Using Severability Doctrine to Solve the Retroactivity Unit-of-Analysis Puzzle: A Dodd-Frank Case Study

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INTRODUCTION

An employee of a public company uncovers evidence that her employer is misleading shareholders and regulators about its financial position. Knowing that federal law protects whistleblowers employed by public companies, the employee reports her concerns to a supervisor. After she files her complaint, the company discharges her, and she brings a whistleblower retaliation claim against it. While her claim is pending, Congress passes omnibus financial reform legislation. Buried in the bill's sixteen hundred sections are five changes to the whistleblower retaliation cause of action. For example, one provision bans agreements to arbitrate whistleblower claims, while another establishes a jury-trial right.[1] The legislation is silent as to whether these or other changes apply retroactively to pending cases—leaving courts to decipher the puzzle.

Should any of the five changes apply to the whistleblower's pending case? If one provision applies retroactively, must the other provisions also apply retroactively?

Current retroactivity doctrine fails to specify the appropriate unit of analysis for this determination—that is, exactly *which* provisions should be analyzed. Similarly, the doctrine provides no guidance as to when retroactive application of one amendment is dependent on the retroactive application of a related amendment.

Resolution of this unit-of-analysis problem is increasingly important as questions of statutory interpretation come to dominate

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 922, Pub L No 111-203, 124 Stat 1376, 1848 (2010), codified at 18 USC § 1514A(b)(2)(E), 1514A(e).

federal dockets.[2] Lengthy, complex enactments are now commonplace.[3] Such "legislative behemoths" present particular challenges for retroactivity doctrine: "The greater the number of provisions a statute contains, the greater the number of possible permutations" created when courts determine retroactive application of each provision on a provision-by-provision, case-by-base basis.[4] A piecemeal approach to retroactivity yields a hybrid regime, whereby the cause of action applicable to pending cases is neither the original cause of action nor the updated cause of action.

This Comment examines the unit-of-analysis problem using five provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act[5] (Dodd-Frank) as a case study of retroactivity doctrine. Part I summarizes the whistleblower protections for employees of public companies created by § 806 of the Sarbanes-Oxley Act (SOX § 806),[6] and discusses five Dodd-Frank amendments to them.

Part II first introduces the Supreme Court's framework for determining whether legislation applies retroactively, established in *Landgraf v USI Film Products*.[7] As an example of the difficulties associated with applying the *Landgraf* framework, Part II then summarizes the dizzying patchwork of conflicting lower-court decisions applying *Landgraf* to the Dodd-Frank amendments to SOX § 806. In determining whether the Dodd-Frank amendments apply to pending § 806 cases, lower courts have all assumed that the appropriate unit of analysis is a single Dodd-Frank provision, meaning retroactive application of one amendment has no bearing on the retroactivity of the other four amendments. In turn, Part III argues that lower courts have incorrectly assumed that *Landgraf* supplied a default rule of provision-by-provision analysis of retroactivity questions.

This Comment answers the retroactivity unit-of-analysis question by borrowing insights from severability doctrine. When

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2 See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv L Rev 405, 409 (1989).

3 See Glen S. Krutz, *Hitching a Ride: Omnibus Legislating in the U.S. Congress* 1–2 (Ohio State 2001) (finding "an increased propensity to pass larger, bundled bills into law" to be "one of the most major recent changes in the legislative process").

4 Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 Tex Rev L & Polit 1, 17–18 (2011).

5 Pub L No 111-203, 124 Stat 1376, 1841–49, 1852 (2010), codified in relevant part at 18 USC § 1514A(a), (b)(2)(D)–(E), (e).

6 Pub L No 107-204, 116 Stat 745, 802–04 (2002), codified as amended in relevant part at 18 USC § 1514A.

7 511 US 244 (1994).

a statutory provision is unconstitutional, severability doctrine asks whether certain provisions are so interrelated that they must be invalidated together. Courts should deploy this severability test in retroactivity cases to determine which provisions are so interrelated that *all* of them must either apply—or not apply—to pending cases. In other words, courts should look to severability doctrine to determine whether statutory provisions may be temporally severed from one another. The Comment argues, however, that while in the severability context judicial modesty recommends an assumption that statutory provisions are independent of one another, the same modesty concerns call for a different assumption in the retroactivity context—that related provisions are interdependent. Thus, courts should not simply embrace wholesale application of the severability framework in the retroactivity context. By rejecting the assumption that a single provision is always the appropriate unit of analysis in retroactivity cases, courts can conserve judicial resources and better allocate responsibility for determining whether a statute applies retroactively to Congress.

I. CONGRESS CREATES, THEN REVISITS WHISTLEBLOWER PROTECTIONS

This Part first provides background information on the original SOX § 806 whistleblower cause of action for employees of public companies. It then describes the changes Dodd-Frank made to that cause of action.

A. The Sarbanes-Oxley Act of 2002

SOX provided new federal whistleblower protections for employees of public companies. Congress enacted SOX in 2002 in response to a series of widely publicized corporate accounting scandals, with the Enron collapse serving as the primary impetus for the legislation.[8] Congressional hearings revealed that would-be Enron whistleblowers had been silenced or fired, leading Congress to conclude that whistleblower protections are key to uncovering complex, difficult-to-detect fraudulent schemes.[9] Prior to SOX, "[c]orporate employees who report[ed] fraud [were]

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[8] See Richard A. Oppel Jr and Daniel Altman, *In a Shift, Republicans Pledge to Pass Accounting Bill*, NY Times C1 (July 18, 2002).

[9] See *The Corporate and Criminal Fraud Accountability Act of 2002*, S Rep No 107-146, 107th Cong, 2d Sess 4–5 (2002).

subject to the patchwork and vagaries of [ ] state laws, although most publicly traded companies [did] business nationwide."[10] SOX thus aimed to extend more predictable, uniform protection to employees of public companies who report suspected fraud.

SOX § 806 created a cause of action for certain corporate whistleblowers who experience retaliation for reporting suspected improprieties.[11] Under that section, a public company may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" who participates in a proceeding related to violations of "section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities and commodities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."[12] The provision also protects those who provide information regarding violations to an enforcement agency, member or committee of Congress, or supervisor.[13] Thus, a whistleblower may report suspected violations either internally to a supervisor, or externally to legislators or prosecutors. SOX also required covered employers to establish procedures for handling whistleblower complaints through their audit committees.[14]

Despite § 806's improvements to the whistleblower protection landscape, it was not perfect. Specifically, § 806 contained

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[10] Id at 10.

[11] SOX § 806, 18 USC § 1514A. This Comment focuses on the private cause of action for retaliation against an employee of a public company. SOX also included other whistleblower protections, including criminal liability for retaliatory interference with the lawful employment of a person who provides information to law enforcement, SOX § 1107, 18 USC § 1513(e), and a narrow antiretaliation provision for securities analysts employed by a broker or dealer who produce an unfavorable research report. SOX § 501, 15 USC § 78o-6(a).

[12] SOX § 806, 18 USC § 1514A(a). Some district courts and administrative law judges (ALJs) hold that the suspected violation must relate to shareholder fraud, reading the statutory phrase "relating to fraud against shareholders" as modifying all of the enumerated criminal statutes. See Marcia E. Goodman and Courtney L. Anderson, *Employment Issues in Securities Investigations*, in Steven Wolowitz, Richard M. Rosenfeld, and Lee H. Rubin, eds, *Securities Investigations: Internal, Civil, and Criminal* § 18, § 18:7.4 (PLI 2d ed 2012). See also *Lawson v FMR LLC*, 724 F Supp 2d 141, 158–60 (D Mass 2010) (reviewing conflicting cases and finding violation must relate to shareholder fraud), revd on other grounds, 670 F3d 61 (1st Cir 2012). Additionally, some district courts and ALJs require "the complained-of conduct be *material* to an investor or shareholder." Laurence S. Moy, et al, *Whistleblower Claims under the Sarbanes-Oxley Act of 2002*, 1912 PLI–Corp 731, 767 (2011) (emphasis added).

[13] See SOX § 806, 18 USC § 1514A(a)(1)(A)–(C).

[14] See SOX § 301, 15 USC § 78j-1(m)(4).

some ambiguity as to its coverage. A covered employer was defined as a

> company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 USC 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 USC 78o(d)) . . . , or any officer, employee, contractor, subcontractor, or agent of such company.[15]

Prior to Dodd-Frank, courts disagreed as to whether § 806 applied to private subsidiaries of covered publicly traded entities.[16]

To make out a prima facie case of prohibited retaliation against a covered employer, the whistleblower must establish by a preponderance of the evidence that: "(1) he engaged in protected activity under SOX; (2) his employer was aware of the protected activity; (3) he suffered an adverse employment action; and (4) the protected activity was a contributing factor in the adverse employment action."[17] To receive protection, a whistleblower is not required to prove that the reported violation of the fraud or securities laws actually occurred. Rather, a whistleblower need only have a reasonable belief that the conduct constitutes a violation.[18] The burden then shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the adverse action against the employee even absent the employee's protected conduct.[19] A prevailing employee is entitled

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15 SOX § 806, 18 USC § 1514A(a).

