedingly long
12 period of nonuse prior to 1995 is outside the scope of the Lapse Ordinance, which was enacted in
13 1995, the six-year period from 1995 to 2001 is properly subject to the Lapse Ordinance. The
14 second involved a four- to five-year period of continuous nonuse from 2001 to 2005 or 2006.

17 ³ Petitioner in *Stokes* claimed vested rights in the continuance of a nonconforming use as it existed prior to
18 changes in zoning regulations, as well as under the well-established principle that a landowner will acquire vested
19 rights if he has incurred substantial liabilities to his detriment after relying in good faith on an issued permit.
20 (*Stokes, supra*, 52 Cal.App.4th at p. 1353; *Avco Community Developers, Inc. v. South Coast Regional Commission*
(1976) 17 Cal.3d 785, 791 (*Avco*)). Without elaboration on these principles, the court in *Stokes* proceeded to apply
the provisions of relevant lapse ordinance, ultimately determining any such rights as petitioner could claim lapsed as
a result of discontinued use.

21 It should be noted that the issue of vested rights under a theory as announced in *Avco* is irrelevant to the present
22 case. Under *Avco* and its progeny, a municipality is essentially estopped from revoking a permit lawfully issued
23 once a permittee has in good faith detrimentally relied upon it. (*Avco, supra*, 17 Cal.3d at p. 791; *Hermosa Beach*
24 *Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 551-552.) In other words, the issue of
25 vested rights under an *Avco* theory pertains to whether or not the permittee may complete implementation of the
permit without governmental interference. (*Hermosa Beach Stop Oil Coalition, supra*, 86 Cal.App.4th at p. 552
[recognizing that the vested rights doctrine established under *Avco* relates to a “developer’s right to complete a
project as proposed”].) That is not the case here.

26 Chevreux obtained its CUP in 1972. Chevreux implemented the permit at that time. The County of Placer
27 made no attempts to revoke or withdraw the permit issued Chevreux and in no way interfered with Chevreux’s
28 implementation of its CUP. Rather, the present case involves the lapsing of vested rights when the permittee has
simply failed to continue the permitted use *after implementation*. As discussed above, such lapsing ordinances are
valid exercises of the police power. (Section II.B., *supra*.)

Accordingly, Chevreaux's rights in the CUP issued in 1972 are properly subject to operation of the Lapse Ordinance by virtue of Chevreaux's removal of the asphalt plant for consecutive periods far in excess of the 12 month timeframe specified in the Ordinance.

MVP is not seeking to put Chevreux out of business, but rather to require it to comply with the County Lapse Ordinance regarding LDA-786. The permit was issued many years ago and has undergone excessive periods of nonuse, which place it squarely within the purview of the Lapse Ordinance. It is patently unfair to the community to allow such an operation to continue under these circumstances. MVP seeks only to hold Chevreux to the terms and restrictions of

1 the County Zoning Code, which require issuance of a new permit in light of the lapse of LDA-
2 786.

3 Since undisputed facts establish that LDA-786 has lapsed, MVP respectfully requests this
4 Court to grant its motion for summary adjudication and issue a declaratory judgment in MVP's
5 favor as to the Third Cause of Action.

6 DATED: February 22, 2007.

7
8 Respectfully submitted,

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF PLACER

MEADOW VISTA PROTECTION,

Petitioner and Plaintiff,

v.

CHEVREAUX AGGREGATES, INC.;
COUNTY OF PLACER; COUNTY OF
PLACER PLANNING DEPARTMENT;
and DOES 1 through 50, inclusive,

Respondents and Defendants.

Case No.: SCV 19614

Complaint Filed: 7/12/06

SEPARATE STATEMENT OF
UNDISPUTED FACTS IN SUPPORT OF
PLAINTIFF'S MOTION FOR
SUMMARY ADJUDICATION

Date: 5/8/07

Time: 8:30 a.m.

Dept.: 4

Trial Date: 6/11/07

The Hon. Charles D. Wachob

Pursuant to Code of Civil Procedure section 437c(b) and Rule of Court 3.1350(d),
plaintiff Meadow Vista Protection (MVP) submits this separate statement of undisputed material
facts, together with references to supporting evidence, in support of plaintiff's Motion for
Summary Adjudication of the Third Cause of Action for declaratory relief against defendant,
Chevreaux Aggregates, Inc. (Chevreaux).

UNDISPUTED MATERIAL FACT	SUPPORTING EVIDENCE
1. Plaintiff MVP is a California nonprofit corporation.	Articles of Incorporation for Meadow Vista Protection, Article II, ¶A, Exhibit 8. ¹
2. MVP is a local grass roots organization comprised of residents of the unincorporated Placer County community of Meadow Vista, California, and the surrounding area, as well as nonresident supporters.	Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, Public Nuisance, Private Nuisance and Trespass (Verified Complaint) ¶3, Exhibit 9.
3. MVP was formed in 2005 for the purpose of protecting the interests of its members from activities proposed or conducted in the area that would pose an adverse risk to the health, safety and/or welfare of the greater Meadow Vista area.	Articles of Incorporation for Meadow Vista Protection, Article II, ¶B, Exhibit 8.
4. Defendant Chevreux Aggregates, Inc. is a California for-profit corporation.	Verified Complaint ¶11, Exhibit 9; Chevreux Aggregates, Inc.'s Verified Answer to Meadow Vista Protection's Verified Complaint (Verified Answer) ¶11, Exhibit 10.
5. Chevreux commenced an in-stream sand and gravel dredging and processing operation in the Bear River near Lake Combie in approximately 1946 or 1947.	Verified Complaint ¶17, Exhibit 9; Verified Answer ¶17, Exhibit 10.
6. In 1965, an Edward Pruss applied for and obtained conditional use permit (CUP) LD-1030 to commence a "shot rock quarry" operation on APNs 72-020-03 and 72-030-01 in Placer County near Meadow Vista, California.	LD-1030 and Minutes of hearing, Exhibit 11.
7. Chevreux acquired Pruss' quarry operation in 1970.	August 13, 1985 letter from Joe Chevreux to the Placer County Board of Supervisors, Exhibit 12.
8. Between 1947 and 1971, Chevreux operated an asphalt plant at the Meadow Vista site on an intermittent basis. Based on these nonconforming operations, Chevreux believed it did not need a CUP to produce asphalt.	April 21, 1971 letter from Joe Chevreux to Richard Heikka (Placer County Planning Director), Exhibit 13; July 28, 1987 letter from Joe Chevreux to Thomas McMahan (Placer County Planning Director), Exhibit 17.

¹ All exhibit references are to Plaintiff's Documentary Evidence in Support of Motion for Summary Adjudication of Third Cause of Action filed concurrently herewith.

1	9. Nevertheless, in 1971, Placer County Planning Department determined that a CUP	April 30, 1971 letter from Richard Heikka
2	was necessary for the asphalt operation.	(Placer County Planning Director) to Joe
3	Chevreaux then sought and obtained CUP	Chevreaux, Exhibit 14; July 28, 1987 letter
4	LDA-691 to "reinstall" an asphalt batch plant	from Joe Chevreaux to Thomas McMahan
	at the quarry.	(Placer County Planning Director), Exhibit 17.
5	10. In 1972, Chevreaux was required to obtain	April 26, 1972 letter from William Cramer
6	a different CUP, LDA-786, to authorize the	(Assistant Planning Director) to Joe
7	relocation of the asphalt plant to a neighboring	Chevreaux, Exhibit 15; Notice of Public
8	parcel, APN 72-030-01. This new location was	Hearing regarding LDA-786, Exhibit 16; July
9	approximately 600 feet northeast of the LDA-	28, 1987 letter from Joe Chevreaux to Thomas
	691 location.	McMahan (Placer County Planning Director),
		Exhibit 17.
10	11. LDA-786 identified two parcels: APNs	LDA-786 and Minutes of Public Hearing,
11	72-030-01 and 72-020-03. APN 72-030-01 has	Exhibit 18; Declaration of Fred Blomquist in
12	subsequently been renumbered as APN 72-	Support of Plaintiff's Motion for Summary
13	030-61, and APN 72-020-03 has subsequently	Adjudication of Third Cause of Action
	been divided and renumbered as APNs 72-020-	(Blomquist Declaration), ¶3, Exhibit 1B.
	13 and 72-020-14.	
14	12. LDA-786 was subject to 12 conditions of	LDA-786 and Minutes of Public Hearing,
15	approval. Its continued validity depends in	Exhibit 18; July 31, 1987 letter from Thomas
16	part upon Chevreaux's observance of these	McMahan (Placer County Planning Director)
	conditions.	to Joe Chevreaux, Exhibit 19.
17	13. The current Placer County Code provides:	Placer County Code, § 17.58.160(B)(2)(b),
18	"Once a project has been implemented . . . the	Exhibit 35.
19	permit that authorized the use shall remain	
20	valid . . . unless one of the following occurs:	
21	... the use (if no appurtenant structure is	
22	required for its operation) is discontinued for	
23	more than twelve consecutive months, or (if an	
	appurtenant structure is required for the	
	conditionally-permitted use) the structure is	
	removed from the site for more than twelve	
	consecutive months."	
24	14. The Placer County Code further provides:	Placer County Code, § 17.58.160(B)(3),
25	"If one of the foregoing events occurs, the	Exhibit 35.
26	permit shall be deemed to have lapsed. No use	
27	of land, building or structure for which a	
28	permit has lapsed shall be reactivated, re-	
	established or used unless a new permit is first	
	obtained as provided by this subchapter."	

1	15. According to the County Code: "The	Placer County Code, § 17.04.020(C)(3),
2	following general rules of construction shall	Exhibit 32.
3	apply to the interpretation and application of	
4	the terms and phrases used in this chapter: . . .	
5	'Shall' is mandatory; 'may' is discretionary."	
6	16. Fresno Paving, Inc. operated an asphalt	Chevreux Aggregates, Inc.'s <i>Amended</i>
7	plant at Chevreux's LDA-786 site from about	Responses to Meadow Vista Protection's Form
8	1972 until about 1976.	Interrogatories (Set One), Response 15.1(a),
9		Exhibit 20.
10	17. No further asphalt operations were	<i>Id.</i>
11	conducted on the site until 2001.	
12	18. Kiewit Pacific Company received a permit	<i>Id.</i> ; Authority to Construct/Temporary Permit
13	from Placer County Air Pollution Control	to Operate issued to Kiewit Pacific Company
14	District (APCD) to operate an asphalt plant on	by APCD, Exhibit 21.
15	Chevreux's property from May 2001 through	
16	May 2002.	
17	19. Kiewit Pacific's asphalt plant was	November 1, 2001 letter from Gerald Edwards
18	completely shutdown in September 2001. The	(Kiewit Pacific) to John Finnell (APCD),
19	plant was removed from Chevreux's site in	Exhibit 22; October 4, 2001 APCD Office
20	late 2001.	Contact Report, Item 2, Exhibit 23.
21	20. An aerial photograph taken in 1998 reveals	Declaration of Patrick M. Soluri in Support of
22	that no asphalt plant was present on the site on	Plaintiff's Motion for Summary Adjudication
23	that date. The area where Kiewit eventually	of Third Cause of Action (Soluri Declaration),
24	operated is not even cleared of trees in this	Exhibit 1A; Blomquist Declaration, Exhibit
25	photograph.	1B, and aerial photograph, Exhibit 2.
26	21. An aerial photograph taken on July 1,	Soluri Declaration, Exhibit 1A; Blomquist
27	1999 reveals that no asphalt plant was present	Declaration, Exhibit 1B, and aerial photograph,
28	on the site on that date. The area where Kiewit	Exhibit 1.
	eventually operated is not even cleared of trees	
	in this photograph.	
	22. An aerial photograph taken on	Blomquist Declaration, Exhibit 1B, and aerial
	November 1, 2002 reveals that no asphalt plant	photograph, Exhibit 4.
	was present on the site on that date. The area	
	where Kiewit operated has been cleared of	
	trees and graded in this photograph.	
	23. An aerial photograph taken on April 1,	Blomquist Declaration, Exhibit 1B, and aerial
	2004 reveals that no asphalt plant was present	photograph, Exhibit 5.
	on the site on that date.	

1	24. In early 2005, Teichert Aggregates, Inc. (Teichert) located an asphalt plant at	February 11, 2005 letter from Daniel Palmer (Teichert Construction) to Bill Combs (Placer County Planning Department), Exhibit 24;
2	Chevreaux's quarry site, but the plant was	February 22, 2005 letter from Bill Combs (Placer County Planning Department) to
3	never fully assembled and never operated due	Daniel Palmer (Teichert Construction), Exhibit
4	to County concerns regarding the validity of	25; March 23, 2005 Press Release announcing
5	LDA-786. Teichert withdrew its plans to site	Teichert's intent to withdraw its plans for an
6	its plant in Meadow Vista in March 2005.	asphalt plant in Meadow Vista, Exhibit 26.
7	25. An aerial photograph taken on August 1,	Blomquist Declaration, Exhibit 1B, and aerial
8	2005 reveals the presence of an asphalt plant	photograph, Exhibit 6.
9	(presumably Teichert's) on the site on that	
10	date.	
11	26. An aerial photograph taken on May 1,	Blomquist Declaration, Exhibit 1B, and aerial
12	2006 reveals that no asphalt plant was present	photograph, Exhibit 7.
13	on the site on that date.	
14	27. On February 25, 2005, in a memorandum	February 25, 2005 Memorandum from
15	to then Planning Director Fred Yeager, county	Anthony La Bouff (Placer County Counsel) to
16	counsel noted that the County lapse statute	Fred Yeager (Placer County Planning
17	might apply to Chevreaux's asphalt permit, and	Director), Exhibit 27.
18	recommended that more information be sought	
19	from Chevreaux regarding its activities.	
20	28. On March 9, 2005, counsel for Chevreaux	March 9, 2005 Memorandum from Brigit
21	responded with a lengthy memorandum, but	Barnes (Chevreaux's counsel) to Anthony La
22	was not able to provide conclusive evidence	Bouff, Scott Finley (Placer County Counsel)
23	that the asphalt plant had operated between	and Bruce Kranz (Placer County Supervisor,
24	1976 through 2001 or after 2002.	Fifth District), Exhibit 28.
25	29. Accordingly, on March 22, 2005, in a	March 22, 2005 letter from Anthony La Bouff
26	reply to counsel for Chevreaux, county counsel	(Placer County Counsel) to Brigit Barnes
27	stated: "[T]he issue of lapse [of LDA-786] has	(Chevreaux's counsel), p. 2, Exhibit 29.
28	never been fully addressed. The fact that the	
	County determined, in 1987, that the permit	
	was valid at that time does not conclusively	
	establish its status almost 20 years later,	
	especially in light of the amendment to the	
	County ordinances in the interim to include	
	new standards concerning lapse. The County	
	is not estopped from looking into the use of the	
	site over time and reviewing that issue should	
	the validity of the permit be otherwise called	
	into question."	

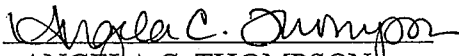
1 30. In a ruling on the demurrer filed by
2 Chevreux in this matter, this Court held that
3 "[w]ith respect to the ... third cause[] of action
4 for declaratory relief, an actual, justiciable
5 controversy has been alleged as between the
6 parties."

October 16, 2006 Ruling on Submitted Matter
at p. 2:18-20, Exhibit 30.

7 DATED: February 22, 2007.

8 Respectfully submitted,

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10 TIMOTHY V. KASSOUNI
11 ANGELA C. THOMPSON
12 THE ZUMBRUN LAW FIRM

13 By 
14 ANGELA C. THOMPSON

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF PLACER

MEADOW VISTA PROTECTION,

Petitioner and Plaintiff,

v.

CHEVREAU AGGREGATES, INC.;
COUNTY OF PLACER; COUNTY OF
PLACER PLANNING DEPARTMENT;
and DOES 1 through 50, inclusive,

Respondents and Defendants.

Case No.: SCV 19614

Complaint Filed: 7/12/06

PLAINTIFF'S REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF MOTION FOR
SUMMARY ADJUDICATION
(Evid. Code, § 452)

Date: 5/8/07

Time: 8:30 a.m.

Dept.: 4

Trial Date: 6/11/07

The Hon. Charles D. Wachob

Plaintiff Meadow Vista Protection hereby requests that, pursuant to section 452,
subdivision (d) of the Evidence Code, this Court take judicial notice of the following documents:

1. Placer County Code, § 17.02.010, a copy of which is attached to Plaintiff's
Documentary Evidence as Exhibit 31.

2. Placer County Code, § 17.04.020, a copy of which is attached to Plaintiff's
Documentary Evidence as Exhibit 32.

///

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1 3. Placer County Code, § 17.04.030, a copy of which is attached to Plaintiff's
2 Documentary Evidence as Exhibit 33.

3 4. Placer County Code, § 17.58.140, a copy of which is attached to Plaintiff's
4 Documentary Evidence as Exhibit 34.

5 5. Placer County Code, § 17.58.160, a copy of which is attached to Plaintiff's
6 Documentary Evidence as Exhibit 35.

7 6. Ruling on Submitted Matter, October 16, 2006, a copy of which is attached to
8 Plaintiff's Documentary Evidence as Exhibit 30.

9 The above documents are part of the records of this Court thus constituting "records of
10 (1) any court of this state or (2) any court of record of the United States or of any state of the
11 United States." (Evid. Code, § 452, subd. (d).)

12 DATED: February 22, 2007.

13 Respectfully submitted,

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11 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
12 COUNTY OF PLACER

13 MEADOW VISTA PROTECTION,

14 Petitioner and Plaintiff,

15 v.

16 CHEVREAUX AGGREGATES, INC.;
17 COUNTY OF PLACER; COUNTY OF
18 PLACER PLANNING DEPARTMENT;
19 and DOES 1 through 50, inclusive,

20 Respondents and Defendants.

Case No.: SCV 19614

Complaint Filed: 7/12/06

PLAINTIFF'S NON-CALIFORNIA
AUTHORITIES
(Rules of Court, rule 3.1113(j))

Date: 5/8/07

Time: 8:30 a.m.

Dept.: 4

Trial Date: 6/11/07

The Hon. Charles D. Wachob

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Pursuant to rule 3.1113 of the California Rules of Court, plaintiff Meadow Vista Protection hereby submits copies of the non-California authorities cited in its memorandum of points and authorities.

