SUPREME COURT OF THE UNITED STATES

Nos. 92–757 AND 92–938

BARBARA LANDGRAF, PETITIONER

92–757 *v.*

USI FILM PRODUCTS ET AL.

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

MAURICE RIVERS AND ROBERT C. DAVISON, PETITIONERS

92–938 *v.*

ROADWAY EXPRESS, INC.

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

[April 26, 1994]

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

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

enact similar legislation, the Civil Rights Act of 1990, S. 2104, 101st Cong., 1st Sess. (1990), see *ante*, at 9–11, 18.

This effectively converts the "clear statement" rule into a "discernible legislative intent" rule—and even that understates the difference. The Court's rejection of the floor statements of certain Senators because they are "frankly partisan" and "cannot plausibly be read as reflecting any general agreement" *ante*, at 17, reads like any other exercise in the soft science of legislative historicizing,[1] undisciplined by any distinctive "clear statement" requirement. If it is a "clear statement" we are seeking, surely it is not enough to insist that the statement can "plausibly be read as reflecting general agreement"; the statement must *clearly* reflect general agreement. No legislative history can do that, of course, but only the text of the statute itself. That has been the meaning of the "clear statement" retroactivity rule from the earliest times. See, *e.g.*, *United States* v. *Heth*, 3 Cranch 399, 408 (1806) (Johnson, J.) ("Unless, therefore, the words are too imperious to admit of a different construction, [the Court should] restric[t] the words of the law to a future operation"); *id*., at 414 (Cushing, J.) ("[I]t [is] unreasonable, in my opinion, to give the law a construction, which would have such a retrospective effect, unless it contained express words to that purpose"); *Murray* v. *Gibson*, 15 How. 421, 423 (1854) (statutes do not operate retroactively unless "required by express command or by necessary and unavoidable implication"); *Schwab* v. *Doyle*, 258 U. S. 529, 537 (1922) ("a statute should not be given a retrospective operation unless its words make that imperative"); see also *Bonjorno*,

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

supra, at 842–844 (concurring opinion) (collecting cases applying the clear statement test). I do not deem that clear rule to be changed by the Court's dicta regarding legislative history in the present case.

The 1991 Act does not expressly state that it operates retroactively, but petitioner contends that its specification of prospective-only application for two sections, §§109(c) and 402(b), implies that its other provisions are retroactive. More precisely, petitioner argues that since §402(a) states that "[e]xcept as otherwise specifically provided, [the 1991 Act] shall take effect upon enactment"; and since §§109(c) and 402(b) specifically provide that those sections shall operate only prospectively; the term "shall take effect upon enactment" in §402(a) must mean *retroactive* effect. The short response to this refined and subtle argument is that refinement and subtlety are no substitute for clear statement. "[S]hall take effect upon enactment" is presumed to mean "shall have prospective effect upon enactment," and that presumption is too strong to be overcome by any negative inference derived from §§109(c) and 402(b).[2]

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[2]Petitioner suggests that in *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1 (1989), the Court found the negative implication of language sufficient to satisfy the "clear statement" requirement for congressional subjection of the States to private suit, see *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 242 (1985). However, in that case it was the express inclusion of States in the definition of potentially liable "person[s]," see 42 U. S. C. §9601(21), as reinforced by the limitation of States' liability in certain limited circumstances, see §9601(20)(D), that led the Court to find a plain statement of liability. See 491 U. S., at 11 (noting the "cascade of plain language" supporting liability); 491 U. S., at 30 (SCALIA, J., concurring in part and dissenting in part)). There is nothing comparable here.

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

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

theory under which attorney's fees might have been discretionarily awarded, see *ante*, at 33–34.

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

One might expect from this "vested rights" focus that the Court would hold all changes in rules of procedure (as opposed to matters of substance) to apply retroactively. And one would draw the same conclusion from the Court's formulation of the test as being "whether the new provision attaches new legal consequences to events completed before its enactment"—a test borrowed directly from our *ex post facto* Clause jurisprudence, see, *e.g.*, *Miller* v. *Florida*, 482 U. S. 423, 430 (1987), where we have adopted a substantive-procedural line, see *id.*, at 433 ("no *ex post facto* violation occurs if the change in law is merely procedural"). In fact, however, the Court shrinks from faithfully applying the test that it has announced. It first seemingly defends the procedural-substantive distinction that a "vested rights" theory entails, *ante*, at 31 ("[b]ecause rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial

retroactive"). But it soon acknowledges a broad and ill defined (indeed, utterly undefined) exception: "Whether a new rule of trial procedure applies will generally depend upon the posture of the case in question." *Ante*, at 31, n.29. Under this exception, "a new rule concerning the filing of complaints would not govern an action in which the complaint had already been filed," *ibid.*, and "the promulgation of a new jury trial rule would ordinarily not warrant retrial of cases that had previously been tried to a judge," *ante*, at 37, n.34. It is hard to see how either of these refusals to allow retroactive application preserves any "vested right." "`No one has a vested right in any given mode of procedure.'" *Ex parte Collett*, 337 U. S. 55, 71 (1949), quoting *Crane* v. *Hahlo*, 258 U. S. 142, 147 (1922).

The seemingly random exceptions to the Court's "vested rights" (substance-*vs*.-procedure) criterion must be made, I suggest, because that criterion is fundamentally wrong. It may well be that the upsetting of "vested substantive rights" was the proper touchstone for interpretation of New Hampshire's constitutional prohibition, as it is for interpretation of the United States Constitution's *ex post facto* Clauses, see *ante*, at 31, n. 28. But I doubt that it has anything to do with the more mundane question before us here: absent clear statement to the contrary, what is the presumed temporal application of a statute? For purposes of *that* question, a *procedural* change should no more be presumed to be retroactive than a *substantive* one. The critical issue, I think, is not whether the rule affects "vested rights," or governs substance or procedure, but rather what is the relevant activity that the rule regulates. Absent clear statement otherwise, only such relevant activity which occurs *after* the effective date of the statute is covered. Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving

conduct that occurred before their effective date. But other statutes have a different purpose and therefore a different relevant retroactivity event. A new rule of evidence governing expert testimony, for example, is aimed at regulating the conduct of trial, and the event relevant to retroactivity of the rule is introduction of the testimony. Even though it is a procedural rule, it would unquestionably not be applied to *testimony already taken*—reversing a case on appeal, for example, because the new rule had not been applied at a trial which antedated the statute.

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

The "vested rights" test does not square with our consistent practice of giving immediate effect to statutes that alter a court's jurisdiction. See, *e.g.*, *Bruner* v. *United States*, 343 U. S. 112, 116–117, and n. 8 (1952); *Hallowell* v. *Commons*, 239 U. S. 506 (1916); cf. *Ex parte McCardle*, 7 Wall. 506, 514

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

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

in futuro," *Deering*, *ibid*. Since the purpose of prospective relief is to affect the future rather than remedy the past, the relevant time for judging its retroactivity is the very moment at which it is ordered.[3]

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

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