Retroactivity and the Fraud Enforcement and Recovery Act of 2009

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This Article resolves confusion over the scope of the Fraud Enforcement and Recovery Act (FERA), which amends the False Claims Act (FCA), to clarify that it covers fraud against the taxpayers even where committed by and against other government contractors and subcontractors. I focus on a controversial retroactivity clause applying FERA's expanded liability language to pre-enactment conduct. Ambiguity has led to inconsistent outcomes: some courts have ruled that FERA's new language applies to pre-enactment conduct while others have reached the opposite result. Much of practical consequence rides on how we resolve this ambiguity—the Department of Justice is currently investigating over a thousand FCA cases, each of which carries the potential for treble damages. I lay out an analytical solution by applying the Supreme Court's retroactivity doctrine announced in Landgraf v. USI Film Products *and conclude that Congress intended the statute to operate retroactively.*

I. THE FRAUD ENFORCEMENT AND RECOVERY ACT (FERA)

Private contractors perform a greater share of government functions than ever before: from military operations and for-profit prisons to social services and education.[1] Privatization has been criticized on a number of grounds, however, including the possible "democracy deficit" caused by outsourcing core government functions,[2] and systemic problems with accountability and oversight.[3] Congressional hearings beginning in 2007, for example, revealed widespread fraud in Iraq war contracting.[4] The prominent role of private military contractors in Iraq and Afghanistan has focused continued attention on questions of criminal and civil accountability.[5] In the most recent scandal, former employees of the private security firm Blackwater (now "Xe")[6] have sued the company under the False Claims Act (FCA), alleging fraudulent billing practices—including charging taxpayers for strippers and prostitutes.[7]

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1. *See* MARTHA MINOW, PARTNERS NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 3 (2002) ("Private and market-style mechanisms are increasingly employed to provide what government had taken as duties. . . . Decision makers in education, health care, social services, and law constantly cross the boundaries between public and private, religious and secular, profit and nonprofit.").

2. *See, e.g.*, PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY THE PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 1–6 (2007) (citing ALFRED C. AMAN, JR., THE DEMOCRACY DEFICIT (2004)).

3. *See, e.g.*, Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 990–95 (2005) (citing Halliburton's no-bid contracts and overbilling for Iraq reconstruction and abuses by private contractors at Abu Ghraib as examples of accountability problems in outsourcing government functions); *see also* SENATE COMM. ON THE JUDICIARY, WAR PROFITEERING PREVENTION ACT OF 2007, S. REP. NO. 110-66, at 2 (2007) ("Over the past four years, war profiteering has . . . plagued this nation during the engagement of U.S. forces in Iraq and Afghanistan. The United States has devoted hundreds of billions of dollars to military, relief, and reconstruction activities in Iraq and Afghanistan, including more than $50 billion to relief and reconstruction activities. Private contractors have been used to a greater extent during these war-time activities than at any time in our history. . . . Inspectors General overseeing the provision of goods and services in Iraq and Afghanistan have found that billions of dollars spent in Iraq are unaccounted for and may have been lost to fraud or other misconduct.").

4. *See, e.g.*, SENATE COMM. ON THE JUDICIARY, *supra* note 3, at 2; *see also War Profiteering and Other Contractor Crimes Committed Overseas: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 2 (2007) (statement of the Hon. Robert C. "Bobby" Scott, Chairman, Subcomm. on Crime, Terrorism, and Homeland Security) ("On the fraud side, the Department of Justice has ignored the False Claims Act cases by obtaining court orders sealing the cases. Most of the cases filed regarding the war profiteering in Iraq have remained under seal.").

5. *See, e.g.*, Editorial, *Privatized War, and Its Price*, N.Y. TIMES, Jan. 11, 2010, at A16 (noting dismissal of charges against Blackwater agents who killed seventeen Iraqis). "There are many reasons to oppose the privatization of war. Reliance on contractors allows the government to work under the radar of public scrutiny." *Id.*

6. *Blackwater Changes Its Name to Xe*, N.Y. TIMES, Feb. 14, 2009, at A10.

7. *See Suit: Prostitute, Strippers Part of Blackwater Fraud*, CNN (Feb. 12, 2010),

The trillion-dollar stimulus package has magnified the risk of fraud against taxpayer funds and led to calls for better oversight of government contractors.[8] Congress responded by enacting the Fraud Enforcement and Recovery Act of 2009 (FERA),[9] a statute designed to "increase accountability for the corporate and mortgage frauds that have contributed to the recent economic collapse and [to] help protect Americans from future frauds that exploit the economic assistance programs intended to restore and rebuild our economy."[10] FERA strengthens preexisting fraud statutes, creates a Financial Crisis Inquiry Commission,[11] and authorizes nearly $500 million for law enforcement.[12] Section 4 of FERA amends the FCA, a statute that allows both private parties and the government to recover taxpayer money lost to fraud.[13] The FCA is one of the government's primary resources to fight civil fraud against taxpayers.[14]

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http://www.cnn.com/2010/CRIME/02/12/blackwater.suit/index.html; Mark Mazzetti, *2 Ex-Workers Accuse Blackwater Security Company of Defrauding the U.S. for Years*, N.Y. TIMES, Feb. 11, 2010, at A22. An FCA lawsuit was filed alleging that "top Blackwater officials had engaged in a pattern of deception as they carried out government contracts in Iraq and Afghanistan, and in Louisiana in the aftermath of Hurricane Katrina. The lawsuit, filed under the False Claims Act, also asserts that Blackwater officials turned a blind eye to 'excessive and unjustified' force against Iraqi civilians by several Blackwater guards." *Id.*

8. *See* S. REP. NO. 111-10, at 10 (2009), *reprinted in* 2009 U.S.C.C.A.N. 430, 437–38 ("In response to the economic crisis, the Federal Government has obligated and expended more than $1 trillion in an effort to stabilize our banking system and rebuild our economy. These funds are often dispensed through contracts with non-governmental entities, going to general contractors and subcontractors working for the Government. Protecting these funds from fraud and abuse must be among our highest priorities as we move forward with these necessary actions."); *see also* Michael Cooper, *Few Cases of Fraud Involving Stimulus Money Have Been Detected, Officials Say*, N.Y. TIMES, Sept. 18, 2009, at A13 (reporting on fears among government officials that stimulus money will be targeted for fraud); Grant McCool & Martha Graybrow, *FBI Targets Fraud in TARP, Stimulus Fund*, REUTERS, June 2, 2009, *available at* http://www.reuters.com/article/idUSTRE5515MF20090602 ("The FBI has been bracing for a wave of fraud and corruption cases stemming from the government's multitrillion-dollar effort to stimulate the economy and help ailing banks.").

9. Pub. L. No. 111-21, 123 Stat. 1617 (May 20, 2009).

10. S. REP. NO. 111-10, at 2.

11. *See About the Commission*, FINANCIAL CRISIS INQUIRY COMMISSION, http://www.fcic.gov/about/ (explaining the goals and mandate of the Commission); *see also* Stephen Labaton, *A Panel Is Named to Examine Causes of the Economic Crisis*, N.Y. TIMES, July 16, 2009, at B3 (describing creation of the Commission and its appointment of members).

12. S. REP. NO. 111-10, at 3–4.

13. See Part II for a more detailed discussion of FCA.

14. Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-Of-Control* Qui Tam *Litigation Under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233, 1235 (2008) (citing S. REP. NO. 99-345, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5268); *see also* S. REP. NO. 111-10, at 10 ("One of the most successful tools for combating waste and abuse in Government spending has been the False Claims Act (FCA), which is an extraordinary civil enforcement tool used to recover funds lost to fraud and abuse.").

As I discuss in Part II, FERA "legislatively overrules" *Allison Engine Co. v. United States ex rel. Sanders*[15] and *United States ex rel. Totten v. Bombardier Corp.*,[16] which held that the FCA requires direct presentation of a false claim to the government.[17] Requiring "presentment"[18] would make FCA cases much more difficult to prove in the increasingly common scenario of fraud by one government contractor against another rather than against the government directly.[19] *Totten* and *Allison Engine* had dulled the edge of a powerful anti-fraud weapon.[20] FERA sharpened it again by removing the presentment requirement.[21]

In Part II, I explain the textual ambiguity in section 4(f), which applies the FERA amendments to conduct on or after the date of enactment. The problem is in the ambiguous language of subsection 4(f)(1), which makes an exception for FERA's revisions to the confusing presentment language in 31 U.S.C. § 3729(a)(1)(B). The revised § 3729(a)(1)(B) would apply to "all claims under the False Claims Act that are pending on or after [June 7, 2008]"[22]—almost a year before President Obama signed FERA into law and two days before the Supreme Court's *Allison Engine* decision. Retroactivity language of this sort departs from

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15. 128 S. Ct. 2123 (2008).

16. 380 F.3d 488 (D.C. Cir. 2004).

17. S. Rep. No. 111-10, at 10–12 (explaining that the FERA amendments were intended to overrule *Totten* and *Allison Engine*). I discuss *Allison Engine* and *Totten* in more detail in Part II.

18. *See* Kevin M. Comeau, *False Certification Claims in Light of* Allison Engine *and False Claims Act Amendments Introduced in the 111th Congress*, 18 Fed. Cir. B.J. 491, 492 (2009) ("*Allison Engine* clarified § 3729(a)(2)'s requirement that a claim be approved 'by the Government,' and resolved a circuit split about the general scope of FCA liability under this theory of recovery."); *see also* Robert L. Vogel, *Feature Comment: The 2009 Amendments to the FCA*, Gov't Contractor, Oct. 7, 2009, at ¶ 342 ("*Totten* and *Allison Engine* made it much more difficult for the Government to prove liability under the FCA in cases in which Government funds were passed down along a chain—e.g., first, from the Government to an entity that administered a program, or to a prime contractor, and then to a grantee or subcontractor who made claims for payment to the administrator of the program or the prime contractor, respectively.").

19. Vogel, *supra* note 18, at ¶ 342; *see also* S. Rep. No. 111-10, at 10–11 ("The Totten decision, like the Allison Engine decision, runs contrary to the clear language and congressional intent of the FCA by exempting subcontractors who knowingly submit false claims to general contractors and are paid with Government funds.").

20. *See* Gerard E. Wimberly, Daniel T. Plunkett & Heather A. LaSalle, *The Presentment Requirement Under the False Claims Act*, Briefing Papers, Nov. 2007, at 1–2 (positing that a decline in FCA recoveries is due to the judicially imposed presentment requirement coupled with "the use of intermediaries in procurement so that perpetrators of fraud are often at the subcontract and consultant levels dealing with prime contractors or in-country entities that are not the U.S. Government").

21. *See* United States v. Sci. Applications Int'l Corp., 653 F. Supp. 2d 87, 106 (D.D.C. 2009) ("FERA 'legislatively overrules' the holding of *Allison Engine* by amending the language of § 3729(a)(2), replacing the words 'to get' with the word 'material.'" (citing S. Rep. No. 111-10)).

22. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(f), 123 Stat. 1617, 1625.

the usual legislative practice of proscribing only future conduct.[23] The phrase "claims under the False Claims Act" causes further problems because it can signify lawsuits brought under FCA or alternatively it can be interpreted to mean the fraudulent claim for payment that triggers liability under FCA.[24] As I explain below, we should interpret *claims* to mean *cases*, *causes of action*, or *lawsuits*. If I am right about this, then FERA governs lawsuits pending on or after June 7, 2008, which means that FCA actions against subcontractors that would have been dismissed under *Allison Engine* could now move forward. This would likely implicate conduct that took place years before FERA's enactment date.[25] On the other hand, we can adopt FCA's special, statutory definition of *claim*, which means "any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that . . . is presented to an officer, employee, or agent of the United States."[26] If *claims* takes the special statutory meaning, then FERA governs conduct on or after June 7, 2008. As a consequence, this reading would dramatically reduce the temporal scope of the FERA amendments.[27] As I explain below, a number of courts have mistakenly adopted the statutory definition of *claims*[28] and have consequently dismissed a number of pending FCA actions against contractors or subcontractors.[29]

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23. *See* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 856 (1990) (Scalia, J., concurring) (stating that legislators typically intend statutes to govern only future conduct).

24. See 31 U.S.C.A. § 3729(a)(1)(A)–(G) (West Supp. 2010) for the FCA liability provisions. *See also* United States *ex rel.* Crennen v. Dell Mktg. L.P., Civil Action No. 06-10546-PBS, 2010 WL 1713633 (D. Mass. Apr. 27, 2010) ("[T]he term 'claims' in the retroactivity clause is a paragon of ambiguity. Does it mean 'claims' for payment pending on the date of enactment or to 'claims' brought under the False Claims Act in cases pending on that date? Not surprisingly, courts have split on the subject. Some have held that 'claims' means claims for payment as defined by the act. Others have held that 'claims' means the cause of action arising under the FCA." (citations omitted)).

25. *See, e.g.*, United States *ex rel.* Sanders v. Allison Engine Co., 667 F. Supp. 2d 747, 752 (S.D. Ohio 2009) ("[T]he 'claims' upon which this 'case' is based were paid in the late 1980s and early 1990s and were no longer pending on June 7, 2008."); *see also* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 945 (1997) (lawsuit first filed in 1989 based on alleged false claims occurring between 1982 and 1984).

26. 31 U.S.C.A. § 3729(b)(2).

27. I explain in Parts VI.A.2(a)–(b) that there are three problems with the technical reading. First, it does not make sense to say that a *claim* (i.e., a request for payment) is made "under the False Claims Act"; therefore the technical reading does not scan on the textual level. Second, even if it did make sense to say this, *claims* appears throughout FCA in a non-technical sense and thus provides little basis for reading the technical meaning into section 4(f)(1) of FERA. Third, there is scant evidence in the legislative history that Congress intended only to capture conduct on or after June 7, 2008. See Part VI.A for a full analysis of the text and legislative history of FERA.

28. See Part V.B for a discussion of the reasoning of the "no retroactivity" courts.

29. *See, e.g.*, *Allison Engine*, 667 F. Supp. 2d at 752 ("Neither the amendments to the FCA set forth in the FERA nor the prior FCA include a definition of 'case.' Thus, a plain reading of the retroactivity language reveals that the relevant change is applicable to 'claims' and not to 'cases.' The new FCA retroactivity clause is not applicable to the Defendants in

While the power of Congress to override judicial rulings is well settled,[30] statutes that implicate past conduct raise both constitutional and basic fairness concerns.[31] The Supreme Court addressed these concerns in *Landgraf v. USI Film Products*, the landmark case that announced modern retroactivity doctrine.[32] Courts have not applied the correct *Landgraf* analysis to FERA's retroactivity provision and have thus reached inconsistent results,[33] with some courts applying the statute

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this case.").

30. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 226 (1995) ("When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." (citing United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801); Landgraf v. USI Film Prods., 511 U.S. 244, 273–80 (1994))); *see also* Rivers v. Roadway Express, Inc., 511 U.S. 298, 305 (1994) ("Congress may also decide to announce a new rule that operates retroactively to govern the rights of parties whose rights would otherwise be subject to the rule announced in the judicial decision."); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 338 (1991) ("Congress frequently overrides or modifies statutory decisions by lower federal courts as well as those by the Supreme Court."). However, Congress cannot command an Article III court to reopen a case that has been brought to final judgment. *See Plaut*, 514 U.S. at 219; *see also* Miller v. French, 530 U.S. 327, 344 (2000) ("Congress cannot retroactively command Article III courts to reopen final judgments."). Some have criticized the *Plaut* line of cases as violating separation-of-powers principles. *See, e.g.*, Ira Bloom, *Prisons, Prisoners, and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power*, 40 ARIZ. L. REV. 389, 390–91 (1998) (arguing that legislative overruling threatens to undermine separation-of-powers and liberty principles).