1. *Fernandez-Vargas v. Gonzales* (2006) 126 S. Ct. 2422
2. *Lakeview Development Corporation v. City of South Lake Tahoe* (9th Cir. 1990) 915 F.2d 1290
3. *Landgraf v. USI Film Products* (1994) 511 U.S. 244

DATED: February 22, 2007.

Respectfully submitted,

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EXHIBIT 1

Westlaw

126 S.Ct. 2422

Page 1

126 S.Ct. 2422, 165 L.Ed.2d 323, 74 USLW 4416, 06 Cal. Daily Op. Serv. 5324, 06 Daily Journal D.A.R. 7858,
 19 Fla. L. Weekly Fed. S 314
 (Cite as: 126 S.Ct. 2422)

▷

Briefs and Other Related Documents

Fernandez-Vargas v. Gonzales U.S., 2006.

Supreme Court of the United States

Humberto FERNANDEZ-VARGAS, Petitioner,

v.

Alberto R. GONZALES, Attorney General.

No. 04-1376.

Argued March 22, 2006.

Decided June 22, 2006.

Background: Alien who illegally reentered United States after being previously removed petitioned for review of reinstatement of previous order of removal by government. The United States Court of Appeals for the Tenth Circuit, Michael W. McConnell, Circuit Judge, 394 F.3d 881, denied petition. Certiorari was granted.

Holding: The Supreme Court, Justice Souter, held that Immigration and Nationality Act (INA) provision for reinstatement of removal orders against aliens illegally reentering applied to aliens who reentered the United States before Illegal Immigration Reform and Immigrant Responsibility Act's (IIRIRA's) effective date and did not retroactively affect any right of, or impose any burden on, continuing violator who had chosen to remain illegally after that date; abrogating *Bejjani v. INS*, 271 F.3d 670, *Castro-Cortez v. INS*, 239 F.3d 1037.

Affirmed.

Justice Stevens filed dissenting opinion.

West Headnotes

[1] Constitutional Law 92 ¶188

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k187 Nature of Retrospective Laws

92k188 k. In General. Most Cited Cases

Statutes are disfavored as retroactive when their application 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.

[2] Statutes 361 ¶263

361 Statutes

361VI Construction and Operation

361VI(D) Retroactive Operation

361k263 k. Retrospective Construction in

General. Most Cited Cases

Statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication.

[3] Constitutional Law 92 ¶188

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k187 Nature of Retrospective Laws

92k188 k. In General. Most Cited Cases

In determining whether statute has impermissibly retroactive effect, Court first looks to whether Congress has expressly prescribed statute's proper reach.

[4] Statutes 361 ¶263

361 Statutes

361VI Construction and Operation

361VI(D) Retroactive Operation

361k263 k. Retrospective Construction in

General. Most Cited Cases

In the absence of express language prescribing statute's proper reach, Court tries to draw comparably firm conclusion about temporal reach specifically intended by applying its normal rules of

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126 S.Ct. 2422, 165 L.Ed.2d 323, 74 USLW 4416, 06 Cal. Daily Op. Serv. 5324, 06 Daily Journal D.A.R. 7858,
19 Fla. L. Weekly Fed. S 314
(Cite as: 126 S.Ct. 2422)

construction.

[5] Constitutional Law 92 ⇐188

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k187 Nature of Retrospective Laws

92k188 k. In General. Most Cited Cases

Statutes 361 ⇐263

361 Statutes

361VI Construction and Operation

361VI(D) Retroactive Operation

361k263 k. Retrospective Construction in General. Most Cited Cases

Statutes 361 ⇐265

361 Statutes

361VI Construction and Operation

361VI(D) Retroactive Operation

361k265 k. Statutes Impairing Vested Rights. Most Cited Cases

Statutes 361 ⇐266

361 Statutes

361VI Construction and Operation

361VI(D) Retroactive Operation

361k266 k. Statutes Imposing Liabilities. Most Cited Cases

If Court cannot draw conclusion about statute's temporal reach through application of its normal rules of construction, it asks whether applying statute to person objecting would have retroactive consequence in disfavored sense of affecting substantive rights, liabilities, or duties on basis of conduct arising before its enactment; if so, then Court applies presumption against retroactivity by construing statute as inapplicable to event or act in question.

[6] Aliens, Immigration, and Citizenship 24 ⇐216

24 Aliens, Immigration, and Citizenship

24V Denial of Admission and Removal

24V(A) In General

24k212 Constitutional and Statutory Provisions

24k216 k. Retroactive Operation. Most Cited Cases

Constitutional Law 92 ⇐190

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases

INA provision for reinstatement of removal orders against aliens illegally reentering applied to aliens who reentered the United States before Illegal Immigration Reform and Immigrant Responsibility Act's (IIRIRA's) effective date and did not retroactively affect any right of, or impose any burden on, continuing violator of INA who had chosen to remain illegally after that date; abrogating *Bejjani v. INS*, 271 F.3d 670, *Castro-Cortez v. INS*, 239 F.3d 1037. Immigration and Nationality Act, § 241(a)(5), 8 U.S.C.A. § 1231(a)(5).

*2423 Syllabus ^{FN*}

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Immigration law has for some time provided that an order for removing an alien present unlawfully may be reinstated if he leaves and unlawfully reenters. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amended the Immigration and Nationality Act (INA) to enlarge the class of illegal reentrants whose orders may be reinstated and limit the possible relief from a removal order available to them. See § 241(a)(5), 8 U.S.C. § 1231(a)(5). Petitioner Fernandez-Vargas, a Mexican citizen, illegally reentered the United States in 1982, after having been deported. He remained undetected for over 20 years, fathering a son in 1989 and marrying the boy's mother, a United States citizen, in 2001.

126 S.Ct. 2422, 165 L.Ed.2d 323, 74 USLW 4416, 06 Cal. Daily Op. Serv. 5324, 06 Daily Journal D.A.R. 7858, 19 Fla. L. Weekly Fed. S 314 (Cite as: 126 S.Ct. 2422)

After he filed an application to adjust his status to that of a lawful permanent resident, the Government began proceedings to reinstate his 1981 deportation order under § 241(a)(5), and deported him. He petitioned the Tenth Circuit to review the reinstatement order, claiming that, because he illegally reentered the country before IIRIRA's effective date, § 241(a)(5) did not bar his application for adjustment of status, and that § 241(a)(5) would be impermissibly retroactive if it did bar his adjustment application. The court held that § 241(a)(5) barred his application and followed *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229, in determining that the new law had no impermissibly retroactive effect in his case.

Held: Section 241(a)(5) applies to those who reentered the United States before IIRIRA's effective date and does not retroactively affect any right of, or impose any burden on, the continuing violator of the INA now before this Court. Pp. 2427-2434.

(a) Statutes are disfavored as retroactive when their application "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." *Landgraf, supra*, at 280, 114 S.Ct. 1483. A statute is not given retroactive effect "unless such construction is required by explicit language or by necessary implication." *United States v. St. Louis, S.F. & T.R. Co.*, 270 U.S. 1, 3, 46 S.Ct. 182, 70 L.Ed. 435. In determining whether a statute has an impermissibly retroactive effect,*2424 the Court first looks to "whether Congress has expressly prescribed the statute's proper reach," *Landgraf, supra*, at 280, 114 S.Ct. 1483, and in the absence of express language tries to draw a comparably firm conclusion about the temporal reach specifically intended by applying its "normal rules of construction," *Lindh v. Murphy*, 521 U.S. 320, 326, 117 S.Ct. 2059, 138 L.Ed.2d 481. If that effort fails, the Court asks whether applying the statute to the person objecting would have a retroactive effect in the disfavored sense of "affecting substantive rights, liabilities, or duties [on the basis of] conduct

arising before [its] enactment," *Landgraf, supra*, at 278, 114 S.Ct. 1483. If the answer is yes, the Court then applies the presumption against retroactivity by construing the statute as inapplicable to the event or act in question. *INS v. St. Cyr*, 533 U.S. 289, 316, 121 S.Ct. 2271, 150 L.Ed.2d 347. Pp. 2427-2428.

(b) Common principles of statutory interpretation fail to unsettle § 241(a)(5)'s apparent application to any reentrant present in the country, whatever the date of return. The statute does not expressly include in or exclude from § 241(a)(5)'s ambit individuals who illegally entered the country before IIRIRA's effective date. Fernandez-Vargas argues that the fact that the old reinstatement provision applied to aliens who had "unlawfully reentered ... after having previously departed or been deported ... , whether before or after June 27, 1952 [the INA's effective date], on any ground described in ... subsection (e)," § 242(f), while § 241(a)(5) lacks language of temporal reach, shows that Congress no longer meant to cover preenactment reentrants. But the old before-or-after clause, which was sandwiched between references to departure or deportation and grounds for deportation, most naturally referred not to an alien's illegal reentry but to the previous deportation or departure. The better inference is that the clause was removed because, in 1996, application keyed to departures in 1952 or earlier was academic. Applying § 241(a)(5) only to deportations or departures after IIRIRA's effective date would exempt anyone who departed before that date but reentered after it. That would be a strange result, since the statute was revised to expand the scope of the reinstatement authority and invest it with something closer to finality. Fernandez-Vargas errs in suggesting that the new law is bereft of clarity and the Court should apply the presumption against retroactivity as a tool for interpreting the statute at the first *Landgraf* step. It is not until a statute is shown to have no firm provision about temporal reach but to produce a retroactive effect when straightforwardly applied that the presumption has its work to do. And IIRIRA has other provisions on temporal reach, which blunt Fernandez-Vargas's argument that a negative inference in his favor may be drawn from

126 S.Ct. 2422, 165 L.Ed.2d 323, 74 USLW 4416, 06 Cal. Daily Op. Serv. 5324, 06 Daily Journal D.A.R. 7858, 19 Fla. L. Weekly Fed. S 314
(Cite as: 126 S.Ct. 2422)

removal of the before-or-after clause. Pp. 2428-2430.

(c) This facial reading is confirmed by two features of IIRIRA. First, the provision's text shows that it applies here not because Fernandez-Vargas reentered at any particular time, but because he chose to remain after the new statute became effective. While the law looks back to "an alien [who] has reentered ... illegally," 8 U.S.C. § 1231(a)(5), the provision does not penalize an alien for the reentry; it establishes a process to remove him under a "prior order any time after the reentry," *ibid.* Thus, it is the conduct of remaining in the country after entry that is the predicate action; the law applies to stop an indefinitely continuing violation that the alien could end at any time by voluntarily leaving. It is therefore the alien's choice to continue his illegal presence, after illegal *2425 reentry and after the new law's effective date, that subjects him to the new and less generous regime, not a past act that is he helpless to undo. *INS v. St. Cyr*, *supra*, distinguished. Second, IIRIRA's effective date provision shows that Fernandez-Vargas had ample warning of the coming change in the law, but chose to remain until the old regime expired and § 241(a)(5) took its place. He had an opportunity to avoid the new law's application by leaving the country and ending his violation during the 6 months between IIRIRA's enactment and effective date. For that matter, he could have married his son's mother and applied for adjustment of status during the period, in which case he would at least have had a claim that proven reliance on the law should be honored by applying the presumption against retroactivity. Instead, he augmented his 15 years of unlawful presence by remaining in the country into the future subject to the new law. And the presumption against retroactivity does not amount to a presumption of legal status for the benefit of continuous lawbreakers. Pp. 2431-2433.

394 F.3d 881, affirmed.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, and ALITO,

JJ., joined. STEVENS, J., filed a dissenting opinion.

Todd Lundell Mayer, Brown, Rowe & Maw LLP, New York, NY, J. Christopher Keen, Keen Law Offices, LLC, Provo, UT, David M. Gossett, Counsel of Record, Andrew Tauber, Mayer, Brown, Rowe & Maw LLP, Washington, DC, for petitioner. Paul D. Clement, Solicitor General, Counsel of Record, Peter D. Keisler, Assistant Attorney General, Edwin S. Kneedler, Deputy Solicitor General, Sri Srinivasan, Assistant to the Solicitor General, Donald E. Keener, Alison Marie Igoe, Attorneys Department of Justice, Washington, D.C., for respondent. For U.S. Supreme Court briefs, see: 2005 WL 3530559 (Pet.Brief) 2006 WL 651707 (Pet.Brief) 2006 WL 331814 (Resp.Brief)

Justice SOUTER delivered the opinion of the Court. For some time, the law has provided that an order for removing an alien present unlawfully may be reinstated if he leaves and unlawfully enters again. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. 104-208, div. C, 110 Stat. 3009-546, enlarged the class of illegal reentrants whose orders may be reinstated and limited the possible relief from a removal order available to them. See Immigration and Nationality Act (INA), § 241(a)(5), 66 Stat. 204, as added by IIRIRA § 305(a)(3), 110 Stat. 3009-599, 8 U.S.C. § 1231(a)(5). The questions here are whether the new version of the reinstatement provision is correctly read to apply to individuals who reentered the United States before IIRIRA's effective date, and whether such a reading may be rejected as impermissibly retroactive. We hold the statute applies to those who entered before IIRIRA and does not retroactively affect any right of, or impose any burden on, the continuing violator of the INA now before us.

I

In 1950, Congress provided that deportation orders issued against some aliens *2426 who later reentered the United States illegally could be reinstated. ^{FN1} Internal Security Act of 1950, §

126 S.Ct. 2422, 165 L.Ed.2d 323, 74 USLW 4416, 06 Cal. Daily Op. Serv. 5324, 06 Daily Journal D.A.R. 7858, 19 Fla. L. Weekly Fed. S 314
(Cite as: 126 S.Ct. 2422)

23(d), 64 Stat. 1012, 8 U.S.C. § 156(d) (1946 ed., Supp. V).^{FN2} Only specific illegal reentrants were subject to the provision, those deported as “anarchists” or “subversives,” for example, see § 23(c), 64 Stat. 1012, while the rest got the benefit of the ordinary deportation rules. Congress retained a reinstatement provision two years later when it revised the immigration laws through the INA, § 242(f), 66 Stat. 212, as codified in this subsection:

FN1. What was formerly known as “deportation” is now called “removal” in IIRIRA. See Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L.Rev. 961, 966 (1998) (IIRIRA “realigned the vocabulary of immigration law, creating a new category of ‘removal’ proceedings that largely replaces what were formerly exclusion proceedings and deportation proceedings”). Our use of each term here will vary according to the scheme under discussion.

FN2. This is the full text of the provision: “Should any alien subject to the provisions of subsection (c) unlawfully return to the United States after having been released for departure or deported pursuant to this section, the previous warrant of deportation against him shall be considered as reinstated from its original date of issuance.”

“Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952,^{FN3} on any ground described in subsection (e) ..., the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry.” 8 U.S.C. § 1252(f) (1994 ed.).

FN3. A date was inserted when the provision was codified; as originally

enacted, the text read, “whether before or after the date of enactment of this Act.” 66 Stat. 212.

Again, only a limited class of illegal reentrants was susceptible, see § 242(e), 66 Stat. 211; cf. § 241(a), *id.*, at 204, and even those affected could seek some varieties of discretionary relief, see, e.g., 8 U.S.C. § 1254(a)(1) (1994 ed.) (suspension of deportation available to aliens who maintained a continuous presence in the United States for seven years and could demonstrate extreme hardship and a good moral character).

In IIRIRA, Congress replaced this reinstatement provision with one that toed a harder line, as the old § 242(f) was displaced by the new § 241(a)(5): “If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.” 8 U.S.C. § 1231(a)(5) (1994 ed., Supp. III).

The new law became effective on April 1, 1997, “the first day of the first month beginning more than 180 days after” IIRIRA’s enactment. § 309(a), 110 Stat. 3009-625. Unlike its predecessor, § 241(a)(5) applies to all illegal reentrants, explicitly insulates the removal orders from review, and generally forecloses discretionary relief from the terms of the reinstated order.^{FN4}

FN4. Notwithstanding the absolute terms in which the bar on relief is stated, even an alien subject to § 241(a)(5) may seek withholding of removal under 8 U.S.C. § 1231(b)(3)(A) (2000 ed.) (alien may not be removed to country if “the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion

126 S.Ct. 2422, 165 L.Ed.2d 323, 74 USLW 4416, 06 Cal. Daily Op. Serv. 5324, 06 Daily Journal D.A.R. 7858, 19 Fla. L. Weekly Fed. S 314 (Cite as: 126 S.Ct. 2422)

"), or under 8 CFR §§ 241.8(e) and 208.31 (2006) (raising the possibility of asylum to aliens whose removal order has been reinstated under INA § 241(a)(5)).

*2427 II

Humberto Fernandez-Vargas is a citizen of Mexico, who first came to the United States in the 1970s, only to be deported for immigration violations, and to reenter, several times, his last illegal return having been in 1982. Then his luck changed, and for over 20 years he remained undetected in Utah, where he started a trucking business and, in 1989, fathered a son, who is a United States citizen. In 2001, Fernandez-Vargas married the boy's mother, who is also a United States citizen. She soon filed a relative-visa petition on behalf of her husband, see 8 U.S.C. §§ 1154(a), 1151(b) (2000 ed.); see *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881, 883, n. 4 (C.A.10 2005), on the basis of which he filed an application to adjust his status to that of lawful permanent resident, see § 1255(i). The filings apparently tipped off the authorities to his illegal presence here, and in November 2003, the Government began proceedings under § 241(a)(5) that eventuated in reinstating Fernandez-Vargas's 1981 deportation order, but without the possibility of adjusting his status to lawful residence. He was detained for 10 months before being removed to Juarez, Mexico in September 2004.

Fernandez-Vargas petitioned the United States Court of Appeals for the Tenth Circuit to review the reinstatement order. He took the position that because he illegally reentered the country before IIRIRA's effective date, the controlling reinstatement provision was the old § 242(f), which meant he was eligible to apply for adjustment of status as spouse of a citizen, and he said that the new § 241(a)(5) would be impermissibly retroactive if it barred his application for adjustment. The Court of Appeals held that § 241(a)(5) did bar Fernandez-Vargas's application and followed *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), in determining that the new law had no impermissibly retroactive effect in Fernandez-Vargas's case. 394 F.3d, at

886, 890-891. We granted certiorari to resolve a split among the Courts of Appeals over the application of § 241(a)(5) to an alien who reentered illegally before IIRIRA's effective date,^{FN5} 546 U.S. ----, 126 S.Ct. 544, 163 L.Ed.2d 458 (2005), and we now affirm.