16 See Goodman and Anderson, *Employment Issues in Securities Investigations* at § 18:7.3 (cited in note 12). A fair amount of uncertainty regarding the definition of "employee" remains even after Dodd-Frank. The First Circuit held coverage does not extend to employees of contractors, subcontractors, or agents of publicly traded companies, and it apparently did not view Dodd-Frank as changing this. See id; *Lawson v FMR LLC*, 670 F3d 61, 68 (1st Cir 2012) (interpreting "employee" after passage of Dodd-Frank to exclude employees of officers, employees, contractors, subcontractors, and agents of public companies without considering the Dodd-Frank amendments). Whether this limitation will be adopted in other jurisdictions is an open question. See Goodman and Anderson, *Employment Issues in Securities Investigations* at § 18:7.3 (cited in note 12). Courts also disagree as to whether the protection extends to employees working outside the United States. See id. Furthermore, courts employ varying methods to assess whether someone is an "employee" covered by the statute, as distinguished from an independent contractor. See Moy, et al, 1912 PLI–Corp at 743 (cited in note 12).

17 See William E. Hartsfield, 2 *Investigating Employee Conduct* § 12:34 at 12-202 (West rev ed 2012).

18 See SOX § 806, 18 USC § 1514A(a)(1).

19 See Hartsfield, 2 *Investigating Employee Conduct* § 12:34 at 12-214 (cited in note 17); 49 USC § 42121(b) (explaining complaint procedure incorporated by 18 USC § 1514A).

to "all relief necessary to make the employee whole," including reinstatement, back pay with interest, and special damages such as litigation costs and reasonable attorney fees.[20]

Although the statute provides a federal cause of action, a whistleblower seeking protection under § 806 cannot immediately bring his claim in court. Instead, an employee must first file a complaint with the Secretary of Labor and may only bring an action in federal district court if the Secretary does not issue a final decision within 180 days.[21] SOX provided a statute of limitations of ninety days from the date of the violation.[22]

Although Congress believed that the new whistleblower-retaliation cause of action created by SOX § 806 would encourage whistleblowers to come forward, "the Act's protections did not produce a robust number of employee victories."[23] Fourteen hundred SOX claims were filed with the Occupational Safety and Health Administration (OSHA) from SOX's enactment in 2002 to April 2009.[24] Of the claims filed, "employees prevailed in 230 (including 210 cases that settled), employers prevailed in 930, and 186 complaints were voluntarily withdrawn."[25] Empirical research shows that § 806 claims succeeded at a lower rate than a broad range of other claims brought by employees and other plaintiffs.[26] For example, for claims under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century—the statute on which § 806 procedures are based—claimants' success rate is more than twice the rate of SOX whistleblowers in OSHA investigations.[27] Section 806 made significant progress

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20 SOX § 806, 18 USC § 1514A(c).

21 See SOX § 806, 18 USC § 1514A(b)(1). Congress modeled this administrative process on the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). See *Lawson*, 670 F3d at 73 (observing that AIR 21 "was a model for at least portions of the whistleblower protection provision of § 1514A, which incorporates the procedures and burden-shifting framework of AIR 21"); 18 USC § 1514A(b)(2) (adopting the rules and procedure of 49 USC § 42121(b)); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) § 519, Pub L No 106-181, 114 Stat 61, 146–48 (2000), codified at 18 USC § 42121(b). Within the Department of Labor, the Occupational Safety and Health Administration (OSHA) is responsible for processing § 806 complaints, investigating them, issuing preliminary findings and orders, and adjudicating the complaint. See 29 CFR § 1980 et seq.

22 SOX § 806, 18 USC § 1514A(b)(2)(D).

23 Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm & Mary L Rev 65, 67 (2007).

24 See Moy, et al, 1912 PLI–Corp at 734–35 (cited in note 12).

25 Id.

26 See Moberly, 49 Wm & Mary L Rev at 93 (cited in note 23).

27 See id.

in the protections available to whistleblowers by providing a uniform, federal cause of action for employees of public companies. These figures, however, make it unsurprising that Congress revisited whistleblowing incentives in Dodd-Frank.

B. The Dodd-Frank Act of 2010

Despite the SOX reforms from 2002, the 2008 financial crisis made it clear that problems of accountability and transparency continued to plague the economy. Whereas SOX sought to address the relatively narrow problem of corporate fraud, Dodd-Frank sought to remedy the 2008 financial crisis, which had "myriad causes . . . buried in a patchwork of problems touching on almost every aspect of the financial services sector."[28] Congress continued to believe that "[w]histleblowers provide a vital early warning system to detect and expose fraud in the financial system. With the right protections, whistleblowers can help root out the kinds of massive Wall Street fraud that contributed to the current financial crisis."[29]

Included among Dodd-Frank's sixteen hundred sections were five amendments to the SOX § 806 whistleblower cause of action, and several other new whistleblower programs not relevant to this Comment.[30] Dodd-Frank made the following additions and

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[28] *The Restoring American Financial Stability Act of 2010*, S Rep No 111-176, 111th Cong, 2d Sess 42 (2010).

[29] *Restoring American Financial Stability Act of 2010*, S 3217, 111th Cong, 2d Sess, in 156 Cong Rec S 4066 (daily ed May 20, 2010) (statement of Senator Edward Kaufman).

[30] Generally speaking, Dodd-Frank "establishes different qualifications, paths, limitations and remedies for different whistleblowers." Hartsfield, 2 *Investigating Employee Conduct* § 12:35 at 12-221 to -22 (cited in note 17). In addition to the changes discussed in this Comment, Dodd-Frank created new whistleblower bounty programs under which whistleblowers providing information to the Securities and Exchange Commission (SEC) or the Commodities Futures Trading Commission (CFTC) receive up to 30 percent of a monetary award exceeding $1 million obtained in a judicial or administrative action brought by the SEC or the CFTC. See Dodd-Frank § 922, 15 USC § 78u-6(b)–(c) (detailing the SEC bounty program); Dodd-Frank § 748, 7 USC § 26(b)–(c) (detailing the CFTC bounty program). Dodd-Frank provides corresponding causes of action for whistleblowers who experience retaliation from their employers because they provided information to these commissions. See Dodd-Frank § 922, 15 USC § 78u-6(h); Dodd-Frank § 748, 7 USC § 26(h). A whistleblower falling within the scope of one of these retaliation provisions may be able to elect to proceed under these statutes, bypassing the administrative procedures applicable under SOX § 806. See Hartsfield, 2 *Investigating Employee Conduct* § 12:35 at 12-223 (cited in note 17). Dodd-Frank also created "a new whistleblower cause of action for employees who perform tasks related to the offering or provision of consumer financial products or services." Willis J. Goldsmith, *Retaliation & Whistleblower Claims*, 880 PLI–Lit 423, 437 (2012); Dodd-Frank § 1057, 12 USC § 5567. Finally, the statute modified the False Claims Act retaliation cause of action, establishing a federal

changes to SOX § 806: (1) express coverage of certain subsidiaries of public companies, (2) coverage of national statistical ratings organizations, (3) an explicit jury-trial right provision, (4) a longer statute of limitations, and (5) a prohibition of agreements to waive or arbitrate claims.[31]

The first Dodd-Frank amendment adds express coverage of certain subsidiaries of publicly traded companies to the statute in an effort to "make clear" as to § 806's coverage, "eliminat[ing] a defense now raised in a substantial number of actions brought by whistleblowers."[32] The second amendment "extend[s]" § 806's coverage to nationally recognized statistical ratings organizations, because such organizations "played a significant role in the unrealistic confidence in securities during our recent economic downturn."[33] The third amendment adds a jury-trial right.[34] Prior to Dodd-Frank, courts held that § 806 whistleblowers did not have a right to a jury trial.[35] The fourth amendment gives plaintiffs more time to bring a claim by extending the statute of limitations from 90 to 180 days and by adopting the discovery rule, which triggers the statute when the conduct is discovered, as opposed to when the violation was committed.[36] The fifth amendment invalidates agreements that waive § 806 rights and remedies, as well as predispute agreements to arbitrate § 806 claims.[37] Prior to Dodd-Frank, employers routinely used blanket predispute arbitration agreements covering all employment-related claims, and employers routinely included waivers of § 806 claims in employee severance and settlement agreements.[38]

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statute of limitations and expanding the definition of protected conduct. See Dodd-Frank § 1079A(c), 31 USC § 3730(h); Hartsfield, 2 *Investigating Employee Conduct* § 12:35 at 12-223 (cited in note 17).

31 See Dodd-Frank §§ 922, 929A, 18 USC § 1514A(a), (b)(2)(D)–(E), (e).

32 S Rep No 111-176 at 114 (cited in note 28); Dodd-Frank § 929A, 18 USC § 1514A(a).

33 *Wall Street Reform and Consumer Protection Act Conference Report*, S 5870, 111th Cong, 2d Sess, in 156 Cong Rec S 5872 (daily ed July 15, 2010) (statement of Senator Ben Cardin); Dodd-Frank § 922, 18 USC § 1514A(a).

34 See 18 USC § 1514A(b)(2)(E).

35 See Hartsfield, 2 *Investigating Employee Conduct* § 12:34 at 12-214 (cited in note 17).

36 See Dodd-Frank § 922, 18 USC § 1514A(b)(2)(D).

37 See Dodd-Frank § 922, 18 USC § 1514A(e). For a summary of other Dodd-Frank provisions limiting or regulating the use of arbitration agreements in other financial settings, see Catherine Moore, *The Effect of the Dodd-Frank Act on Arbitration Agreements: A Proposal for Consumer Choice*, 12 Pepperdine Disp Resol L J 503, 514–18 (2012).

38 See Goldsmith, 880 PLI–Lit at 438–39 (cited in note 30).

Although § 4 of Dodd-Frank contained general effective-date language, the legislation did not explicitly address whether any of these five Dodd-Frank amendments to § 806 were to apply retroactively to pending cases.[39] Part II of this Comment surveys the cases attempting to fill this gap in the statute's language.