31. *Landgraf*, 511 U.S. at 265 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."). *See generally* Debra Lynn Bassett, *In the Wake of* Schooner Peggy*: Deconstructing Legislative Retroactivity*, 69 U. CIN. L. REV. 453, 454 (2001) ("A careful analysis of the Court's [retroactivity] decisions reveals a consistent approach to retroactive legislation—an approach ultimately based in fundamental principles of fairness . . . ."); Michael J. Graetz, *Retroactivity Revisited*, 98 HARV. L. REV. 1820, 1822–26 (1985) (criticizing categorical condemnations of retroactivity and arguing that all statutes are retroactive to some extent, and that retroactive laws are not categorically unfair or inefficient); Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 444 (1982) ("[R]etroactive laws affecting property, contracts, and taxation are more often justifiable than might be thought . . . ."); Bryant Smith, *Retroactive Laws and Vested Rights*, 6 TEX. L. REV. 409 (1928) (discussing historical and political factors leading to anti-retroactivity bias); Daniel E. Troy, *Toward a Definition and Critique of Retroactivity*, 51 ALA. L. REV. 1329 (2000) (arguing that retroactive laws are generally without justification); Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1063 (2006) ("[T]raditional categories of public and private rights might be used to [create a] coherent scheme for deciding when statutory retroactivity is constitutional."). The present Article is of limited scope: because my goal here is to resolve FERA's retroactivity problem under established legal doctrine, I do not enter the broader theoretical debate concerning retroactivity, which I address in a separate work in progress.

32. See Part III for a discussion of *Landgraf*, 511 U.S. 244.

33. *Compare* United States v. Aguillon, 628 F. Supp. 2d 542, 550–51 (D. Del. 2009) (holding that FERA's amendment to the FCA did not apply retroactively under the Supreme Court's *Landgraf* analysis because Congress did not explicitly provide for such retroactive

retroactively,[34] and others reaching the opposite conclusion.[35] This pattern is troubling for at least two reasons. First, courts that find no retroactive intent fail to do justice to individual litigants, potentially dismissing otherwise valid suits. Second, the inconsistency reinstates the legal confusion that FERA was meant to resolve.[36] My goal is to clarify this confusion by guiding courts through the thicket of retroactivity analysis.

Part III discusses *Landgraf v. USI Film Products*, which created a two-step inquiry to determine whether a new civil law[37] may govern conduct prior to the statute's effective date.[38] We first ask whether Congress clearly expressed retroactive intent.[39] If so, then the statute may be applied retroactively, barring a violation of the Takings,[40] Due Process,[41] Contract, Ex Post Facto,[42] or Bill of

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effects), *with* United States *ex rel.* Westrick v. Second Chance Body Armor, Inc., 685 F. Supp. 2d 129, 140 (D.D.C. 2010) ("FERA provided for § 3729(a)(1)(B)'s retroactive application 'to all claims under the False Claims Act . . . that are pending on or after' June 7, 2008. Because this suit was pending on June 7, 2008, the amended provision applies here." (alteration in original) (citation omitted)).

34. See Part V.A for a discussion of the decisions that have held FERA to be retroactive.

35. See Part V.B for a discussion of the decisions that have found FERA not to be retroactive.

36. *See* S. REP. NO. 110-507, at 9 (2008). The Senate Report explains that the False Claims Act Corrections Act of 2008, the precursor to section 4 of FERA, was intended to

> clarify conflicting interpretations of the FCA, to provide an affirmative answer
> to unresolved questions created over the years by litigation, and to bring the
> FCA back into line with congressional intent. . . . These provisions will assist
> practitioners, judges, and businesses across the country by providing clarity and
> certainty to the FCA.

Id.

37. Congress is, of course, categorically barred from passing ex post facto criminal laws. *See infra* note 42.

38. *See* Bassett, *supra* note 31, at 490 ("*Landgraf* set out a two-part structure for initial retroactivity analysis.").

39. Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994) ("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.").

40. *See, e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 534 (1998) (holding that Coal Industry Retiree Health Benefit Act would violate Takings Clause because it would have retroactively imposed "liability on Eastern and the magnitude of that liability raise[s] substantial questions of fairness").

41. *See id.* at 549 (Kennedy, J., concurring in the judgment and dissenting in part) (disagreeing with the plurality's holding that the Coal Act violated the Takings Clause but that "[t]he case before us represents one of the rare instances where the Legislature has exceeded the limits imposed by due process"); *see also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 18–20 (1976) (applying general due process analysis and finding that the Coal Mine Health and Safety Act's requirement that the company provide benefits for a former miner's death was not arbitrary and irrational).

42. *Allison Engine* on remand held that applying the FCA would violate the Ex Post Facto Clause because it is essentially punitive in nature. United States *ex rel.* Sanders v. Allison Engine Co., 667 F. Supp. 2d 747, 758 (S.D. Ohio 2009) ("Retroactive application violates the Ex Post Facto Clause because Congress intended for the FCA to be punitive and because FCA sanctions are punitive in purpose and effect."). I disagree with this holding, but address the question fully in a separate work in progress. In sum, though, the Ex Post Facto

Attainder Clauses of the United States Constitution.[43] If, on the other hand, there is no express statement, we next ask whether applying the statute to past conduct would have genuinely "retroactive effects."[44] To find an answer, we appeal to "familiar considerations of fair notice, reasonable reliance, and settled expectations"[45] and ask "whether the new provision attaches new legal consequences to events completed before its enactment."[46] In the absence of a clear statement, a new law may not control a pending case where such an application would have retroactive effects.[47]

In Part IV, I review *Lindh v. Murphy*,[48] *Martin v. Hadix*,[49] and *Hughes Aircraft Co. v. United States ex rel. Schumer*,[50] which clarified that legislative history and general statutory interpretation principles continue to be relevant to the clear statement analysis. Part V discusses the rulings to date on FERA's retroactivity. Courts have split into "retroactivity" and "no retroactivity" camps and have either reached the wrong result or have reached the right result but have not provided adequate justification. Part VI supplies a retroactivity analysis of section 4(f)(1) and concludes that Congress intended FERA to govern cases that were pending on June 7, 2008. *Claims* is used as a synonym for *cases* throughout FCA, so there is no reason to import the technical definition from FCA into section 4(f)(1) of FERA.[51]

Clause applies to criminal/punitive statutes and not civil/remedial ones, such as FERA section 4. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 394 (1798) ("The restraint against making any *ex post facto laws* was not considered, by the framers of the constitution, as extending to prohibit the depriving a citizen even of a *vested right to property*; or the provision, 'that *private* property should not be taken for public use, without just compensation,' was unnecessary." (emphasis in original)); *see also* Oliver P. Field, *Ex Post Facto in the Constitution*, 20 MICH. L. REV. 315, 315 (1922) ("This doctrine of *Calder v. Bull* is so well settled as to have become one of the commonplaces of American constitutional law.").

43. *Landgraf*, 511 U.S. at 266 (noting that the Contracts, Takings, Bill of Attainder, Due Process, and Ex Post Facto Clauses of the United States Constitution prohibit certain types of retroactive legislation). As a general rule, however, the constitutional bars to retroactive civil legislation are now quite mild. *See id.* at 267 ("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.").

44. *Id.* at 280.

45. Martin v. Hadix, 527 U.S. 343, 358 (1999) (quoting *Landgraf*, 511 U.S. at 270); *see* Bassett, *supra* note 31, at 497–98.

46. *Martin*, 527 U.S. at 357–58 (quoting *Landgraf*, 511 U.S. at 270).

47. Republic of Austria v. Altmann, 541 U.S. 677, 693–94 (2004) (quoting *Landgraf*, 511 U.S. at 280).

48. 521 U.S. 320 (1997).

49. 527 U.S. 343 (1999).

50. 520 U.S. 939 (1997).

51. See Part VI.A for a discussion of the reasons to reject the technical definition as controlling section 4(f)(1).

II. FERA'S RETROACTIVITY PROVISION

The False Claims Act imposes civil liability for making a false or fraudulent claim to obtain payment from the government.[52] Both the Justice Department and private parties (called "relators") may initiate an FCA action.[53] A *qui tam*[54] suit functions as a "private attorney general" action.[55] The statute imposes civil penalties of up to ten thousand dollars plus three times actual damages.[56] If a private suit, the relator retains up to thirty percent of the recovery.[57] Between 1986 and 2009, taxpayers recovered more than $24 billion in FCA judgments—$2.4 billion in 2009 alone.[58] In this Part, I explain the "subcontractor loophole" created by the Supreme Court in *Allison Engine* and *Totten*. I then describe FERA's legislative closing of the loophole and the retroactivity problem that it creates.

Under the pre-FERA version of the FCA, two key provisions—§ 3729(a)(1)–(2)—impose liability on (1) one who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval"[59] and (2) one who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government."[60] Recent FCA suits have involved the Medicare Part B program[61] and the defense industry.[62] Where the defendant defrauds the

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52. See 31 U.S.C.A. § 3729(a)(1)(A)–(G) (West Supp. 2010) for the range of conduct proscribed by FCA; *see also* CHARLES DOYLE, CONG. RESEARCH SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 5–19 (2009) (providing historical background and summary of modern FCA).

53. Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 283–84 (2007).

54. "*Qui tam*" is short for the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*" meaning "who as well for the king as for himself sues in this matter." BLACK'S LAW DICTIONARY 1368 (9th ed. 2009).

55. Marc S. Raspanti & David M. Laigaie, *Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act*, 71 TEMP. L. REV. 23, 23 (1998) ("In passing . . . [FCA] *qui tam* provisions, Congress intended to commission 'private attorneys general' . . . .").

56. 31 U.S.C.A. § 3729(a)(1) (West Supp. 2010).

57. *Id.* § 3730(d)(2).

58. *See* Press Release, Dep't of Justice, Justice Department Recovers $2.4 Billion in False Claims Cases in Fiscal Year 2009; More Than $24 Billion Since 1986 (Nov. 19, 2009), *available at* http://www.justice.gov/opa/pr/2009/November/09-civ-1253.html.

59. 31 U.S.C. § 3729(a)(1) (2006). Section 4(a) of FERA changed the wording of this provision. *See infra* text accompanying notes 67–69.

60. 31 U.S.C. § 3729(a)(2). Section 4(a) of FERA changed the wording of this provision. *See infra* text accompanying notes 67–69.

61. *See, e.g.*, United States *ex rel.* Jamison v. McKesson Corp., No. 2:08CV214-SA-DAS, 2009 WL 3176168, at *3 (N.D. Miss. Sept. 29, 2009) (FCA suit alleging that "McKesson and MediNet caused the submission of false claims under Medicare Part B because they knew that CSMS was a 'sham' Part B supplier that failed to meet supplier standards.").

62. *See, e.g.*, United States *ex rel.* Gale v. Raytheon Co., No. 05cv2264-MMA(LSP),

government directly, liability under (a)(1)–(2) is straightforward. The fraudster either "presented a claim to an officer or employee of the United States" under (a)(1) or "ma[de] . . . a false record . . . to get a false or fraudulent claim paid or approved by the Government," thus satisfying (a)(2). As simple as this seems on the surface, it is often not self-evident when money is "paid by the Government," and as a consequence it is not always obvious when FCA liability attaches.[63] To see why this matters, imagine that Boeing wins a large Pentagon contract for a new fighter jet. Boeing then enters into a subcontract with AirCorp for a jet engine. AirCorp in turn enters into a further subcontract with TechCo for an engine component. After completing the project, AirCorp presents a fraudulently inflated demand for payment to Boeing, conduct that would surely violate FCA if AirCorp had presented the bill to the government directly. Is AirCorp defrauding the "government" for FCA purposes if Boeing rather than the Pentagon writes the check, even if the ultimate source of the funds is the government? To further complicate matters, what if TechCo presents a false claim to AirCorp?

Federal courts have squarely addressed the Boeing-AirCorp-TechCo scenario. *United States ex rel. Totten v. Bombardier Corp.* involved false claims to Amtrak, a government grantee.[64] In *Allison Engine Co. v. United States ex rel. Sanders*, defense subcontractors presented false claims to government contractors farther up the chain.[65] The question was whether FCA liability required direct connection between the defendant and the federal fisc. *Totten* and *Allison Engine* answered this question in the affirmative: FCA liability would not attach unless subcontractors presented their claim directly to the government or intended the fraud to be "material to the Government's decision to pay or approve the false claim."[66]

Congress enacted section 4 of FERA, titled "Clarifications to the False Claims Act to Reflect the Original Intent of the Law," to close the subcontractor loophole opened by *Totten* and *Allison Engine*[67] by replacing (a)(2)'s problematic phrase "to

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2009 WL 3378976, at *1 (S.D. Cal. Oct. 19, 2009) ("Gale claims that by hiring an unqualified building maintenance and janitorial services company, and then charging the federal government at inflated rates for the services, Defendants are together guilty of misappropriating taxpayer funds and needlessly and recklessly endangering navy personnel.").

63. This is in part because contractors and subcontractors perform so much government work. *See, e.g.*, Lindsey Nelson, Note, *Mission Not Accomplished: Missing Billions in Iraq, Enhanced Whistleblower Protections, and a Large Failure in a Small Step*, 38 PUB. CONT. L.J. 277, 280 (2008) ("Contractors are now performing an increasing amount of work that, in the past, had been performed by government employees." (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-93SP, A CALL FOR STEWARDSHIP: ENHANCING THE FEDERAL GOVERNMENT'S ABILITY TO ADDRESS KEY FISCAL AND OTHER 21ST CENTURY CHALLENGES (2007))); *see also supra* Part I.

64. 380 F.3d 488, 498 (2004) ("Making false records or statements to get a false claim paid or approved by Amtrak is not making or using 'a false record or statement to get a false or fraudulent claim paid or approved *by the Government*' [for purposes of § 3729(a)(2) liability]." (emphasis in original)).

65. 553 U.S. 662, 666 (2008).

66. *Id.* at 665; *Totten*, 380 F.3d at 491.

67. S. REP. NO. 111-10, at 10 (2009), *reprinted in* 2009 U.S.C.C.A.N. 430, 438 ("The effectiveness of the FCA has recently been undermined by court decisions limiting the scope of the law and allowing subcontractors and non-governmental entities to escape

get . . . paid or approved by the government" with a materiality standard: "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[68] FERA also removes the phrase "to an officer or employee of the Government, or to a member of the Armed Forces," which clarifies that there is no presentment requirement in (a)(1).[69] Drafts of similar FCA amendments had been circulating in Congress since 2007,[70] but the financial crisis created the necessary impetus to pass FERA.[71] The federal government has committed over a trillion dollars of taxpayer money to the bailout and stimulus packages.[72] Much of this money is likely to be channeled through subcontractors and other intermediaries.[73]

   Commentators have noted FERA's potential for increased FCA liability in light of the federal stimulus package.[74] I focus here on the controversy surrounding FERA's effective date provision, which reads:

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responsibility for proven frauds. In order to respond to these decisions, certain provisions of the FCA must be corrected and clarified in order to protect the Federal assistance and relief funds expended in response to our current economic crisis."); *see also id.* at 10–12 (discussing the impact of *Allison Engine*, *Totten*, and *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2006), on FCA liability for subcontractors and grantees).

   68. *See* United States v. Sci. Applications Int'l Corp., 653 F. Supp. 2d 87, 106 (D.D.C. 2009) ("FERA 'legislatively overrules' the holding of *Allison Engine* by amending the language of § 3729(a)(2), replacing the words 'to get' with the word 'material.'"); *see also* Robert T. Rhoad & Matthew T. Fornataro, *A Gathering Storm: The New False Claims Act Amendments and Their Impact on Healthcare Fraud Enforcement*, HEALTH LAW., Aug. 2009, at 14, 17 ("FERA has legislatively overruled the Supreme Court's *Allison Engine* decision . . . ."); S. REP. NO. 111-10, at 12 (new FCA definition of "material" is "consistent with the Supreme Court definition, as well as other courts interpreting the term as applied to the FCA").

   69. S. REP. NO. 111-10, at 11.

   70. Prior to FERA, both the House and Senate had drafted amendments to the False Claims Act. *See* False Claims Act Correction Act of 2009, H.R. 1788, 111th Cong.; *see also* H.R. REP. NO. 111-97, at 2 (2009) ("This legislation is particularly relevant during this period of increased reliance on private contractors to perform what have traditionally been viewed as governmental functions."); False Claims Act Clarification Act of 2009, S. 458, 111th Cong.; False Claims Act Correction Act of 2008, S. 2041, 110th Cong.; False Claims Act Correction Act of 2007, H.R. 4854, 110th Cong. For a summary of the legislative history of FERA, see Comeau, *supra* note 18, at 508–12. I discuss the earlier drafts of section 4 of FERA in Part VI.