FN5. Two Courts of Appeals have held that § 241(a)(5) does not apply at all to aliens who reentered before the provision's effective date, see *Bejjani v. INS*, 271 F.3d 670 (C.A.6 2001); *Castro-Cortez v. INS*, 239 F.3d 1037 (C.A.9 2001), while eight have held that it does, at least in some circumstances, see *Arevalo v. Ashcroft*, 344 F.3d 1 (C.A.1 2003); *Avila-Macias v. Ashcroft*, 328 F.3d 108 (C.A.3 2003); *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102 (C.A.4 2001); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292 (C.A.5 2002); *Faiz-Mohammad v. Ashcroft*, 395 F.3d 799 (C.A.7 2005); *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858 (C.A.8 2002); 394 F.3d 881 (C.A.10 2005) (case below); *Sarmiento Cisneros v. United States Attorney General*, 381 F.3d 1277 (C.A.11 2004). The Courts of Appeals in the majority are themselves divided on the question whether an alien's marriage or application for adjustment of status before the statute's effective date (facts not in play here) renders the statute impermissibly retroactive when it is applied to the alien. See, e.g., *Faiz-Mohammad*, *supra*, at 809-810 (application for adjustment of status); *Alvarez-Portillo*, *supra*, at 862, 867 (marriage).

III

[1][2] Statutes are disfavored as retroactive when their application "would impair rights a party possessed when he *2428 acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, *supra*, at 280, 114 S.Ct. 1483. The modern law thus follows Justice Story's definition

126 S.Ct. 2422, 165 L.Ed.2d 323, 74 USLW 4416, 06 Cal. Daily Op. Serv. 5324, 06 Daily Journal D.A.R. 7858, 19 Fla. L. Weekly Fed. S 314
(Cite as: 126 S.Ct. 2422)

of a retroactive statute, as "tak[ing] away or impair[ing] vested rights acquired under existing laws, or creat[ing] a new obligation, impos[ing] a new duty, or attach[ing] a new disability, in respect to transactions or considerations already past," *Society for the Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756, 767 (No. 13,156) (CCNH 1814). Accordingly, it has become "a rule of general application" that "a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication." *United States v. St. Louis, S.F. & T.R. Co.*, 270 U.S. 1, 3, 46 S.Ct. 182, 70 L.Ed. 435 (1926) (opinion for the Court by Brandeis, J.).

[3][4][5] This Court has worked out a sequence of analysis when an objection is made to applying a particular statute said to affect a vested right or to impose some burden on the basis of an act or event preceding the statute's enactment. We first look to "whether Congress has expressly prescribed the statute's proper reach," *Landgraf, supra*, at 280, 114 S.Ct. 1483, and in the absence of language as helpful as that we try to draw a comparably firm conclusion about the temporal reach specifically intended by applying "our normal rules of construction," *Lindh v. Murphy*, 521 U.S. 320, 326, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). If that effort fails, we ask whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of "affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment," *Landgraf, supra*, at 278, 114 S.Ct. 1483; see also *Lindh, supra*, at 326, 117 S.Ct. 2059. If the answer is yes, we then apply the presumption against retroactivity by construing the statute as inapplicable to the event or act in question owing to the "absen[ce of] a clear indication from Congress that it intended such a result." *INS v. St. Cyr*, 533 U.S. 289, 316, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001); see *Martin v. Hadix*, 527 U.S. 343, 352, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999) (quoting *Landgraf, supra*, at 280, 114 S.Ct. 1483).

[6] Fernandez-Vargas fights at each step of the way, arguing that Congress intended that INA § 241(a)(5) would not apply to illegal reentrants like

him who returned to this country before the provision's effective date; and in any event, that application of the provision to such illegal reentrants would have an impermissibly retroactive effect, to be avoided by applying the presumption against it. We are not persuaded by either contention.^{FN6}

FN6. The Government urges us to forgo *Landgraf* analysis altogether because § 241(a)(5) regulates only a present removal process, not past primary conduct, citing our recent decision in *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004). Although we ultimately agree with the Government, in the abstract at least, that the reinstatement provision concerns itself with postenactment affairs, see *infra*, at 13-15, we find the Government's allusion to *Altmann* inapt. The Court's conclusion in that case, that *Landgraf* was to be avoided, turned on the peculiarities of the Foreign Sovereign Immunities Act. See *Altmann, supra*, at 694-696, 124 S.Ct. 2240. Those peculiarities are absent here, and we thus advert to *Landgraf*, as we ordinarily do.

A

Needless to say, Congress did not complement the new version of § 241(a)(5) with any clause expressly dealing with individuals who illegally reentered the country before IIRIRA's April 1, 1997, effective date, either including them within *2429 § 241(a)(5)'s ambit or excluding them from it. Fernandez-Vargas argues instead on the basis of the generally available interpretive rule of negative implication, when he draws attention to language governing temporal reach contained in the old reinstatement provision, but missing from the current one. Section 242(f) applied to "any alien [who] has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in ... subsection (e)." 8 U.S.C. § 1252(f) (1994 ed.).

126 S.Ct. 2422, 165 L.Ed.2d 323, 74 USLW 4416, 06 Cal. Daily Op. Serv. 5324, 06 Daily Journal D.A.R. 7858, 19 Fla. L. Weekly Fed. S 314
(Cite as: 126 S.Ct. 2422)

According to Fernandez-Vargas, since that before-or-after clause made it clear that the statute applied to aliens who reentered before the enactment date of the earlier version, its elimination in the current iteration shows that Congress no longer meant to cover preenactment reentrants.

See *Brewster v. Gage*, 280 U.S. 327, 337, 50 S.Ct. 115, 74 L.Ed. 457 (1930) ("deliberate selection of language ... differing from that used in the earlier Acts" can indicate "that a change of law was intended"); cf. 2B N. Singer, *Statutes and Statutory Construction* § 51.04, p. 244 (6th rev. ed.2000). But the clues are not that simple.

To begin with, the old before-or-after clause was sandwiched between references to departure or deportation under a deportation order and to grounds for deportation set out in a different subsection of the INA. It thus most naturally referred not to the illegal reentry but to the alien's previous deportation or departure. If its omission from the new subsection (a)(5) is significant, its immediate significance goes to the date of leaving this country, not the date of illegal return. Since the old clause referred to the date of enactment of the INA in 1952, the negative implication argument from dropping the language is that the reinstatement section no longer applies to those who left the country before that date. But, in 1996, application keyed to departures in 1952 or earlier was academic, and the better inference is that the clause was removed for that reason.^{FN7}

FN7. We therefore need not entertain Fernandez-Vargas's argument that the provision's drafting history indicates that the language was eliminated deliberately.

If, moreover, we indulged any suggestion that omitting the clause showed an intent to apply § 241(a)(5) only to deportations or departures after IIRIRA's effective date, the result would be a very strange one: it would exempt from the new reinstatement provision's coverage anyone who departed before IIRIRA's effective date but reentered after it. The point of the statute's revision, however, was obviously to expand the

scope of the reinstatement authority and invest it with something closer to finality, and it would make no sense to infer that Congress meant to except the broad class of persons who had departed before the time of enactment but who might return illegally at some point in the future.

Fernandez-Vargas sidesteps this problem (on a very generous reading of his argument) by making a more general suggestion of congressional intent: whatever the event to which the old law was tied, activity before as well as activity after it implicated the reinstatement power. Since the new law is bereft of such clarity, we should apply the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien," *St. Cyr*, 533 U.S., at 320, 121 S.Ct. 2271 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987)), which would effectively impose "[t]he presumption against retroactive application of ambiguous statutory provisions," *St. Cyr*, *supra*, at 320, 121 S.Ct. 2271. If we did so, we would find that *2430 § 241(a)(5) operates only to reentries after its effective date.

Even at this amorphously general level, however, the argument suffers from two flaws, the first being that it puts the cart before the horse. As Fernandez-Vargas realizes, he urges application of the presumption against retroactivity as a tool for interpreting the statute at the first *Landgraf* step. But if that were legitimate, a statute lacking an express provision about temporal reach would never be construed as having a retroactive potential and the final two steps in the *Landgraf* enquiry would never occur (that is, asking whether the statute would produce a retroactive effect, and barring any such application by applying the presumption against retroactivity). It is not until a statute is shown to have no firm provision about temporal reach but to produce a retroactive effect when straightforwardly applied that the presumption has its work to do. See 511 U.S., at 280, 114 S.Ct. 1483.

The second flaw is the argument's failure to account for the new statute's other provisions on temporal

126 S.Ct. 2422, 165 L.Ed.2d 323, 74 USLW 4416, 06 Cal. Daily Op. Serv. 5324, 06 Daily Journal D.A.R. 7858, 19 Fla. L. Weekly Fed. S 314
(Cite as: 126 S.Ct. 2422)

reach, from which one might draw a negative inference that subsection (a)(5) was (or at least may well have been) meant to apply to reentries before its effective date. In contrast to their silence about the temporal sweep of § 241(a)(5), the 1996 amendments speak directly to the scope of changes in provisions making reentry criminal and setting civil penalties. IIRIRA § 324(c), 110 Stat. 3009-629, note following 8 U.S.C. § 1326 (2000 ed.), provides that the expanded criminal prohibitions, see § 1326(a), apply only to reentries or attempts after the effective date, and § 105(b), 110 Stat. 3009-556, note following 8 U.S.C. § 1325, provides the same as to civil penalties for illegal reentry, see § 1325(b). The point here is not that these provisions alone would support an inference of intent to apply the reinstatement provision retroactively, see *Lindh*, 521 U.S., at 328, n. 4, 117 S.Ct. 2059, for we require a clear statement for that, see *Martin*, 527 U.S., at 354, 119 S.Ct. 1998. But these provisions do blunt any argument that removal of the before-or-after clause suffices to establish the applicability of § 241(a)(5) only to posteffective date reentries. The fact is that IIRIRA sometimes expressly made changes prospective as from its effective date and sometimes expressly provided they were applicable to earlier acts; compare §§ 324(c) and 105(b), with § 347(c), 110 Stat. 3009-639 (provision governing removal of aliens who have unlawfully voted is applicable “to voting occurring before, on, or after the date of the enactment of this Act”), and § 351(c), *id.*, at 3009-640 (provision applicable to “waivers filed before, on, or after the date of the enactment of this Act”). With such a variety of treatment, it is just too hard to infer any clear intention at any level of generality from the fact of retiring the old before-or-after language from what is now § 241(a)(5).

One conclusion can be stated, however. Common principles of statutory interpretation fail to unsettle the apparent application of § 241(a)(5) to any reentrant present in the country, whatever the date of return.^{FN8}

FN8. Justice STEVENS states that when,

in 1952, Congress inserted the before-or-after clause with the old § 242(f), it was responding to the Immigration and Naturalization Service (INS) practice of applying the reinstatement provision only to deportation orders issued after the provision's enactment, a practice that necessarily meant INS applied the provision only to postenactment reentries. By correcting the INS's interpretation only as to deportation orders, Justice STEVENS suggests, Congress did nothing to disturb the practice as to reentries. And when it removed the obsolete before-or-after clause in 1996 without adding alternative language of temporal reach, the argument goes, Congress held fast to its intent in 1950 and 1952 to apply the reinstatement provision only to postenactment reentries. But the INS's practice circa 1951 of applying the reinstatement provision only to postenactment reentries followed from its policy regarding deportation orders, and in 1952 Congress might just as easily have assumed that the branch would go the way of the root. In any event, it is difficult to accept Justice STEVENS's view that congressional understanding from 40 years back was intended to govern the IIRIRA reinstatement provision, given Congress's care to make the revised criminal and civil penalties applicable only to postenactment reentries.

*2431 B

This facial reading is confirmed by two features of IIRIRA, not previously discussed, that describe the conduct to which § 241(a)(5) applies, and show that the application suffers from no retroactivity in denying Fernandez-Vargas the opportunity for adjustment of status as the spouse of a citizen of the United States.^{FN9} One is in the text of that provision itself, showing that it applies to Fernandez-Vargas today not because he reentered in 1982 or at any other particular time, but because he chose to remain after the new statute became

126 S.Ct. 2422, 165 L.Ed.2d 323, 74 USLW 4416, 06 Cal. Daily Op. Serv. 5324, 06 Daily Journal D.A.R. 7858, 19 Fla. L. Weekly Fed. S 314
(Cite as: 126 S.Ct. 2422)

effective. The second is the provision setting IIRIRA's effective date, § 309(a), 110 Stat. 3009-625, which shows that Fernandez-Vargas had an ample warning of the coming change in the law, but chose to remain until the old regime expired and § 241(a)(5) took its place.

FN9. We would reach the same conclusion about denial of opportunities to apply for permission for voluntary departure as an alternative to removal, see 8 U.S.C. § 1229c, and about cancellation of removal, see § 1229b(b), if there were a need to deal with these matters separately. Although Fernandez-Vargas argues that he is being denied the chance to seek these forms of relief, he never applied for either of them and has not formally attempted to claim them in response to the reinstatement and removal proceedings.

As a preface to identifying the conduct by Fernandez-Vargas to which the reinstatement provision applies (the conduct that results in reinstating the old deportation order without the former opportunities to seek adjustment of status), a look at our holding in *St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, is helpful. The alien, *St. Cyr*, was a lawful, permanent resident who made a plea agreement and pleaded guilty to an aggravated felony charge. Although the resulting conviction justified his deportation, when he entered his plea the law allowed him to seek a waiver of deportation at the discretion of the Attorney General. Between the plea and deportation proceedings, however, IIRIRA and another statute repealed the provision for that discretionary relief, converting deportation from a possibility to a certainty. *Id.*, at 325, 121 S.Ct. 2271. The question was whether *Landgraf* barred application of the new law eliminating discretionary relief, on the ground that applying it to a defendant who pleaded guilty before the enactment of the new law would attach a further burdensome consequence to his plea, amounting to "a new disability, in respect to transactions or considerations already past," 533 U.S., at 321, 121 S.Ct. 2271 (internal quotation marks omitted). The

answer was that converting deportation from a likely possibility to a dead certainty would add such a burden, and application of the new law was accordingly barred. *Id.*, at 325, 121 S.Ct. 2271. In making this "commonsense, functional judgment," *Martin, supra*, at 357, 119 S.Ct. 1998, we emphasized that plea agreements "involve a *quid pro quo* between a criminal defendant and the government," *St. Cyr*, 533 U.S., at 321, 121 S.Ct. 2271, in which a waiver of "constitutional rights (including the right to a trial)," had been exchanged for a "perceived benefit," *id.*, at 322, 121 S.Ct. 2271, which in practical *2432 terms was valued in light of the possible discretionary relief, a focus of expectation and reliance, *id.*, at 323, 121 S.Ct. 2271.

St. Cyr's agreement for a *quid pro quo* and his plea were entirely past, and there was no question of undoing them, but the "transactio[n] or consideratio[n]" on which § 241(a)(5) turns is different.^{FN10} While the law looks back to a past act in its application to "an alien [who] has reentered ... illegally," 8 U.S.C. § 1231(a)(5), the provision does not penalize an alien for the reentry (criminal and civil penalties do that); it establishes a process to remove him "under the prior order at any time after the reentry." *Ibid.* Thus, it is the conduct of remaining in the country after entry that is the predicate action; the statute applies to stop an indefinitely continuing violation that the alien himself could end at any time by voluntarily leaving the country. It is therefore the alien's choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out.

FN10. We understand Fernandez-Vargas's claim as falling within the second of Justice Story's categories of retroactivity (new consequences of past acts), not the first category of canceling vested rights. The forms of relief identified by Fernandez-Vargas as rendered unavailable to him by § 241(a)(5) include cancellation of removal, see 8 U.S.C. § 1229b(b),

126 S.Ct. 2422, 165 L.Ed.2d 323, 74 USLW 4416, 06 Cal. Daily Op. Serv. 5324, 06 Daily Journal D.A.R. 7858, 19 Fla. L. Weekly Fed. S 314
(Cite as: 126 S.Ct. 2422)

adjustment of status, see § 1255, and voluntary departure, see § 1229c. These putative claims to relief are not "vested rights," a term that describes something more substantial than inchoate expectations and unrealized opportunities.

In contrast to "an immediate fixed right of present or future enjoyment," *Pearsall v. Great Northern R. Co.*, 161 U.S. 646, 673, 16 S.Ct. 705, 40 L.Ed. 838 (1896) (internal quotation marks omitted), Fernandez-Vargas's claim to such relief was contingent, and it was up to him to take some action that would elevate it above the level of hope. It is not that these forms of relief are discretionary, cf. *St. Cyr*, 533 U.S., at 325, 121 S.Ct. 2271; it is rather that before IIRIRA's effective date Fernandez-Vargas never availed himself of them or took action that enhanced their significance to him in particular, as *St. Cyr* did in making his *quid pro quo* agreement, see *supra*, at 2431-2432.

That in itself is enough to explain that Fernandez-Vargas has no retroactivity claim based on a new disability consequent to a completed act, but in fact his position is weaker still. For Fernandez-Vargas could not only have chosen to end his continuing violation and his exposure to the less favorable law, he even had an ample warning that the new law could be applied to him and ample opportunity to avoid that very possibility by leaving the country and ending his violation in the period between enactment of § 241(a)(5) and its effective date. IIRIRA became law on September 30, 1996, but it became effective and enforceable only on "the first day of the first month beginning more than 180 days after" IIRIRA's enactment, that is, April 1, 1997. § 309(a), 110 Stat. 3009-625. Unlawful alien reentrants like Fernandez-Vargas thus had the advantage of a grace period between the unequivocal warning that a tougher removal regime lay ahead and actual imposition of the less opportune terms of the new law. In that stretch of six months, Fernandez-Vargas could have ended his illegal presence and potential exposure to the

coming law by crossing back into Mexico.^{FN11} For that *2433 matter, he could have married the mother of his son and applied for adjustment of status during that period, in which case he would at least have had a claim (about which we express no opinion) that proven reliance on the old law should be honored by applying the presumption against retroactivity.^{FN12}

FN11. In a series of letters submitted to the Court after oral argument, the parties dispute the consequences if Fernandez-Vargas had left voluntarily after IIRIRA's enactment and, specifically, the period of inadmissibility to which Fernandez-Vargas would thereupon have been subject. Because we conclude that § 241(a)(5) does not operate on a completed pre-enactment act, we need not consider the retroactive implications either of the fact of his inadmissibility or of any variance between the period of inadmissibility upon a postenactment voluntary return and that prescribed under the old regime. The period of inadmissibility stems from an alien's illegal reentry within a specified time after a prior removal and is applicable to Fernandez-Vargas because he reentered shortly after his 1981 deportation, but Fernandez-Vargas does not challenge as impermissibly retroactive IIRIRA's lengthening of that period from 5 to 10 or 20 years, see 8 U.S.C. § 1182(a)(6)(B) (1994 ed.); § 1182(a)(9)(A)(ii) (2000 ed.). In any event, any period of inadmissibility is subject to waiver by the Attorney General, see § 1182(a)(6)(B) (1994 ed.); § 1182(a)(9)(A)(iii) (2000 ed.), and presumably Fernandez-Vargas could plead his serious case for such a waiver (his marriage, his child) in seeking legal reentry to the United States.