II. COURTS ADDRESS RETROACTIVITY ONE PROVISION AT A TIME

Since Dodd-Frank took effect on July 22, 2010,[40] courts have struggled to determine which, if any, of the five Dodd-Frank amendments to the SOX § 806 whistleblower cause of action apply retroactively to pending cases. This Part begins with an introduction to the Supreme Court's framework for determining whether civil legislation applies retroactively, established in *Landgraf v USI Film Products*. It then summarizes cases applying this framework to the Dodd-Frank changes to § 806. In addressing whether Dodd-Frank applies retroactively, the lower courts assumed that *Landgraf* supplied a default rule requiring provision-by-provision analysis. The lower courts thus analyzed each of the amendments to § 806 independently of one another.

A. *Landgraf v USI Film Products*

In *Landgraf*, the Court articulated a two-prong test to determine whether a civil statute applies to conduct predating enactment.[41] First, a court looks for an express statement by Congress regarding the statute's proper temporal reach. If such a directive exists, it controls. Absent an express statement, the court moves to the second prong of the analysis, applying the statute to pending cases only absent impermissible "retroactive effects":

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or

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39 See Dodd-Frank § 4, 124 Stat at 1390.

40 Dodd-Frank § 4, 124 Stat at 1390.

41 See *Landgraf*, 511 US at 280.

> 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.[42]

In explaining the concerns that animate the second prong, the *Landgraf* Court articulated a distinction between provisions affecting contractual rights, in which retroactivity is disfavored,[43] and provisions that affect jurisdiction or procedure, which raise fewer concerns because they "regulate secondary rather than primary conduct."[44] This distinction has played a central role in lower court cases examining whether the Dodd-Frank provision prohibiting arbitration of SOX claims applies to agreements predating Dodd-Frank's enactment, as discussed in more detail below.

The *Landgraf* Court argued that its two-prong framework vindicates several goals of retroactivity doctrine. First, "a requirement that Congress first make its intention clear [before a statute is given retroactive application] helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness."[45] The requirement of clear intent thus "allocates to Congress responsibility for fundamental policy judgments,"[46] while also reducing the "risk that [Congress] may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."[47] The Court also found its approach supported by a background antiretroactivity principle articulated in several constitutional provisions, a principle that "[e]lementary 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."[48]

Unfortunately, the lower courts' attempts to apply the *Landgraf* test to the five Dodd-Frank amendments to SOX § 806 have yielded unpredictable results. Courts have assumed without discussion that they should apply the two prongs of *Landgraf* to each Dodd-Frank provision individually. When treated in

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42 Id.
43 See id at 271.
44 Id at 274–75.
45 *Landgraf*, 511 US at 268.
46 Id at 273.
47 Id at 266.
48 Id at 265–67.

this way, the retroactive application of one of the five provisions is independent of the retroactive application of the other four provisions. Further complicating the issue, courts frequently disagree as to how the *Landgraf* prongs apply to even a single Dodd-Frank provision. Accordingly, an unwieldy number of hybrid whistleblower protection schemes has emerged to govern preenactment conduct.

B. Dodd-Frank Held to Invalidate Existing Arbitration Agreements

The fifth Dodd-Frank provision, which invalidates predispute agreements to arbitrate SOX § 806 whistleblower claims, has engendered the most disagreement among courts and received the most attention. That provision provides that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."[49] In *Pezza v Investors Capital Corp*,[50] the first district court to consider the issue applied the provision retroactively.[51] The court denied the defendant's motion to compel arbitration, which the court had taken under advisement at the time of Dodd-Frank's enactment.[52]

The *Pezza* court found that the general effective-date language in Dodd-Frank failed to supply "an express congressional intent regarding retroactivity."[53] The court noted that three other Dodd-Frank provisions limiting predispute arbitration agreements in other contexts contain express statements indirectly implicating retroactivity, but the court declined to draw a negative inference from these provisions.[54] The court explained that given the "sprawling" nature of Dodd-Frank, "the presumption against the retroactive application of ambiguous statutory provisions . . . [and] the national policy favoring arbitration of claims that parties contract to settle in that manner," it could not conclude 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."[55]

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49 Dodd-Frank § 922, 18 USC § 1514A(e)(2).

50 767 F Supp 2d 225 (D Mass 2011).

51 See id at 234.

52 See id at 227, 234.

53 Id at 228 (discussing § 4 of Dodd-Frank).

54 See *Pezza*, 767 F Supp 2d at 232.

55 Id (quotation marks and citations omitted).

The *Pezza* court held that the arbitration provision "principally concerns the type of jurisdictional statute" that applies to pending cases without creating retroactive effects.[56] The court explained that "statutes conferring or ousting jurisdiction 'speak to the power of the court rather than to the rights or obligations of the parties.'"[57] In other words, the enforceability of an agreement to arbitrate "takes away no substantive right but simply changes the tribunal" and thus does not raise retroactivity concerns.[58]

In a case considering the same Dodd-Frank arbitration provision, the Southern District of New York followed *Pezza*. The plaintiff in *Wong v CKX, Inc*[59] alleged she was terminated for internally reporting her concerns that the company had claimed the wrong tax status in its SEC filings and was liable "for nearly 100 million dollars in back taxes to the United States government."[60] The court applied the fifth Dodd-Frank provision to prohibit arbitration of the dispute, which was pending at the time of Dodd-Frank's enactment.[61]

While recognizing that four district courts had since disagreed with the *Pezza* court's retroactivity holding, the *Wong* court nonetheless adopted the *Pezza* analysis.[62] The court reasoned that there was "no clear answer" regarding congressional intent and that "despite altering a provision of a contract," the statute "primarily affects the jurisdiction of the court to hear the substantive claim."[63] Thus, it was "proper to apply the present law to this dispute."[64]

Examining only the Dodd-Frank provision invalidating agreements to arbitrate SOX § 806 claims, the *Pezza* and *Wong* courts concluded that the provision applies retroactively because it is best characterized as regulating procedural, rather than substantive, aspects of the whistleblower cause of action. The cases summarized in Part II.C reached the opposite conclusion,

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56 Id at 233.

57 Id, quoting *Landgraf*, 511 US at 274.

58 See *Pezza*, 767 F Supp 2d at 233, quoting *Hamdan v Rumsfeld*, 548 US 557, 577 (2006).

59 890 F Supp 2d 411 (SDNY 2012).

60 Id at 416.

61 See id at 417, 423. Oddly, although the case involved denial of the *defendant's* motion to compel arbitration, the plaintiff herself had demanded arbitration of the employment dispute prior to the passage of Dodd-Frank, apparently unavailingly. See id at 416.

62 Id at 423 n 2.

63 *Wong*, 890 F Supp 2d at 422–23.

64 Id at 423.

instead focusing analysis on the provision's effects on the parties' prior right to contract.

C. Dodd-Frank Held Inapplicable to Existing Arbitration Agreements

Between the *Pezza* and *Wong* decisions, four district courts declined to apply the Dodd-Frank arbitration provision retroactively to invalidate an existing arbitration agreement. In *Henderson v Masco Framing Corp*,[65] the Nevada District Court granted the plaintiff's motion to compel arbitration of his claim, which alleged that he was discharged for complaining about improper tax withholdings.[66] Henderson's claim was pending at the time of Dodd-Frank's enactment.[67]

The *Henderson* court skipped the first prong of the *Landgraf* test, noting the parties' arguments regarding congressional intent yet failing to rule on them.[68] Instead, the court emphasized that a presumption against retroactivity is most often applied to "provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance."[69] The court reasoned that the Supreme Court has characterized "the right of the parties to agree to arbitration [as] a *contractual* matter governed by contract law."[70] Retroactive application of the Dodd-Frank arbitration provision would "fundamentally interfere" with a right to contract for arbitration that existed prior to the amendment.[71]

In holding that the Dodd-Frank provision invalidating agreements to arbitrate SOX § 806 claims does not apply retroactively, other district courts largely followed *Henderson*'s reasoning. In *Holmes v Air Liquide USA LLC*,[72] the plaintiff argued that the Dodd-Frank provision banning arbitration of § 806 claims also invalidated a general agreement to arbitrate any employment-related claim, including her discrimination claims arising under other statutes.[73] The parties entered the arbitration

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65 2011 WL 3022535 (D Nev).

66 See id at *1, 4.

67 See id at *1.

68 See id at *3–4.

69 *Henderson*, 2011 WL 3022535 at *4, quoting *Landgraf*, 511 US at 271.

70 *Henderson*, 2011 WL 3022535 at *4, citing *AT&T Mobility LLC v Concepcion* 131 S Ct 1740, 1752–53 (2011).

71 *Henderson*, 2011 WL 3022535 at *4, citing *Landgraf*, 511 US at 271.

72 2012 WL 267194 (SD Tex).