   71. *See* Laura Laemmle-Weidenfeld & Michael J. Schaengold, *Feature Comment: The Impact of the Fraud Enforcement and Recovery Act of 2009 on the Civil False Claims Act*, GOV'T CONTRACTOR, July 8, 2009, at ¶ 224 ("The current financial crisis and the resulting Government bailout initiatives also provided the momentum necessary for Congress to revise the civil False Claims Act (FCA) through FERA's § 4 . . . .").

   72. David Cho & Lori Montgomery, *New Bailout May Top $1.5 Trillion*, WASH. POST, Feb. 10, 2009, at A1.

   73. *See supra* note 8.

   74. *See, e.g.*, Gerard E. Wimberly, Daniel T. Plunkett & Laura C. Settlemyer, *The Presentment Requirement Under the False Claims Act: The Impact of* Allison Engine *& the Fraud Enforcement & Recovery Act of 2009*, BRIEFING PAPERS, Aug. 2009, at 11 ("The sheer number of potential parties to FCA liability has already increased with the passage of the

(f) EFFECTIVE DATE AND APPLICATION.—The amendments made by this section shall take effect on the date of enactment of this Act [*May 20, 2009*] and shall apply to conduct on or after the date of enactment, except that—

> (1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), *shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date*; and

> (2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); *shall apply to cases pending on the date of enactment.*[75]

To understand the problem, take each provision separately. Section 4(f) states that FERA's amendments to FCA apply only to future conduct.[76] This is straightforward: statutes typically operate prospectively. However, it is followed by two subsections whose meaning is not immediately apparent. The problematic provision—section 4(f)(1)[77]—carves out an exception for the amendments to § 3729(a)(1)(B), the provision eliminating the presentment requirement. Section 3729(a)(1)(B) applies to "all claims under the False Claims Act . . . that are pending on or after [June 7, 2008]." Some courts have held—correctly[78]—that "all claims under the False Claims Act" refers to all FCA cases that were pending on or after June 7, 2008.[79] On this reading, *claims* means *lawsuits*. Other courts have held

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economic stimulus bills. Now, with the FERA amendments in place that broaden the scope of liability under the FCA, the potential exists for almost any business or company to be liable under the FCA. Combining that possibility with the other FERA amendments that provide for expanded protection available to whistleblowers and qui tam relators, the potential is great for a flood of FCA litigation.").

75. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(f), 123 Stat. 1617, 1625 (emphasis added).

76. Note that this provision applies only to the amendments to FCA ("[t]he amendments made by *this section*"). *Id.* (emphasis added). The statute does not include effective date language for the remainder of FERA.

77. Subsection (f)(2) applies to several procedural and jurisdictional sections of FCA: § 3731(b) covers government intervention in a privately filed FCA case; § 3733 modifies the procedures for the government to institute FCA actions; and § 3732 modifies the rules for service of the FCA complaint on state and local governments. There have been no challenges to section 4(f)(2), although I should point out that it is retroactive in the sense that its new procedural rules will govern cases filed prior to May 20, 2009.

78. It is my contention that this reading of section 4(f)(1) is a natural fit with the text of FCA (which uses *claims* generically to refer to *lawsuits* and *causes of action*) and better comports with the "restorative" purpose of FERA. Several circuit and district courts have adopted this reading of *claims*, although these rulings lack thorough reasoning. See Part VI for my analysis of why we should read section 4(f)(1) as referring to *cases*.

79. See Parts V.A–B for a discussion of the district and circuit courts that have reached this conclusion.

that *claims* refers to the special statutory definition of "claim." [80] As noted above, the choice between these two meanings is highly consequential.[81] According to the Department of Justice, as of September 30, 2009, there was a backlog of nearly 1000 FCA cases under investigation.[82] Many of these are likely to involve claims against subcontractors, grantees, or other intermediaries, so the scope of subcontractor liability is a pressing concern. Under any reading of *claims*, however, section 4(f)(1) purports to regulate pre-enactment conduct and thus raises the red flag of legislative retroactivity.[83] Commentators have noted FERA's retroactivity issue,[84] but no scholar has yet analyzed section 4(f)(1)'s proper scope and operation. Because retroactivity analysis is grounded in the Supreme Court's landmark[85] retroactivity decision, *Landgraf v. USI Film Products*, I turn to that case in Part III.

III. Retroactivity Analysis Under *Landgraf v. USI Film Products*

As I explained in Part II, FERA closed the presentment loophole by altering key FCA language, which it then applied retroactively to "claims under the False Claims Act . . . pending on [June 7, 2008]." Congress intended to overrule *Allison Engine* and other decisions that had required presentment or specific intent to defraud the government. Parts III and IV lay out the doctrinal roadmap for retroactivity analysis grounded in a line of cases beginning with *Landgraf v. USI Film Products*.

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80. *See* United States *ex rel.* Sanders v. Allison Engine Co., Inc., 667 F. Supp. 2d 747 (S.D. Ohio 2009); United States v. Sci. Applications Int'l Corp., 653 F. Supp. 2d 87 (D.D.C. 2009); United States v. Aguillon, 628 F. Supp. 2d 542 (D. Del. 2009).

81. *See supra* Part I.

82. FRAUD STATISTICS, CIVIL DIVISION, U.S. DEP'T OF JUSTICE 9, *available at* http://www.justice.gov/civil/frauds/fcastats.pdf; *see also* Rich, *supra* note 14, at 1241–42 (noting that FCA actions must remain under seal for sixty days, although the government can request extensions, which are "routinely granted" and that *qui tam* actions often remain sealed for up to two years).

83**.** *See* Landgraf v. USI Film Prods., 511 U.S. 244, 268 (1993) ("[S]tatutory retroactivity has long been disfavored . . . .").

84. *See, e.g*., Kashmira Makwana & Peter M. Smith, *"To Be or Not To Be (Retroactive)"—That Is the FERA Question*, J. HEALTH CARE COMPLIANCE, Jan.–Feb. 2010, at 47 (summarizing FERA retroactivity rulings and evaluating the impact for corporate compliance officers); *see also* Christopher C. Burris, Michael E. Paulhus & Louisa B. Childs, *Converging Events Signal a Changing Landscape in False Claims Act and Whistle-Blower Litigation and Investigations*, FED. LAW., Nov.–Dec. 2009, at 59, 61 ("The application of FERA's revisions to the FCA's substantive liability provisions is . . . complex. . . . Confusion already has arisen as to how courts should interpret this provision.").

85. *See* Vashti D. Van Wyke, Comment, *Retroactivity and Immigrant Crimes Since* St. Cyr*: Emerging Signs of Judicial Restraint*, 154 U. PA. L. REV. 741, 756 (2006) ("In *Landgraf v. USI Film Products*, the Supreme Court provided the modern framework for analysis of retroactivity questions in the civil context.").

A. Retroactivity and Negative Implication

The starting point for modern retroactivity analysis is *Landgraf v. USI Film Products*.[86] Barbara Landgraf sued for constructive discharge in 1989 under Title VII of the Civil Rights Act of 1964.[87] While her appeal was pending, President Bush signed into law the Civil Rights Act of 1991.[88] Among other things, the 1991 Act provided compensatory and punitive damages, where the 1964 Act had only allowed equitable relief, such as reinstatement and back pay.[89] Landgraf asked for a jury trial on damages under the 1991 Act.[90] It was not clear whether Congress intended the new language to apply to pending Title VII cases, so Landgraf relied on the canon of "negative implication" to argue that retroactive intent was evidenced by several provisions read in tandem.[91] Negative implication is a canon of interpretation that "depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which [is] abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded."[92] The canon applies only "when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence."[93] Two or more sections covering the same subject matter and drafted at the same point in the legislative process may reasonably be interpreted as if they expressed a unified intent.[94] The negative inference relies on the "rule against surplusage," which disfavors readings that render legislative provisions nugatory and assumes that each word has a specific, intended purpose within the whole statutory scheme.[95]

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86. *See id.*
87. *Landgraf*, 511 U.S. at 248.
88. *Id.* at 249.
89. *Id.* at 252–54.
90. *See id.* at 249.
91. *See id.* at 258–61.
92. Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (alteration in original) (quoting Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 81 (2002)); *see also* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 255 (2000) ("[Negative implication] is close cousin to the hoary canon, *inclusio [expressio] unius est exclusio alterius . . .* [a] rule of thumb [that] rests on the supposition that directives normally allow what they don't prohibit." (second alteration in original)).
93. *Barnhart*, 537 U.S. at 168.
94. *See* Martin v. Hadix, 527 U.S. 343, 356 (1998) (citing Lindh v. Murphy, 521 U.S. 320, 329 (1997)) (observing that the negative implication in *Lindh* had special force because the relevant provisions of the AEDPA covered the same subject matter); *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 579 (2006) (noting that where the relevant provisions had been "considered . . . together at every stage," negative inference was strong); Field v. Mans, 516 U.S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects.").
95. *See* Hibbs v. Winn, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY

Landgraf began her inquiry with section 402(a), which reads: "*Except as otherwise specifically provided*, this Act and the amendments made by this Act *shall take effect upon enactment*."[96] Notice that this sentence has two clauses (in italics). The main clause ("this Act . . . shall take effect upon enactment") tells us that the Act becomes operative on the enactment date.[97] However, this clause is preceded by a subordinate clause ("except as otherwise provided"), which modifies the main clause and leaves us with a general rule ("takes effect upon enactment") followed by an indication that some of the statute's provisions follow a different rule.[98] Thus, because the effective date language includes the caveat "except as otherwise provided," there must be at least two effective date rules. Rule 1 tells us that the amendments take effect upon enactment (although it does not tell us what "take effect" means). Rule 2 tells us that there is at least one exception to Rule 1's "take effect upon enactment" somewhere in the statute. This is so because the "rule against surplusage" tells us that Congress would not have included the Rule 2 exception unless it meant to. So we should read the sentence to say, "The statute generally takes effect upon enactment, although some provisions do not take effect upon enactment and where this is the case we say so specifically."

This line of reasoning has intuitive appeal. If a teacher says to her students "some of you may leave early today," we would take that to mean that *some* students may leave early while *some others* may not. And so it is, *mutatis mutandis*, with the language of the 1991 Act. After all, why would *some* provisions of the Act take effect upon enactment if *some other* provisions did not? But even if this is all

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CONSTRUCTION § 46.06 (rev. 6th ed. 2000))); Keene Corp. v. United States, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quoting Russello v. United States, 464 U.S. 16, 23 (1983))); *see also* ESKRIDGE ET AL., *supra* note 92, at 266 ("[E]very statutory term adds something to a law's regulatory impact.").

     The negative inference concept is not without its critics. *See, e.g.*, *id.* at 255 ("[*I*]*nclusio unius* is . . . an unreliable canon, and the reasons for its unreliability apply to other negative implication canons as well."). It has also been rejected or criticized in specific cases where there are other plausible inferences from those sought by a litigant. *See, e.g.*, *Lindh*, 521 U.S. at 337–41 (Rehnquist, J., dissenting) (listing several possible inferences, noting that "[n]one of these competing inferences is clearly superior to the others," and arguing that under *Landgraf*'s exceptions for procedural/jurisdictional statutes, it would not be "retroactive" to apply AEDPA to pending case); *see also Hadix*, 527 U.S. at 356 (rejecting negative implication where relevant provisions covered different subject matter).

    96. Landgraf v. USI Film Prods., 511 U.S. 244, 257 (1993) (emphasis added) (quoting the Civil Rights Act of 1991, Pub. L. No. 102-166, § 402(a), 105 Stat. 1071, 1099).

    97. As clear as this may seem at first blush, I note a potential ambiguity even here. After all, "take effect upon enactment" might very well mean that the statute should be applied to pending cases. This is so because it is not self-evident that "take effect" by definition excludes pending cases. If so, this would simply raise the same *Landgraf* question under a different guise. FERA gets around this problem by stipulating that "take effect" means "apply to conduct on or after the date of enactment." *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(f), 123 Stat. 1617, 1625.

    98. *Landgraf*, 511 U.S. at 258 ("[Landgraf] 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.").

true, it does not help us identify the exceptions. Two provisions were natural choices because they contained different effective language from the default rule:

> [§ 109(c)] The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

> [§ 402(b)] 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 . . . .[99]

These provisions specify that certain sections of the Act *are not retroactive*.

Now, if these are the only two exceptions to the default rule, and they are exceptions because they stipulate certain sections *not to be retroactive*, then the default rule must implicitly authorize retroactivity. In other words, why would Congress have gone to the trouble of specifying that certain narrow provisions did not apply retroactively if in fact all the provisions in the statute were not retroactive? Because the statute identifies provisions that are not to apply retroactively, it follows that "take effect upon enactment" in the default provision must mean that the statute generally governs pending cases. If it were otherwise, statutory language would be superfluous.

This line of reasoning did not persuade the majority. For one thing, plaintiff had freighted two "minor and narrow provisions" with the burden of her entire argument.[100] Also, legislative history contained ample evidence of other possible inferences. For example, the fact that an earlier version of the bill contained an explicit retroactivity provision that President Bush cited as a reason for vetoing it, while the enacted version did not contain that provision, made it likely that Congress could not reach consensus on the retroactivity issue.[101] Because retroactivity doctrine prior to *Landgraf* was unsettled, Congress may have left it to the courts to determine the temporal reach of the statute.[102] Legislative history only confirmed that no general agreement had been reached about retroactivity.[103] Although some statements in the legislative history appeared to support *Landgraf*'s

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99. *Id.* (quoting the Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 109(c), 402(b), 105 Stat. 1071, 1078, 1099).

100. *Id.*

101. *Id.* at 255–56 ("[I]t 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.").

102. *Id.* at 261 ("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.").

103. *Id.* at 262 ("The 1991 bill as originally introduced in the House contained explicit retroactivity provisions similar to those found in the 1990 bill. However, the Senate substitute that was agreed upon omitted those explicit retroactivity provisions. 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.").

theory, the Court discounted these as "frankly partisan."[104] Because the retroactivity language had been a point of contention in the earlier version of the 1991 Act,

> [t]he 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.[105]

It was reasonable to conclude that Congress left the contentious retroactivity issue to the courts.

B. Landgraf*'s Presumption Against Retroactivity*

Neither plain language nor negative implication resolved the retroactivity problem. Thus, the Court invoked statutory interpretation principles, which revealed two competing retroactivity theories.[106] On the one hand, *Thorpe v. Housing Authority*[107] and *Bradley v. School Board*[108] held that "a court is to apply the law in effect at the time it renders its decision."[109] In other words, a new law governs pending cases and is thus presumptively retroactive. On the other hand, a more recent line of cases beginning with *Bowen v. Georgetown University Hospital*[110] and *Kaiser Aluminum & Chemical Corp. v. Bonjorno*[111] held to the contrary that "[r]etroactivity is not favored in the law . . . [and] congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[112] Faced with these contrary theories, the Court opted for a presumption against retroactivity.[113] Apparently not willing to overrule the *Bradley-Thorpe* line of cases outright, the Court carved out four exceptions where "application of new statutes passed after the events in suit is unquestionably proper"[114] even in the absence of a clear statement: (1) statutes

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104. *Id.*
105. *Id.* at 256.
106. *Id.* at 264.
107. 393 U.S. 268 (1969).
108. 416 U.S. 696 (1974).
109. *Landgraf*, 511 U.S. at 264 (quoting *Bradley*, 416 U.S. at 711).
110. 488 U.S. 204 (1988).
111. 494 U.S. 827 (1990).
112. *Landgraf*, 511 U.S. at 264 (quoting *Bowen*, 488 U.S. at 208) (internal punctuation omitted).
113. *See Bowen*, 488 U.S. at 208 ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."); *see also Bonjorno*, 494 U.S. at 840–58 (Scalia, J., concurring) (providing a history of retroactivity doctrine and concluding that "[t]he presumption of nonretroactivity, in short, gives effect to enduring notions of what is fair, and thus accords with what legislators almost always intend").
114. *Landgraf*, 511 U.S. at 273.

affecting only prospective relief are not "retroactive";[115] (2) courts "regularly appl[y] intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed";[116] (3) a new procedural rule may control a pending case without retroactivity issues;[117] (4) new attorney's fees statutes, which are "collateral to" and "separable from the [main] cause of action to be proved at trial."[118] These situations do not raise retroactivity concerns.

