Michigan Law Review

Volume 119 | Issue 4

2021

The Doctrine of Clarifications

Pat McDonell
University of Michigan Law School

https://doi.org/10.36644/mlr.119.4.doctrine

NOTE

THE DOCTRINE OF CLARIFICATIONS

*Pat McDonell**

Clarifications are a longstanding but little-studied concept in statutory interpretation. Most courts have found that clarifying amendments to preexisting statutes bypass retroactivity limitations. Therein lies their power. Because clarifications simply restate the law, they do not implicate the presumption against retroactivity that Landgraf v. USI Film Products *embedded in civil-statute interpretation. The problem that courts have yet to address is how exactly clarifying legislation can be distinguished from legislation that substantively changes the law. What exactly is a clarification? The courts' answers implicate many of the entrenched debates in statutory interpretation. This Note offers three primary contributions. First, it summarizes the existing doctrine of clarifications as it has been established in the federal circuits and highlights the important implications of their approaches. Second, it argues that clarifications are an important tool for courts and lawmaking bodies. Third, it provides a more intelligible taxonomy for courts to use, including specific factors that ought to guide their determination of whether an amendment clarifies the law.*

TABLE OF CONTENTS

* J.D., May 2021, University of Michigan Law School. Thank you so much to my family, friends, and amazing editors: the Notes squad, the Student Scholarship Workshop, Nina Mendelson, Brian Remlinger, and the amazing team at *MLR*. Thank you to Maggie Mantel for help and support and to my brother, Christopher, of whom I am always so proud. I am honored to be published alongside my good friend, Hanna Rutkowski—here's to making the second weekend.

INTRODUCTION

Actress Ashley Judd, a central figure in the #MeToo Movement,[1] filed suit against film producer Harvey Weinstein in April 2018.[2] Judd alleged that she had been repeatedly harassed by Weinstein and passed over for a possible role in *The Lord of the Rings* movies because she refused his advances.[3] In her lawsuit, Judd stated that Weinstein violated California law by making a sexual quid pro quo within a professional relationship, offering to help establish Judd's Hollywood career in exchange for sex.[4] A federal judge, however, dismissed the claim on an obscure legal technicality: an amendment that expressly covered Judd and Weinstein's relationship was a *substantive change* to the existing law rather than a *clarification*.[5]

Judd's argument relied on a new bill that amended California Civil Code § 51.9, a law that forbids harassment in certain professional relationships.[6] The new bill added "[d]irector or producer" to the list of professions expressly covered by the law.[7] The bill's proponents cited concerns with harassment in the film industry and even named Harvey Weinstein.[8] The legislative history of the amendment stated that "this bill's explicit mention

1. Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *Person of the Year 2017: The Silence Breakers*, TIME (Dec. 6, 2017), https://time.com/time-person-of-the-year-2017-silence-breakers/ [https://perma.cc/V5AM-UWPS].

2. Notice of Removal at 1, Judd v. Weinstein, No. 18-CV-05724 (C.D. Cal. June 28, 2018).

3. First Amended Complaint for Damages and Equitable Relief at 2–3, Judd v. Weinstein, No. 18-CV-05724 (C.D. Cal. Oct. 19, 2018).

4. *Id.* at 10–18, 22–24.

5. Judd v. Weinstein, No. 18-CV-05724, 2019 WL 926343, at *4 (C.D. Cal. Jan. 9, 2019) (order granting defendant's motion to dismiss), *rev'd*, 967 F.3d 952 (9th Cir. 2020).

6. CAL. CIV. CODE § 51.9 (West 2020) (establishing liability for injury or economic loss if "the defendant holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party" by "[making] sexual advances, solicitations, sexual requests, [or] demands for sexual compliance"); *The #MeToo Laws Coming to California in 2019*, CBS L.A. (Dec. 20, 2018, 6:55 PM), https://losangeles.cbslocal.com/2018/12/20/sexual-harassment-laws-california-2019/ [https://perma.cc/3G4X-LEGL].

7. CIV. § 51.9.

8. S. JUD. COMM., ANALYSIS OF S.B. 224, 2017–2018 Sess., at 4–5 (Cal. 2018) (discussing harassment in the entertainment industry and citing coverage of the Weinstein scandal).

of [producer–actor] relationships is almost certainly declaratory of *existing* law."[9] Thus, Judd claimed, the legislature merely clarified that the law applied to cases like hers going back to its original enactment.[10]

Judd's argument is grounded in a longstanding but little-studied legal principle, the doctrine of clarifications.[11] Suits over whether an amendment clarifies or changes the law occur infrequently, but when they do, the outcomes can carry powerful consequences. The central issue of such lawsuits is retroactivity.[12] Clarifications restate what the law has always been and are not limited by presumptions against the retroactive application of new laws.[13] Under Judd's argument, Weinstein could be held liable even though the amendment was passed years after the relevant conduct.

The judge disagreed and held that the amendment changed the law. He concluded that the 2018 California legislature was limited by the intended scope of the original enactment and that the amendment could only apply to producer–actor relationships *going forward*.[14] Those harassed by Weinstein and other Hollywood figures would have to seek relief on different grounds.[15]

Clarification doctrine is an increasingly relevant, but controversial, legal principle. With retroactivity in the balance, courts' interpretations have de-

---

9. S. RULES COMM., SENATE FLOOR ANALYSES OF S.B. 224, 2017–2018 Sess., at 4 (Cal. 2018) (emphasis added); *see also* Defendant's Request for Judicial Notice in Support of Motion to Dismiss the Second Cause of Action of Plaintiff's First Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), Judd v. Weinstein, No. 18-CV-05724 (C.D. Cal. Nov. 12, 2018).