73 See id at *4.

agreement in question in 2006,[74] but the complaint was filed after Dodd-Frank's enactment.[75]

The *Holmes* court avoided the question of the scope of agreements invalidated by Dodd-Frank by finding the arbitration provision did not apply retroactively to the case.[76] The court did not undertake its own analysis of congressional intent, noting that the *Pezza* court found no reliable evidence of congressional intent and the *Henderson* court implicitly agreed.[77] The court then reiterated the *Henderson* court's conclusion that Dodd-Frank "would have a 'genuinely retroactive effect'" because it impacted contractual rights.[78] Thus, the court concluded that Dodd-Frank did not impact the enforceability of the parties' general arbitration agreement.[79]

The DC District Court in *Taylor v Fannie Mae*[80] also followed the *Henderson* court's reasoning in enforcing a pre-Dodd-Frank arbitration agreement.[81] In dicta,[82] the South Carolina District Court in *Blackwell v Bank of America Corp*[83] stated that Dodd-Frank did not preclude arbitration of a SOX § 806 claim where the agreement to arbitrate predated Dodd-Frank.[84] The *Blackwell* court departed from the reasoning in *Henderson* by finding that the general effective date included in Dodd-Frank § 4 is an "express term[ ]" precluding retroactive application of the arbitration provision.[85] Despite this finding, the *Blackwell* court continued to the second *Landgraf* prong, finding retroactive application of the statute would interfere with "the parties' contractual expectation [ ] that they would arbitrate."[86]

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74 Appellees' Brief, *Holmes v Air Liquide USA, LLC*, No 12-20129, *8 (5th Cir filed Aug 14, 2012) (available on Westlaw at 2012 WL 3560678).

75 See *Holmes*, 2012 WL 267194 at *1.

76 See id at *6.

77 See id at *6 n 2.

78 Id at *5, quoting *Landgraf*, 511 US at 277, 280 (quotation marks omitted).

79 See *Holmes*, 2012 WL 267194 at *6.

80 839 F Supp 2d 259 (DDC 2012).

81 See id at 261–63 (noting no other court has found "any express intent from Congress that [the provision] be applied retroactively" and concluding that retroactive application would impair "the parties' rights possessed when they acted").

82 See *Blackwell v Bank of America Corp*, 2012 WL 1229673, *4 n 3 (D SC) (noting that because the plaintiff failed to exhaust administrative remedies, "the plaintiff has not stated a SOX claim, and the Dodd-Frank Act amendments are irrelevant").

83 2012 WL 1229673 (D SC).

84 See id at *3.

85 Id.

86 Id at *4.

The preceding discussion summarizes the disagreement among district courts as to whether the fifth Dodd-Frank amendment invalidating agreements to arbitrate SOX § 806 claims applies retroactively to pending cases. The lower courts assumed the appropriate unit of analysis for retroactivity questions is a single amendment, so a separate set of decisions addresses whether other Dodd-Frank amendments to SOX § 806 apply retroactively. Part II.D summarizes decisions considering retroactive application of the Dodd-Frank amendment extending § 806 coverage to subsidiaries of public companies, as well as a decision regarding the Dodd-Frank amendment extending the statute of limitations for § 806 claims.

D. Retroactive Application of Other Dodd-Frank Amendments to SOX § 806

Lower courts disagree as to whether the Dodd-Frank amendment adding express coverage of certain subsidiaries of public companies to SOX § 806's scope applies retroactively. That provision amends the statute's description of covered companies by inserting the following language: "including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company."[87] Prior to Dodd-Frank, no consensus existed among courts regarding § 806's coverage of such subsidiaries.[88]

In three different cases, the Southern District of New York concluded that the subsidiaries provision applies retroactively because it is a clarification, rather than a change of law.[89] *Ashmore v CGI Group Inc*[90] is largely representative of the court's reasoning in all three cases.[91] Ashmore filed his claim of retaliatory discharge from a private subsidiary of a publicly traded company after Dodd-Frank's enactment.[92]

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87 Dodd-Frank § 929A, 18 USC § 1514A(a).

88 See Hartsfield, 2 *Investigating Employee Conduct* § 12:34 at 12-204 to -05 (cited in note 17).

89 See *Leshinsky v Telvent GIT, SA*, 873 F Supp 2d 582, 601 (SDNY 2012); *Ashmore v CGI Group Inc*, 2012 WL 2148899, *3–4 (SDNY); *Gladitsch v Neo@Ogilvy*, 2012 WL 1003513, *4 (SDNY). See also *Johnson v Siemens Building Technologies, Inc*, 2011 WL 1247202, *11 (DOL ARB).

90 2012 WL 2148899 (SDNY).

91 In the other two cases, the judges disagreed as to how much deference to accord the Administrative Review Board's retroactivity analysis. Compare *Leshinsky*, 873 F Supp 2d at 589 (applying *Skidmore* deference), with *Gladitsch*, 2012 WL 1003513 at *4 & n 4 (applying *Chevron* deference).

92 See *Ashmore*, 2012 WL 2148899 at *3.

The *Ashmore* court first noted, "the text of the 2010 amendment to § 806 does not express a clear intent that it apply retroactively."[93] It then adopted the Administrative Review Board's analysis of "[1] whether the enacting body declared that it was clarifying a prior enactment; [2] whether a conflict or ambiguity existed prior to the amendment; and [3] whether the amendment is consistent with a reasonable interpretation of the prior enactment and its legislative history."[94] The court concluded that the Dodd-Frank provision "is a clarification of Section 806 and does not create retroactive effects."[95] In another of the three cases, the Southern District of New York rejected the argument that the subsidiaries amendment should not apply retroactively because other courts declined to apply other Dodd-Frank provisions amending § 806 retroactively.[96] The court thus assumed that the proper unit of analysis is a single provision—that the subsidiaries amendment should apply to pending cases independently of any other Dodd-Frank amendment to § 806.[97]

In *Mart v Gozdecki, Del Giudice, Americus & Farkas LLP*,[98] the Northern District of Illinois analyzed the same provision yet reached the opposite conclusion, dismissing a legal malpractice claim whose success depended on retroactive application of the Dodd-Frank subsidiaries amendment to SOX § 806.[99] The court first reasoned that "the [pre-Dodd-Frank] language of the statute is plain and [ ] the vast majority of [administrative law judges] and federal courts that have reached the issue have concluded that section 806 did not extend protection to employees of privately held subsidiaries."[100] Thus, the court believed Dodd-Frank to be an alteration, rather than a clarification of § 806.[101] The court then announced it would apply the *Landgraf* test, resolving the issue at the first prong by finding that Dodd-Frank's general effective-date language precluded retroactive application.[102]

Finally, in addition to finding that the subsidiaries amendment applied to a claim arising prior to Dodd-Frank's enactment,

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93 Id.

94 Id at *4 (alterations in original), quoting *Middleton v City of Chicago*, 578 F3d 655, 663–64 (7th Cir 2009).

95 *Ashmore*, 2012 WL 2148899 at *4, quoting *Johnson*, 2011 WL 1247202 at *11.

96 See *Leshinsky*, 873 F Supp 2d at 601.

97 See id.

98 910 F Supp 2d 1085 (ND Ill 2012).

99 See id at 1095.

100 Id at 1094.

101 Id.

102 See *Mart*, 910 F Supp 2d at 1095.

the *Ashmore* court also applied the 180-day limitations period enacted in Dodd-Frank instead of the original 90-day limitations period.[103] The court did not engage in its own analysis of the issue, instead citing a Second Circuit case holding that a limitations period is a procedural matter, with the relevant conduct being not "the primary conduct of the defendants, the alleged discrimination, but [ ] instead the secondary conduct of the plaintiffs, the filing of their suit."[104] Although the *Ashmore* court treated the retroactive application of the subsidiaries amendment and the retroactive application of the new limitations period as separate questions, the dearth of independent analysis of the latter provision suggests that a desire to resolve the two questions in the same way may have influenced the court.[105]

In sum, lower courts have all proceeded provision by provision, independently analyzing three of the five Dodd-Frank amendments to SOX § 806, and have reached confusing, conflicting results. Two courts held that the provision banning agreements to arbitrate § 806 claims applies retroactively, while four other courts held that the provision does not apply retroactively.[106] One court concluded that the amendment expressly adding subsidiaries of public companies to § 806's coverage does not apply to pending cases, while another decided the amendment does apply to pending cases.[107] One court also applied the Dodd-Frank provision extending the § 806 statute of limitations to pending cases.[108] In short, a plaintiff whose § 806 claim was pending at the time of Dodd-Frank's passage would have little hope of predicting which mix of SOX and Dodd-Frank provisions governs the case.

III. A PROPOSED SOLUTION TO THE UNIT-OF-ANALYSIS PROBLEM

Part II surveyed cases considering whether Dodd-Frank changes to SOX § 806 apply retroactively to pending cases. Dodd-Frank made five such amendments to § 806, and the lower

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[103] See *Ashmore*, 2012 WL 2148899 at *5.

[104] *Vernon v Cassadaga Valley Central School District*, 49 F3d 886, 889–90 (2d Cir 1995); *Ashmore*, 2012 WL 2148899 at *5, citing *Vernon*, 49 F3d at 889–90.

[105] See *Ashmore*, 2012 WL 2148899 at *5.

[106] Compare *Wong*, 890 F Supp 2d at 422–23, and *Pezza*, 767 F Supp 2d at 233–34, with *Blackwell*, 2012 WL 1229673 at *3–4, *Taylor*, 839 F Supp 2d at 263, *Holmes*, 2012 WL 267194 at *6, and *Henderson*, 2011 WL 3022535 at *4.

[107] Compare *Mart*, 910 F Supp 2d at 1095, with *Leshinsky*, 873 F Supp 2d at 601, *Ashmore*, 2012 WL 2148899 at *3–4, and *Gladitsch*, 2012 WL 1003513 at *4.