   With the contrary line of authorities neutralized, the Court was ready to apply its new retroactivity theory. Where a statute implicates past conduct, we follow a two-step analysis.[119] First, we determine if Congress has "expressly prescribed the statute's proper reach."[120] The purpose of this "clear statement rule" is to ensure that Congress has considered the potential unfairness of retroactive operation.[121] If the language is clear, then we apply the statute as intended, barring a violation of the United States Constitution.[122] If there is no express language, the analysis moves to a second step and asks whether applying the statute to a pending case would have genuinely "retroactive effects."[123] There is no clear test to determine

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   115. *Id.* at 273 (citing Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184 (1921)).

   116. *Id.* at 274 (citing Bruner v. United States, 343 U.S. 112, 116–17 (1952)).

   117. *Id.* at 275 (citing *Ex parte* Collett, 337 U.S. 55, 71 (1949)).

   118. *Id.* at 276–77 (quoting White v. N.H. Dep't of Emp't Sec., 455 U.S. 445 (1982)). The attorney's fees exception accounted for *Bradley*. As for *Thorpe*, the Court treats it as an exceptional case involving an important constitutional right. *Id.* at 276. *Thorpe* seemed to combine aspects of "procedure" and "prospective relief" cases. *Id.* *Thorpe* also comports with the principle that the government should extend a grace period. *Id.* at 276 n.30.

   119. *See id.* at 280. Courts have added an extra step when interpreting an agency rule. *See, e.g.*, Durable Mfg. Co. v. U.S. Dep't of Labor, 578 F.3d 497, 503 (7th Cir. 2009) ("When . . . an administrative rule is at issue, the inquiry is two-fold: whether Congress has expressly conferred power on the agency to promulgate rules with retroactive effect and, if so, whether the agency clearly intended for the rule to have retroactive effect." (citing *Bowen*, 488 U.S. at 208; Clay v. Johnson, 264 F.3d 744, 749 (7th Cir. 2001))).

   120. *See Landgraf*, 511 U.S. at 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."). See Part VI.A for a discussion of the clear statement standard as applied to FERA's retroactivity provision.

   121. *See Landgraf*, 511 U.S. at 268 ("[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."); *see also id.* at 272–73 ("Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.").

   122. *See id.* at 266 (noting that the Contracts, Takings, Bill of Attainder, Due Process, and Ex Post Facto Clauses of the United States Constitution prohibit certain types of retroactive legislation); *see also id.* at 267 ("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.").

   123. *Id.* at 280. "[R]etroactive effect" inquiry asks whether the statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or

"retroactive effect," which is a practical inquiry requiring a "functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'"[124] *Landgraf* laid out the following general principles to guide our inquiry: (1) we should ask whether a statute "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";[125] (2) we should be guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations";[126] and (3) we should consider "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."[127] It is important to note that a statute is not "retroactive" merely because it implicates pre-enactment events.[128] A statute is only "retroactive" if it implicates past events in a way that a court deems to be especially unfair or inequitable.[129]

The 1991 Act contained no clear statement, so the inquiry moved to the second stage to determine whether remanding Landgraf's case for a new trial on punitive and compensatory damages would have a retroactive effect.[130] The punitive damages provision, section 102(b)(1), created retroactivity concerns because exemplary and punitive damages are like criminal sanctions, and thus raise problems under the ex post facto clause.[131] But even the compensatory damages provision, section 102(a)(1), was impermissibly retroactive because it provided damages where there were none before.[132] Thus, Landgraf could not avail herself of the damages provisions of the Civil Rights Act of 1991.[133]

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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." *Id.*

124. Martin v. Hadix, 527 U.S. 343, 357–58 (1999) (quoting *Landgraf*, 511 U.S. at 270); *see also Landgraf*, 511 U.S. at 265 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."); Bassett, *supra* note 31, at 506–07 (stating that retroactive effect analysis applies "principles of fairness encompassing a wide range of considerations, including equity, justice, and reliance").

125. *Landgraf*, 511 U.S. at 280.

126. *Id.* at 270; *see also* INS v. St. Cyr, 533 U.S. 289, 321 (2001) ("[T]he judgment whether a particular statute acts retroactively 'should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.'" (quoting *Hadix*, 527 U.S. at 358) (additional internal quotation marks omitted)).

127. *Landgraf*, 511 U.S. at 270; *see also* Princess Cruises v. United States, 397 F.3d 1358, 1364 (Fed. Cir. 2005) (combining *Landgraf* factors three and four into a three-part retroactivity inquiry).

128. *Landgraf*, 511 U.S. at 269–70.

129. *See id.*

130. *Id.* at 280–82.

131. *Id.* at 281.

132. *Id.* at 282–83.

133. *Id.* at 286. Although agreeing with the result, Justice Scalia criticized the majority for indulging in the "soft science" of legislative history, which risked turning *Landgraf*'s "clear statement" rule into a "discernible legislative intent" rule. *Id.* at 287 (Scalia, J., concurring).

IV. THE SUPREME COURT MODIFIES THE *LANDGRAF* DOCTRINE

A line of Supreme Court decisions developed the *Landgraf* doctrine, reinforcing the clear statement rule in theory, but modifying it in practice. As Justice Scalia feared, the clear statement rule has softened into a "discernible legislative intent" standard.[134] The most important *Landgraf* case from the 1990s, *Lindh v. Murphy*, involved the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[135] Defendant was convicted for murder and filed a losing habeas appeal with the district court. While his appeal was pending, Congress passed the AEDPA, which amended the statute governing petitioner's habeas claim[136] and made habeas arguments more difficult to win by requiring the state court decision to be "contrary to, or involv[ing] an unreasonable application of, clearly established Federal law."[137] Lindh argued that the new, more onerous standard should not be applied to his pending case.[138] The Supreme Court agreed and took the opportunity to clarify that *Landgraf*'s presumption against retroactivity did not trump other interpretive principles.[139]

The State argued that in the absence of an express command, the *Landgraf* presumption was triggered thus ending the inquiry.[140] The Court rejected this.[141] Ordinary interpretive principles (such as negative implication) may actually remove the case from *Landgraf*'s ambit, for example "by rendering the statutory provision wholly inapplicable to a particular case."[142] In other words, where there is no clear statement, a court should analyze whether the provision at issue even applies to the litigant's case. If the statutory provision at issue does not govern litigant's case, then the *Landgraf* inquiry is unnecessary. Because the AEDPA included an express effective date clause specifying that Chapter 154 applied to pending cases, this implied that the provision at issue, Chapter 153, was only meant to apply to future cases.[143] For our purposes, *Lindh* is important for two reasons: first, *Landgraf*'s

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134. *Id.*

135. 521 U.S. 320 (1997).

136. *Id.* at 322–23 ("The issue in this case is whether that new section of the [AEDPA] dealing with petitions for habeas corpus governs applications in noncapital cases that were already pending when the Act was passed. We hold that it does not.").

137. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1219; *see* Harris v. Stovall, 212 F.3d 940, 944–45 (6th Cir. 2000) ("[T]he AEDPA expressly limits the source of law to cases decided by the United States Supreme Court. . . . We have stated that this provision marks a 'significant change' and prevents the district court from looking to lower federal court decisions in determining whether the state court decision is contrary to, or an unreasonable application of, clearly established federal law.").

138. Brief for Petitioner at 10, Lindh v. Murphy, 521 U.S. 320 (1997) (No. 96-6298), 1997 WL 82672.

139. *Lindh*, 521 U.S. at 324–26.

140. *See id.* at 325.

141. *Id.* at 324–26.

142. *Id.* at 326.

143. *Id.* at 326–27 ("We read this provision of § 107(c), expressly applying chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those

presumption against retroactivity does not simply trump ordinary interpretation principles. And second, *Lindh* teaches that negative implication analysis is relevant for retroactivity issues despite the "clear statement" principle.[144]

Several cases have called into doubt the "exceptional" nature of jurisdictional, attorney's fees, and procedural statutes. One of these, *Hughes Aircraft Co. v. U.S. ex rel. Schumer*,[145] lies at the intersection of FCA and retroactivity jurisprudence. By the time *Hughes Aircraft* was decided in 1997, the retroactivity of the 1986 FCA amendments had been litigated for ten years.[146] In 1986, the FCA was amended, in part to lift the jurisdictional bar on *qui tam* lawsuits where the government is already aware of the wrongdoing (the so-called government knowledge bar).[147] Respondent filed his FCA suit in 1989, based on conduct from the early and mid 1980s.[148] Defendant argued that the action would be precluded under the pre-1986 FCA government knowledge bar that was in effect when the conduct occurred.[149] Thus, applying the newly amended FCA language to conduct pre-dating the amendments would be unfairly retroactive. Respondent countered that there was no basic unfairness because

> the 1986 Amendments to the *qui tam* bar do not create a new cause of action where there was none before, change the substance of the extant cause of action, or alter a defendant's exposure for a false claim by

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cases had been filed after the date of the Act."). The dissent quarreled with the majority's negative inference analysis and would have applied AEDPA to pending cases under *Landgraf*'s "procedural cases," "prospective relief," and "jurisdictional statute" exceptions. *Id.* at 341–43 (Rehnquist, J., dissenting). Justice Rehnquist raises the possibility that any inferences we could draw about what Congress intended by including retroactivity language in Chapter 154 and not Chapter 153 could be countered by equally plausible inferences in the opposite direction. *Id.* For example, different language in Chapters 153 and 154 might have been the result of tacit Congressional agreement to let the courts decide the question of an effective date. *See id.*

144. *See, e.g.*, Mathews v. Kidder, Peabody & Co., 161 F.3d 156, 161–62 (3d Cir. 1998); *see also* Killingsworth v. HSBC Bank Nev., N.A., 507 F.3d 614, 621 (7th Cir. 2007) ("The Third Circuit has characterized *Lindh* as establishing an intermediate step in the *Landgraf* framework, requiring courts to examine a statute under normal rules of statutory construction for evidence of congressional intent to apply the statute prospectively only." (citing *Mathews*, 161 F.3d at 162)); Hamdan v. Rumsfeld, 548 U.S. 557, 578 (2006) ("A familiar principle of statutory construction, relevant both in *Lindh* and here, is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.").

145. 520 U.S. 939 (1997).

146. See Part VI for a discussion of the Justice Department's desire to have FERA avoid the costly litigation over the effective date of the 1986 FCA amendments.

147. *Id.* at 946.

148. *Id.* at 942–43.

149. *Id.* at 945 ("The allegedly false claims at issue in this case were submitted by Hughes between 1982 and 1984. At that time, the FCA required a district court to 'dismiss [a *qui tam*] action . . . based on evidence or information the Government had when the action was brought.'" (alterations in original) (quoting 31 U.S.C. § 3730(b)(4) (1982))).

even a single penny [and] thus d[o] not increase a party's liability for past conduct.[150]

This line of attack failed. First, depriving the defendant of the government knowledge bar amounted to the retroactive deprivation of an affirmative defense.[151] Second, removing the government knowledge bar empowered more *qui tam* relators to sue with different (i.e., purely monetary) incentives from those of the government.[152] This new incentive in effect created a new cause of action.[153] Third, and most puzzlingly, the Court rejected respondent's argument that the 1986 amendments were jurisdictional and thus did not raise retroactivity concerns under *Landgraf*.[154] The Court rejected this argument because *Landgraf*'s reference to jurisdictional statutes was more narrowly focused on laws that "simply *change*[] the tribunal that is to hear the case" rather than those that, as FCA arguably did here, create jurisdiction where none existed previously.[155] But this is not really convincing. After all, the Court is really just saying that jurisdictional statutes should be analyzed under ordinary retroactive effect principles, thus calling into doubt the vitality of the exception that they had articulated in *Landgraf*.[156] Similarly, it is unclear whether attorney's fees[157] and jurisdictional or procedural

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150. *Id.* at 948 (alterations in original) (quoting Brief for Respondent at 15, Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939 (1997) (No. 95-1340), 1997 WL 2550 (internal quotation marks omitted)).

151. *Id.* at 946–52.

152. *Hughes Aircraft*, 520 U.S. at 949 ("The extension of an FCA cause of action to private parties in circumstances where the action was previously foreclosed is not insignificant. As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good.").

153. *Id.* at 948–50.

154. *Id.* at 950–51.

155. *Id.* at 951 (emphasis in original) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1993)).

156. *See* Bassett, *supra* note 31, at 497 ("Taken together, *Hughes* and *Lindh* served effectively to eliminate the exceptions for jurisdictional and procedural legislation that had been described in *Landgraf*. Rather than treating such provisions as exceptions to the presumption against retroactivity, the Court instead evaluated such matters in the same manner as any other legislation. These decisions undercut *Landgraf*'s claim that it provides a purported framework for retroactivity analysis—a point made even more clearly by [*Martin v. Hadix*].").

157. *See, e.g.*, Martin v. Hadix, 527 U.S. 343 (1998). The Prison Litigation Reform Act (PLRA) lowered the statutory fee award for prisoner civil rights litigation. *Id.* at 351–52. *Hadix* acknowledged that applying the new lower rate to *past* legal work would have retroactive effect, despite the fact that *Landgraf* had seemed to make an exception for attorney's fees statutes: "When determining whether a new statute operates retroactively, it is not enough to attach a label (*e.g.*, 'procedural,' 'collateral') . . . ." *Id.* at 359. However, the Court held that applying the new lower award for *future* legal work was not "retroactive," despite the fact that attorneys had agreed to undertake representation under the higher, pre-PLRA fee schedule. *Id.* at 360–61. The majority reasoned that attorneys were free to refuse to continue representing clients if they were not happy with the new lower PLRA fee. *Id.* at 360. Justice Ginsburg reasons convincingly that, to the contrary, altering an attorney's fees

statues[158] operate as the exceptions to retroactivity that *Landgraf* had strongly implied.[159]

Finally, courts have developed *Landgraf*'s "retroactive effect" jurisprudence. In *INS v. St. Cyr*, for example, the Supreme Court decided the retroactivity implications of the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) and related statutes.[160] The question was whether the IIRIRA's repeal of discretionary relief from deportation applied retroactively where petitioner had pled guilty to a felony prior to the statute's enactment.[161] Because petitioner had entered a plea agreement under an earlier regime where discretionary withholding was available, it would violate "familiar considerations of fair notice, reasonable

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statute may in fact be retroactive in the disfavored sense: "attorneys engaged before passage of the PLRA have little leeway to alter their conduct in response to the new legal regime; an attorney who initiated a prisoner's rights suit before April 26, 1996, remains subject to a professional obligation to see the litigation through to final disposition." *Id.* at 369 (Ginsburg, J., concurring in part and dissenting in part).

158. *See, e.g.*, Republic of Austria v. Altmann, 541 U.S. 677, 693 (2004) ("[W]e sanctioned the application to *all pending and future cases* of 'intervening' statutes that merely 'confe[r] or ous[t] jurisdiction.' Such application, we stated, 'usually takes away no substantive right but simply changes the tribunal that is to hear the case.' Similarly, the 'diminished reliance interests in matters of procedure' permit courts to apply changes in procedural rules 'in suits arising before [the rules'] enactment without raising concerns about retroactivity.'" (alterations in original) (emphasis added) (citations omitted) (quoting *Landgraf*, 511 U.S. at 274–75)); *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 576–77 (2006) ("We have explained . . . that . . . unlike other intervening changes in the law, a jurisdiction-conferring or jurisdiction-stripping statute usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' . . . That does not mean, however, that all jurisdiction-stripping provisions—or even all such provisions that truly lack retroactive effect—must apply to cases pending at the time of their enactment." (quoting Hallowell v. Commons, 239 U.S. 506 (1915))); *id.* at 656 (Scalia, J., dissenting) ("An ancient and unbroken line of authority attests that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date.").

159. *Landgraf*, 511 U.S. at 274 ("We have *regularly* applied intervening statutes conferring or ousting jurisdiction . . ." (emphasis added)); *see also id.* ("Application of a new jurisdictional rule *usually* 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" (emphasis added) (quoting *Hallowell*, 239 U.S. at 508)); *id.* at 275 ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit *does not make application of the rule at trial retroactive*." (emphasis added)); *id.* ("Changes in procedural rules *may often be applied* in suits arising before their enactment without raising concerns about retroactivity." (emphasis added)). The Court adds a caveat in a footnote that

> [o]f 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.

Id. at 275 n.29.

160.   533 U.S. 289 (2000).