FN12. See 394 F.3d, at 890, and n. 11 (distinguishing Fernandez-Vargas's circumstance from that of aliens who had

126 S.Ct. 2422, 165 L.Ed.2d 323, 74 USLW 4416, 06 Cal. Daily Op. Serv. 5324, 06 Daily Journal D.A.R. 7858, 19 Fla. L. Weekly Fed. S 314
(Cite as: 126 S.Ct. 2422)

married, or both married and applied for adjustment of status, before IIRIRA's effective date).

Fernandez-Vargas did not, however, take advantage of the statutory warning, but augmented his past 15 years of unlawful presence by remaining in the country into the future subject to the new law, whose applicability thus turned not on the completed act of reentry, but on a failure to take timely action that would have avoided application of the new law altogether. To be sure, a choice to avoid the new law before its effective date or to end the continuing violation thereafter would have come at a high personal price, for Fernandez-Vargas would have had to leave a business and a family he had established during his illegal residence. But the branch of retroactivity law that concerns us here is meant to avoid new burdens imposed on completed acts, not all difficult choices occasioned by new law. What Fernandez-Vargas complains of is the application of new law to continuously illegal action within his control both before and after the new law took effect. He claims a right to continue illegal conduct indefinitely under the terms on which it began, an entitlement of legal stasis for those whose lawbreaking is continuous. But "[i]f 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." L. Fuller, *The Morality of Law* 60 (1964) (quoted in *Landgraf*, 511 U.S., at 269, n. 24, 114 S.Ct. 1483).^{FN13}

FN13. This is the nub of our disagreement with Justice STEVENS. He says it misses the point to say that Fernandez-Vargas could avoid the new law by returning to Mexico, which he thinks is like saying that a defendant could avoid a retroactive criminal penalty by locking himself up for 10 years, *post*, at 2434, n. 2. Justice STEVENS thus argues that reimposing an order of removal to end illegal residence is like imposing a penalty for a completed act (the defendant's unspecified act in his analogy). But even on his own analysis,

Fernandez-Vargas continued to violate the law by remaining in this country day after day, and Justice STEVENS does not deny that the United States was entitled to bring that continuing violation to an end. He says, however, that Congress should not be understood to provide that if the violation continues into the future it may be ended on terms less favorable than those at the beginning. But this is not the position that retroactivity doctrine imputes to an inexplicit Congress. Fernandez-Vargas may have an equitable argument that the Government should not, for the future, eliminate an opportunity for continuing illegality accompanied by the hopes that long illegal residence and a prospect of marriage gave him in the past. But Congress apparently did not accept such an argument, which could prevail here only if the presumption against retroactivity amounted to a presumption of legal stasis for the benefit of continuous lawbreakers.

*2434 Because we conclude that § 241(a)(5) has no retroactive effect when applied to aliens like Fernandez-Vargas, we affirm the judgment of the Court of Appeals.

It is so ordered.

Justice STEVENS, dissenting.

In 1982, petitioner Humberto Fernandez-Vargas, an alien who had previously been deported, reentered the United States illegally. Over the next 20 years, petitioner remained here. He worked as a truckdriver, owned a trucking business, fathered a child, and eventually married the child's mother, a United States citizen. The laws in place at the time of petitioner's entry and for the first 15 years of his residence in this country would have rewarded this behavior, allowing him to seek discretionary relief from deportation on the basis of his continued presence in and strong ties to the United States. See 8 U.S.C. § 1254(a)(1) (1994 ed.).

In 1996, however, Congress passed a new version of the applicable provision eliminating almost

126 S.Ct. 2422, 165 L.Ed.2d 323, 74 USLW 4416, 06 Cal. Daily Op. Serv. 5324, 06 Daily Journal D.A.R. 7858,
 19 Fla. L. Weekly Fed. S 314
 (Cite as: 126 S.Ct. 2422)

entirely the possibility of relief from deportation for aliens who reenter the country illegally having previously been deported. See Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), § 305(a)(3), 110 Stat. 3009-599, 8 U.S.C. § 1231(a)(5) (2000 ed.); see also *ante*, at 2426-2427, n. 4. The 1996 provision is silent as to whether it was intended to apply retroactively to conduct that predated its enactment.^{FN1} Despite a historical practice supporting petitioner's reading, and despite the harsh consequences that attend its application to thousands of individuals who, like petitioner, entered the country illegally before 1997, the Court not only holds that the statute applies to preenactment reentries but also that it has no retroactive effect. I disagree with both of these conclusions.

FN1. The statutory provisions expanding the class of people to whom criminal penalties for illegal reentry might apply, however, explicitly apply only to postenactment reentries. See IIRIRA, § 324(c), 110 Stat. 3009-629, note following 8 U.S.C. § 1326.

I

In 1950, when Congress first gave the Attorney General the authority to reinstate an order of deportation, it enacted a reinstatement provision containing no explicit temporal reach.^{FN2} See Internal Security Act, § 23(d), 64 Stat. 1012, 8 U.S.C. § 156(d) (1946 ed., Supp. V). The natural reading of this provision, the one most consistent with the "deeply rooted" traditional presumption against retroactivity, *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), is that it would apply to deportations that occurred before the provision's enactment but not to preenactment reentries. While both deportation and reentry can constitute "events completed before [the provision's] enactment," *id.*, at 270, 114 S.Ct. 1483, an alien's reentry is the act that triggers the provision's operation and is therefore the act to which the provision attaches legal consequences.

FN2. The provision stated:

"Should any alien subject to the provisions of subsection (c) unlawfully return to the United States after having been released for departure or deported pursuant to this section, the previous war-rant of deportation against him shall be considered as reinstated from its original date of issuance." 64 Stat. 1012, codified as 8 U.S.C. § 156(d) (1946 ed., Supp. V).

When the Immigration and Naturalization Service (INS) promulgated regulations implementing the 1950 statute, however, it did not read the statute so naturally. Instead, the INS' regulations, *2435 embodying an overly strong version of the presumption against retroactivity, provided that an order of deportation could only be reinstated if that deportation occurred after the statute's enactment date. See 8 CFR § 152.5 (1950 Cum.Supp.). Thus, the INS read the reinstatement provision as inapplicable even to reentries that occurred *after* the statute's enactment date if the underlying deportation had been entered before that date; it follows *a fortiori* that the provision was considered inapplicable to reentries that occurred before the statute's enactment.

Congress corrected the INS' error two years later by adding the clause "whether before or after the date of enactment of this Act." Immigration and Nationality Act, § 242(f), 66 Stat. 212, 8 U.S.C. § 1252(f) (1994 ed.); see also *ante*, at 2426, and nn. 2-3. As the Court correctly notes, that amendment "most naturally referred not to the illegal reentry but to the alien's previous deportation or departure." *Ante*, at 2429. The best interpretation of Congress' intent with regard to the 1952 statute, then, was that it meant to apply the reinstatement provision to preenactment deportations but to preserve the status quo with regard to preenactment reentries: In accordance with the traditional presumption against retroactivity, preenactment reentries would remain uncovered by the reinstatement provision.

In 1996, when Congress enacted the current reinstatement provision, it drafted a version of the statute that, like its 1950 predecessor, was silent as

126 S.Ct. 2422, 165 L.Ed.2d 323, 74 USLW 4416, 06 Cal. Daily Op. Serv. 5324, 06 Daily Journal D.A.R. 7858, 19 Fla. L. Weekly Fed. S 314
(Cite as: 126 S.Ct. 2422)

to its temporal reach. See 8 U.S.C. § 1231(a)(5) (2000 ed.). If we assume (as the Court does) that the addition of the “before-or-after” clause in the 1952 statute merely clarified Congress’ original intent in 1950 to make the provision applicable to preenactment departures without authorizing any application to preenactment reentries, it is reasonable to attribute precisely the same intent to the Congress that enacted the 1996 statute: As in the 1950 and 1952 versions of the provision, Congress intended the 1996 reinstatement provision to apply to preenactment deportations but not to preenactment reentries.

In sum, our normal rules of construction support the reasonable presumption that Congress intended the provision to cover only postenactment reentries. Accordingly, the 1996 reinstatement provision should not be construed to apply to petitioner’s earlier entry into the United States.

II

The Court not only fails to give the 1996 Act its most normal interpretation, but also erroneously concludes that the provision does not have any retroactive effect. The Court reaches this conclusion based on its judgment that the provision applies not to conduct that occurred before the statute’s enactment date, but rather to “an indefinitely continuing violation that the alien himself could end at any time by voluntarily leaving the country.” *Ante*, at 2432. This reasoning is unpersuasive.

It is true, of course, that the order of deportation entered against petitioner in 1981 could not be reinstated unless he was present in the United States, and that, until he was arrested in 2003, petitioner could have chosen to leave the United States. But it is precisely petitioner’s “continuing violation” that allowed him to be eligible for relief from deportation in the first place: He was required to have been physically present in the United States for a period of not less than seven years, to have been a person of good moral character during that time, and to have developed ties to the United

States such that his deportation would result in extreme hardship to himself or to his United States citizen wife or child.^{FN3} See 8 U.S.C. § 1254(a)(1) (1994 ed.); see also *INS v. Phinpathya*, 464 U.S. 183, 104 S.Ct. 584, 78 L.Ed.2d 401 (1984) (strictly construing physical presence requirement). Moreover, under the pre-1996 version of the reinstatement provision, the longer petitioner remained in the United States the more likely he was to be granted relief from deportation. See *Matter of Ige*, 20 I. & N. Dec. 880, 882, 1994 WL 520996 (1994) (listing factors considered in evaluating extreme hardship requirement, including alien’s length of residence in United States, family in United States, business or occupation, and position in community).

FN3. Although petitioner became eligible for relief from deportation after being physically present in the United States for seven years, he could not apply for that relief until the Government placed him in deportation proceedings, at which point he could raise his eligibility as an affirmative defense. Cf. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951-952, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) (applying presumption against retroactivity to statute eliminating affirmative defense).

Given these incentives, petitioner legitimately complains that the Government has changed the rules midgame. At the time of his entry, and for the next 15 years, it inured to petitioner’s benefit for him to remain in the United States continuously, to build a business, and to start a family. After April 1, 1997, the date on which the applicable reinstatement provision became effective, all of these activities were rendered irrelevant in the eyes of the law. Only the Court’s unfortunately formalistic search for a single “past act that [petitioner] is helpless to undo,” *ante*, at 2432, allows it to conclude that the provision at issue has no retroactive effect.^{FN4} For regardless of whether his 1982 reentry was or was not an act that he could now “undo,” it is certainly an act to which the 1996

126 S.Ct. 2422, 165 L.Ed.2d 323, 74 USLW 4416, 06 Cal. Daily Op. Serv. 5324, 06 Daily Journal D.A.R. 7858, 19 Fla. L. Weekly Fed. S 314
(Cite as: 126 S.Ct. 2422)

reinstatement provision has attached serious adverse consequences. Because the provision has an undeniably harsh retroactive effect, "absent a clear indication from Congress that it intended such a result," *INS v. St. Cyr*, 533 U.S. 289, 316, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), we should apply the presumption against retroactivity and hold that the 1996 reinstatement provision does not apply to petitioner.

FN4. Even on its own terms the Court's logic is troubling. The Court believes that petitioner could have avoided being affected by the 1996 reinstatement provision, not just retroactively but in any way whatsoever, by leaving the country prior to its effective date—a date that occurred six months after the statute's enactment date not to give aliens "ample warning," *ante*, at 2431, 2432, but instead to allow the Attorney General to prepare for the substantial changes caused by the IIRIRA and to promulgate regulations to effectuate that Act. See § 309, 110 Stat. 3009-625. But had petitioner "take[n] advantage of the statutory warning," *ante*, at 2433, he would have imposed upon himself the very same punishment—the guarantee of removal to Mexico—that he hopes to avoid. Just as we would not say that a defendant may avoid the retroactive application of a criminal statute by locking himself up for 10 years, it cannot be that petitioner's ability to leave the country of his own accord somehow helps to prove that the provision at issue has no retroactive effect.

Accordingly, I respectfully dissent.

U.S., 2006.

Fernandez-Vargas v. Gonzales

126 S.Ct. 2422, 165 L.Ed.2d 323, 74 USLW 4416, 06 Cal. Daily Op. Serv. 5324, 06 Daily Journal D.A.R. 7858, 19 Fla. L. Weekly Fed. S 314

Briefs and Other Related Documents (Back to top)

- 2006 WL 651707 (Appellate Brief) Reply Brief for the Petitioner (Mar. 4, 2006) Original Image of this Document (PDF)
- 2006 WL 331814 (Appellate Brief) Brief for the Respondent (Feb. 8, 2006) Original Image of this Document (PDF)
- 2005 WL 3530559 (Appellate Brief) Brief for the Petitioner (Dec. 22, 2005) Original Image of this Document (PDF)
- 2005 WL 3543090 (Appellate Brief) Brief of Amici Curiae American Immigration Law Foundation, American Immigration Lawyers Association, Capital Area Immigrants' Rights Coalition, Immigrants' Rights Project of The American Civil Liberties Union, Midwest Immigrant and Human Rights Center, National Immigration Law Center, National Immigration Project of the National Lawyers Guild, Northwest Immigrant Rights Project, and The Texas Lawyers' Committee For Civil Rights Under Law in Support of Petitioner (Dec. 22, 2005)
- 2005 WL 2566459 (Appellate Petition, Motion and Filing) Reply Brief for Petitioner (Oct. 11, 2005)
- 2005 WL 2412714 (Appellate Petition, Motion and Filing) Brief for the Respondent (Sep. 27, 2005)
- 04-1376 (Docket) (Apr. 14, 2005)
- 2005 WL 879510 (Appellate Petition, Motion and Filing) Petition for a Writ of Certiorari (Apr. 12, 2005)

END OF DOCUMENT

EXHIBIT 2

Westlaw.

915 F.2d 1290

Page 1

915 F.2d 1290
(Cite as: 915 F.2d 1290)

H

Lakeview Development Corp. v. City of South Lake Tahoe C.A.9 (Cal.), 1990.

United States Court of Appeals, Ninth Circuit.
LAKEVIEW DEVELOPMENT CORPORATION,
a California corporation, Plaintiff-Appellant,
v.

CITY OF SOUTH LAKE TAHOE, a municipal corporation; Tahoe Regional Planning Agency, a separate legal entity created pursuant to an interstate Compact between the States of Nevada and California, and Does 1 through 30,
Defendants-Appellees.
No. 89-15214.

Argued and Submitted April 18, 1990.
Decided Sept. 28, 1990.

Developer brought action against city and Tahoe Regional Planning Agency to obtain declaratory judgment that it had vested right to complete development without further intervention by Agency, to obtain injunction against land-use restrictions, and to obtain damages for taking without just compensation and for violation of due process. The United States District Court for the Eastern District of California, Raul A. Ramirez, J., entered summary judgment in favor of defendants. Developer appealed. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) state law, rather than federal law, governed developer's claim to vested right; (2) developer waited too long before indicating desire to complete construction, even if it had vested right; and (3) restrictions on remainder of development did not constitute taking or deprive developer of property with due process.

Affirmed.

West Headnotes

[1] Federal Courts 170B ¶433

170B Federal Courts

170BVI State Laws as Rules of Decision

170BVI(C) Application to Particular Matters

170Bk433 k. Other Particular Matters.

Most Cited Cases

Developer's claim that it had vested right to complete development was species of governmental estoppel governed by state, rather than federal law, in that no federal constitutional or statutory law required states to recognize any doctrine of governmental estoppel.

[2] Eminent Domain 148 ¶2.4

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police and Other Powers Distinguished

148k2.4 k. Taxes, Licenses, Assessments, and Users' Fees in General. Most Cited Cases
(Formerly 148k2(1.1))

Claim brought under Federal Constitution charging taking or deprivation of property cannot be premised solely on charge that government has repealed law and revoked once valid permit. U.S.C.A. Const. Amends. 5, 14.

[3] Estoppel 156 ¶62.2(3)

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k62 Estoppel Against Public, Government, or Public Officers

156k62.2 States and United States

156k62.2(3) k. United States Government, Officers, and Agencies in General. Most Cited Cases

Claim of estoppel against government rests not on Constitutional norms of fairness, but on broader norms of equity.

[4] Federal Courts 170B ¶433

170B Federal Courts

170BVI State Laws as Rules of Decision

170BVI(C) Application to Particular Matters

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915 F.2d 1290

Page 2

915 F.2d 1290

(Cite as: 915 F.2d 1290)

170Bk433 k. Other Particular Matters.

Most Cited Cases

Developer's claim that it had vested right to complete development in area subject to interstate compact and California Tahoe Regional Planning Agency was governed by state, rather than federal, law. West's Ann.Cal.Gov.Code § 68000 et seq. (Repealed); N.R.S. 277.190 et seq.

[5] Zoning and Planning 414 ↪ 465

414 Zoning and Planning

414VIII Permits, Certificates and Approvals

414VIII(D) Effect of Determination;
Revocation

414k465 k. Vested or Property Rights.

Most Cited Cases

Developer that indicated readiness to build townhouses 12 years after receiving special use permit could not estop Tahoe Regional Planning Agency from imposing subsequent land-use restrictions, even if developer had vested right, and even though developer had completed some townhouses and hotel; developer did not proceed at pace reasonably close to that anticipated, and government did not interfere until well after time that developer could have completed entire project.