[108] See *Ashmore*, 2012 WL 2148899 at *5.

courts all assumed that they should analyze each of these changes independently.[109] As a matter of simple math, if each amendment may or may not apply to pending cases independently of the other four, then a court could conceivably create thirty-two different iterations of the § 806 cause of action to govern cases pending at the time of Dodd-Frank's enactment. In addition, the cases summarized in Part II indicate that jurisdictions disagree about how the *Landgraf* test applies to even a single provision. Thus each jurisdiction might recognize a different iteration of the cause of action.

This variety is problematic for two reasons. First, when a court analyzes only one new provision at a time despite the fact that other related provisions were included in the same enactment, it may create a hybrid cause of action not envisioned by Congress. In enacting SOX § 806, the 107th Congress created a cause of action with a specific constellation of features, such as the statute of limitations, the scope of coverage, and so forth. When the 111th Congress subsequently changed the § 806 cause of action through the five Dodd-Frank amendments, it endorsed a cause of action comprised of a different constellation of features.

When a court applies just one of these five amendments to a pending case without considering the other four amendments, it mixes a feature endorsed by the 111th Congress with a constellation of features endorsed by the 107th Congress. In the case of § 806, there is evidence that SOX's enacting Congress would find this approach objectionable, because it considered and rejected several of the changes ultimately included in Dodd-Frank.[110] When lower courts apply the *Landgraf* test on a provision-by-provision basis, they implicitly assume that legislators prefer a hybrid cause of action to both the original version of the cause of action and the later, updated version of the cause of action. In the typical retroactivity case in which Congress is silent regarding retroactive application, support for this assumption is lacking. In other words, faced with choosing between applying an enactment of one Congress and the enactment of another Congress, courts essentially decide to fabricate their own third

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[109] See, for example, *Leshinsky v Telvent GIT, SA*, 873 F Supp 2d 582, 601 (SDNY 2012); *Landgraf*, 511 US at 280.

[110] See S Rep No 107-146 at 22 (cited in note 9) (noting adoption of amendment reducing SOX whistleblower statute of limitations from 180 to 90 days and removing provision prohibiting compelled arbitration of SOX claims, among other provisions); S 2010, 107th Cong, 2d Sess, in 148 Cong Rec 2945 (Mar 12, 2002) (original Senate version of bill).

approach out of whole cloth. This is in tension with the *Landgraf* Court's desire to vindicate legislative intent.

Second, the provision-by-provision approach undermines other professed goals of retroactivity doctrine: to protect reliance-based interests and to allocate to Congress responsibility for making reasoned judgments regarding retroactive application.[111] Part II canvassed the conflicted array of decisions regarding the law governing pending cases. Such variety makes it difficult for parties to have "confidence about the legal consequences of their actions."[112] Provision-by-provision analysis also seems to undermine the professed goals of whistleblower protections, as uncertainty about the applicable law is itself a deterrent to whistleblowing.[113] Furthermore, in *Landgraf* the Court sought to "allocate[ ] to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes."[114] Provision-by-provision analysis, however, lowers the stakes of delegating retroactivity questions to the judiciary—only one provision at a time is at risk. Piecemeal analysis may thus encourage legislators to abdicate decision-making responsibility, undermining one of the central goals of the Court's *Landgraf* framework.

The Dodd-Frank changes to SOX § 806 provide just one example of the unit-of-analysis problem in retroactivity doctrine. As lengthy, complex enactments like Dodd-Frank or the Patient Protection and Affordable Care Act[115] become increasingly common,[116] the number of difficult retroactivity questions facing courts will increase. This Comment argues that courts should abandon the assumption that individual amendments within a statute should be examined independently for retroactive effects, irrespective of the relationship between the amendments. If courts persist in this assumption, we can expect omnibus enactments to spawn more piecemeal, conflicting retroactivity

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111 See *Landgraf*, 511 US at 266–68, 272–73.

112 Id at 266.

113 S Rep No 107-146 at 10 (cited in note 9) (explaining pre-SOX law was inadequate because whistleblowers were "subject to the patchwork and vagaries of current state laws").

114 *Landgraf*, 511 US at 273.

115 Pub L No 111-148, 124 Stat 119 (2010).

116 See Krutz, *Hitching a Ride* at 5 (cited in note 3) ("[R]olling many measures into one bill has become more common, the resulting bills span a greater number of diverse policy areas, and significant policy change occurs through omnibus bills."); Klukowski, 16 Tex Rev L & Polit at 17 (cited in note 4) (noting a trend toward more lengthy enactments and the corresponding challenges facing severability doctrine).

decisions like those summarized in Part II. Case-by-case, provision-by-provision determination of whether a statute applies to pending cases consumes significant judicial resources without any concomitant benefits for parties seeking to understand the governing law and without any indication this approach furthers congressional intent.

Part III.A argues that lower courts are incorrect in assuming *Landgraf* requires provision-by-provision analysis. Part III.B borrows insights from severability doctrine to propose a test for determining which provisions should be analyzed as a unit in retroactivity cases. Part III.C applies the proposed test to this Comment's case study, the five Dodd-Frank amendments to SOX § 806.

A. *Landgraf* Fails to Address the Unit-of-Analysis Problem

Part II demonstrated that in determining whether Dodd-Frank applies retroactively, lower courts assumed, without explanation, that the appropriate unit of analysis is a single provision. To the extent this assumption is based on *Landgraf*, the lower courts overreach. *Landgraf* does not address the unit-of-analysis question with a generalizable rule. Rather, *Landgraf*'s only comment on the question is specific to the statute analyzed in that case, the Civil Rights Act of 1991.[117] Before proceeding to analyze the Civil Rights Act's provisions individually, the *Landgraf* Court remarked, "there is no special reason to think that all the diverse provisions of the [Civil Rights] Act must be treated uniformly for [retroactivity] purposes."[118] The Court grounded this proposition in its extensive analysis of the legislative history of the Civil Rights Act, concluding that Congress desired piecemeal analysis.[119] *Landgraf* thus purported to ratify the specific intent of a particular enacting body by analyzing the statute's provisions independently. It did not advocate for a broader default rule of provision-by-provision analysis.

The Court had good reason to confine its analysis of the interdependency of the statute's provisions to the case at hand, as the Civil Rights Act of 1991 presented an atypical retroactivity case. The legislative history of the Civil Rights Act of 1991 is quite unusual—as the Supreme Court acknowledged. Before the

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117 Pub L No 102-166, 105 Stat 1071, codified as amended at 42 USC § 2000e et seq.

118 *Landgraf*, 511 US at 280.

119 See id.

Act was ultimately signed into law, a predecessor bill including express retroactivity clauses was presented to President George H.W. Bush for his signature.[120] The President vetoed the bill, "citing the bill's 'unfair retroactivity rules' as one reason for his disapproval."[121] The Court thus found that congressional silence in the bill ultimately signed into law

> 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 [of the Civil Rights Act] was an agreement *not* to include the kind of explicit retroactivity command found in the 1990 bill.[122]

However, in many cases where Congress passes omnibus legislation without expressly stating its temporal application, silence likely does reflect mere "oversight or [ ] unawareness."[123]

The *Landgraf* Court's belief that the omission of an express retroactivity clause in the Civil Rights Act of 1991 was intentional undoubtedly contributed to its decision to analyze the Act's provisions independently. The Court explained that silence demonstrated that "legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct."[124] Thus, as a compromise, legislators left the retroactive application of the Act as "an open issue to be resolved by the courts."[125] For this reason, the Court rejected "the unsupported assumption that Congress expected that all of the Act's provisions would be treated alike."[126] The Court believed that Congress viewed piecemeal judicial resolution as the solution to a problem it was "unable to resolve" itself.[127] In other words, if the Congress treated retroactive application of the statute as a binary question, deferring to the judiciary would not have been a viable compromise. The Court thus engaged in provision-by-provision analysis because it believed this approach ratified congressional intent.

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120 Id at 255–56.
121 Id.
122 *Landgraf*, 511 US at 256.
123 Id.
124 Id at 263.
125 Id at 261.
126 *Landgraf*, 511 US at 261 n 12.
127 Id at 261.

Absent the unusual circumstances surrounding enactment of the Civil Rights Act of 1991, however, there is no reason to believe Congress prefers provision-by-provision retroactivity analysis. The *Landgraf* decision certainly did not articulate any such general reason, as it rooted the decision to proceed provision by provision in the specific, unusual circumstances of the Civil Rights Act's enactment. Furthermore, even if the *Landgraf* Court had sought to articulate a default rule of piecemeal analysis, it is unclear this rule would bind the lower courts, as "the Supreme Court does not give stare decisis effect to doctrines of statutory interpretation methodology."[128]

Because the lower courts analyzed single provisions of Dodd-Frank for retroactive effects independently and without discussion of the appropriate unit of analysis, it is impossible to know for certain whether they viewed *Landgraf* as the source of their sub silentio default rule. What is clear is that *Landgraf*'s "no special reason" language cannot bear this weight.[129] Rather, the unique legislative history of the Civil Rights Act of 1991 suggests that when it comes to the appropriate unit of analysis, *Landgraf* is the special case. Where there are no similar indications of congressional intent regarding piecemeal retroactivity analysis, this Comment argues for filling the gap with a test derived from severability doctrine.

B. Severability Doctrine Provides Insights into the Unit-of-Analysis Problem in Retroactivity Doctrine

Both retroactivity and severability cases present the risk that a "[c]ourt's decree [will create] its own new statutory regime, consisting of policies, risks, and duties that Congress did not enact."[130] Courts should borrow insights from severability doctrine to determine the appropriate unit of analysis in retroactivity cases. Severability doctrine addresses how much of a statute must be invalidated when one provision is unconstitutional.