161.   *See id.* at 293.

reliance, and settled expectations" to deprive him of the quid pro quo implied in the decision to enter a plea agreement as a means to avoid deportation.[162]

V. COURTS ARE SPLIT OVER FERA'S RETROACTIVITY

Litigants have begun to test FERA's retroactivity clause.[163] Parts V.A–B discuss court rulings, which have split into "retroactivity" and "no retroactivity" camps, neither of which has done a very good job justifying its holdings. Retroactivity courts reach the right result, but do not conduct a complete *Landgraf* analysis, nor do they address the *claims/cases* question. The "no retroactivity" courts at least acknowledge the interpretive difficulties, but they reach the wrong result because they fail to apply a correct and complete *Landgraf* analysis.

A. Retroactivity Courts

The Second,[164] Fifth, Seventh, and Tenth Circuits have stated or implied that FERA is retroactive. In *United States ex rel. Longhi v. United States*, the Fifth Circuit faced the question of whether the narrow "outcome materiality" standard[165] or FERA's broader materiality standard[166] controlled an FCA case filed in 2002. The *Longhi* court held that FERA's materiality standard governed the case, reasoning that FERA opted for the broader materiality standard adopted by the Fourth, Ninth, and Sixth Circuits.[167] The court declined to rule on whether this was a "retroactive[] or prospective[]" application of FERA, but held that the new

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162. *See id.* at 321–22.

163. *See* Burris et al., *supra* note 84, at 61–62 (noting impact of the FERA amendments on FCA litigation).

164. Wood *ex rel.* United States v. Applied Research Assocs., Inc., No. 08-3799-cv, 2009 WL 2143829, at *3 n.2 (2d Cir. July 16, 2009) (acknowledging that some of FERA's provisions were retroactive, but holding this did not affect the present case); *see also* United States *ex rel.* Kirk v. Schindler Elevator Corp., 601 F.3d 94, 113 (2d Cir. 2010) ("The amendment to § 3729(a)(2), but not the amendment to § 3729(a)(1), was made retroactive to June 7, 2008, applicable to 'all claims under the False Claims Act . . . that [were] pending on or after that date.' Because [relator's] claim was filed in March 2005, and was pending as of June 7, 2008, the potentially applicable provisions in this case are former § 3729(a)(1) . . . and current § 3729(a)(1)(B) . . . ." (citations omitted)).

165. 575 F.3d 458, 468–69 (5th Cir. 2009) (citing United States v. Southland Mgmt. Corp., 288 F.3d 665, 676 (5th Cir. 2002)) (defining "outcome materiality" as requiring that "a falsehood or misrepresentations must affect the government's ultimate decision whether to remit funds to the claimant in order to be 'material'").

166. *Id.* at 470. Under FERA,

> "'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." If Congress intended materiality to be defined under the more narrow outcome materiality standard, it had ample opportunity to adopt the outcome materiality standard in FERA. Instead, Congress embraced the test as stated by the Supreme Court and several courts of appeals.

Id. (quoting § 3729(b)(4)).

167. *Id.*

materiality standard was relevant to interpreting what Congress had intended in the 1986 FCA amendments.[168]

The Seventh Circuit, in *United States ex rel. Lusby v. Rolls-Royce Corp.*, noted that FERA section 4(f) generally applies its amendments to § 3729(a) to post-enactment conduct.[169] As an aside, however, the Court added that there was "an exception for the changes to § 3729(a)(1)(B), but that does not affect [relator's § 3729(a)(7)] action."[170] In *United States ex rel. Lacy v. New Horizons, Inc.*, the Tenth Circuit stated in a footnote that "a very few of the Act's provisions apply retroactively to [plaintiff's] claims. . . . Of those provisions expressly made retroactive, none establishes or changes the pleading requirements for an FCA complaint."[171]

The District Courts for the Eastern District of Virginia,[172] the Northern District of Illinois,[173] the Northern District of Georgia,[174] the Northern District of Texas,[175] and the Eastern District of Louisiana[176] have stated—or implied—that FERA operates retroactively. These courts do not explicitly address the *claims/cases* issue. *United States ex rel. Walner v. NorthShore*, for example, simply applies FERA to a pending case as if the referent for *claims* were self evident: "Section 4(f)(1) of [FERA] states that § 3729(a)(1)(B) applies to all claims pending on and after June 7, 2008 . . . . [B]ecause [plaintiff's] claim was pending on June 7, 2008, the Court will apply the new version . . . ."[177] Likewise, *United States ex rel. Stephens v. Tissue Science Laboratories* held that

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168. *Id.* (citing NCNB Tex. Nat'l Bank v. Cowden, 895 F.2d 1488, 1500 (5th Cir. 1990) ("[A] legislative body may amend statutory language to make what was intended all along even more unmistakably clear." (quoting United States v. Montgomery Cnty., Md., 761 F.2d 998, 1003 (4th Cir. 1985))). The position of the Fifth Circuit on the retroactivity of FERA is not clear. In a criminal money laundering case, *United States v. Bueno*, 585 F.3d 847 (5th Cir. 2009), Judge DeMoss stated in a special concurrence that FERA "is silent on retroactivity; therefore, it only applies to conduct which occurs post-amendment," *id.* at 853 n.4 (citing Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994)).

169. 570 F.3d 849, 855 n.* (7th Cir. 2009).

170. *Id.* (citing *Landgraf*, 511 U.S. 244).

171. 348 F. App'x 421, 424 n.2 (10th Cir. 2009).

172. United States *ex rel.* Carter v. Halliburton Co., No. 1:08cv1162, 2009 WL 2240331, at *5 n.3 (E.D. Va. July 23, 2009) ("Because this case was pending on June 7, 2008, the Court has applied the amendment in § 3729(a)(1)(B) (2009) to Count 4, a claim originally brought under § 3729(a)(2) (1994).").

173. United States *ex rel.* Walner v. NorthShore Univ. Health Sys., 660 F. Supp. 2d 891, 895 n.3 (N.D. Ill. 2009).

174. United States *ex rel.* Stephens v. Tissue Sci. Labs., 664 F. Supp. 2d 1310, 1315 n.2 (N.D. Ga. 2009).

175. United States *ex rel.* Dekort v. Integrated Coast Guard Sys., No. 3:06-CV-1792-O, 2010 WL 1330521, at *8 n.3 (N.D. Tex. Apr. 5, 2010) (applying prior version of FCA except for the amendments to § 3729(a)(2), which apply retroactively).

176. United States *ex rel.* Branch Consultants, L.L.C. v. Allstate Ins. Co., 668 F. Supp. 2d 780, 803–4 (E.D. La. 2009) (applying amended FERA language to pending case without noting the retroactivity issue).

177. 660 F. Supp. 2d at 895 n.3 (citations omitted).

[a]lthough most of [FERA's] changes apply only to conduct on or after the day of enactment, changes to § 3729(a)(1)(B) are effective retroactive to June 7, 2008, and apply to all claims under the FCA pending on or after that date. Because this action was pending on June 7, 2008, the amended § 3729(a)(1)(B) applies to this action.[178]

As I explain in Part VI, this reading has the best support in FERA's structure, intent, and overall restorative purpose to "clarify" and "correct" the holdings of *Allison Engine* and *Totten*.

B. No Retroactivity Courts

The District Courts of Idaho,[179] Delaware,[180] the District of Columbia,[181] New Jersey,[182] and New Mexico,[183] as well as the Southern District of Ohio,[184] the Eastern District of Arkansas,[185] the Middle District of Georgia,[186] the Western

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178. 664 F. Supp. 2d at 1315 n.2 (citations omitted).

179. United States *ex rel.* Putnam v. E. Idaho Reg'l Med. Ctr., 696 F. Supp. 2d 1190, 1196 (D. Idaho 2010) ("Congress's use of the words 'claims' and 'cases' when amending the FCA and providing for retroactive application of certain subsections therefore illustrates that it intended claims to encompass claims for money or property that are governed by the FCA, not cases brought to enforce it.").

180. United States v. Aguillon, 628 F. Supp. 2d 542 (D. Del. 2009).

181. United States v. Sci. Applications Int'l Corp., 653 F. Supp. 2d 87 (D.D.C. 2009); *see also* United States *ex rel.* Bender v. N. Am. Telecomm., Inc., 686 F. Supp. 2d 46, 48 n.4 (D.D.C. 2010) (granting motion to dismiss because *claims* means *request for payment*) (citing *Sci. Applications*, 686 F. Supp. 2d at 107); Boone v. MountainMade Found., 684 F. Supp. 2d 1, 78 n.7 (D.D.C. 2010) ("Because the conduct underlying the plaintiffs' allegations occurred well before the enactment of the FERA, its amendments to § 3729(a)(1) do not apply here. Moreover, because the purportedly false claims for payment at issue here were made in 2006 . . . and because there is no indication that they were still pending as of the June 7, 2008 cutoff date provided for in the FERA's retroactivity clause, the FERA's amendments to § 3729(a)(2) likewise do not apply." (citations omitted)). *But see* United States *ex rel.* Westrick v. Second Chance Body Armor, Inc., 685 F. Supp. 2d 129, 137 (D.D.C. 2010) ("FERA provided for § 3729(a)(1)(B)'s retroactive application 'to all claims under the False Claims Act . . . that are pending on or after' June 7, 2008. Because this suit was pending on June 7, 2008, the amended provision applies here." (citation omitted)).

182. United States *ex rel.* Pilecki-Simko v. Chubb Inst., No. 06-3562, 2010 WL 1076228, at *4 n.10 (D.N.J. Mar. 22, 2010) (finding no retroactivity because *claims* refers to *requests for payment*).

183. United States *ex rel.* Baker v. Cmty. Health Sys., Inc., No. 05-279 WJ/WDS, 2010 WL 1740624, at *15–17 (D.N.M. Mar. 19, 2010) (adopting the technical definition to reject retroactivity).

184. United States *ex rel.* Sanders v. Allison Engine Co., Inc., 667 F. Supp. 2d 747 (S.D. Ohio 2009).

185. United States *ex rel.* Burroughs v. Cent. Ark. Dev. Council, No. 4:08CV2757 JMM, 2010 WL 1542532, at *2 (E.D. Ark. Apr. 19, 2010) (applying earlier FCA language because *claims* means *requests for payment* and defendant had no outstanding requests as of June 7, 2008).

186. United States *ex rel.* Parato v. Unadilla Health Care Ctr., Inc.*,* No. 5:07-CV-76(HL),

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District of Texas,[187] the Northern District of Illinois,[188] and the Southern District of Florida,[189] have held that FERA is not retroactive.[190] *United States v. Aguillon* was the first case to address the retroactivity issue and concluded that FERA did not provide the requisite clear statement of retroactive intent required by *Landgraf v. USI Film Products*: "Although the Congressional record implies retrospective application it directed against applying the amendments in a way that would cause retroactive effects. Congress has not provided the requisite instruction necessary for the amendments to be used to cause retroactive effects."[191]

United States v. Science Applications International Corp. rejected retroactivity on two grounds. First, the court held that *claims* takes the special statutory meaning,[192] a holding which is unwarranted: the fact that a statute includes a technical definition, standing alone, does not preclude the word from being used in other senses throughout the statute.[193] Second, the negative implication canon revealed that the use of *claims* in section 4(f)(1) and *cases* in section 4(f)(2) means that *claims* in (f)(1) meant something other than *cases*.[194] In other words, the fact that Congress uses the word *claims* in section 4(f)(1) and *cases* in section 4(f)(2) implies that they must have had a different reference point in mind for each provision (or else they would have chosen the same language for both).[195] The

2010 WL 146877, at *4 n.4 (M.D. Ga. Jan. 11, 2010) ("For purposes of the FCA, a 'claim' is defined as a 'request or demand . . . for money or property.' The revised version of section (a)(1)(B) does not apply to this case because none of Defendants' claims at issue here (the grant request or Medicare reimbursement claims) were pending on or after June 7, 2008." (alteration in original) (quoting 31 U.S.C. § 3729(c) (2006))); *see also* United States *ex rel.* Compton v. Circle B Enters., Inc., No. 7:07-cv-31 (HL), 2010 WL 942293, at *2 n.5 (M.D. Ga. Mar. 11, 2010) (adopting technical definition of *claims* and rejecting retroactivity).

187. United States *ex rel.* Gonzalez v. Fresenius Med. Care N. Am., No. EP-07-CV-247-PRM, 2010 WL 1645971, at *9 (W.D. Tex. Mar. 31, 2010) (applying earlier language on the theory that *claims* means *requests for payment*).

188. Mason v. Medline Indus., No. 07 C 5615, 2010 WL 653542, at *3 (N.D. Ill. Feb. 18, 2010) (holding that FERA did not apply retroactively because *claims* means *request for payment*) (citing Hopper v. Solvay Pharms., Inc., 588 F.3d 1318, 1327 n.3 (11th Cir. 2009); *Allison Engine*, 667 F. Supp. 2d at 750–51; U.S. v. Sci. Applications Int'l Corp., 653 F. Supp. 2d 87, 106–07 (D.D.C. 2009)).

189. United States *ex rel.* Cullins v. Astra, Inc., No. 09-60696-CIV, 2010 WL 625279, at *2 n.2 (S.D. Fla. Feb. 17, 2010) (finding amendments not retroactive).

190. Another court has stated without explanation that "since the time of the government's Complaint, the FCA has been amended. In this Opinion, all references to 31 U.S.C. § 3729 refer to the version of the FCA in force at the time of the alleged violations." United States v. Edelstein, No. 3:07-52, 2009 WL 2982884, at *3 n.1 (E.D. Ky. Sept. 16, 2009) (citations omitted).

191. United States v. Aguillon, 628 F. Supp. 2d 542, 550–51 (D. Del. 2009). The major problem with the *Aguillon* holding is that does not provide an adequate analysis of the plain language of the statute for congressional intent. Had it done so, it would have found the express retroactivity clause in FERA section 4(f)(1) that I discuss below. *See infra* Part VI.

192. *See* United States v. Sci. Applications Int'l Corp., 653 F. Supp. 2d 87, 106–07 (D.D.C. 2009).

193. *See infra* Part VI.A.2.

194. *See Sci. Applications*, 653 F. Supp. 2d at 107.

195. See Part VI.A.6 for a discussion of the problems with analyzing section 4(f)(1) of FERA under a negative implication rubric. *See also* Lindh v. Murphy, 521 U.S. 320, 330

remaining "no-retroactivity" courts follow the reasoning of *Science Applications* to hold that the new FCA language does not apply to pending cases, in part because the conduct at issue took place before June 7, 2008.[196]

VI. *LANDGRAF* RETROACTIVITY ANALYSIS OF FERA

Based on the foregoing analysis, I will first determine if FERA includes a clear statement of retroactive intent. To answer this question, I ask "whether Congress has expressly prescribed the statute's proper reach."[197] The clear statement rule ensures that "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."[198] Because of the special concerns arising from potential retroactive operation, the statement must be "so clear that it could sustain only one interpretation."[199] The clear statement may be found through negative implication.[200] If statutory text is not clear, legislative history provides guidance.[201] Next, I will apply ordinary interpretive principles to determine the scope of retroactivity, which will require a resolution of the *claims/cases* issue.[202]

(1997) ("[N]egative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted."); Field v. Mans, 516 U.S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to *contrasting statutory sections originally enacted simultaneously in relevant respects . . . .*" (emphasis added)).

196. *See* Hopper v. Solvay Pharms., Inc., 588 F.3d 1318, 1327 n.3 (11th Cir. 2009) ("While this *case* was pending on and after June 7, 2008, the relators do not allege that any *claims,* as defined by § 3729(b)(2)(A), were pending on or after June 7, 2008. Therefore, we conclude the Fraud Enforcement and Recovery Act does not apply retroactively to this case." (citing *Sci. Applications*, 653 F. Supp. 2d at 106–07)); *see also* United States *ex rel.* Cullins v. Astra, Inc., No. 09-60696-CIV, 2010 WL 625279, at *2 n.2 (S.D. Fla. Feb. 17, 2010) (citing to *Hopper*, 588 F.3d at 1327 n.3, to conclude that FERA does not apply retroactively); United States *ex rel.* Parato v. Unadilla Health Care Cent., Inc., No. 5:07-CV-76(HL), 2010 WL 146877, at *4 n.4 (M.D. Ga. Jan. 11, 2010) ("The revised version of section (a)(1)(B) does not apply to this case because none of Defendants' claims at issue here . . . were pending on or after June 7, 2008." (citing *Sci. Applications*, 653 F.Supp.2d at 106–07)); United States *ex rel.* Sanders v. Allison Engine Co., Inc., 667 F. Supp. 2d 747, 750–51 (S.D. Ohio 2009) (holding that *claims* takes technical meaning supported by negative implication and legislative history) (citing *Sci. Applications*, 653 F. Supp. 2d at 106–07); Bridges v. Omega World Travel, Inc., No. 4:07cv01060 BSM, 2009 WL 5174283, at *2 (E.D. Ark. Dec. 18, 2009) ("The FCA was recently amended by the Fraud Enforcement and Recovery Act of 2009. Although the sections of the FCA at issue in this case were amended, those amendments did not have retroactive application. Therefore, the FCA is interpreted herein as it existed prior to the 2009 amendments." (citations omitted)).

197. Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994).

198. INS v. St. Cyr, 533 U.S. 289, 316 (2001) (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 272–73 (1988)).

199. *Lindh*, 521 U.S. at 328 n.4.

200. *See id.* at 327.

201. *See id.* at 330.

202. Deweese v. Nat'l R.R. Passenger Corp., 590 F.3d 239, 251 (3d Cir. 2009) ("In deciding whether a statute has a retroactive effect, a court must determine the 'important

I conclude that FERA contains an express retroactivity clause: section 4(f)(1) names a specific pre-enactment day, June 7, 2008, as its effective date, and it applies to claims pending on or after that day. Whatever *claims* means, the statute increases the liability of subcontractors and others who were not liable under FCA previously because they had benefitted from the holdings of *Totten* and *Allison Engine*. Legislative history shows that Congress intended the FCA amendments to overrule the holding of *Allison Engine*.[203] Standing alone, this is enough for FERA to operate retroactively. Because Congress clearly intended FERA to operate retroactively to overrule the holding of the Supreme Court in *Allison Engine*, and because *claims* means *cases*, FERA should be applied to any case pending on or after June 7, 2008.

Although FERA's express language and legislative history resolves the retroactivity issue, I also provide a retroactive effect analysis of FERA for the sake of completeness. The retroactive effect inquiry tests the fairness and equity of applying a new statute to events preceding its enactment.[204] We apply normal statutory interpretation principles to determine retroactive effect.[205] These principles reveal that applying FERA to past events (absent express intent) would have an impermissibly retroactive effect.

A. FERA Includes an Express Retroactivity Provision

A clear statement of retroactive intent requires unambiguous language describing the temporal reach of the statute.[206] This language may be located in legislative history or found through negative implication.[207] FERA clearly expresses retroactive intent by unambiguously designating a pre-enactment day, June 7, 2008, as the effective date for the FERA amendment to FCA § 3729(a). This reference to a pre-enactment date evinces clear intent for the statute to apply in a way that would effectively impose a new legal standard on already-completed events.

1. FERA's Retroactivity Language Is Clear on Its Face

The clear statement rule tests whether Congress considered the potential downside of retroactivity, an area that raises particular "quasi-constitutional" concerns.[208] Retroactivity language must be "so clear that it could sustain only one

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event' to which the statute allegedly attaches new legal consequences.").

203. *See infra* Part VI.A.3.
204. *See supra* Part V.
205. *See supra* Part V.
206. *See supra* Part V.
207. *See supra* Part V.
208. *See supra* Part V; *see also* LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 244 (2008) ("The requirement of a clear, or plain, statement is based on the simple assumption that a legislature would not make major changes without being absolutely clear about doing so."); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (arguing that "super-strong clear statement rules" are a way that courts can force legislators to focus on otherwise underenforced constitutional norms).

interpretation."[209] Although there are no "magic words" that signify retroactive intent, courts have provided some guidance.[210] For example, *Landgraf* stated that the 1990 Civil Rights Act expressed clear retroactive intent: "[This Act] shall apply to all proceedings pending on or commenced after the date of enactment of this Act."[211] The same year as *Landgraf*, the Supreme Court held that the phrase "shall apply to all proceedings 'pending on or commenced after'" a certain date "assuredly would have applied to pending cases."[212] *Lindh v. Murphy* noted a number of Supreme Court decisions that had found a clear statement for retroactive intent.[213] *Graham v. Goodcell*, for example, held that a tax "was manifestly intended to operate retroactively . . . . [where] it expressly applied to internal revenue taxes which had been assessed prior to June 2, 1924, and within the period of limitation applicable to the assessment."[214] *Automobile Club of Michigan v. Commissioner*, identified the following to be a clear statement: "The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect."[215] *Hadix* found an "express command" in the statement that "[this section] shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title."[216] *Lockheed Corp. v. Spink*

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209. INS v. St. Cyr, 533 U.S. 289, 317 (2001) (quoting Lindh v. Murphy, 521 U.S. 320, 328 n.4 (1997)).

210. *See* John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1557–58 (2008) ("It is true, of course, that judges can disagree about the question whether a statute is clear. But one can at least articulate a plausible standard against which to argue about clarity: if all or almost all of those conversant with applicable social and linguistic conventions would agree upon a statute's meaning, the outcome can be said to be clear in context. In such a case, where almost all interpreters (sharing a common methodology) would agree that the evidence points decisively in one direction, only the most dedicated rule skeptics would hesitate to attribute the resultant interpretation to Congress." (footnotes omitted)).

211. Landgraf v. USI Film Prods., 511 U.S. 244, 255 n.8 (1994) (quoting S. 2104, 101st Cong. §15(a)(4) (1990)); *see also id.* at 255 ("[T]he 1990 bill . . . 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.").

212. Rivers v. Roadway Express, Inc., 511 U.S. 298, 307–08 (1994).

213. 521 U.S. at 328 n.4.

214. 282 U.S. 409, 418 (1931). The relevant provision reads:

> If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was . . . assessed prior to June 2, 1924 . . . then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

Id. at 432 n.1.

215. 353 U.S. 180, 184 (1957) (quoting 26 U.S.C. § 3791(b) (1939)); *see also Lindh*, 521 U.S. at 328 n.4 (citing *Auto. Club of Mich.*, 353 U.S. at 184).

216. Martin v. Hadix, 527 U.S. 343, 355 (1999) (alteration in original) (quoting 42 U.S.C. § 1997(e)(d)(3)).

provided that the following was a clear statement of prospective intent: "[The Omnibus Budget Reconciliation Act of 1986] expressly provides that '[t]he amendments . . . shall apply only with respect to plan years beginning on or after January 1, 1988 . . . .'"[217] More recently, *INS v. St. Cyr* found the following language to be a clear statement: "'conviction[s] . . . entered before, on, or after' the statute's enactment date."[218] These cases show that the more specific and concrete the temporal language is, the more likely a court is to find that it is a clear statement of retroactivity.[219]

Section 4(f)(1) of FERA echoes this retroactivity language. For example, FERA's phrase "pending on or after that date" resembles the *Rivers v. Roadway* clear statement "shall apply to all proceedings pending on or commenced after."[220] In *Goodcell*, the approved language mentions a specific pre-enactment date, as does FERA.[221] *St. Cyr* identifies the phrase "before, on, or after" as a clear retroactivity statement and FERA includes the phrase "pending on or after."[222] FERA's provision includes a similar combination of phrases "shall take effect . . . on [specific day] . . . and apply to all claims . . . pending on or after that date" as that found in other cases.[223] The overlap between FERA's effective date language and

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217.   517 U.S. 882, 896 (1996) (quoting the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, § 9204(a)(1)); *see also* Thorn v. BAE Sys. Haw. Shipyards, Inc., No. 08-00058 JMS/BMK, 2009 WL 274507, at *2 (D. Haw. Feb. 2, 2009) ("[T]he ADA Amendment indicates a preference for prospective application—'This Act and the amendments made by this Act shall become effective on January 1, 2009.'" (quoting ADA Amendments Act of 2008, Pub. L. 110-325, § 8, 122 Stat. 3553, 3559)).

218.   INS v. St. Cyr, 533 U.S. 289, 319 (2001) (quoting Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 321(b), 110 Stat. 3009-546, 3009-628).

219.   Justice Scalia has indicated that a clear statement does not even require this much:

> Even in those areas of our jurisprudence where we *have* adopted a "clear statement" rule (notably, the sovereign immunity cases to which the Court adverts), clear statement has never meant the kind of magic words demanded by the Court today—explicit reference to habeas or to § 2241—rather than reference to "judicial review" in a statute that explicitly calls habeas corpus a form of judicial review. In *Gregory v. Ashcroft*, we said: "This [the Court's clear-statement requirement] does not mean that the [Age Discrimination in Employment] Act must mention [state] judges explicitly, though it does not. Rather, it must be plain to anyone reading the Act that it covers judges."

Id. at 333–34 (Scalia, J., dissenting) (citations omitted) (quoting Gregory v. Ashcroft, 501 U.S. 452, 467 (1991)).

220.   511 U.S. 298, 307 (1994); *see also* Ileto v. Glock, Inc., 565 F.3d 1126, 1138 (9th Cir. 2009) (holding that the Protection of Lawful Commerce in Arms Act (PLCAA) expressed clear retroactive intent); *cf.* 15 U.S.C. § 7902(b) (2006) (PLCAA) ("Dismissal of Pending Actions[:] A qualified civil liability action that is pending on [the date of enactment of this Act], shall be immediately dismissed by the court in which the action was brought or is currently pending.").

221.   Graham v. Goodcell, 282 U.S. 409, 418 (1931).

222.   533 U.S. at 319.

223.   *See, e.g.*, Martinez v. INS, 523 F.3d 365, 370 (2d Cir. 2008) ("Notwithstanding any other provision of law (including any effective date), the term . . . applies regardless of whether the conviction was entered before, on, or after [September 30, 1996]." (quoting

judicially approved retroactivity language qualifies it as a clear statement of retroactive intent.

Similarly, FERA's stated purpose to "clarify" *Totten* and *Allison Engine* points towards retroactive intent. In *Rivers v. Roadway Express, Inc.*, the companion case to *Landgraf*, the Supreme Court faced the retroactivity of the 1991 Civil Rights Act.[224] As is the case with FERA, one purpose of the Civil Rights Act addressed in *Rivers* was to legislatively overrule federal decisions construing an earlier version of the statute.[225] The 1990 version was vetoed but included language that indicated that the new law "assuredly . . . applied to pending cases."[226] Several combined factors led to this conclusion: (1) the "Purpose" section of the 1990 version "unambiguously declared that it was intended to 'respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions'";[227] (2) the section responding to the disapproved case was titled "Restoring Prohibition Against All Racial Discrimination in the Making and Enforcement of Contracts";[228] and (3) the 1990 version included the language "'shall apply to all proceedings pending on or commenced after' the date of the *Patterson* decision."[229] FERA shares the linguistic pattern indicating restorative and retroactive intent: (1) section 4 of FERA is titled "Clarifications to the False Claims Act to Reflect the Original Intent of the Law"; (2) the effective date provision states that it applies to "claims . . . that are pending on or after that date."[230]

2. *Claims* Means *Cases*

Recall that either definition of *claims* will alter the legal significance of completed transactions.[231] This is because if *claims* means *request for payment*, a false claim submitted on, say, June 7, 2008 will entail potential subcontractor liability under the new FERA amendments, which would not have been so under *Totten* and *Allison Engine*, the law in existence at the time of the conduct. If, on the other hand, *claims* means *cases*, subcontractor defendants in lawsuits pending on or after June 7, 2008, but who did not present their claims directly to the government, would potentially be liable for conduct occurring many years before.[232] Although either definition creates retroactive effect, our choice between them will be

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Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 321(b), 110 Stat. 3009-546, 3009-628) (alternations in original)); Sadhvani v. Chertoff, 460 F. Supp. 2d 114, 121 (D.D.C. 2006) (finding that the phrase "effective immediately and applicable 'to cases in which the final administrative order of removal . . . was issued before, on, or after'" indicated retroactive intent).

224. 511 U.S. 298 (1994).

225. *Id.* at 307–08.

226. *Id.* at 307.

227. *Id.* (citations omitted) (emphasis in original).

228. *Id.* (emphasis in original).

229. *Id.* at 308; *see also id.* at 307 n.7 (stating that the "restorative purpose" standing alone was not dispositive, but when combined with the other language in the 1990 version pointed to retroactive intent).

230. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621–25.

231. *See supra* Part I.

232. *See supra* Part I.

enormously consequential. The question, then, is how to make the choice. But before I answer this, I must first correct an important mistake that has led a number of FERA courts astray: namely, that where a statute provides a technical definition of a word or phrase, that term always takes the special meaning wherever it appears in the statute.[233] So, for example, because *claims* is defined in FCA as *request for payment*, it must always mean *request for payment* wherever it appears. It is not hard to see why this is false: a technical term will only control interpretation where the term is being used in the same technical way in the provision we are interpreting as it is where it is defined by the statute.[234] The mere fact that a statute defines a term does not in itself mean that that definition controls every iteration of that word in the statute. To assume otherwise is to make the mistake indentified by the Supreme Court in *General Dynamics Land Systems, Inc. v. Cline*.[235] Petitioner invoked the "presumption that identical words used in different parts of the same act are intended to have the same meaning"[236] to argue that the word "age" meant the same thing every time it was used in the ADEA. The Court explained that we cannot invoke this presumption where we can reasonably conclude the word is used in different senses throughout the statute.[237] "The presumption of uniform usage . . . relents when a word used has several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation, without being confused or getting confusing."[238] Several courts have simply assumed without explanation or justification that FCA's definition of *claims* as "requests for payment" resolves the apparent ambiguity in FERA's effective date provision.[239] In place of this blanket assumption, however, we instead must ask whether *claims* has "several commonly understood meanings among which a speaker can alternate."[240] The answer to that question is yes. The fact that section 4(f)(1) embeds *claims* in the phrase "claims . . . under the False Claims Act," coupled with the frequent use of *claims* as a synonym for *cases*, both in FERA and general legal usage, reveals that *claims* is not being used in a technical way in the retroactivity clause.

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233. Schneider v. Chertoff, 450 F.3d 944, 953 (9th Cir. 2006) ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (quoting United States v. Smith, 155 F.3d 1051, 1057 (9th Cir. 1998))).

234. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 594–95 (2004).

235. *Id.*

236. *Id.* at 595 (quoting Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932)). The Court went on to say, "[T]he presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Id.* (quoting *Atl. Cleaners*, 286 U.S. at 433). The Court cited *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001), for the proposition that "'wages paid' has different meanings in different parts of Title 26 U.S.C.," and *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343–44 (1997), for the proposition that the "term 'employee' has different meanings in different parts of Title VII." *Id.*

237. *Id.*

238. *Id.* at 595–96 (footnote omitted).

239. *See, e.g.*, United States v. Sci. Applications Int'l Corp., 653 F. Supp. 2d 87, 106–07 (D.D.C. 2009).

240. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 595 (2004).

a) Reading *Claims* as Part of a Whole Phrase

As with all interpretive questions, we read disputed statutory language in context.[241] Our first piece of contextual evidence is that *claims* is embedded in the phrase: "all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date."[242] When we plug our two definitions of *claims* into this phrase, it quickly becomes apparent that the technical definition would not be a natural fit. It does not make sense to say that a claim submitted for payment to the government or another contractor is a claim "under the False Claims Act." While it is true that such conduct would be "under the jurisdiction" of FCA, we would not normally say that a request for payment is submitted "under" a statute that might be violated by its submission. It is also true that FCA defines *claim* as "any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property."[243] But the use of "under" in the definition of *claim* counts as evidence against importing the technical reading in the retroactivity clause, because its inclusion in section 4(f)(1) would be redundant (i.e., "a claim under a contract under the False Claims Act"). If Congress had intended to have the new rule apply exclusively to conduct that took place on or after June 7, 2008, it could simply have said so, as it did with earlier versions of the statute.[244]

Additionally, *claims* as *cases* tracks common legal usage. Courts routinely use the phrase "claim under the False Claims Act" and cognate phrases in the generic sense to mean "lawsuits brought under the False Claims Act."[245] The FCA itself

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241. *See* Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 545 U.S. 409, 415 (2005).

242. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(f), 123 Stat. 1617, 1625.