[6] Constitutional Law 92 ↪ 278.2(1)

92 Constitutional Law

92XII Due Process of Law

92k278.2 Zoning, Building, and Planning
Regulations

92k278.2(1) k. In General. Most Cited
Cases

Developer claiming that further land-use restrictions would constitute taking and deprivation of property without due process and that refusal to allow development of more townhouses deprived developer of all economically viable use of land was required to allege that it attempted to ask Tahoe Regional Planning Authority for less intensive use of land or that such an attempt would be futile. U.S.C.A. Const.Amends. 5, 14.

[7] Eminent Domain 148 ↪ 2.10(6)

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police
and Other Powers Distinguished

148k2.10 Zoning, Planning, or Land Use;
Building Codes

148k2.10(4) Zoning and Permits

148k2.10(6) k. Particular Cases.

Most Cited Cases

(Formerly 148k2(1.2))

Refusal to permit developer to complete original plan to construct 28 townhouses after building 14 townhouses and 160-unit hotel did not deprive developer of all economically viable use of land. U.S.C.A. Const.Amends. 5, 14.

***1291** Lawrence L. Hoffman, Hoffman, Lien & Faccinto, Tahoe City, Cal., for plaintiff-appellant. Gary A. Owen, Crowell, Susich, Owen & Tackes, Carson City, Nev., Richard M. Skinner, Deputy Atty. Gen., Sacramento, Cal., for defendants-appellees.

Appeal from the United States District Court for the Eastern District of California.

Before **LIVELY, FN* FLETCHER,** and
REINHARDT, Circuit Judges.

FN* Honorable Pierce Lively, Senior
United States Circuit Judge for the Sixth
Circuit, sitting by designation.

FLETCHER, Circuit Judge:

Plaintiff Lakeview Development Corporation (Lakeview) appeals from the district court's entry of judgment against it on four claims, the first of which asks for a declaration that Lakeview has a "vested right" to complete the construction of a townhouse development, and the other three of which ask for injunctive relief and damages to redress the alleged deprivation of Lakeview's right to the economically viable use of its land. We affirm the district court's judgment on all four claims, albeit for reasons different from those stated by the district court.

I.

915 F.2d 1290

Page 3

915 F.2d 1290

(Cite as: 915 F.2d 1290)

FACTS

In 1967, Lakeview ^{FN1} bought a four acre plot of land in South Lake Tahoe, intending to build a "planned unit development" consisting of townhouses and a hotel.

FN1. Although the entity that is now Lakeview has had several different names, for convenience, we refer to it as Lakeview.

In October of 1968, Lakeview submitted an application to the City of South Lake Tahoe (City) for a special use permit (SUP). The application included a proposed subdivision map and a proposed site plan which depicted the layout of nine structures to be built on the site-eight townhouse buildings containing between two and six units each (a total of forty-two units) and one hotel containing 158 rooms. The map reflected that there were to be two clusters of townhouses, designated Unit One and Unit Two, containing eighteen and twenty-four units respectively. A swimming pool and a recreation area were also depicted. Also submitted were maps depicting among other things elevations of the buildings, floor plans, and common road and drainage facilities.

On November 27, 1968, the City Planning Commission approved the special use permit subject to four conditions and the tentative map subject to thirteen conditions. One of the four conditions of the SUP was, "All buildings, tree removal, and landscaping to be as approved by Architectural Review Committee ... such approval to be obtained prior to issuance of any individual permit for construction."

On December 3, 1968, the City Council approved the tentative map subject to the same conditions as imposed by the City Planning Commission.

The minutes of the May, 1969 City Planning Commission meeting show that development of the townhouses was intended at that time to take place in two phases; the first was to include the fourteen townhouses designated "Unit One" and the second

was to include the twenty-eight townhouses designated "Unit Two." There was to be a three to six month span of time between the completion of phase one and the commencement of phase two.

On June 18, 1969 the newly-created California Tahoe Regional Planning Agency *1292 (CTRPA) approved the plan subject to the same conditions as those imposed by the City. (Appellee Tahoe Regional Planning Agency (TRPA), created by an interstate compact approved by Congress, P.L. 91-148, 83 Stat. 360, was still being formed and had not yet come into official existence. It began operations on March 19, 1970.) On November 7, 1969, the final map for Unit One was recorded. On November 17, 1970, the final map for Unit Two was recorded.

Between November of 1969 and November of 1971, Lakeview obtained building permits from the city as each Unit One structure, including the swimming pool and recreation pavilion, was built.

Almost two years later, in October of 1973, Lakeview obtained a foundation permit for the first sixplex in Unit Two. Shortly thereafter, however, it abandoned the permit and changed its construction plans. Lakeview decided to delay building Unit Two and to proceed with the development of the hotel. Nat Sinclair, one of Lakeview's principals, stated in his affidavit that he made the decision because of a "hostile regulatory environment." In other words, it was becoming clear that the California legislature was on the verge of giving CTRPA a broader mandate to control development than it had previously. ^{FN2} Sinclair felt that the hotel was more important to develop and that the sooner the construction was begun on the hotel, the greater the protection Lakeview would have against changes in the law.

FN2. See Cal.Govt.Code § 67041.

Lakeview attempted to obtain a building permit for the hotel before July 12, 1974, the date CTRPA was expected to announce its new plan. Lakeview failed to do so, but it began to lay a foundation anyway-apparently on assurances that the City

915 F.2d 1290

Page 4

915 F.2d 1290

(Cite as: 915 F.2d 1290)

would later ratify the work done.

On July 12, 1974, CTRPA announced an interim plan, Resolution 74-1. That plan stated that CTRPA would review all permits for certain buildings "granted [by local governments] since January 1972 for which actual construction has not commenced. For purposes of this section, construction shall constitute issuance of a building permit and completion of a foundation."

On July 24, 1974, the City granted Lakeview the foundation permit for the hotel. On July 28, Gordon Hooper of CTRPA wrote to the City Manager, stating his intention to have a "stop work" order issued because CTRPA had not reviewed the project. The City Manager wrote back, asserting that CTRPA *had* reviewed and approved the hotel project in 1969. CTRPA took no further action.

During the same week in July when Lakeview's foundation permit application was pending before the City, TRPA, independently of CTRPA, expressed in a letter to the City its opinion that the permit should not be granted. TRPA, it should be recalled, did not exist when the special use permit was obtained in 1969. When TRPA began operations, it passed an ordinance requiring all developers to obtain administrative permits from TRPA before building. Section 9.11 of that ordinance, subsequently renumbered as § 9.10, contained a grandfather clause exempting certain developments from the administrative permit requirement. The clause provided:

Uses of land ... that do not conform to the regulations established by this Ordinance and ... which are to be created in connection with a subdivision the final map of which was approved by the appropriate local government ... within five years prior to February 10, 1972 are non-conforming uses [that may be continued], *provided, however*, in the case of a ... use to be created, it shall occupy no greater area than planned at the time such subdivision was approved. If any such use ceases for a period of one year, subsequent use of such land shall be in conformity with the regulations contained in this Ordinance.

*1293 The City responded to TRPA's letter with its own letter stating that it intended to issue the foundation permit. The City's letter, without specifically referring to the grandfather clause, pointed out to TRPA that a series of approvals were obtained by Lakeview "prior to the initiation of regulatory measures" by TRPA and that pursuant to such approvals, "work was begun on the project." The City seemed to be referring to the work done on Unit One, but the reference is not entirely clear. In any event, the City's letter to TRPA, like its letter to CTRPA, proved effective. TRPA did not pursue its objection to the hotel construction. The parties speculate that TRPA did not pursue its objection because of the grandfather clause. That, however, is not entirely clear. TRPA may simply have chosen not to fight a particular battle notwithstanding the fact that it felt the hotel was not grandfathered.

Because of problems with financing, the hotel project proceeded exceedingly slowly. Several years after construction began, only about a quarter of the structure was built. In 1979, Lakeview sold the hotel to another group, and that group eventually finished building it, but only after protracted litigation with CTRPA, which commenced in 1982. That litigation ultimately ended in a settlement, under which both parties (neither of them parties to this lawsuit) agreed that the result would not prejudice them in other cases.

In 1980, TRPA was reconstituted pursuant to extensive amendments to the Interstate Compact. See P.L. 96-551, 95 Stat. 3233; Cal.Govt.Code §§ 68000 *et seq.*; Nevada R.S. §§ 277.190 *et seq.*

Between May, 1974 and the summer of 1981, Lakeview had done virtually nothing to proceed with the development of Unit Two. In the summer of 1981, Lakeview contacted City officials about obtaining building permits for Unit Two. The City said that it was willing to grant the permits, but only with the consent of TRPA. The City noted that one condition of its own still had to be met—architectural review approval. In September of 1981, a TRPA attorney wrote Lakeview's lawyer that his client should seek a vested rights ruling from TRPA to determine if Lakeview was entitled to build Unit

915 F.2d 1290

Page 5

915 F.2d 1290

(Cite as: 915 F.2d 1290)

Two. Without such a determination, TRPA would not allow Unit Two to be built absent its further review of the project.

More than two years passed, and no administrative proceeding was brought to determine vested rights. On May 1, 1984, TRPA became subject to a temporary restraining order (TRO), which on August 9 became an injunction, prohibiting it from approving *any* developments, except in "circumstances of imminent threat to public health, safety, and welfare." The appellees do not raise a claim of laches with regard to Lakeview's failure to seek a vested rights determination prior to May 1, 1984.

This lawsuit was filed on July 12, 1985. The appellees concede that during the period of the TRO and injunction (May 1, 1984 to July 15, 1987), an attempt by Lakeview to exhaust its vested rights remedies by applying to TRPA would have been futile. They concede as well that under TRPA's new post-injunction plan, there is no possibility that TRPA could review its vested rights claim.

Lakeview's first claim asks for a declaratory judgment that it has a vested right to develop Unit Two without further intervention by TRPA. Its second claim asks for an injunction preventing TRPA from imposing its land use restrictions on the land planned for Unit Two, because such imposition would deprive it of all economically viable use of its land in violation of the fifth and fourteenth amendments to the United States Constitution. The third claim asks for damages resulting from the taking of all economically viable use of the land without just compensation. The fourth claim is essentially the same as the third, except that it seeks damages under 42 U.S.C. § 1983 for a deprivation of property without due process.

*1294 The district court decided the first two claims against Lakeview on summary judgment and the last two on a motion to dismiss pursuant to *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir.1977). Lakeview appeals all four adverse determinations.

II.

DISCUSSION

A. The Vested Rights Claim

A number of cases in California ^{FN3} and in other jurisdictions ^{FN4} hold that if a government agency grants a real estate developer formal permission to build a particular project and the developer incurs certain kinds of expenses in reliance on that permission, the developer may acquire a "vested right" to complete the project as approved—even if the completed project would violate more stringent land use laws passed since the time permission was granted. This case raises the questions of what kind of formal government permission suffices to meet the first requirement of a "vested right" and what the scope of such a right is assuming it attaches. Before we analyze these questions, we first consider whether state or federal law governs.

FN3. See, e.g., *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546 (1976).

FN4. See 49 A.L.R.3d 13 (1973).

[1] Lakeview argues that the question whether it has a "vested right" to complete its project is a question of federal law and that this court may therefore ignore state court decisions to the extent it finds their reasoning unpersuasive. It argues first that because the vested rights doctrine limits the state's power to interfere with property rights, the doctrine has federal Constitutional implications and requires federal courts to fashion their own rules. Lakeview argues second that even if its vested rights claim does not implicate the Constitution, it implicates the Interstate Compact between California and Nevada and that therefore this court may create federal common law to decide the claim. Both arguments lack merit.

Lakeview acknowledges that the "vested rights"

915 F.2d 1290

Page 6

915 F.2d 1290

(Cite as: 915 F.2d 1290)

doctrine traditionally has been treated as a doctrine of state law and that the doctrine has evolved in the state courts. Nonetheless, Lakeview argues that the case of *Nollan v. California Coastal Commission*, 483 U.S. 825, 833-34 n. 2, 107 S.Ct. 3141, 3146 n. 2, 97 L.Ed.2d 677 (1987), changed the framework for analyzing the issue, and that in the wake of *Nollan*, we may depart from the California cases. Lakeview relies in particular on footnote 2 of *Nollan*, where the Court, in responding to Justice Brennan's dissent, said that "the right to build on one's own property—even though its exercise can be subject to legitimate permitting requirements—cannot remotely be described as a 'government benefit.'" Lakeview argues that the reference to building on one's property as a "right" and not a "benefit" is somehow inconsistent with the doctrine that a "right" to build a *particular project* vests only after substantial work is performed in reliance on a government permit.

[2] There are two difficulties with this argument. First, the *Nollan* case dealt only with a property owner's right to build a single-family house, traditionally among the most minimally-regulated uses.^{FN5} Second, and more important, the *Nollan* court's reference to a landowner's abstract "right" to build in no way suggests that a landowner has an unconditional right under the taking or deprivation clauses^{FN6} of the federal Constitution to build any particular project he chooses. The sentence quoted from the *Nollan* footnote is qualified by its reference to "legitimate permitting requirements." The footnote does not imply that a permitting requirement is "illegitimate" *1295 simply because it disallows a previously permitted use. It is well established that there is no federal Constitutional right to be free from changes in land use laws. See, e.g., *Haas v. City and County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir.1979); *Traweek v. City and County of San Francisco*, 659 F.Supp. 1012, 1026 (N.D.Cal.1984) ("[P]laintiffs bought into a heavily regulated situation and were on notice that ... [t]heir purchase of property ... was therefore necessarily 'subject to further legislation upon the same topic.'" *Veix v. Sixth Ward Building and Loan Association*, 310 U.S. 32, 38, 60 S.Ct. 792, 795, 84 L.Ed. 1061 (1940)). A claim brought under the federal Constitution charging the taking or

deprivation of property thus cannot be premised solely on the charge that the government has repealed a law and revoked a once valid permit.

FN5. See Cunningham and Kremer, *Vested Rights Estoppel, and the Land Development Process*, 29 Hastings L.J. 625, 636 & nn. 42-43 (1978).

FN6. The fifth amendment to the United States Constitution provides in relevant part: "No person shall be ... deprived of ... property without due process of law; nor shall private property be taken for public use, without just compensation."

[3] In contrast to a taking or deprivation claim, the gravamen of a "vested rights" claim is that the landowner has a right to a particular use of his land because he has relied to his detriment on a formal government promise (in the form of a permit) stating that he can develop that use. The claim is thus a species of governmental estoppel. *Raley v. California Tahoe Regional Planning Agency*, 68 Cal.App.3d 965, 985, 137 Cal.Rptr. 699, 712 (1971). A claim of estoppel against the government rests not on Constitutional norms of fairness but on broader norms of equity. *Id.*; see also *Watkins v. United States Army*, 875 F.2d 699, 706 (9th Cir.1989) (en banc) *petition for cert. filed*, 58 U.S.L.W. 3771 (U.S. May 21, 1990) (No. 89-1806), (equitable estoppel against the government is a "nonconstitutional ground" for relief). Since no federal constitutional or statutory law requires the states to recognize any doctrine of governmental estoppel, let alone a doctrine with the particular contours that Lakeview urges us to recognize, we must reject Lakeview's suggestion that federal law governs the issue of vested rights.

[4] Lakeview argues that even if federal law does not generally govern the question of vested rights, federal law nonetheless applies in this case because the case arises under the Interstate Compact between Nevada and California. In *California Tahoe Regional Planning Agency v. Jennings*, 594 F.2d 181, 190 (9th Cir.1979), we held that by approving the Compact, "Congress did no more

915 F.2d 1290

Page 7

915 F.2d 1290
(Cite as: 915 F.2d 1290)

than incorporate the agreement of the two parties into the body of federal law; it did not make applicable the entire panoply of federal administrative and substantive standards." We therefore must look to the laws of Nevada and California to resolve the question before us. If there were a conflict between California and Nevada law on the question of vested rights, this case would be more difficult. We would have to decide whether to apply the law of the jurisdiction where the land is situated and the permit was granted or whether to apply some other principle to resolve the conflict. But there is no conflict here. Nevada follows California law on vested rights. See *Kings Castle v. Washoe County Bd. of Com'rs*, 88 Nev. 557, 502 P.2d 103 (1972). We therefore apply state law to Lakeview's claim.

The seminal case on vested rights is *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546 (1976) (Mosk, J.). In *Avco*, a large real estate developer, plaintiff Avco, had submitted a subdivision map to the county setting forth a plan for a certain 74-acre parcel. The map indicated that the 74 acres would be divided into 27 parcels and that multi-residential structures would be built on those parcels. The county approved the map and a rough grading permit, which did not refer to grading for any specific building site. Avco, pursuant to the county permits, built storm drains, culverts, street improvements, utilities and similar facilities. After the developer had spent over two million dollars on these improvements, California passed a major *1296 reform of zoning laws for lands in the coastal zone. The new law required approval from the Coastal Commission for certain projects, such as Avco's. Avco contested the application of the new law to its project, claiming it had a vested right to complete the project. The court denied Avco's claim.

The court stated the general rule as follows: "[I]f a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit." 132

Cal.Rptr. at 389, 553 P.2d at 549. In *Avco*, the court addressed the question of what qualified as a "permit" ^{FN7} for the purposes of this rule, and in so doing addressed as well the general principles that inform the vested rights doctrine.

FN7. In the course of a development project, a builder must often obtain several different kinds of permits from the government; the larger and more complex the project, the more approvals are required. Developments involving more than one structure, such as the ones at issue both in *Avco* and in this case, require the developer to submit progressively more specific maps and plans for government approval. The application for a building permit is the last and most specific item the developer must submit for approval before commencing construction on a particular building. The building permit application includes detailed construction plans that are reviewed to ensure compliance with, among other things, building safety codes.

Since each structure in a large development project may be different, each requires its own set of construction plans and its own building permit. The normal practice of developers is to apply for each building permit just before beginning the construction of the particular building to which the permit applies, since building permits are valid only for a relatively short time.