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[128] Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 Georgetown L J 1863, 1866, 1874 (2008) ("The Supreme Court has not explicitly addressed whether statutory interpretation methodology gets stare decisis effect, but it has come tantalizingly close to stating that it does not."). Another scholar has pointed out that binding rules of statutory interpretation may create *Erie*-doctrine problems when applied to state statutes. See generally Ryan Scoville, *The New General Common Law of Severability*, 91 Tex L Rev 543 (2013).

[129] *Landgraf*, 511 US at 280.

[130] See *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2668 (2012) (Scalia, Kennedy, Thomas, and Alito dissenting).

To decide how much of a statute to invalidate, courts consider which provisions are so interrelated that they must stand or fall together.[131]

The unit-of-analysis problem in retroactivity doctrine poses a similar question. It requires determining which legislative provisions are so interrelated that either none of them may apply to pending cases or all of them must together apply to pending cases. In essence, retroactivity doctrine needs a mechanism for determining what portions of a statute cannot be severed from each other in their temporal application. Severability doctrine is a natural place to turn for insights, as it addresses the same problem of determining which statutory provisions are so interdependent that a court may not unbundle them.

Part III.B.1 summarizes the Supreme Court's severability test. Part III.B.2 argues that this test should be adopted in retroactivity cases, but with an important modification. In severability doctrine, a concern for judicial modesty underlies a norm that courts should strive to invalidate only a single provision if possible. In retroactivity doctrine, however, judicial modesty counsels in favor of the opposite result—related provisions should be kept together.

1. Severability framework.

In *Free Enterprise Fund v Public Company Accounting Oversight Board*,[132] the Supreme Court articulated the test for determining how much of a statute to invalidate when one provision is held unconstitutional.[133] That case held a SOX provision unconstitutional and then severed the provision from the statute.[134] The *Free Enterprise* severability test is "a sequential two-step framework."[135]

The first step is functional. A court first asks whether the act remains "fully operative as a law" without the constitutionally problematic provisions.[136] Before *Free Enterprise*, this required assessing "whether the statute will function in a *manner* consistent

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131 See Part III.B.1.

132 130 S Ct 3138 (2010).

133 See id at 3161–62.

134 Id at 3161. Note that the provision at issue in *Free Enterprise Fund* is unrelated to § 806, which is the focus of this Comment's case study.

135 Klukowski, 16 Tex Rev L & Polit at 54 (cited in note 4).

136 *Free Enterprise Fund*, 130 S Ct at 3161, quoting *Alaska Airlines, Inc v Brock*, 480 US 678, 684 (1987) (quotation marks omitted).

with the intent of Congress" absent a severed provision.[137] One scholar argues that after *Free Enterprise*, the functional step is about structural functionality, rather than congressional intent. Under this view, the step examines "whether Provision A is somehow dependent by reference or inference on an invalid Provision B, such that some aspect of Provision A is linguistically or logically incapacitated or rendered nonsensical—or functionally incapacitated—without Provision B."[138] This view, however, is contested. Subsequent to *Free Enterprise*, some members of the Court argued that this step is not limited to structural concerns, reiterating the earlier intent-based articulation of the test.[139] That is, under this latter view, the statute's ability to function is not simply a question of whether it becomes textually nonsensical without the unconstitutional provision; the relevant question is whether it continues to further congressional purposes. Whichever version of the functionality prong is applied, if the remaining provisions do not function together, they are all invalidated.[140]

The second step is indisputably intent based. A court should "sustain [the statute's] remaining provisions '[u]nless it is evident that the Legislature would not have enacted those provisions . . . independently of that which is [invalid].'"[141] That is, "[c]ourts are to imagine that Congress was faced with a bill containing the statute minus the invalid provision, and determine whether Congress would still have voted in favor of the bill."[142] In doing so in *Free Enterprise*, the Court considered the statute's text and "historical context."[143]

Applying this severability test, the Court operated from the baseline assumption that "the 'normal rule' is that 'partial, rather than facial, invalidation is the required course.'"[144] Stated another way, "when confronting a constitutional flaw in a statute, [the Court tries] to limit the solution to the problem."[145] This background understanding manifests itself in the second step of

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137 *Alaska Airlines*, 480 US at 685.

138 Klukowski, 16 Tex Rev L & Polit at 56 (cited in note 4).

139 *National Federation of Independent Business*, 132 S Ct at 2668 (Scalia, Kennedy, Thomas, and Alito dissenting) ("Even if the remaining provisions will operate in some coherent way, that alone does not save the statute.").

140 See, for example, id at 2668–69 (Scalia, Kennedy, Thomas, and Alito dissenting).

141 *Free Enterprise Fund*, 130 S Ct at 3161, quoting *Alaska Airlines*, 480 US at 684.

142 Klukowski, 16 Tex Rev L & Polit at 56–57 (cited in note 4).

143 *Free Enterprise Fund*, 130 S Ct at 3162.

144 Id at 3161, quoting *Brockett v Spokane Arcades, Inc*, 472 US 491, 504 (1985).

145 *Ayotte v Planned Parenthood of Northern New England*, 546 US 320, 328 (2006).

the severability test, where a court severs only the unconstitutional provision "[*u*]*nless* it is evident that the Legislature would not have enacted" the other provisions independently.[146] That is, courts search for evidence that the provisions are interdependent, rather than evidence that they are independent. Thus, such evidence must overcome a presumption that the provisions are independent. The exact role of this presumption in severability doctrine is unclear: "while the Court has sometimes applied at least a modest presumption in favor of . . . severability, it has not always done so."[147] To the extent that courts do deploy a presumption, it is a powerful one because the search for legislative intent "can sometimes be 'elusive.'"[148]

In *Ayotte v Planned Parenthood of Northern New England*,[149] the Court explained the background rule of partial severance by reference to "[t]hree interrelated principles," all of which reflect a desire for judicial modesty.[150] In essence, *Ayotte* explained that invalidation of a statute on *constitutional* grounds raises particular concerns about the footprint of the court's decision and its counter-majoritarian implications. That is, after finding a statutory provision unconstitutional, courts try to avoid performing radical surgery on a statute for fear of displacing the more expert policy judgment of Congress, a democratically elected branch.[151] By assuming a single provision may be severed, courts leave "editorial freedom" to Congress, meaning legislators are "free to pursue any of [the] options going forward" for repackaging the statute without the unconstitutional provision.[152] Part III.B.2 examines the *Ayotte* judicial modesty concerns in greater depth, demonstrating that in the retroactivity context, these same modesty concerns favor an assumption that related provisions are interdependent.

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146 *Free Enterprise Fund*, 130 S Ct at 3161 (emphasis added), quoting *Alaska Airlines*, 480 US at 684.

147 *National Federation of Independent Business*, 132 S Ct at 2668 (Scalia, Kennedy, Thomas, and Alito dissenting) (quotation marks and citations omitted).

148 *Free Enterprise Fund*, 130 S Ct at 3161–62, quoting *Immigration and Naturalization Service v Chadha*, 462 US 919, 932 (1983).

149 546 US 320 (2006).

150 Id at 328–30.

151 See id.

152 *Free Enterprise Fund*, 130 S Ct at 3162.

2. Severability framework transplanted to retroactivity doctrine.

In retroactivity cases, courts should deploy the *Free Enterprise* severability test to determine how many provisions to analyze at once when applying *Landgraf*'s second prong—with one modification. In retroactivity cases, judicial modesty advises courts to assume related provisions are interdependent, not independent, as severability cases sometimes presume. This Section describes the proposed test for determining whether related provisions should be analyzed as a unit for retroactivity purposes. Part III.C applies the proposed test to the Comment's case study, the five Dodd-Frank amendments to SOX § 806.

Under the test proposed by this Comment, a court should conduct its analysis as follows: (1) analyze whether there is an express congressional statement, (2) apply the unit-of-analysis inquiry, and (3) apply the retroactive-effects inquiry. The first *Landgraf* prong looks for an express congressional statement of temporal application. This step must always come first, because if Congress commands that a particular provision or provisions apply to pending cases, that directive is followed.[153] Absent an express directive, the second prong of the *Landgraf* test requires the court to determine whether application to pending cases would yield retroactive effects.[154] Before considering the second *Landgraf* prong, however, a court should determine how many provisions to analyze as a unit. It should then apply that finding when conducting the second prong analysis. This approach will improve predictability for litigants, create better incentives for Congress to decide retroactivity questions, and conserve judicial resources.

First, the court should ask whether the provision would be "fully operative as a law" if it alone applied to pending cases.[155] While not recognized as its own step, in retroactivity cases courts already engage in the structural-functionality version of this analysis.[156] If the provision cannot function alone, either because it would be incoherent without other provisions or because

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153 See *Landgraf*, 511 US at 280.

154 See id.

155 *Free Enterprise Fund*, 130 S Ct at 3161, quoting *Alaska Airlines*, 480 US at 684.

156 See, for example, *Landgraf*, 511 US at 280–81 (acknowledging that a provision creating a jury-trial right would normally apply to pending cases, but could not in the instant case because the right was only afforded when certain remedies created by the statute were available).

it would not by itself be consistent with Congress's intent in enacting the statute, then related provisions must be analyzed simultaneously. If the provision could function alone, the court should proceed to the next question borrowed from severability doctrine: Would Congress have enacted the provision as a standalone measure?