243. 31 U.S.C.A. § 3729(b)(2)(A) (West Supp. 2010); *see also* United States *ex rel.* Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1170–71 (9th Cir. 2006) ("[E]ach and every *claim submitted under a contract*, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim." (emphasis added) (quoting S. REP. NO. 99-345, at 9 (1986))).

244. *See, e.g.*, S. 2041, 110th Cong. § 9(b) (2007) ("The amendments made by section 2 shall take effect on the date of enactment of this Act and shall apply to conduct occurring after the date of enactment.").

245. *See, e.g.*, United States *ex rel.* Pogue v. American Healthcorp., Inc., 914 F. Supp. 1507, 1512 (M.D. Tenn. 1996) ("[T]he court dismissed the plaintiff's *claim under the False Claims Act*." (emphasis added) (discussing United States *ex rel.* Weinberger v. Equifax, 557 F.2d 456 (5th Cir. 1977))); *see also* United States *ex rel.* Stephens v. Tissue Sci. Lab., 664 F. Supp. 2d 1310, 1316 (N.D. Ga. 2009) ("*Claims* brought pursuant to the FCA must also meet the particularity requirement." (emphasis added)); United States *ex rel.* Gay v. Lincoln Technical Inst., Inc., No. Civ.A. 301CV505K, 2003 WL 22474586, at *2 (N.D. Tex. Sept. 3, 2003) ("Even if Relators had alleged sufficient facts, they would have still failed to state a cognizable *claim under the False Claims Act*." (emphasis added)); United States *ex rel.* Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1169 (9th Cir. 2006) ("This case involves allegations *under the False Claims Act* . . . ." (emphasis added)).

uses the prepositional "under" construction in this same way.[246] If section 4(f)(1) did not include the prepositional phrase beginning "under," the technical reading might be rescued (although it would still be a stretch). As it stands, however, to make sense at all, we would need to exclude the "under the False Claims Act" phrase, which the rule against redundancy will not permit us to do.

The generic meaning does not cause this problem. Lawyers and judges often use the word "claims" interchangeably with "case," "legal theory," "lawsuit," and so on, as does the FCA itself.[247] Thus, the generic reading comports with our expectation of how *claims* is ordinarily used by legislators and courts.[248] As well as fitting better with its common usage, the generic meaning avoids rendering the phrase "under the False Claims Act" redundant. This is because it is not redundant to specify that the amendment applies to cases brought "under the False Claims Act" since there are cases pending in federal courts under myriad legal theories. "Cases pending under the False Claims Act" accounts for each word in the phrase in a way that the technical meaning does not. It thus avoids the rule against redundancy.

b) Reading *Claims* as Part of the Whole Statute

When FCA uses *claims* in its technical sense, it is clear from context that it is being used as such and is often embedded in a phrase such as "false or fraudulent claim." For example, the key liability provisions § 3729(a)(1)(A)–(B) use the phrase "false or fraudulent claim" when specifying the proscribed behavior.[249] Similarly, § 3729(a)(2)(A) includes the phrase "false claims violations."[250] *Claims* appears throughout § 3733 in the phrases "false claims investigation," "false claims law," or "false claims act."[251] Of course, the word also appears in the Definitions section, § 3729(b)(2).[252]

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246. *See, e.g.*, 31 U.S.C. § 3730(a) (2006) ("[T]he Attorney General may bring a civil action *under* this section . . . ." (emphasis added)); *see also id.* § 3730(b)(3) ("The defendant shall not be required to respond to any complaint filed *under* this section . . . ." (emphasis added)).

247. *See infra* Part VI.A.2.b.

248. *See* BLACK'S LAW DICTIONARY 281–82 (9th ed. 2009) ("claim, *n.* 1. The aggregate of operative facts giving rise to a right enforceable by a court . . . . 2. The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional . . . . 3. A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for."); *see also* Republic of Austria v. Altmann, 541 U.S. 677, 698 n.18 ("The office of the word 'henceforth' [in the statute at issue] is to make the statute effective with respect to *claims* to immunity thereafter asserted. Notably, any such *claim* asserted immediately after the statute became effective would necessarily have related to conduct that took place at an earlier date." (emphasis added)).

249. 31 U.S.C.A. § 3729(a)(1)(A)–(B) (West Supp. 2010).

250. *Id.* § 3729(a)(2)(A).

251. *See, e.g.*, 31 U.S.C. § 3733(a)(1) (2006) ("a false claims law investigation"); *see also id.* § 3733(a)(2)(A) ("alleged violation of a false claims law").

252. 31 U.S.C.A. § 3729(b) (West Supp. 2010).

Claims is frequently used throughout FCA interchangeably with *case* or *civil action*. Section 3730 explains the scope of government and private power to bring civil actions under FCA. Several provisions in the same section use the word *claims* interchangeably with *case* or *cause of action*:

> § 3730(c)(5) "the Government may elect to pursue its *claim* through any alternate remedy available to the Government . . . ."
>
> § 3730(d)(1) "[i]f the Government proceeds with an *action* brought by a person . . . such person shall . . . receive at least 15 percent but not more than 25 percent of the proceeds of the *action* or settlement of the *claim* . . . ."
>
> § 3730(d)(2) "the person bringing the *action* or settling the *claim* . . . ."
>
> § 3730(d)(4) "if the defendant prevails in the *action* and the court finds that the *claim* of the person bringing the action was clearly frivolous . . . ."[253]

Section 3731(c) finds Congress again using *claims* interchangeably with *civil action* and *causes of action*: "the Government may file its own complaint . . . to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief."[254] Section 3732 delimits the jurisdiction in which an FCA action may be brought. The heading of §3732(b) is "Claims Under State Law."[255] Section (b) then goes on to talk about jurisdiction over "actions."[256] In short, Congress commonly uses *claims* as a synonym for *cases* in the FCA. Where a technical meaning is intended in the statute, it is part of the Definitions section, or it appears in § 3733 as part of the phrase "false claims law investigator" or a variant.[257] Because the term *claims* is used in this generic sense throughout the statute, it is not a strong candidate for the presumption in favor of the statutory definition.[258]

3. FERA's Legislative History

The retroactivity issue is resolved at the textual level because "claims under the False Claims Act" means "lawsuits under the False Claims Act." Where textual language is clear, there is no need to resort to legislative history.[259] However, despite the predominance of textualist methodologies, retroactivity courts routinely

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253. 31 U.S.C. § 3730(c)(5), (d)(1), (d)(2), (d)(4) (2006) (emphasis added).

254. 31 U.S.C.A. § 3731(c) (West Supp. 2010).

255. 31 U.S.C. § 3732(b) (2006).

256. *Id.*; *see also* 31 U.S.C.A. § 3729(d) (West Supp. 2010) ("This section does not apply to *claims*, records, or statements made under the Internal Revenue Code of 1986.").

257. *See supra* note 251.

258. *See* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 594–95 (2004).

259. *See* United States v. Gonzales, 520 U.S. 1, 6 (1997) ("[G]iven the straightforward statutory command, there is no reason to resort to legislative history." (citing Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992))).

examine legislative history for congressional intent.[260] Thus, I will do so here. Not every piece of legislative history is equally authoritative.[261] Professors William Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett provide a "Hierarchy of Legislative History Sources" that, while not setting forth an exclusive list of valid legislative materials, will guide my inquiry.[262] In descending order of importance, these sources are: (1) committee reports;[263] (2) explanatory statements by the legislation's sponsors;[264] and (3) drafting and deliberation history.[265] I examine each of these sources below. In sum, FERA's legislative history shows that Congress intended to overrule *Allison Engine* and *Totten* but does not definitively resolve the *claims/cases* question.

a) Prior Drafts of FERA

The FERA Committee Report refers us to precursor legislation—the False Claims Act Corrections Act of 2008 ("Corrections Act").[266] The Corrections Act was introduced on September 12, 2007 by Senator Charles Grassley[267] who was joined by original co-sponsors Senators Durbin, Leahy, Specter, and Whitehouse.[268] It was then referred to the Judiciary Committee, chaired by Senator Leahy.[269] The Judiciary Report begins with a history of the FCA, and leads up to

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260. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 262–63 (1994); *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 579–80 (2006).

261. *See* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 64 (2009) ("Given the presence of contradictory materials in [legislative history] courts have developed guidance to determine the most reliable sources of intent.").

262. ESKRIDGE ET AL., *supra* note 92, at 302–08.

263. *Id.* at 302 (explaining that committee reports are a useful source to glean general and specific intent); *see also* Garcia v. United States, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill . . . ."); 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 48A:11, at 676 (6th ed. 2000) ("'A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' . . . Committee reports are often the best evidence of bicameral agreement, either because the House and Senate reports are identical, or because a conference report explicates the chambers' resolution of differences." (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969))).

264. ESKRIDGE ET AL., *supra* note 92, at 303–04 (citing N. Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982)).

265. *Id.* at 305.

266. S. REP. NO. 111-10, at 10 n.2 (2009), *reprinted in* 2009 U.S.C.C.A.N. 430, 438 ("The provisions in Section 4 were drawn, in significant part, from the Committee's previous work on S. 2041, the False Claims Act Corrections Act of 2008, in the 110th Congress. . . . *The Committee feels that the report to S. 2041, S. Rpt. 110-507, should be read as a complement to this report due to a number of similar changes contained in S. 386*." (emphasis added)).

267. S. REP. NO. 110-507, at 9 (2008). Senator Grassley was a key player in the genesis of FERA's amendments to FCA. This is unsurprising, as he was also the sponsor of the major 1986 amendments to FCA.

268. *Id.*

269. *Id.*

the 1986 FCA amendments.[270] A section titled "The Importance of the False Claims Act," begins by stating that "[t]he need for a robust FCA cannot be understated"[271] and emphasizes the taxpayer dollars that have been recovered since the 1986 amendments.[272] The report cites new areas of fraud, such as Medicare and Medicaid, with estimates of possible losses as high as $16.25 billion.[273] The "purpose" section describes the FCA's "noble goals" of rooting out fraud and notes that the courts had created "conflicting interpretations" of FCA that led to inconsistent outcomes that varied from "court to court."[274] By clarifying the original intent of the law, the Senate hoped to "assist practitioners, judges, and businesses across the country by providing clarity and certainty to the FCA."[275]

b) The Evolution of FERA's Effective Date Language

The Judiciary Committee held a hearing on February 27, 2008 titled: "The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century."[276] The Department of Justice expressed concerns that there would be extensive litigation regarding FERA's effective date as there had been following the 1986 FCA amendments.[277] In response to these concerns, the Committee added an effective date provision that would cover "all cases pending on the date of enactment, and to all cases filed thereafter."[278] This is a simple, express retroactivity provision. The Justice Department filed a second letter in April 2008 expressing concern that it "was not clear whether the effective date should apply to all parts of the bill or only to its procedural provisions."[279] In response, the Committee changed the language again, this time creating a two-tiered provision with a default retroactivity rule plus exceptions for the amendments to the substantive liability provisions of FCA:

> (a) IN GENERAL.—Except as provided under sub sections (b) and (c), the amendments made by this Act *shall take effect on the date of enactment of this Act and shall apply to all civil actions filed before, on, or after that date.*
>
> (b) FALSE CLAIMS.—*The amendments made by section 2 shall take effect on the date of enactment of this Act and shall apply to conduct occurring after that date of enactment.*
>
> (c) STATUTE OF LIMITATION.—The amendment made to section 3731(b)(1) of title 31, United States Code, by section 6 of this Act shall

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270. *Id.* at 1–5.
271. *Id.* at 6.
272. *Id.*
273. *Id.*
274. *Id.* at 8–9.
275. *Id.* at 9.
276. *Id.*
277. *Id.* at 12.
278. *Id.* at 30.
279. *Id.*

> take effect on the date of enactment of this Act and shall apply to civil actions filed after that date of enactment.[280]

As the Committee Report explains, this change was meant to clarify that "the substantive liability provisions amended in § 3729 take effect upon the date of enactment" and apply to conduct on or after that date.[281] This effective date provision is almost a mirror image of FERA's. It begins with default retroactivity ("all civil actions filed before, on, or after that date") and then carves out prospectivity for the amendments to FCA's substantive liability sections. If this language had remained in section 4(f) of FERA, there would be no question that it did not apply retroactively. This language, however, was not included in FERA, which instead makes the substantive revisions retroactive. The Corrections Act was reported out of the Judiciary Committee on September 25, 2008, but no action was taken on it.

c) The Senate Judiciary Report for FERA

Several months after the onset of the financial crisis, Senators Leahy, Grassley, and Kaufman introduced the Fraud Enforcement and Recovery Act of 2009.[282] On February 11, 2009, the Senate Judiciary Committee held a hearing titled "The Need for Increased Fraud Enforcement in the Wake of the Economic Downturn."[283] At the hearing, the Committee heard testimony from the FBI Director, the Special Inspector General for the Troubled Asset Relief Program, and the Acting Assistant Attorney General for the Criminal Division of the Department of Justice.[284] The FBI Director spoke about an increase in mortgage fraud, the Inspector General spoke about the need for increased funding to fight securities and financial fraud, especially in light of the massive influx of taxpayer funds via TARP, and the Acting Assistant General discussed the need for FERA to "provide key statutory enhancements that will assist in ensuring that those who have committed fraud are held accountable."[285] The Committee Report does not comment on the effective date provision. The "Purpose" section frames FERA generally as a law enforcement response to the financial crisis[286] but reiterates the FCA amendments'

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280. S. 2041, 110th Cong. § 9(a)–(c) (2007) (emphasis added).

281. *Id.*

282. S. REP. NO. 111-10, at 1–2 (2009), *as reprinted in* 2009 U.S.C.C.A.N. 430, 430. The following senators joined later as co-sponsors: Klobuchar (D-Minn.), Schumer (D-N.Y.), Murray (D-Wash.), Bayh (D-Ind.), Specter (D-Pa.), Snowe (R-Me.), Harkin (D-Iowa), Levin (D-Mich.), Dorgan (D-N.D.), Whitehouse (D-R.I.), Rockefeller (D-W.V.), Shaheen (D-N.H.), Stabenow (D-Mich.), Sanders (I-Vt.), Bennet (D-Colo.), Durbin (D-Ill.), Mikulski (D-Md.), Gillibrand (D-N.Y.), Begich (D-Alaska), Burris (D-Ill.), Dodd (D-Conn.), Menendez (D-N.J.), Cardin (D-Md.), Reid (D-Nev.), and Pryor (D-Ark.). *See* S. 155 CONG. REC. S4735–36 (daily ed. Apr. 27, 2009).

283. S. REP. NO. 111-10, at 5.

284. *Id.* at 4–5.

285. *Id.* at 5.

286. *Id.* at 3 ("This bipartisan legislation will reinvigorate our Nation's capacity to investigate and prosecute the kinds of financial frauds that have so severely undermined our financial markets and hurt so many hard working people in these difficult economic times.

restorative purpose to overrule *Allison Engine* and *Totten*.[287] Despite the large-bore overhaul of the anti-fraud regime throughout the rest of FERA, the amending language in section 4 of FERA (including subcontractor liability and a clarified definition of claims) is very close to that contemplated by the Corrections Act, discussed above.[288]

4. FERA Sponsor Statements

Unsurprisingly, individual senators emphasized different aspects of FERA at different points in the legislative process. There are no smoking guns in the sponsor statements. Nevertheless, several themes emerge. The first is the need for accountability for the economic crisis. Senator Leahy, for example, emphasized the criminal sanctions for mortgage fraud included in FERA.[289] Senator Kaufman focused on the need to "rescue, reform, and recapitalize our banking system."[290] The second theme is the restorative purpose of FERA's FCA amendments, which respond to "recent court decisions and changes in government-contracting practices [that] have limited the effectiveness of the False Claims Act."[291] Statements by co-sponsors affirm that section 4 of FERA was meant to reverse the presentment decisions.[292] They also show that the sponsors considered the FCA amendments integral to a broad anti-fraud program necessitated by the present financial crisis.[293] At the same time, the statements show that Congress considered the amendments to be narrowly targeted and to not create any new penalties.[294]

This legislation provides the resources and new tools needed for law enforcement to uncover and prosecute these frauds and to aggressively work to detect and prevent fraud related to the Government's ongoing efforts to bail out banks and stimulate the economy.").

287. *Id.* at 10 ("[Section 4] amends the FCA to clarify and correct erroneous interpretations of the law that were decided in [*Allison Engine* and *Totten*].").