Prior to the *Avco* decision, California's lower courts had held that to obtain a vested right to complete the construction of a particular project, the landowner had to obtain a "building permit." See *Avco*, 17 Cal.3d at 792-93, 132 Cal.Rptr. at 390-91, 553 P.2d at 550-51 (discussing the rule of *Spindler Realty Co. v. Manning*, 243 Cal.App.2d 255, 53 Cal.Rptr. 7 (1966)). In *Avco*, the developer argued that the building permit rule should not apply to larger development projects when the developer has subdivided the land and installed subdivision improvements pursuant to governmental authorization. It pointed out that the building

915 F.2d 1290

Page 8

915 F.2d 1290

(Cite as: 915 F.2d 1290)

permit is issued late in the development process, often after the developer has performed a great deal of work on the land in reliance on more preliminary approvals. To allow the government to reverse itself at that late a point, argued the developer, would lead to the waste of resources on uncompleted projects and an unnecessary increase in the costs of building housing due to the excessive risks involved.^{FN8}

FN8. For an elaboration on this argument, see generally Cunningham and Kremer, *Vested Rights*, *supra* n. 5.

The defendant Coastal Commission in *Avco* conceded to the court that in the context of larger development projects, it did not believe there should be an absolute requirement that the document relied on be designated a "building permit" in order for the developer to obtain a vested right. The Commission stated that if another kind of permit, such as a "conditional use permit," afforded substantially the same specificity and definition to a project as did a building permit, such a permit should suffice. 17 Cal.3d at 793-94, 132 Cal.Rptr. at 391. A "conditional use permit" is another name for a "special use permit," which is what Lakeview has obtained in this case.

The *Avco* court did not decide the question whether it would recognize an exception to the building permit rule; rather it held that even if an exception were appropriate, the permits relied on by *Avco* were insufficient because the permits did not relate to "identifiable buildings," and because maps and plans submitted to the county government did not advise the county of such "elementary details as the dimension, height ... or placement of the buildings to be built on the tract." 17 Cal.3d at 794, 132 Cal.Rptr. at 392. This rule requiring specificity recognizes that since the grant of a vested right to develop a given tract of land takes away power *1297 from the government to control the use of the land, it is fitting that in exchange for yielding that power, the public know the facts concerning the approved use.

Although the court did not definitively decide

whether it would recognize an exception to the building permit rule, it stated that its conclusion was "not founded upon an obdurate adherence to archaic concepts inappropriate in the context of modern development practices nor upon a blind insistence on a document entitled 'building permit.'" 17 Cal.3d at 797, 132 Cal.Rptr. at 394. The court thus left open the question whether a "special use permit," if sufficiently specific, could form the basis of a vested right claim, but the language it used strongly indicates how it would answer the question.

While the court suggested that it would not necessarily insist on a "building permit" as a prerequisite to a vested right, it also suggested that if it were to broaden the class of permits on which developers could rely, it would then have to guard against the dangers of a too broad expansion of the vested rights doctrine:

If we were to accept the premise that the construction of subdivision improvements or the zoning of land for a planned community are sufficient to afford a developer a vested right to construct buildings on the land in accordance with the laws in effect at the time the improvements are made or the zoning enacted, there could be serious impairment of the government's right to control land use policy. In some cases, the inevitable consequence would be to freeze the zoning law applicable to a subdivision or planned unit development as of the time the events occurred.

17 Cal.3d at 797, 132 Cal.Rptr. at 394.

The district court in this case, in denying the defendants' motion to dismiss, initially held that a building permit was not required, but then in granting summary judgment, reversed itself and held that under California law, a building permit was indeed required. The court then held that under the rule of *Courthouse Plaza Company v. City of Palo Alto*, 117 Cal.App.3d 871, 173 Cal.Rptr. 161 (1981), a developer cannot establish that it has a vested right to complete a given project by showing only that it has performed work pursuant to a permit granted for a different project. It therefore concluded that since Lakeview had performed no construction pursuant to a building permit on Unit Two, it had no vested right to build

915 F.2d 1290

Page 9

915 F.2d 1290
(Cite as: 915 F.2d 1290)

Unit Two. In addition, the district court found that the Unit Two townhouses, the Unit One townhouses, and the hotel did not constitute an interdependent, unitary project.^{FN9}

FN9. Under the district court's rationale this finding was unnecessary, since according to the building permit rule, it does not matter how closely related a particular building is to the rest of the project; if no building permit has been obtained for that building, no right attaches. See *Leroy Land Dev. v. Tahoe Regional Planning*, 543 F.Supp. 277 (D.Nev.1982).

Lakeview makes a number of contentions on appeal. It argues that the district court erred in holding that California law requires strict adherence to the "building permit" rule. It argues further that under a rule allowing an exception for sufficiently specific "special use permits," its claim would withstand summary judgment. It argues that there is a genuine factual dispute concerning whether Unit Two is a unitary, interdependent project and that the district court's resolution of the issue was therefore improper on summary judgment.

[5] In light of the *Avco* court's disapproving reference to "blind insistence" on the building permit rule, we are hesitant to affirm the district court's judgment based on the invocation of that rule.^{FN10} We assume,*1298 without deciding, that the California Supreme Court would recognize an exception to the rule in the case of sufficiently specific special use permits. We also assume, without deciding, that the special use permit that Lakeview received in 1969 was sufficiently specific to meet the requirements of the *Avco* decision.^{FN11} For even if we were to decide these issues in favor of Lakeview, its claim to a vested right would still fail, because it did not act expeditiously enough in proceeding with the development of the Unit Two townhouses.

FN10. The California lower courts have given conflicting signals on the continuing

vitality of the strict "building permit" rule.

Compare *Billings v. California Coastal Comm'n*, 103 Cal.App.3d 729, 735, 163 Cal.Rptr. 288, 291 (1980) (suggesting in dicta that building permit "may no longer be the *sine qua non* of a vested right") with *South Cent. Coast Regional Comm'n v. Charles A. Pratt Const. Co.*, 128 Cal.App.3d 830, 845, 180 Cal.Rptr. 555, 563 (1982) (suggesting opposite).

FN11. Making this assumption frees us from deciding whether Lakeview's failure to obtain architectural review approval for the Unit Two townhouses would defeat its claim on the ground that it failed to obtain final discretionary approval. See *Tosh v. California Coastal Comm'n*, 99 Cal.App.3d 388, 394-95, 160 Cal.Rptr. 170, 173-74 (1979).

In *Avco*, the court said that if it were to accept the premise that a vested right could attach prior to the grant of a building permit, "evils" would result. 17 Cal.3d at 798, 132 Cal.Rptr. at 394. The court offered the following hypothetical to illustrate its point:

[L]et us hypothesize that because of mounting costs, decreasing demand, or innumerable potential other causes, *Avco* does not build multiple residential units on tract 7479 for a number of years. If we were to accept [the developer's] premise, the tract would be exempted not only from the current requirements of the Act, but from all zoning laws enacted for an indefinite period in the future. It is no response to those inherent evils to assert that this builder presently intends to construct its multiple residential units expeditiously.

Id.

In this case, even though Lakeview told the City that it intended to build the Unit Two townhouses within six months of completing Unit One, Lakeview chose not to develop the Unit Two townhouses on schedule. Unit One was completed in 1971. Lakeview then waited almost three years before it began any further construction on the development. In 1974 it decided to build the hotel

915 F.2d 1290

Page 10

915 F.2d 1290
(Cite as: 915 F.2d 1290)

instead of the townhouses. We may assume that Lakeview's decision to depart from its initial plan and build the townhouses after building the hotel would have been immaterial had Lakeview been able to complete both projects in the time anticipated for both, but Lakeview's delays in building the hotel caused the project to drag on even longer. Lakeview has offered no evidence that any governmental agency placed obstacles in its way to developing its project expeditiously until 1981, when Lakeview first indicated it was ready to build the Unit Two townhouses. By that time twelve years had elapsed since the time Lakeview had received its special use permit. In 1969, it could not reasonably have been expected that the land on which Unit Two was to be built would still be undeveloped in 1981. In these circumstances, for Lakeview to argue that the expenditures it has made on Unit One and the hotel in reliance on the 1969 permit entitle it to a vested right for Unit Two is for it to argue in effect that its right to develop Unit Two is vested forever. Yet such a permanent vesting is the evil that the *Avco* court said that it would not tolerate. It matters not that Unit Two may have been conceived of as a dependent part of a planned unitary development. The rationale for departing from the "building permit" rule as applied to such developments is that preliminary development expenses are high and cannot be recouped if the government prohibits development before a sufficiently substantial portion of the project is completed. When, as in this case, the government does not interfere until well after the time the developer could have completed the entire project, the reason for recognizing a vested right evaporates.

The California courts have recognized that the law of vested rights must balance two conflicting interests: the public interest in lower construction costs that result from providing developers a fair degree of certainty about their investments; and the public interest in controlling pollution and congestion effectively. See *Avco*, 17 Cal.3d at 788, 132 Cal.Rptr. at 388; *1299 *Raley v. California Tahoe Regional Planning Agency*, 68 Cal.App.3d 965, 975-76, 137 Cal.Rptr. 699, 708 (1977). As we have noted, the vested rights doctrine draws on the governmental estoppel principle to achieve the

balance. In *Avco*, the court held that it would not estop the government from prohibiting a development about which the developer had provided incomplete information. In *Oceanic California, Inc. v. North Central Coast Regional Com'n*, 63 Cal.App.3d 57, 67, 133 Cal.Rptr. 664, 670 (1976), the court held that ("the scope of the development which the developer has a right to complete ... is limited by the scope of the specific development theretofore approved and permitted"). It follows from these decisions that the developer should not be able to estop the government when the project temporally exceeds the scope of that approved. In other words, a government's commitment to a "planned unit development" is necessarily conditioned on the developer's proceeding at a pace reasonably close to that contemplated at the time the project was approved. If the public is to be deprived of its power to control pollution and other problems caused by overdevelopment, it should be deprived only to the extent necessary to ensure private parties a reasonable degree of certainty about the legal status of their investments.

In this case, given the scope of the project and its expected duration at the time it was approved, Lakeview may not assert estoppel against the Tahoe governments. Construing the facts submitted most favorably to Lakeview, we hold that a rational trier of fact would be compelled to conclude that Lakeview did not proceed at a pace even reasonably close to that anticipated. Summary judgment was therefore appropriate on the vested rights claim. ^{FN12}

FN12. Lakeview also asserts a claim to what it calls a "statutory vested right" in former TRPA Land Use Ordinance § 9.11 (subsequently renumbered § 9.10), the grandfather provision quoted *supra* in section I of this opinion. This claim utterly lacks merit. It is well established that a vested right claim cannot be based on a general zoning ordinance. *HFH, Ltd. v. Superior Court of Los Angeles County*, 15 Cal.3d 508, 516, 125 Cal.Rptr. 365, 370, 542 P.2d 237, 242 (1975) ("

915 F.2d 1290

Page 11

915 F.2d 1290

(Cite as: 915 F.2d 1290)

landowners have no vested right in existing or anticipated zoning ordinances”).

and Fourteenth Amendment.
(Emphasis ours).

B. *The Remaining Claims*

[6] Lakeview's second claim asks for an injunction to prevent TRPA from imposing any further permitting restrictions on its property on the grounds that such restrictions would constitute an unconstitutional deprivation of property. The claim ^{FN13} reiterates the allegations in the vested rights claim adding only the conclusory allegation that the refusal to allow the development of townhouses deprives Lakeview of all economically viable use of its land. This additional allegation purports to take the claim out of the realm of the state law vested rights doctrine and into the realm of the federal Constitution's prohibition against deprivations of property without due process of law. Even though we read them most sympathetically to the pleader, Lakeview's complaint and affidavits fail to make out a claim. “Under [Fed.R.Civ.P.] 56(c), the motion for summary judgment should have been granted in [defendant's] favor if the amended complaint and affidavits showed that there was no genuine issue as to any material fact and that appellees were entitled to a judgment as a matter of law.” *Ellis v. Carter*, 291 F.2d 270, 275 (9th Cir.1961). We are “free to affirm on any ground supported by the record, provided the parties have an opportunity to discuss it in their briefs.” *Paskaly v. Seale*, 506 F.2d 1209, 1211 n. 4 (1974). Although the district court granted summary judgment against Lakeview *sua sponte* on the second claim and did not make clear its grounds for so doing, Lakeview has fully discussed the claim in its briefs.

FN13. The claim reads in relevant part:

As a result of Defendants' refusal to allow completion of construction of the Townhouses, and as a result of the overly stringent land use restrictions which TRPA currently seeks to impose to prevent Plaintiff from completing construction of the project, Plaintiff has been deprived of the entire practical, substantial, viable ... economic ... use of its property without due process of law in violation of the Fifth

*1300 [7] Lakeview's complaint asserts a constitutional right to build the precise project it proposed in 1969. As we noted in *Hoehne v. County of San Benito*, 870 F.2d 529, 532-33 (9th Cir.1989), “The Supreme Court has recognized that land-use planning is not an all-or-nothing proposition. A government entity is not required to permit a landowner to develop property to the full extent it may desire. Denial of the intensive development desired by a landowner does not preclude less intensive, but still valuable development.” Lakeview makes no allegation that it has attempted to ask TRPA for a less intensive use of its land, nor does it allege that such an attempt would be futile. The complaint is thus defective under *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 353, 106 S.Ct. 2561, 2568, 91 L.Ed.2d 285 (1986). Moreover, it is clear from Lakeview's submissions that it has not been denied all economically viable use of its land and that its reasonable investment backed expectations have not been upset. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978); *Moore v. City of Costa Mesa*, 886 F.2d 260, 263 (9th Cir.1989). Lakeview bought the land in question in 1967 for one million dollars. Since then, it has constructed fourteen townhouses on the property, and it and its successors have built a 160-unit hotel, as well. Of the 200 units Lakeview initially wanted to build, only 28 will not be permitted. We have upheld far more drastic curtailments of land uses. See, e.g., *Haas v. City and County of San Francisco*, 605 F.2d 1117, 1119-20 (9th Cir.1979). In *Haas*, the landowner purchased property zoned in an area with a height limit of 300 feet and obtained a permit to build. Subsequently, the land was rezoned to restrict the construction of buildings higher than 40 feet, which restriction caused the land to diminish in value from two million dollars to one hundred thousand dollars. Since Lakeview's own submissions make clear that the defendants' refusal to allow Lakeview to complete the project has not deprived Lakeview of all economically viable use of the land, we affirm the grant of summary judgment on the second claim. As the appellees

915 F.2d 1290

Page 12

915 F.2d 1290

(Cite as: 915 F.2d 1290)

argue in their brief, the claim is essentially a reiteration of the vested rights claim "dressed up" as a constitutional claim.

The third and fourth claims ask for money damages for the deprivation of property without due process. The district court dismissed them on the authority of *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir.1977), *rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979). In light of the Supreme Court's decision in *First English Evangelical Lutheran Church*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), *Jacobson* is no longer good law. See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, (9th Cir.1990) (as amended). Nonetheless, the claims are identical to the second claim in that the only injury they allege is Lakeview's inability to complete the project. We therefore find them deficient for the same reasons we find the second claim deficient.

CONCLUSION

The judgment is AFFIRMED.

C.A.9 (Cal.),1990.

Lakeview Development Corp. v. City of South Lake
Tahoe
915 F.2d 1290

END OF DOCUMENT

EXHIBIT 3

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114 S.Ct. 1483

Page 1

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255

(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

▷

Briefs and Other Related Documents
 Landgraf v. USI Film Products U.S. Tex., 1994.
 Supreme Court of the United States
 Barbara LANDGRAF, Petitioner
 v.
 USI FILM PRODUCTS, et al.
 No. 92-757.

Argued Oct. 13, 1993.

Decided April 26, 1994.

Former employee brought action alleging sexual harassment and retaliation in violation of Title VII. The United States District Court, Eastern District of Texas, Robert H. Parker, Chief Judge, entered judgment in favor of defendants, and employee appealed. The Fifth Circuit Court of Appeals, 968 F.2d 427, affirmed. Certiorari was granted. The Supreme Court, Justice Stevens, held that provisions of Civil Rights Act of 1991 creating right to recover compensatory and punitive damages for certain violations of Title VII, and providing for trial by jury if such damages are claimed, do not apply to Title VII case pending on appeal when statute was enacted.

Affirmed.

Justice Scalia filed opinion concurring in judgment, in which Justices Kennedy and Thomas joined, 114 S.Ct. 1522.

Justice Blackmun filed dissenting opinion.
 West Headnotes

[1] Civil Rights 78 ⚡ 1106

78 Civil Rights

78II Employment Practices

78k1102 Constitutional and Statutory Provisions

78k1106 k. Retrospective Application.
 Most Cited Cases

(Formerly 78k102.1)

Jury 230 ⚡ 10

230 Jury

230II Right to Trial by Jury

230k10 k. Constitutional and Statutory Provisions. Most Cited Cases
 Provisions of Civil Rights Act of 1991 creating right to recover compensatory and punitive damages for certain violations of Title VII, and providing for trial by jury if such damages are claimed, do not apply to Title VII case pending on appeal when statute was enacted. 42 U.S.C.A. § 1981a(a).

[2] Constitutional Law 92 ⚡ 190

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases
 With respect to determining retroactivity of legislation, elementary considerations of fairness dictate that individuals should have opportunity to know what law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

[3] Constitutional Law 92 ⚡ 199

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k198 Retroactive Operation of Ex Post Facto Laws

92k199 k. In General. Most Cited Cases
 Ex post facto clause of Federal Constitution prohibits retroactive application of penal legislation. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[4] Eminent Domain 148 ⚡ 1

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

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114 S.Ct. 1483

Page 2

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

148k1 k. Nature and Source of Power. Most Cited Cases

Eminent Domain 148 ⚡122

148 Eminent Domain

148II Compensation

148II(C) Measure and Amount

148k122 k. Necessity of Just or Full Compensation or Indemnity. Most Cited Cases
Fifth Amendment's taking clause prevents legislature and other government actors from depriving private persons of vested property rights, except for public use and upon payment of just compensation. U.S.C.A. Const.Amend. 5.

[5] Constitutional Law 92 ⚡82.5

92 Constitutional Law

92V Personal, Civil and Political Rights

92k82.5 k. Bills of Attainder, Prohibition Against. Most Cited Cases
Constitutional prohibitions on bills of attainder prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

[6] Constitutional Law 92 ⚡253(4)

92 Constitutional Law

92XII Due Process of Law

92k253 Nature of Acts Prohibited in General
92k253(4) k. Retrospective Laws and Decisions; Change in Law. Most Cited Cases
Due process clause protects interests in fair notice and repose that may be compromised by retroactive legislation; justification sufficient to validate statute's prospective application under due process clause may not suffice to warrant its retroactive application. U.S.C.A. Const.Amend. 14.