It is at this second stage that a departure from the letter, but not the spirit, of severability doctrine is required. As explained in Part III.A.1, at this second stage in severability cases, courts assume provisions are independent absent evidence to the contrary. Thus, the court generally invalidates a single provision.[157] In retroactivity cases, however, the rationales articulated in *Ayotte* point to a different background principle: courts should assume that related provisions are interdependent, absent evidence they are independent. Thus, the court would analyze related provisions simultaneously under the second prong of *Landgraf* unless there is evidence that Congress would have enacted them individually.

This approach is consistent with the principles that guided the *Ayotte* Court. *Ayotte* explained that "[f]irst, we try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'"[158] In severability cases, constitutional invalidation crowds out opportunities for more democratic decision making, as it narrows the field of permissible legislative action. For this reason, courts excise the narrowest provision possible. In retroactivity cases, however, courts do not serve as "the branch of last resort."[159] The legislature may override an "incorrect" decision with an express statement of retroactivity.[160] The error costs of declining to apply multiple provisions of a statute to pending cases are thus significantly lower. Furthermore, whereas constitutional invalidation is prospective and virtually permanent, retroactivity analysis deals with a slice of time. No matter how a court answers retroactivity questions, eventually the entire enactment will apply to all cases.

If a court analyzes just one provision at a time, congressional override becomes harder. Part II demonstrates that when courts go provision by provision, a large number of conflicting,

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157 See *Free Enterprise Fund*, 130 S Ct at 3161.

158 *Ayotte*, 546 US at 329, quoting *Regan v Time, Inc*, 468 US 641, 652 (1984).

159 Klukowski, 16 Tex Rev L & Polit at 42 (cited in note 4).

160 See *Landgraf*, 511 US at 267–68.

but relatively low-stakes cases result. Provision-by-provision analysis thus increases the costs to Congress of learning about disagreeable decisions while also decreasing the stakes—and thus the likelihood—of an override. When courts analyze related provisions simultaneously, however, Congress has a single stimulus to which to respond.

The *Ayotte* Court's second rationale for narrow invalidation was that because the Court's "constitutional mandate and institutional competence are limited, we restrain ourselves from 'rewrit[ing] state law to conform it to constitutional requirements' even as we strive to salvage it."[161] That is, the courts avoid undertaking "quintessentially legislative work" by invalidating the smallest statutory provision possible.[162] In retroactivity cases, however, it is piecemeal analysis that tends toward legislative-like outcomes. The case-by-case character of these decisions yields a judicially created hybrid cause of action. If courts instead assume that related provisions are interdependent, then the law applying to pending cases is either the original enactment or the later enactment. No amalgamation of provisions endorsed by different general assemblies would occur.

The final *Ayotte* rationale for narrow intervention was that "the touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'"[163] The Court reasoned that "we try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates [legislators'] intent.'"[164] That is, in severability cases the Court's decision to nullify some part of the statute will always conflict with the congressional intent that the entire statute be in force. Thus, in severability cases, courts disturb as few provisions as possible. This concern does not translate to retroactivity cases, however, because if the legislature expresses its intent regarding retroactivity, that directive is followed at the first stage of analysis. In these situations, the second stage at which a presumption of interdependence would apply is never reached. Furthermore, the mere fact of the statute's passage is not probative of

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[161] *Ayotte*, 546 US at 329 (alteration in original), quoting *Virginia v American Booksellers Association, Inc*, 484 US 383, 397 (1988).

[162] *Ayotte*, 546 US at 329.

[163] Id at 330, quoting *Califano v Westcott*, 443 US 76, 94 (1979) (Powell concurring in part and dissenting in part).

[164] *Ayotte*, 546 US at 329 (first alteration in original), quoting *Regan*, 468 US at 652.

whether Congress intended it to apply to pending cases. Congressional intent is inherently more ambiguous in the retroactivity context.

Thus, the judicial-modesty concerns animating severability doctrine's assumption that provisions are independent do not translate directly to the retroactivity context. Accordingly, in determining the unit of analysis in retroactivity cases, courts should not import the assumption from severability doctrine that the narrowest possible intervention is preferable.

One possible alternative to this Comment's proposed approach is that in retroactivity analysis there simply is no stable unit of analysis, and courts must assess congressional intent on a retail basis to determine which provisions are to be held together. This approach would still be lacking, however, because it would require an expenditure of significant judicial resources in pursuit of what may often be an illusory inquiry. After all, when the text of a statute is silent as to its retroactive application, there is a strong possibility the silence is due to Congress's "oversight or [ ] unawareness of the retroactivity issue."[165] Legislative history simply may not provide any information regarding which provisions Congress intended to be interdependent for retroactivity purposes. A gap-filling default rule is needed.

Courts should thus go one step further and reverse the severability presumption, meaning that related provisions should be assumed to be interdependent in their temporal application. Doing so would vindicate the *Landgraf* Court's dual goals of creating predictability and of allocating retroactivity determinations to Congress. When courts assume related provisions are interdependent, they are all less likely to apply to pending cases—if one provision has retroactive effects, neither it nor the related provisions apply to pending cases. Thus, litigants are less likely to be surprised by retroactive application of statutory provisions, and Congress has greater incentive to speak if it wants legislation to apply to pending cases.

Furthermore, insofar as retroactivity doctrine seeks to ratify congressional intent, applying either the original or updated version of a statute to pending cases intuitively seems more likely to conform to this intent than does the creation of a third, hybrid statute. Accordingly, where a statute lacks express language indicating its temporal application, courts should analyze

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[165] *Landgraf*, 511 US at 256.

related provisions together as a unit for retroactive effects unless there is evidence Congress would have enacted them individually.

C. The Proposed Framework for Retroactivity Analysis Applied to the Five Dodd-Frank Changes to SOX § 806

Part III.B proposed a new framework for analyzing whether a civil statute should apply retroactively. This Section applies that framework to the five Dodd-Frank amendments to the SOX § 806 whistleblower retaliation cause of action, which are: (1) express coverage of certain subsidiaries of public companies, (2) expanded coverage to national statistical ratings organizations, (3) creation of a jury-trial right, (4) extension of the statute of limitations, and (5) prohibition of agreements to waive or arbitrate claims.[166] In applying the proposed framework to these amendments, this Comment also seeks to resolve methodological differences among the lower courts regarding the *Landgraf* test. Even though the proposed framework reduces the number of possible permutations, predictability cannot be achieved unless courts also agree on the basics.

1. Step one: express congressional intent inquiry.

The first step of the proposed framework is simply to apply *Landgraf*'s first prong, which requires determining "whether Congress has expressly prescribed the statute's proper reach."[167]

The *Pezza* court correctly concluded that there is no express statement of the arbitration provision's temporal reach.[168] Nor does an express statement accompany the other four Dodd-Frank provisions.[169] The *Blackwell* and *Mart* courts erred in finding the statute's general effective date to be an express statement of the statute's temporal application, as when faced with nearly identical language, the *Landgraf* Court explicitly rejected this possibility.[170]

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166 See Dodd-Frank §§ 922, 929A, 18 USC § 1514A(a), (b)(2)(D)–(E), (e).

167 *Landgraf*, 511 US at 280.

168 *Pezza*, 767 F Supp 2d at 234; 18 USC § 1514A(e).

169 See Dodd-Frank §§ 922, 929A, 18 USC § 1514A(a), (b)(2)(D)–(E), (e).

170 Compare *Landgraf*, 511 US at 257 (finding statement that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment" not dispositive of the retroactivity question), with *Mart*, 910 F Supp 2d at 1095 ("Dodd–Frank unequivocally sets forth its effective date, noting that that [sic] the amendments are to 'take effect 1 day after enactment.'"), and *Blackwell*, 2012 WL 1229673 at *3 ("By their express terms, the statutory amendments on which plaintiff relies were not effective until 'the day after' July 21, 2010.").

Second, the *Pezza* court was correct to explore, but ultimately reject, the negative inference that "the fact that Congress has explicitly directed that another section of a given statute not be applied in pending cases may be viewed as evidence that Congress intended, at least implicitly, the remainder of the statute to apply thereto."[171] While Dodd-Frank does include some retroactivity clauses,[172] the contrast in statutory language does not appear deliberate, as required by the Court to justify a negative inference,[173] and the sections "address wholly distinct subject matters."[174] It is worth underscoring that if there were an express retroactivity statement, the inquiry would stop at the first *Landgraf* prong.[175] The *Blackwell* court apparently believed otherwise.[176]

2. New step two: unit-of-analysis inquiry.

Having found no express statement of congressional intent, the next step is to determine whether the five Dodd-Frank amendments should be analyzed as a single unit.

First, a court should ask whether any of the five provisions would be unable to "fully operat[e] as a law" if applied to a pending case by itself.[177] Whether a structural or intent-based approach to functionality is preferable is beyond the scope of this Comment. For the Dodd-Frank case study, the difference is immaterial. None of the five amendments are structurally linked in a way that makes them nonsensical if separated. Furthermore,

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171 *Pezza*, 767 F Supp 2d at 228.

172 See Dodd-Frank § 921, 15 USC §§ 78o(o), 80b–5(f) (giving SEC rulemaking authority to regulate arbitration of "any future dispute" between customers or clients of any broker, dealer, or municipal-securities dealer, or between customers or clients and an investment advisor); Dodd-Frank § 1028, 12 USC § 5518 (giving the new Consumer Financial Protection Bureau rulemaking authority to regulate arbitration of "any future dispute" between a consumer and "a covered person"). While these provisions relate to arbitration, they address consumer protection issues and not whistleblower claims. Congress's desire to delegate only prospective rulemaking authority to an administrative agency provides no insights as to whether it intended outright statutory bans on arbitration to apply only prospectively.

