SUPREME COURT OF THE UNITED STATES

No. 92–757

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

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

[April 26, 1994]

JUSTICE BLACKMUN, dissenting.

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

A straightforward textual analysis of the Act indicates that §102's provision of compensatory damages and its attendant right to a jury trial apply to cases pending on appeal on the date of enactment. This analysis begins with §402(a) of the Act, 105 Stat. 1099: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." Under the "settled rule that a statute must, if possible, be construed in such fashion that every word has operative effect," *United States* v. *Nordic Village, Inc.*, 503 U. S. ___, ___ (1992) (slip op. 6), citing *United*

States v. *Menasche*, 348 U. S. 528, 538–539 (1955), §402(a)'s qualifying clause, "[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 Ass'n, Inc.*, 975 F. 2d 886, 890 (CADC 1992). Instead, it most logically refers to the Act's two sections "specifically providing" that the statute does not apply to cases pending on the date of enactment: (a) §402(b), 105 Stat. 1099, which provides, in effect, that the Act did not apply to the then pending case of *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989), and (b) §109(c), 105 Stat. 1078, which states that the Act's protections of overseas employment "shall not apply with respect to conduct occurring before the date of the enactment of this Act." Self-evidently, if the entire Act were inapplicable to pending cases, §§402(b) and 109(c) would be "entirely redundant." *Kungys* v. *United States*, 485 U. S. 759, 778 (1988) (plurality opinion). Thus, the clear implication is that, while §402(b) and §109(c) do not apply to pending cases, other provisions—including §102—do.[1] "`Absent a clearly expressed legislative intention to the contrary, [this] language must . . . be regarded as conclusive.'" *Kaiser*, 494 U. S., at 835, quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). The legislative history of the Act, featuring a welter of conflicting and "some frankly partisan" floor statements, *ante*, at 17, but no committee report, evinces no such contrary legislative intent.[2] Thus, I

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

[2]Virtually every Court of Appeals to consider the application of the 1991 Act to pending cases has concluded that the legislative history provides no reliable guidance. See, *e.g.*, *Gersman* v. *Group Health Ass'n, Inc.*,

see no reason to dismiss as "unlikely," *ante*, at 14, the most natural reading of the statute, in order to embrace some other reading that is also "possible," *ibid*.

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975 F. 2d 886 (CADC 1992); *Mozee* v. *American Commercial Marine Service Co.*, 963 F. 2d 929 (CA7 1992).

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

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

At no time within the last generation has an

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

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

Accordingly, I respectfully dissent.