[7] Constitutional Law 92 ⚡186

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k186 k. Constitutional Prohibitions in General. Most Cited Cases

Absent violation of specific constitutional provisions, potential unfairness of retroactive civil legislation is not sufficient reason for court to fail to give statute its intended scope.

[8] Statutes 361 ⚡263

361 Statutes

361VI Construction and Operation

361VI(D) Retroactive Operation

361k263 k. Retrospective Construction in General. Most Cited Cases

In some cases, interest in avoiding adjudication of constitutional questions will counsel against retroactive application of civil legislation; if challenged statute is to be given retroactive effect, regulatory interest that supports prospective application will not necessarily also sustain its application to past events.

[9] Constitutional Law 92 ⚡188

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k187 Nature of Retrospective Laws

92k188 k. In General. Most Cited Cases

Statute does not operate "retrospectively" merely because it is applied in case arising from conduct antedating statute's enactment, or upsets expectations based in prior law but, rather, court must ask whether new provision attaches new legal consequences to events completed before its enactment.

[10] Constitutional Law 92 ⚡188

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k187 Nature of Retrospective Laws

92k188 k. In General. Most Cited Cases

Retroactivity is matter on which judges tend to have sound instincts, and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance in determining whether statute operates "retroactively."

[11] Constitutional Law 92 ⚡189

114 S.Ct. 1483

Page 3

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k187 Nature of Retrospective Laws

92k189 k. Construction to Avoid

Retroactive Operation. Most Cited Cases

While constitutional impediments to retroactive civil legislation are modest, prospectivity remains appropriate default rule; presumption against retroactivity will generally coincide with legislative and public expectations, as it accords with widely held intuitions about how statutes ordinarily operate.

[12] Statutes 361 191

361 Statutes

361VI Construction and Operation

361VI(D) Retroactive Operation

361k263 k. Retrospective Construction in General. Most Cited Cases

There is no conflict between principle that court should apply law in effect at time it renders its decision and presumption against retroactivity when statute in question is unambiguous.

[13] Statutes 361 191

361 Statutes

361VI Construction and Operation

361VI(D) Retroactive Operation

361k267 Statutes Relating to Remedies and Procedure

361k267(2) k. Application to Pending Actions and Proceedings. Most Cited Cases

Even absent specific legislative authorization, application of new statutes passed after events in suit is proper in many situations.

[14] Constitutional Law 92 191

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k191 k. Laws Relating to Remedies. Most Cited Cases

When intervening statute authorizes or affects propriety of prospective relief, application of new provision is not "retroactive."

[15] Constitutional Law 92 191

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k191 k. Laws Relating to Remedies. Most Cited Cases

Application of new jurisdictional rule usually takes away no substantive right but simply changes tribunal that is to hear case, and present law normally governs in such situations; as jurisdictional statutes speak to power of court, rather than to rights or obligations of parties.

[16] Constitutional Law 92 191

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k191 k. Laws Relating to Remedies. Most Cited Cases

Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.

[17] Constitutional Law 92 191

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k191 k. Laws Relating to Remedies. Most Cited Cases

Because rules of procedure regulate secondary rather than primary conduct, fact that new procedural rule was instituted after conduct giving rise to suit does not make application of rule at trial "retroactive."

[18] Statutes 361 191

361 Statutes

361VI Construction and Operation

361VI(D) Retroactive Operation

361k267 Statutes Relating to Remedies and Procedure

361k267(2) k. Application to Pending Actions and Proceedings. Most Cited Cases

Mere fact that new rule is procedural does not mean that it applies to every pending case; new rule concerning filing of complaints would not govern action in which complaint had already been properly filed under old regime, and promulgation of new rule of evidence would not require appellate

114 S.Ct. 1483

Page 4

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

remand for new trial.

[19] Statutes 361 ⇨ 263

361 Statutes

361VI Construction and Operation

361VI(D) Retroactive Operation

361k263 k. Retrospective Construction in General. Most Cited Cases

Statutes 361 ⇨ 265

361 Statutes

361VI Construction and Operation

361VI(D) Retroactive Operation

361k265 k. Statutes Impairing Vested Rights. Most Cited Cases
Presumption against statutory retroactivity is not restricted to cases involving vested rights.

[20] Constitutional Law 92 ⇨ 190

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases

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

[21] New Trial 275 ⇨ 25

275 New Trial

275II Grounds

275II(A) Errors and Irregularities in General

275k25 k. Effect of Change in Law

Subsequent to Trial. Most Cited Cases

(Formerly 92k191)

Promulgation of new jury trial rule would ordinarily not warrant retrial of cases previously tried to judge.

[22] Constitutional Law 92 ⇨ 190

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k190 k. Retroactive Operation as to Rights and Obligations. Most Cited Cases

Even when conduct in question is morally reprehensible or illegal, degree of unfairness is inherent whenever law imposes additional burdens based on conduct that occurred in past. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[23] Constitutional Law 92 ⇨ 191

92 Constitutional Law

92VIII Retrospective and Ex Post Facto Laws

92k191 k. Laws Relating to Remedies. Most Cited Cases

For purposes of determining retroactivity, retroactive modification of damages remedies may normally harbor much less potential for mischief than retroactive changes in principles of liability, but that potential is nevertheless still significant.

[24] Statutes 361 ⇨ 263

361 Statutes

361VI Construction and Operation

361VI(D) Retroactive Operation

361k263 k. Retrospective Construction in General. Most Cited Cases

Fact that retroactive application of new statute would vindicate its purpose more fully is not sufficient to rebut presumption against retroactivity; statutes are seldom crafted to pursue single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue main goal.

[25] Constitutional Law 92 ⇨ 70.1(11)

92 Constitutional Law

92III Distribution of Governmental Powers and

114 S.Ct. 1483

Page 5

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

Functions

92III(B) Judicial Powers and Functions

92k70 Encroachment on Legislature

92k70.1 In General

92k70.1(7) Particular Subjects,

Application to

92k70.1(11) k. Remedies and

Procedure. Most Cited Cases

Supreme Court is not free to fashion remedies that Congress has specifically chosen not to extend.

**1486 Syllabus^{FN*}

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*244 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 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. 1489-1508.

(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. 1489-1493.

(b) The 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, "[e]xcept 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 *245 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. 1493-1496.

(c) 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. School Bd. of Richmond*,

114 S.Ct. 1483

Page 6

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476, and the axiom that statutory retroactivity is not favored, see ****1487** *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208, 109 S.Ct. 468, 471, 102 L.Ed.2d 493. Pp. 1496-1497.

(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. 1497-1501.

(e) Thus, when a case implicates a federal statute enacted after the events giving rise 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 antiretroactivity 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. 1501-1505.

***246** f) Application of the foregoing principles demonstrates that, absent guiding instructions from Congress, § 102 is not the type of provision that should govern 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 § 102(c)(1) must fall with the attached damages provisions because § 102(c) makes a jury trial available only “[i]f a complaining party seeks compensatory or punitive damages.” Pp. 1505-1508.

968 F.2d 427 (CA5 1992), affirmed.

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, *post*, p. 1522. BLACKMUN, J., filed a dissenting opinion, *post*, p. 1508.

Eric Schnapper, New York City, for petitioner.
Drew S. Days, III, New York City, for U.S., as amicus curiae, by special leave of the Court.

***247** Glen D. Nager, Washington, DC, for respondents. For U.S. Supreme Court briefs, see: 1993 WL 326575 (Pet.Brief) 1993 WL 326577 (Resp.Brief) 1994 WL 638234 (Reply.Brief)

****1488** Justice STEVENS delivered the opinion of the Court.

114 S.Ct. 1483

Page 7

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255

(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

[1] 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) (1988 ed., Supp. IV), as added by § 102 of the 1991 Act, Pub.L. 102-166, 105 Stat. 1072. The Act further provides that any party may demand a trial by jury if such damages are sought.^{FN1} 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.

FN1. See Rev.Stat. § 1977A(c), 42 U.S.C. § 1981a(c) (1988 ed., Supp. IV), 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.

I

From September 4, 1984, through January 17, 1986, petitioner Barbara Landgraf was employed in the USI Film *248 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, its corporate owner, and that company's successor in interest.^{FN2} 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:

FN2. Respondent Quantum Chemical Corporation owned the USI plant when petitioner worked there. Respondent Bonar Packaging, Inc., subsequently purchased the operation.

"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 *249 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 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. School Bd. of Richmond]*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

476 (1974)].” 968 F.2d 427, 432 (CA5 1992). Commenting **1489 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 we do not invalidate procedures followed before the new rule was adopted.” *Id.*, 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. *Id.*, at 433. 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.*, 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994). Our order limited argument to the question whether § 102 of the 1991 *250 Act applies to cases pending when it became law. 507 U.S. 908, 113 S.Ct. 1250, 122 L.Ed.2d 649 (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 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

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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 preface our analysis with a brief description of the scope of the 1991 Act.

The 1991 Act 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), 105 Stat. 1071, note following 42 U.S.C. § 1981, expressly identifies as one of the Act’s purposes “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 *251 *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), as a decision that gave rise to special concerns.^{FN3} Section 105 of the Act, entitled “Burden of Proof in Disparate Impact Cases,” is a direct response to *Wards Cove*.

FN3. 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 [109 S.Ct. 2115, 104 L.Ed.2d 733] (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 1493-1496.

Other sections of the Act were obviously drafted with “recent decisions of the Supreme Court” in mind. Thus, § 101 (which is at issue in *Rivers*, 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994)) amended the 1866 Civil Rights Act’s prohibition of racial discrimination in the “mak[ing] and enforce[ment] [of] contracts,” 42 U.S.C. § 1981

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

(1988 ed., Supp. IV), in response to *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989); § 107 responds to **1490 *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), by setting forth standards applicable in “mixed motive” cases; § 108 responds to *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989), by prohibiting certain challenges to employment practices implementing consent decrees; § 109 responds to *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 111 S.Ct. 1227, 113 L.Ed.2d 274 (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, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989), by expanding employees' rights to challenge discriminatory seniority systems; § 113 responds to *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (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, 106 S.Ct. 2957, 92 L.Ed.2d 250 (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 *252 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 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. ^{FN4} Title VII's backpay remedy, [FN5] *253 modeled on that of the National **1491 Labor Relations Act, 29 U.S.C. § 160(c), is a “make-whole” remedy that resembles compensatory damages in some respects. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-422, 95 S.Ct. 2362, 2372-2374, 45 L.Ed.2d 280 (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).

FN4. 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, 110 S.Ct. 1331, 1335, n. 1, 108 L.Ed.2d 504 (1990) (assuming without deciding no right to jury trial); *Teamsters v. Terry*, 494 U.S. 558, 572, 110 S.Ct.

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

1339, 1348-1349, 108 L.Ed.2d 519 (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.

FN5. "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. IV).

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. 229, 239, 112 S.Ct. 1867, 1873, 119 L.Ed.2d 34 (1992). 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, *254 when it is shown that the employer acted "with malice or with reckless indifference to the [plaintiffs] federally protected rights," § 102(b)(1), a plaintiff may recover punitive damages.^{FN6}

FN6. 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.

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*, 504 U.S., at 240, 112 S.Ct., at 1873. ("[T]he 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 antidiscrimination 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),^{FN7} 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 making persons whole for injuries suffered through past discrimination," *Albemarle Paper Co.*, 422 U.S., at 421, 95 S.Ct., at 2373, § 102 of the *255 1991 Act effects a major expansion in the relief available to victims of employment discrimination.

FN7. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993) (discrimination in "

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255

(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

terms, conditions, or privileges of employment" actionable under Title VII "is not limited to 'economic' or 'tangible' discrimination") (citations and internal quotation marks omitted).

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.**1492
 FN8 The President vetoed*256 the 1990 legislation, however, citing the bill's "unfair retroactivity rules" as one reason for his disapproval.
 FN9 Congress narrowly failed to override the veto. See 136 Cong.Rec. S16589 (Oct. 24, 1990) (66 to 34 Senate vote in favor of override).

FN8. 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. Atonio*, 490 U.S. 642, 109 S.Ct. 2115];

"(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, 109 S.Ct. 1775];

"(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, 109 S.Ct. 2180];

"(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, 109 S.Ct. 2261]; 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, 109 S.Ct. 2363].

"(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."

FN9. 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, S16419 (Oct. 22, 1990). The President's veto message referred to the bill's "retroactivity" only briefly; the Attorney

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

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 (Oct. 22, 1990) in App. to Brief for Petitioner A-13 ("And Section 15 unfairly applies the changes in the law made by S. 2104 to *cases already decided*") (emphasis added).

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 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 *257 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.

**1493 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 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.^{FN10} *258 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.

FN10. 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

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255

(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

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, 99 S.Ct. 1946, 1958-1959, 60 L.Ed.2d 560 (1979), its choice of language in § 402(a) would imply nonretroactivity.

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 entire Act to cases arising from preenactment conduct would have important consequences, including the possibility that trials completed before its enactment*259 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 **1494 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, 108 S.Ct. 2182, 2189, and n. 11, 100 L.Ed.2d 836 (1988). Unless the word "otherwise" in § 402(a) refers to either § 402(b) or § 109(c), she contends, the first five words in § 402(a) are entirely superfluous. Moreover, relying on the canon "[e]xpressio unius est exclusio alterius," see *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 1163, 122 L.Ed.2d 517 (1993), 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 determinatemeaning, *260 it surely would have used language comparable to its reference to the predecessor Title VII damages provisions in the 1990 legislation: that the new provisions "shall apply to all proceedings pending on or commenced

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255

(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

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.^{FN11} 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.

FN11. 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.

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 *261 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 **1495 arising before enactment while others might not.^{FN12} Compare *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988), with *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). See also *Bennett v. New Jersey*, 470 U.S. 632, 105 S.Ct. 1555, 84 L.Ed.2d 572 (1985). 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.

FN12. 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.

Turning to the text of § 402(b), it seems unlikely that the introductory phrase (“Notwithstanding 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”

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255

(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

in § 402(a) to identify two *262 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.^{FN13} However, the Senate substitute that was agreed upon omitted those explicit retroactivity provisions.^{FN14} 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.^{FN15} The history reveals no evidence that Members believed *263 that an agreement had been tacitly struck on the controversial retroactivity**1496 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.

FN13. 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.

FN14. On the other hand, two proposals that would have provided explicitly for prospectivity also foundered. See 137 Cong.Rec. S3021, S3023 (Mar. 12, 1991); *id.*, at 13255, 13265-13266.

FN15. 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 “[t]he bill provides that, unless otherwise specified, the provisions of this legislation shall take effect upon enactment *and shall not apply retroactively.*” *Id.*, at 29047. (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. School Bd. of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974)). The legislative history reveals other partisan statements on the proper meaning of the 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).

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, 103 S.Ct. 2764, 2781-2784, 77 L.Ed.2d 317 (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.

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

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.^{FN16} In order to resolve the question left open by the 1991 Act, federal courts have labored to *264 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, 94 S.Ct., at 2016. The second is the axiom that “[r]etroactivity 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, 109 S.Ct., at 471.

FN16. 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 “[r]emedial 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).

We have previously noted the “apparent tension” between those expressions. See *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837, 110 S.Ct. 1570, 1577, 108 L.Ed.2d 842 (1990); see also *Bennett*, 470 U.S., at 639-640, 105 S.Ct., at 1560. 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.” 494 U.S., at 837-838, 110 S.Ct., at 1577. In the case before us today, however, we have concluded that the 1991 Act 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, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969)—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 *265 promulgate a rule requiring private hospitals to refund Medicare payments for services rendered before promulgation of the **1497 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, 5 L.Ed. 257 (1821).

A

[2] 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.^{FN17} Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

accordingly; settled expectations should not be lightly disrupted.^{FN18} 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, 110 S.Ct., at 1586 (SCALIA, J., concurring). In *266 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.

FN17. See *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 842-844, 855-856, 110 S.Ct. 1570, 1579-1581, 1586-1587, 108 L.Ed.2d 842 (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).

FN18. See *General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 1112, 117 L.Ed.2d 328 (1992) (“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).

[3][4][5][6] 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.^{FN19} 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, 85 S.Ct. 1707, 1719-1722, 14 L.Ed.2d 484 (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, 96 S.Ct. 2882, 2893, 49 L.Ed.2d 752 (1976).

FN19. 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, 1 L.Ed. 648 (1798) (opinion of Chase, J.).

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 responsiveness 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 **1498 the Court in *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), the *Ex Post Facto* Clause not only ensures*267 that individuals have “fair warning” about the effect of criminal statutes, but also “restricts governmental power by restraining arbitrary and potentially vindictive

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255

(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

legislation.” *Id.*, at 28-29, 101 S.Ct., at 963-964 (citations omitted). ^{FN20}

FN20. See *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 513-514, 109 S.Ct. 706, 732, 102 L.Ed.2d 854 (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, 81 S.Ct. 1052, 1052, n. 3, 6 L.Ed.2d 246 (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, “[b]ills 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 “speculat[e] 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”).

[7][8] 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.

^{FN21} Retroactivity provisions often serve entirely *268 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.

FN21. 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 Corporation v. R. A. Gray & Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17, 96 S.Ct. 2882, 2893, 49 L.Ed.2d 752 (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.

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)

511 U.S. 244; 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

(CCNH 1814), a case construing a provision of the New Hampshire Constitution that broadly prohibits “retrospective” laws both criminal and civil.^{FN22} 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, “**1499 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 *269 rights and past transactions.” *Ibid.* “Upon principle,” Justice Story elaborated,

FN22. 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 F.Cas., at 766-769.

“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, 1 L.Ed. 648 (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.^{FN23}

FN23. See, e.g., *Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (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, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981)); *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199, 34 S.Ct. 101, 102, 58 L.Ed. 179 (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, 5 S.Ct. 1014, 1018, 29 L.Ed. 240 (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”).

[9][10] 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. 80, 100, 113 S.Ct. 554, 565-566, 121 L.Ed.2d 474 (1992) (THOMAS, J., concurring in part and concurring in judgment), or upsets expectations based in prior law.^{FN24} Rather, the court must ask *270 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

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255

(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

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 ... instinct[s]," 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 reliance, and settled expectations offer sound guidance.