173 See *Hamdan v Rumsfeld*, 548 US 557, 576 (2006) (finding negative inference that paragraph (1) does not apply retroactively appropriate because "only paragraphs (2) and (3) of subsection (e) [of the Detainee Treatment Act of 2005] are expressly made applicable to pending cases").

174 See *Martin v Hadix*, 527 US 343, 356 (1999).

175 *Landgraf*, 511 US at 280.

176 See *Blackwell*, 2012 WL 1229673 at *3–4 (finding that the general effective date provides an express retroactivity statement yet proceeding to prong two).

177 See *Free Enterprise Fund*, 130 S Ct at 3161, quoting *Alaska Airlines*, 480 US at 684.

retroactive application of any one amendment would appear to "function in a *manner* consistent with the intent of Congress."[178] Congress intended that "more claims . . . be pursued and remedied in the court system," and applying any one of the five amendments to pending cases would be consistent with this goal.[179]

Next, the related provisions must be analyzed as a unit absent evidence that Congress would have enacted the provisions individually. In the case of the amendment extending coverage to subsidiaries, there is such evidence. That provision was included in the initial House version of Dodd-Frank, months before the other four provisions were introduced, and it also appeared in the Senate version of the bill.[180] Furthermore, it appeared in a different section of Dodd-Frank than the other four provisions.[181] Thus, the subsidiaries amendment would be analyzed separately from the other four Dodd-Frank amendments for retroactive effects.

In contrast, either all or none of the remaining four provisions should apply to pending cases. The legislative history of Dodd-Frank is devoid of evidence that Congress would have enacted them individually. The provisions extending the statute of limitations, adding a jury-trial right, and banning waivers of claims and predispute arbitration agreements were all added at the same stage in the legislative process—the conference committee—and in the same section of the bill, suggesting Congress conceived of these provisions as one bundle.[182] The statistical ratings organization coverage amendment was added earlier in the legislative process, appearing in the Senate version of the bill.[183] That provision, however, never appeared as a standalone provision in the House, and the conference committee amendments were ultimately added to the same section of the bill as the statistical ratings organization amendment. Since these four

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178 *Alaska Airlines*, 480 US at 685.

179 See Moore, 12 Pepperdine Disp Resol L J at 514 (cited in note 37).

180 Compare *Wall Street Reform and Consumer Protection Act of 2009*, HR 4173, 111th Cong, 1st Sess § 7607 (2009), and *Restoring America's Financial Stability Act of 2010*, HR 4173, 111th Cong, 2d Sess § 929A (2010), with *Dodd-Frank Wall Street Reform and Consumer Protection Act*, HR Rep No 111-517, 111th Cong, 2d Sess 486 (2010).

181 Compare Dodd-Frank § 929A with Dodd-Frank § 922.

182 Compare HR 4173, 111th Cong, 1st Sess § 7203 (2009), and HR 4173, 111th Cong, 2d Sess § 922 (2012), with *Dodd-Frank Wall Street Reform and Consumer Protection Act*, HR Rep No 111-517, 111th Cong, 2d Sess 482 (2010).

183 *Restoring America's Financial Stability Act of 2010*, 111th Cong, 2d Sess § 922(b) (2012).

provisions all amend the same cause of action and there is no evidence Congress would have enacted them individually, the new, proposed framework's presumption of interdependence applies.

3. Step three: retroactive effects inquiry.

Having determined that four Dodd-Frank amendments to SOX § 806 are to be analyzed as a unit, the second *Landgraf* prong asks "whether the new statute would have retroactive effect."[184] If any one of the four provisions would have retroactive effect, none of the four provisions apply to pending cases. Analysis under the second *Landgraf* prong should focus on functional considerations of "retroactive *effect*," and "legal *consequences*."[185] Courts should refrain from reducing the inquiry to a "simple or mechanical task" by compiling citations characterizing a provision as substantive versus procedural or jurisdictional.[186] *Landgraf* does not hold that such characterizations are dispositive of a provision's retroactive effect, and courts should take care not to place undue weight on how a provision has been characterized in other contexts. For example, the Supreme Court held statutes of limitation to be substantive in the *Erie*-doctrine[187] context, but procedural in the choice-of-law context.[188] "Substance" and "procedure" are not self-explanatory terms.[189]

A functional analysis supports *Henderson*'s conclusion that the Dodd-Frank arbitration provision has retroactive effects. While the provision changes the forum that will hear the case, if applied retroactively, the provision would also invalidate agreements for which the parties otherwise had the right to bargain,[190] thus "impair[ing] rights a party possessed when he acted."[191] When negotiating terms of employment, for example, employers may have offered greater compensation in exchange for an agreement to arbitrate. Invalidating this deal would im-

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184 *Landgraf*, 511 US at 280.

185 Id at 270 (emphasis added).

186 Id at 268.

187 *Erie Railroad Co v Tompkins*, 304 US 64 (1938).

188 Compare *Guaranty Trust Co v York*, 326 US 99, 110 (1945), with *Sun Oil Co v Wortman*, 486 US 717, 726 (1988).

189 See *Sun Oil*, 486 US at 726 (explaining that "what ['substance' and 'procedure'] mean in a particular context is largely determined by the purposes for which the dichotomy is drawn").

190 See Hartsfield, 2 *Investigating Employee Conduct* § 12:34 at 12-217 to -18 (cited in note 17) (noting courts enforced agreements to arbitrate SOX whistleblower claims prior to Dodd-Frank).

191 *Landgraf*, 511 US at 280.

pose an unanticipated burden on the party that paid more up front to avoid costly litigation later, undermining the "predictability and stability" that are "of prime importance" to contract law.[192] While many such agreements are general boilerplate, those concerns are better policed through contract doctrine than indirectly through retroactivity analysis.[193]

The *Pezza* decision is unresponsive to the concern that retroactive application will impair contract rights. To support its "view that this section principally concerns the type of jurisdictional statute envisioned in *Landgraf*," the court cites Federal Arbitration Act cases asking whether arbitration would impair statutory rights—the equivalent of asking whether arbitration would impair a whistleblower's right not to be fired for protected conduct.[194] The *Henderson* court and its adherents, however, argue that retroactive application would impair a right independent of the statute: contract rights.[195] The *Henderson* reasoning is persuasive, and the *Pezza* court gave it insufficient weight when it merely noted in passing that "[c]ourts have refused to apply retroactively state statutes voiding certain arbitration provisions on the basis that such statutes affected contractual rights and therefore has retroactive effect."[196]

Because the arbitration provision would have retroactive effect, neither it nor the three other Dodd-Frank amendments determined to be the unit of analysis should apply to pending cases.

CONCLUSION

When considering whether a new statute applies to pending cases, courts should not assume that each provision must always be analyzed individually under *Landgraf*. That case provides no such default rule, and provision-by-provision analysis yields an unpredictable array of hybrid statutes governing preenactment conduct, whereby different permutations of the old and new statutes apply to pending cases.

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192 Id at 271.

193 See, for example, *Taylor*, 839 F Supp 2d at 263.

194 *Pezza*, 767 F Supp 2d at 233–34, citing *Gilmer v Interstate/Johnson Lane Corp*, 500 US 20, 26 (1991); *Rodriguez de Quijas v Shearson/American Express, Inc*, 490 US 477, 486 (1989); *Desiderio v National Association of Securities Dealers, Inc*, 191 F3d 198, 205–06 (2d Cir 1999).

195 See *Henderson*, 2011 WL 3022535 at *4.

196 *Pezza*, 767 F Supp 2d at 233.

This unit-of-analysis problem is not unique to the Dodd-Frank context. Given the trend toward longer, more complicated pieces of legislation, courts can expect to confront more challenging retroactivity questions. For example, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 sparked a flurry of retroactivity litigation over its myriad provisions, which continued for decades.[197] More recently, courts have been asked to decide the retroactive application of the OPEN Government Act of 2007, the 2008 Amendments to the Americans with Disabilities Act, and the Veterans Benefits Act of 2010, to name a few.[198] An across-the-board assumption by courts that every statute's provisions must be analyzed individually leaves litigants little hope of knowing the law applicable to pending cases.

Severability doctrine provides a useful framework for thinking about the unit-of-analysis problem in retroactivity cases, as it confronts the question of when statutory provisions are so interrelated that they may not be separated. Declaring a statute unconstitutional, however, is much harsher medicine than prescribing its temporal application. Accordingly, when applying the severability test in retroactivity cases, courts should abandon the assumption that provisions are independent of one another. Faced with a statute that is ambiguous about its temporal application, courts should analyze related provisions as a unit absent evidence that Congress would have enacted them individually. Doing so will create greater predictability for litigants and less work for courts.

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[197] See 3B Am Jur 2d Aliens and Citizens § 1517 (2013) (collecting cases on retroactive application of IIRIRA).

[198] See *Gordon v Pete's Auto Service of Denbigh, Inc*, 637 F3d 454, 457 (4th Cir 2011) (examining whether § 802 of the Veterans' Benefits Act of 2010 providing an express cause of action applies to pending cases); *Singh v George Washington University School of Medicine and Health Sciences*, 667 F3d 1, 4 (DC Cir 2011) (considering retroactive application of the ADA Amendments Act of 2008); *Summers v Department of Justice*, 569 F3d 500, 504 (DC Cir 2009) (examining whether attorney's fees were retroactively available under the OPEN Government Act of 2007).