288. *See supra* Part VI.A.

289. *See* 155 CONG. REC. S4408–10 (daily ed. Apr. 20, 2009) (statement of Sen. Leahy) (emphasizing law enforcement response to the fraud causing massive financial loss); *see also id.* at S4414–15 (statement of Sen. Klobuchar) (emphasizing need for law enforcement response to financial fraud); *id.* at S4420 (statement of Sen. Dorgan) ("There is a lot of work to do in investigating and cracking down on financial fraud, including mortgage fraud. The bill we are considering this week is going to go a long way toward that effort.").

290. 155 CONG. REC. S3120 (daily ed. Mar. 16, 2009) (statement of Sen. Kaufman) ("Foremost, we must rescue, reform, and recapitalize our banking system. . . . [The co-sponsors] and I pressed this legislation forward because we needed to ensure that the Justice Department, the FBI, and other law enforcement agencies have the resources they need to find, prosecute, and jail those who have committed financial fraud.").

291. 155 CONG. REC. S4410 (daily ed. Apr. 20, 2009).

292. *See, e.g.*, 155 CONG. REC. S1682 (daily ed. Feb. 5, 2009) (statement of Sen. Leahy) ("The effectiveness of the False Claims Act has recently been undermined by court decisions which limit the scope of the law and allow sub-contractors paid with government money to escape responsibility for proven frauds. The False Claims Act must quickly be corrected and clarified in order to protect from fraud the Federal assistance and relief funds expended in response to our current economic crisis.").

293. *See id.* at S1681–82 (statement of Sen. Leahy).

294. 155 CONG. REC. S4410 (daily ed. Apr. 20, 2009) (statement of Sen. Leahy) ("The bill creates no new statutes and no new sentences. Instead, it focuses on modernizing existing statutes to reach unregulated conduct and on addressing flawed court decisions

Finally, Representative Berman, a key sponsor of the House version of FERA, made a statement that supports retroactive application.[295] Representative Berman directly addressed the retroactivity of section 4(f)[296] and then stated:

> We intend for the definition of claim also to apply to all False Claims Act claims pending on or after June 7, 2008, as that definition is an intrinsic part of amended Section 3729(a)(1)(B). The purpose of this amendment is to avoid the extensive litigation over whether the amendments apply retroactively, as occurred following the 1986 False Claims Act amendments.[297]

Representative Berman added that:

> With the exception of conspiracy liability, the courts should rely on these amendments to clarify the existing scope of False Claims Act liability, *even if the alleged violations occurred before the enactment of these amendments.*
> In other words, the clarifying amendments in Section 4(a) do not create a new cause of action where there was none before. Moreover, these clarifications do not remove a potential defense or alter a defendant's potential exposure under the Act. In turn, courts should consider and honor these clarifying amendments, for they correctly describe the existing scope of False Claims Act liability under the current and amended False Claims Act. The amended conspiracy provision, on the other hand, is limited to those violations that occur after the enactment of these amendments.[298]

These remarks are intended to close a potential loophole caused by the fact that section 4(f) does not explicitly incorporate the newly revised definition of *claims*, which resides in a different section.[299] The context for this statement is *Totten*, where plaintiff attempted to escape the presentment requirement by pointing to FCA's definition of *claims*, which even prior to FERA included requests "made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money"—a move the court rejected.[300] Representative Berman is

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interpreting those laws."); *see also id.* at S4413 (statement of Sen. Kaufman) (stating that the changes to FCA did not create "new paths to recover[] ill-gotten gains," but instead were "carefully considered" and "precisely targeted" to correct "ill-considered" court decisions).

295. 155 CONG. REC. E1300 (daily ed. June 3, 2009) (statement of Rep. Berman).

296. *Id.*

297. *Id.*

298. *Id.* (emphasis added).

299. *See* 31 U.S.C.A. § 3729(b)(2) (West. Supp. 2010).

300. Totten v. Bombardier Corp., 380 F.3d 488, 498–99 (2004) ("[T]he dissent points to Section 3729(c), which, as we have seen, provides that the term 'claim' includes requests made to grantees and other recipients 'if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse [the recipient] for any portion of the money or property.'. . . This reading has a fatal flaw: it yields exactly the same meaning that would result if Section 3729(a)(2) did not contain the words 'by the Government' at all." (quoting 31 U.S.C. § 3729(c)) (citations omitted)).

saying that both the newly "clarified" liability provisions and the new definitions of *claims* apply retroactively. The reference to "removing a potential defense" and "increasing liability" addresses the holding of *Hughes Aircraft* by making explicit that the "clarifications" to FCA do not create new liability and thus do not have "retroactive effect."[301]

5. FERA's Drafting History

There were several draft versions of FERA. The first was introduced into the Senate on February 5, 2009.[302] The original version of FERA did not include an effective date provision. On March 5, a marked-up version was introduced containing retroactivity language that is the same language that appears in section 4(f)(1) of FERA, but without the companion subsection (f)(2).[303] On May 6, 2009, the House[304] amended FERA by adding section 4(f)(2), which applies certain procedural amendments "to cases pending on the date of enactment."[305] This multi-tiered provision remained in the final version signed by President Obama on May 20, 2009.

6. Conclusion: Legislative History

We can draw several conclusions from legislative history. First, Congress intended section 4 of FERA to overrule *Totten* and *Allison Engine*.[306] Congress

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301. *See supra* Part IV.

302. S. Rep. No. 111-10, at 2 (2009), *as reprinted in* 2009 U.S.C.C.A.N. 430, 430.

303. *Id.* at 6, *as reprinted in* 2009 U.S.C.C.A.N. 430, 434; *see also* S. 386, 111th Cong. § 4(b) (reported in Senate Mar. 5, 2009).

304. The earliest House version of the FCA Corrections Act was introduced by Representative Berman (joined by Representative James Sensenbrenner) to the House on December 19, 2007. H.R. 4854, 110th Cong. (2007). The original bill includes an express retroactivity provision that reads "[t]he amendments made by this Act shall take effect on the date of the enactment of this Act and shall apply to any case pending on, or filed on or after, that date." *Id.* at § 8. Representative Berman explained that the law's intent was to correct judicial rulings where "courts have thrown out cases in which the Government has administered Government programs, and expended its funds through contractors and other agents, as opposed to direct expenditure." 153 Cong. Rec. E2658 (daily ed. Dec. 19, 2007) (statement of Rep. Berman). To further that end, "[w]e intend for these amendments to apply to all future cases as well as all cases that are pending in the courts on the date the amendments become law." *Id.* The 2009 version of the House Corrections Act is far more detailed and has a multi-tiered effective date provision with default retroactivity ("shall apply to any case pending on, or filed on or after, that date"), but now also has exceptions for several procedural provisions that would operate prospectively. *See* H.R. 1788, 111th Cong. § 7 (2009).

305. S. 386, 111th Cong. § 4(f)(2) (engrossed House amendment, May 6, 2009).

306. *See, e.g.*, S. Rep. No. 111-10, at 11 (2009), *as reprinted in* 2009 U.S.C.C.A.N. 430, 438 ("The Totten decision, like the Allison Engine decision, runs contrary to the clear language and congressional intent of the FCA by exempting subcontractors who knowingly submit false claims to general contractors and are paid with Government funds."); *see also id.* ("Following the decision in *Totten* a number of courts have held that the FCA does not

achieved this in part by revising the technical definition of *claims* to clarify that the FCA was designed to capture all fraud against government funds, whether or not the government has title to the money.[307] The "original intent" argument has additional force because Senator Grassley was both the original sponsor of the 1986 FCA amendments and an original co-sponsor of FERA.[308] While a stated intent to restore the original understanding of a statute does not dispose of the retroactivity question, it nevertheless points toward applying the FCA amendments to pending cases. Where Congress overrules a federal court's erroneous interpretation of a statute, the correct reading applies to pending cases. *Plaut v. Spendthrift Farm* established the principle that "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly."[309] Moreover, "[i]t is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must 'decide according to existing laws.'"[310] Under the *Plaut* rule, Congress cannot reopen a final judgment lest it trigger a separation-of-powers violation.[311] A final judgment is one rendered by the United States Supreme Court (or one in which the time for appeal has expired).[312] Therefore, FERA cannot be construed to reopen cases brought to final adjudication.

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reach false claims that are (1) presented to Government grantees and contractors, and (2) paid with Government grant or contract funds. These cases are representative of the types of frauds the FCA was intended to reach when it was amended in 1986." (footnote omitted)).

307. *Id.* at 13 ("[T]his bill includes a clarification to the definition of the term 'claim' in new Section 3729(b)(2)(A) and attaches FCA liability to knowingly false requests or demands for money and property from the U.S. Government, without regard to whether the United States holds title to the funds under its administration.").

308. 155 CONG. REC. S4412 (daily ed. Apr. 20, 2009) (statement of Sen. Grassley) ("I think I have some expertise in that area, being the author of this legislation and finding the Supreme Court's ruling contrary to congressional intent, albeit their motivation may be to interpret the law and that is the way they interpret it, but it does not keep us from going back to what we think is the original intent and saying to the courts: You got it wrong.").

309. 514 U.S. 211, 226 (1995); *see also* Landgraf v. USI Film Prods., 511 U.S. 244, 273–80 (1994); Lundeen v. Canadian Pac. Ry. Co., 532 F.3d 682, 689 (8th Cir. 2008) (applying new corrective amendment to conduct preceding enactment where the statute applies "to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002"); *supra* note 26.

310. *Plaut*, 514 U.S. at 227 (quoting United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 109 (1801)); *see also Lundeen*, 532 F.3d at 689 ("[T]he Supreme Court reiterated Congress possesses the power to amend existing law even if the amendment affects the outcome of pending cases." (citing *Plaut*, 514 U.S. at 218)).

311. *Plaut*, 514 U.S. at 227 ("Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was." (emphasis in original)); *see also* Ileto v. Glock, Inc., 565 F.3d 1126, 1139 (finding that there is no separation of power challenge to an amendment to applicable law, which applies in pending and future cases).

312. *Plaut*, 514 U.S. at 227 ("Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole.").

Second, legislative history reveals that Congress considered the retroactivity issue. Early versions of section 4 of FERA include retroactivity language.[313] The Clarifications Act twice amended the effective date language to assuage the concerns of the Department of Justice that unclear retroactivity language could lead to a replay of the post-1986 FCA litigation.[314] In the next version of section 4, Congress tied the substantive amendments to the date of *Allison Engine*, making these amendments retroactive. The floor statement made by Representative Berman only confirms that Congress considered the retroactivity issue.[315]

Third, drafting history undermines the negative implication theory that several courts have relied on to conclude that *claims* and *cases* must mean different things.[316] It is well established that negative implication works best where the provisions at issue were drafted at the same time and cover the same subject matter.[317] As demonstrated above, sections 4(f)(1)–(2) were drafted in different chambers of Congress at different times.[318] Section 4(f)(1) began its life in the March 5, 2009 Senate version of FERA.[319] Section 4(f)(2) entered the mix through an amendment made by the House and accepted by the Senate on May 5, 2009.[320] If the provisions had been drafted together, it might have been possible to draw the inference that they include different language because section 4(f)(1) implicates substantive liability while section 4(f)(2) refers only to procedural provisions. As it stands, however, because they were drafted at different times in different chambers of Congress, the case for a negative inference regarding sections (f)(1) and (f)(2) is accordingly weak.

B. Retroactive Effect Analysis

The imposition of FCA liability on subcontractors without a clear statement of retroactive intent would have retroactive effect because it would impose increased liability for past conduct. Under either definition of *claims*, subcontractors who would not have been liable under the pre-FERA presentment rulings would now be liable for treble damages under FCA. Prior to FERA, under the technical reading, subcontractors who had claims pending between June 7, 2008 and May 20, 2009 would not have been subject to treble-damages FCA liability. They now would be

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313. *See supra* note 278–80 and accompanying text.

314. *See supra* Part VI.A.3.b.

315. *See supra* Part VI.A.4.

316. *See*, *e.g.*, Sci. Applications Int'l Corp., 653 F. Supp. 2d 87, 107 (D.D.C. 2009); *see also supra* Part VI.A.5.

317. Lindh v. Murphy, 521 U.S. 320, 330 (1997) ("[N]egative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." (citing Field v. Mans, 516 U.S. 59, 75 (1995))); *see also Field*, 516 U.S. at 75 ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects . . . .").

318. *See supra* Part VI.A.5.

319. *Id.*

320. *Id.*

subject to such liability. Even ordinary compensatory damages would affect the liability of FCA subcontractor defendants in the same fashion as triggered retroactivity concerns in *Landgraf*.[321] As the Supreme Court stated in *Landgraf*, "[t]he extent of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored."[322]

Moreover, under the *cases* theory, potential liability reaches back many years, as the conduct underlying pending FCA cases may have occurred long ago.[323] The *Aguillon* court's analysis was therefore correct in at least one respect: "If, in fact, plaintiff were not required to prove actual payment or approval under the 2009 amendments to the FCA, application of the FCA amendments would cause retroactive effects because it would increase defendant's liability for past conduct."[324] This is in line with the Supreme Court's ruling in *Hughes Aircraft* that the 1986 FCA amendments retroactively subjected parties to *qui tam* litigation that was foreclosed under prior law.[325] A new statute that without expressly intending to nevertheless imposes retroactive liability where there was no liability before can fairly be said to operate in a fundamentally unfair way.[326]

CONCLUSION

It is an unfortunate irony that Congress chose the word *claims* to describe the *cases* to which section 4(f)(1) of FERA applies. Using *claims* in a generic sense where the statute also provides a narrower technical definition of that very term is at best sloppy draftsmanship.[327] This is doubly so because FERA is meant to provide clarity and consistency in an unclear area of the law.[328] The present confusion could have been avoided had Congress written a phrase such as "cases pending on June 7, 2008" or "conduct occurring prior to June 7, 2008." Nevertheless, as I have demonstrated above, all available evidence points towards retroactivity, so courts should apply the new FCA subcontractor liability language in cases that were pending on or after June 7, 2008. This is the result Congress intended.

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321. Landgraf v. USI Film Prods., 511 U.S. 244, 282 (1994) ("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." (emphasis in original)).

322. *Id.* at 283–84.

323. *See supra* Part I.

324. United States v. Aguillon, 628 F. Supp. 2d 542, 550 (D. Del. 2009).

325. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 950 (2009).

326. *See id.*; *see also Landgraf*, 511 U.S. at 265; Basset, *supra* note 31, at 530 ("[T]he Supreme Court's decisions have . . . traditionally considered notions of fairness in reviewing legislative retroactivity. These notions of fairness have included equity, justice, and reliance.").

327. This point was suggested to me by Professor Michael Rich. *See* E-mail from Professor Michael Rich, Assistant Professor of Law, Capital University, to Matthew Titolo, Visiting Assistant Professor of Law, West Virginia University School of Law (Feb. 17, 2010, 16:21 EST) (on file with author).

328. *See supra* Part VI.A.3.a.

One final point. The financial crisis has starkly revealed structural cracks in our public policy consensus that privatized government and deregulation typically lead to better outcomes.[329] Longtime proponents of a law and economics approach, such as Judge Richard Posner, have initiated a dialogue on the conceptual shortcomings of *laissez faire* economics that have contributed to our current economic malaise.[330] Similarly, legal scholars will continue to debate the merits of our nation's heavy reliance on private contractors to perform many functions traditionally performed by government.[331] Space does not permit me to address these larger issues here. In future essays, however, I will join this debate by addressing the theoretical underpinnings that have informed both the law and economics movement and the dominant policy preference for privatized government.

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329. *See, e.g.*, *supra* notes 2–3; *see also* Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 63 (2009) ("In the past year, the world has shown us the folly of some of legal scholarship's most powerful intellectual assumptions. The sudden collapse of our world economy has led to economists' open confessions that markets are not self-regulating and that they can be skewed by systematic irrational behavior, [undermining] frequent assumptions of neoclassical law and economics.").

330. *See, e.g.*, RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 235 (2009) ("As far as one can judge on the basis of what is known today . . . the depression is the result of normal business activity in a laissez-faire economic regime—more precisely, it is an event consistent with the normal operation of economic markets.").

331. This debate is well underway. *See, e.g.*, GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minnow eds., 2009); *see also* VERKUIL, *supra* note 2; Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); Minow, *supra* note 3.