FN24. 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, 43 S.Ct. 154, 157, 67 L.Ed. 332 (1922). See *Reynolds v. United States*, 292 U.S. 443, 444-449, 54 S.Ct. 800, 801-803, 78 L.Ed. 1353 (1934); *Chicago & Alton R. Co. v. Tranbarger*, 238 U.S. 67, 73, 35 S.Ct. 678, 680, 59 L.Ed. 204 (1915).

Since the 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, 2 L.Ed. 479 (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, **1500*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 *271 repeals were understood to preclude punishment for acts antedating the repeal. See, e.g., *United States v. Chambers*, 291 U.S. 217, 223-224, 54 S.Ct. 434, 435-436, 78 L.Ed. 763 (1934); *Gulf, C. & S. F. R. Co. v. Dennis*, 224 U.S. 503, 506, 32 S.Ct. 542, 543, 56 L.Ed. 860 (1912); *United States v. Tynen*, 11 Wall. 88, 93-95, 20 L.Ed. 153 (1871); *Norris v. Crocker*, 13 How. 429, 440-441, 14 L.Ed. 210 (1852); *Maryland ex rel. Washington Cty. v. Baltimore & Ohio R. Co.*, 3 How. 534, 552, 11 L.Ed. 714 (1845); *Yeaton v. United States*, 5 Cranch 281, 284, 3 L.Ed. 101 (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. FN25 The presumption has not, however, been limited to such cases. At issue in *Chew Heong v. United States*, 112 U.S. 536, 5 S.Ct. 255, 28 L.Ed. 770 (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 reenter without a certificate, and invoked the "uniformly" accepted rule against "giv[ing] to statutes a retrospective*272 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, 5 S.Ct., at 266-267.

FN25. See, e.g., *United States v. Security Industrial Bank*, 459 U.S. 70, 79-82, 103

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255

(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

S.Ct. 407, 413-414, 74 L.Ed.2d 235 (1982); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164, 65 S.Ct. 172, 185, 89 L.Ed. 139 (1944); *United States v. St. Louis, S.F. & T.R. Co.*, 270 U.S. 1, 3, 46 S.Ct. 182, 183, 70 L.Ed. 435 (1926); *Holt v. Henley*, 232 U.S. 637, 639, 34 S.Ct. 459, 460, 58 L.Ed. 767 (1914); *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U.S., at 199, 34 S.Ct., at 102; *Twenty Per Cent Cases*, 20 Wall. 179, 187, 22 L.Ed. 339 (1874); *Sohn v. Waterson*, 17 Wall. 596, 599, 21 L.Ed. 737 (1873); *Carroll v. Lessee of Carroll*, 16 How. 275, 14 L.Ed. 936 (1854). While the great majority of our decisions relying upon the antiretroactivity 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, 48 S.Ct. 236, 72 L.Ed. 509 (1928); *White v. United States*, 191 U.S. 545, 24 S.Ct. 171, 48 L.Ed. 295 (1903).

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, 109 S.Ct., at 471, was in step with this long line of cases. FN26 *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, 109 S.Ct., at 471; our search for clear congressional intent authorizing retroactivity was consistent with the approach taken in decisions spanning two centuries.

FN26. See also, e.g., *Greene v. United States*, 376 U.S. 149, 160, 84 S.Ct. 615, 621-622, 11 L.Ed.2d 576 (1964); *White v. United States*, 191 U.S. 545, 24 S.Ct. 171, 48 L.Ed. 295 (1903); *United States v. Moore*, 95 U.S. 760, 762, 24 L.Ed. 588

(1878); *Murray v. Gibson*, 15 How. 421, 423, 14 L.Ed. 755 (1854); *Ladiga v. Roland*, 2 How. 581, 589, 11 L.Ed. 387 (1844).

[11] 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 **1501 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, 96 S.Ct., at 2892-2893; *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 436-444, 54 S.Ct. 231, 239-242, 78 L.Ed. 413 (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 *273 to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate.

B

[12] 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, 94 S.Ct., at 2016, 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

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

Cranch 103, 2 L.Ed. 49 (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 in effect” at the time of our decision in *Schooner Peggy* was simply a response to the language of the statute. *Id.*, at 109.

[13][14] 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, 42 S.Ct. 72, 66 L.Ed. 189 (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, *274 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, 42 S.Ct., at 75-76. See also, *e.g.*, *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 201-202, 24 L.Ed.2d 214 (1969); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464, 41 S.Ct. 172, 175, 65 L.Ed. 349 (1921).

[15] We have 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, 72 S.Ct. 581, 584-585, 96 L.Ed. 786 (1952), relying on our “consisten[t]” practice, we ordered an action dismissed because the jurisdictional statute under which it had been (properly) filed was subsequently repealed.^{FN27} See also **1502 *Hallowell v. Commons*, 239 U.S. 506, 508-509, 36 S.Ct. 202, 203-204, 60 L.Ed. 409 (1916); *Assessors v. Osbornes*, 9 Wall. 567, 575, 19 L.Ed. 748 (1870).

Conversely, in *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 607-608, n. 6, 98 S.Ct. 2002, 2005, n. 6, 56 L.Ed.2d 570 (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, 80 S.Ct. 924, 926, 4 L.Ed.2d 982 (1960) (*per curiam*); *Stephens v. Cherokee Nation*, 174 U.S. 445, 478, 19 S.Ct. 722, 734, 43 L.Ed. 1041 (1899). 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, 36 S.Ct., at 202. 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 100, 113 S.Ct., at 565 (THOMAS, J., concurring).

FN27. 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 [46 S.Ct. 182, 183, 70 L.Ed. 435] (1926), with *Smallwood v. Gallardo*, 275 U.S. 56, 61 [48 S.Ct. 23, 23-24, 72 L.Ed. 152] (1927).” 343 U.S., at 117, n. 8, 72 S.Ct., at 584, n. 8.

[16][17][18][19] *275 Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. For example, in *Ex parte Collett*, 337 U.S. 55, 71, 69 S.Ct. 944, 952-953, 93 L.Ed. 1207 (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. 337 U.S., at 71, 69 S.Ct., at 952-953.^{FN28} Because rules of

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255

(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

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, 25 L.Ed. 378 (1879).^{FN29}

FN28. 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., *Dobbett v. Florida*, 432 U.S. 282, 293-294, 97 S.Ct. 2290, 2298-2299, 53 L.Ed.2d 344 (1977); see also *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990); *Beazell v. Ohio*, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925).

FN29. 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 complaints 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 commonsense 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, 511 U.S. at 290, 114 S.Ct. at 1524, 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 1499, so restricted.) Nor do we suggest that concerns about retroactivity have no application to procedural rules.

*276 Petitioner relies principally upon *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), and *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474 (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 1501-1502. 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, 89 S.Ct., at 524-525, and, because the tenant **1503 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, 89 S.Ct., at 527.

The Court in *Thorpe* viewed the new eviction procedures as "essential to remove a serious impediment to the successful protection of constitutional rights." *Ibid.* ^{FN30} Cf. *Youakim v. Miller*, 425 U.S. 231, 237, 96 S.Ct. 1399, 1402-1403, 47 L.Ed.2d 701 (1976) (*per curiam*) (citing *Thorpe* for propriety of applying new law to avoiding necessity of deciding constitutionality of old one).

FN30. *Thorpe* is consistent with the principle, analogous to that at work in the common-law presumption about repeals of

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

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, 54 S.Ct. 434, 78 L.Ed. 763 (1934), which ordered dismissal of prosecutions pending when the National Prohibition Act was repealed. See *Thorpe*, 393 U.S., at 281, n. 38, 89 S.Ct., at 526, n. 38; *id.*, at 282, n. 40, 89 S.Ct., at 526, n. 40.

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 *277 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, 94 S.Ct., at 2016.

Although that language suggests a categorical presumption 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, 102 S.Ct. 1162, 1166, 71 L.Ed.2d 325 (1982). See also *Hutto v. Finney*, 437 U.S. 678, 695, n. 24, 98 S.Ct. 2565, 2576, n. 24, 57 L.Ed.2d 522 (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 costs of desegregating their children’s public schools. See 416 U.S., at 718, 94 S.Ct., at 2019-2020 (noting that the plaintiffs had brought the school board “into compliance with its constitutional mandate”) (citing *278 *Brown v. Board of Education*, 347 U.S. 483, 494, 74 S.Ct. 686, 691, 98 L.Ed. 873 (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 “d [id] not impose an additional or unforeseeable obligation” upon the school board. *Bradley*, 416 U.S., at 721, 94 S.Ct., at 2021.

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 **1504 that had applied the antiretroactivity canon. See *id.*, at 720, 94 S.Ct., at 2020-2021 (citing *Greene v. United States*, 376 U.S. 149, 160, 84 S.Ct. 615, 621-622, 11 L.Ed.2d 576 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164, 65 S.Ct. 172, 185, 89 L.Ed. 139 (1944), and *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199, 34 S.Ct. 101, 102, 58 L.Ed. 179 (1913)). 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, 110

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255

(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

S.Ct., at 1583-1584 (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, 94 S.Ct., at 2017, n. 17 (citing, *inter alia*, *Freeborn v. Smith*, 2 Wall. 160, 17 L.Ed. 160 (1865)),^{FN31} the retroactive application of intervening judicial decisions, see 416 U.S., at 713-714, n. 17, 94 S.Ct., at 2017, n. 17 (citing, *inter alia*, *Patterson v. Alabama*, 294 U.S. 600, 607, 55 S.Ct. 575, 578, 79 L.Ed. 1082 (1935)),^{FN32} statutes *279 altering jurisdiction, 416 U.S., at 713, n. 17, 94 S.Ct., at 2017, n. 17 (citing, *inter alia*, *United States v. Alabama*, 362 U.S. 602, 80 S.Ct. 924, 4 L.Ed.2d 982 (1960)), and repeal of a criminal statute, 416 U.S., at 713, n. 17, 94 S.Ct., at 2017, n. 17 (citing *United States v. Chambers*, 291 U.S. 217, 54 S.Ct. 434, 78 L.Ed. 763 (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.^{FN33}

FN31. 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, 94 S.Ct., at 2016, 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).

FN32. 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, 92 S.Ct. 349, 355-356, 30 L.Ed.2d 296 (1971); *Linkletter v. Walker*, 381 U.S. 618, 636, 85 S.Ct. 1731, 1741, 14 L.Ed.2d 601 (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. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993); *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

FN33. See, e.g., *Treasury Employees v. Von Raab*, 489 U.S. 656, 661-662, and n. 1, 109 S.Ct. 1384, 1388-1389, and n. 1, 103 L.Ed.2d 685 (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, 107 S.Ct. 2617, 2621, 96 L.Ed.2d 572 (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, 107 S.Ct. 2022, 2025, 95 L.Ed.2d 582 (1987) (in case involving retroactivity of judicial decision, citing *Thorpe* for same “usual rule”); *Hutto v. Finney*, 437 U.S., at 694, n. 23, 98 S.Ct., at 2575, 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, 96 S.Ct., at 1403 (*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, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26 (1975) (stating that *Bradley* warranted

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

application of intervening statute transferring to administrative agency jurisdiction over claim for injunctive relief); *Hamling v. United States*, 418 U.S. 87, 101-102, 94 S.Ct. 2887, 2899-2900, 41 L.Ed.2d 590 (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, 94 S.Ct. 1494, 1511, n. 21, 39 L.Ed.2d 812 (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 of Miami, Inc.*, 404 U.S. 412, 414, 92 S.Ct. 574, 575, 30 L.Ed.2d 567 (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, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (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, 90 S.Ct. 200, 201-202, 24 L.Ed.2d 214 (1969) (in action for injunctive relief from state election statute, citing *Thorpe* as authority for considering intervening amendment of statute).

****1505 [20] *280** 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 1494-1495, and n. 12; 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 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 preenactment conduct.

[21] 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 *281 VII cases, the provision would presumably apply to cases tried after November 21, 1991, regardless of when the underlying conduct occurred.^{FN34} However, because § 102(c) makes a jury trial available only "[i]f a complaining party seeks compensatory or punitive damages," the jury trial option must stand or fall with the attached damages provisions.

FN34. 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

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255

(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

support remand for a jury trial in this case.

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, 96 S.Ct., at 2893 (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, 80 S.Ct. 1146, 1155, 4 L.Ed.2d 1109 (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 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 *282 make unlawful conduct that was lawful when it occurred; as we have noted, *supra*, at 1490-1491, § 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 to retroactive application on grounds of fairness have their greatest force.

[22] 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.^{FN35} In this case, the event to which the new damages *283 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.

FN35. 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 co-worker, 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

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

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, 101 S.Ct., at 963-965 (*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 preenactment conduct.

[23] 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 ****1507** 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 ***284** consequence that cannot be ignored. ^{FN36} Neither in *Bradley* itself, nor in any case before or 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 *Winfrey v. Northern Pacific R. Co.*, 227 U.S. 296, 301, 33 S.Ct. 273, 273-274, 57 L.Ed. 518 (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"); ***285** *United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314-315, 28 S.Ct. 537, 539-540, 52 L.Ed. 804 (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). ^{FN37}

FN36. 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 damage[s] limitations are actually changes in substantive rights and not mere remedial

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255

(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

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*, 276 Minn. 490, 150 N.W.2d 689, 697 (1967).

FN37. 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, 69 S.Ct., at 952-953, and n. 38 (“Clearly, § 1404(a) is a remedial provision applicable to pending actions”); *Beazell*, 269 U.S., at 171, 46 S.Ct., at 69 (*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 1501-1502 (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 damages remedies may “normally harbo[r] much less potential for mischief than retroactive changes in the principles of liability,” *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (CA DC), cert. denied, 449 U.S. 905, 101 S.Ct. 281, 66

L.Ed.2d 137 (1980), but that potential is nevertheless still significant.

[24][25] 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.^{FN38} That consideration, **1508 *286 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.

FN38. Petitioner argues that our decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (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 66, 112 S.Ct., at 1033 (quoting *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939 (1946)), we held in *Franklin* that the right of action under Title IX of the Education 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 “

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255

(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

traditional presumption in favor of all available remedies.” 503 U.S., at 72, 112 S.Ct., at 1036. That statute did not create a “general right to sue” for employment discrimination, but instead specified a set of “circumscribed remedies.” See *United States v. Burke*, 504 U.S. 229, 240, 112 S.Ct. 1867, 1873, 119 L.Ed.2d 34 (1992). 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, 101 S.Ct. 1571, 1583-1584, 67 L.Ed.2d 750 (1981).

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.

*294 Justice BLACKMUN, dissenting.

Perhaps from an eagerness to resolve the “apparent tension,” see *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837, 110 S.Ct. 1570, 1577, 108 L.Ed.2d 842 (1990), between *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), and *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988), the Court rejects the “most logical reading,” *Kaiser*, 494 U.S., at 838, 110 S.Ct., at 1577, 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 fidelity to the settled principle that the “starting point for interpretation of a statute ‘is the language of the statute itself,’ ” *Kaiser*, 494 U.S., at 835, 110 S.Ct., at 1575, quoting *Consumer Product Safety Comm’n v. GTE*

Sylvania, Inc., 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (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 *295 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. 30, 36, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992), citing *United States v. Menasche*, 348 U.S. 528, 538-539, 75 S.Ct. 513, 519-520, 99 L.Ed. 615 (1955), § 402(a)’s qualifying clause, “[e]xcept as otherwise specifically provided,” cannot be dismissed as mere surplusage or an “insurance policy” against future judicial interpretation. Cf. *Gersman v. Group Health Assn., Inc.*, 975 F.2d 886, 890 (CA DC 1992). Instead, it most logically refers to the Act’s two sections “specifically provid[ing]” 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 **1509 the Act did not apply to the then-pending case of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (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, 108 S.Ct. 1537, 99 L.Ed.2d 839 (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.^{FN1} “Absent a clearly expressed legislative intention to the contrary, [this] language must ... be regarded as conclusive.” *Kaiser*, 494 U.S., at 835, 110 S.Ct., at 1575, quoting *Consumer Product Safety Comm’n*

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255
(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

v. GTE Sylvania, Inc., 447 U.S., at 108, 100 S.Ct., at 2056. The legislative history of the Act, featuring a welter of conflicting and “some frankly partisan” floor statements, *ante*, at 1495, but no committee report, evinces no such contrary *296 legislative intent. ^{FN2} Thus, I see no reason to dismiss as “unlikely,” *ante*, at 1494, the most natural reading of the statute, in order to embrace some other reading that is also “possible,” *ibid*.

FN1. It is, of course, an “unexceptional” proposition that “a particular statute may in some circumstances *implicitly* authorize retroactive [application].” *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 223, 109 S.Ct. 468, 479, 102 L.Ed.2d 493 (1988) (concurring opinion) (emphasis added).

FN2. 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 Assn., 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), reprinted at 136 Cong.Rec. H6829 (Aug. 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 *id.*, at H6747 (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 13255, 13265-13266 (introduction and defeat of Michel substitute for H.R. 1).

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. ^{FN3} 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. 775, 784 (1936) (retroactivity *297 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, 8 L.Ed. 665 (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 was known”), cert. denied, **1510449 U.S. 905, 101 S.Ct. 281, 66 L.Ed.2d 137 (1980); 1 J. Kent, *Commentaries on American Law* *455-*456 (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”).

FN3. Directly at issue in this case are compensatory damages and the right to a jury trial. While there is little unfairness

114 S.Ct. 1483

Page 32

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255

(Cite as: 511 U.S. 244, 114 S.Ct. 1483)

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 preenactment conduct represents a more difficult question, one not squarely addressed in this case and one on which I express no opinion.

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, 17 L.Ed. 922 (1865). See also 2 N. Singer, *Sutherland on Statutory Construction* § 41.04, p. 349 (4th rev. 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.

U.S.Tex.,1994.

Landgraf v. USI Film Products

511 U.S. 244, 114 S.Ct. 1483, 64 Fair Empl.Prac.Cas. (BNA) 820, 64 Empl. Prac. Dec. P 42,947, 128 L.Ed.2d 229, 62 USLW 4255

Briefs and Other Related Documents (Back to top)

- 1993 WL 757646 (Oral Argument) Oral Argument (Oct. 13, 1993)
- 1993 WL 638234 (Appellate Brief) Reply Brief for Petitioner (Aug. 10, 1993)
- 1993 WL 326577 (Appellate Brief) BRIEF FOR RESPONDENTS (Jun. 25, 1993)
- 1993 WL 326575 (Appellate Brief) Brief for Petitioner (Apr. 30, 1993)

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