10. Plaintiff's Opposition to Defendant's Motion to Dismiss the Second Cause of Action of Plaintiff's First Amended Complaint at 15–16, Judd v. Weinstein, No. 18-CV-05724 (C.D. Cal. Dec. 10, 2018).

11. For example, the American Jurisprudence article on the topic contains only two short paragraphs and cites just seven cases. *See* 73 AM. JUR. 2D *Statutes* § 238, Westlaw (database updated Feb. 2020).

12. *See, e.g.*, ABKCO Music, Inc. v. LaVere, 217 F.3d 684, 685 (9th Cir. 2000) (explaining that the central issue was whether an amendment signed into law after the lawsuit governs the case).

13. *E.g.*, Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1283 (11th Cir. 1999) (stating that clarifications do not implicate retroactivity limitations).

14. Judd v. Weinstein, No. 18-CV-05724, 2019 WL 926343, at *4 (C.D. Cal. Jan. 9, 2019) (order granting defendant's motion to dismiss) ("While the 2018 Legislature almost certainly hoped that the prior version of § 51.9 covered harassment by producers, its statement in the bill analysis, which under the circumstances may have been colored by wishful thinking, is entitled to little weight in interpreting what the statute meant when it was enacted in 1999."), *rev'd*, 967 F.3d 952 (9th Cir. 2020).

15. In July 2020, after most of the editing for this Note was completed, the Ninth Circuit overruled the District Court's decision. Judd's claim could proceed under § 51.9. But the Ninth Circuit reached this ruling by finding that the statute "plainly encompasse[d] Judd and Weinstein's relationship, which was 'substantially similar' to the 'business, service, or professional relationship[s]' enumerated in the statute." Judd v. Weinstein, 967 F.3d 952, 959 (9th Cir. 2020). The Ninth Circuit did not determine whether the original statute applied to producer-actor relationships in general and declined to say whether the amendment clarified or modified the law. *Id.* at 957 n.2.

termined the validity of wrongful termination claims of corporate whistleblowers,[16] allegations of discrimination against former servicemembers,[17] and a suit about whether Rolling Stones songs infringed on copyright protections.[18] As exemplified in *Judd v. Weinstein*, the central question in clarification-doctrine cases is how to determine whether an amendment clarifies. But that simple question hides a complex analysis that courts have yet to fully develop. Answering it requires a two-part inquiry: First, did the enacting body intend to clarify the existing law? And second, does the amendment restate, rather than change, the original enactment?[19] Those questions in turn provide fertile ground for debates on statutory construction and the proper amount of deference to legislative bodies' interpretive rules regarding prior enactments.

By failing to adopt a uniform analysis, courts have created difficulties for legislative staff drafting new laws and for litigants trying to determine whether those laws affect their interests. The courts have also muddied our understanding of the legislature's power to direct courts and agencies as to how to interpret prior statutes. Clarity is in order.

This Note explores the clarification doctrine and proposes a framework for consistent analysis of legislative amendments. Part I explains the constitutional background for the doctrine and the varying applications that exist in federal courts. Part II highlights the major issues with the doctrine, including implications for the separation of powers and divergent approaches on what evidence should be considered when a court decides whether an amendment clarifies the law. Part III discusses why the doctrine is useful and proposes a new analytical framework for clarification analysis based on how the amendment is labeled, whether the amendment resolves or attempts to resolve a defined ambiguity, and the amendment's consistency with preenactment interpretations of prior law.

I. THE DOCTRINE OF CLARIFICATIONS

When a legislative body or agency amends a prior enactment, the amendment serves one of two purposes. The amendment either changes the substantive content of law or amends the previous language without actually changing the law's meaning. Clarifications are part of this latter category.[20] They are a kind of interpretive directive, telling courts that an alteration in the language of a statute or rule *does not* indicate legislative intent to change

16. *See* Leshinsky v. Telvent GIT, S.A., 873 F. Supp. 2d 582 (S.D.N.Y. 2012).

17. *See* Middleton v. City of Chicago, 578 F.3d 655 (7th Cir. 2009).

18. *See* ABKCO Music, Inc. v. LaVere, 217 F.3d 684 (9th Cir. 2000).

19. Put another way, does the *original* enactment cover the behavior specified in the amending legislation, such that the latter is merely a restatement?

20. Clarifications are sometimes referred to as "declaratory acts" because they declare what the law is rather than change it. 1A NORMAN SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 26.1, Westlaw (database updated Oct. 2019).

the law.[21] Courts, as interpreters of the law, decide whether amendments are substantive changes or clarifications to the statute;[22] however, they sometimes struggle to distinguish between the two. Usually, the distinction is apparent—the statutory text expressly labels the new law as a change that only takes effect upon being signed into law or on a specified future date.[23] At the margins, however, amendments can make adjustments that seem within the bounds of the original law.[24]

Section I.A. outlines the retroactivity issues implicated by the distinction between change and clarification. Section I.B. discusses the presumption against retroactivity and the beginnings of a doctrine of clarifications being formed around it. Section I.C. explains the different approaches that federal courts have taken to distinguish clarifications from substantive changes.

A quick note on vocabulary: This topic requires unusually careful usage of certain terms, most notably forms of "clarify" and "change." For clarity (you see the problem), this Note generally uses "clarification" to mean a nonsubstantive alteration to the *text* of the law. "Change" means a substantive alteration of what the law *means*. This Note also aims to use "amendment" as a neutral term that simply means that the text was altered, with no implication of whether the law was *changed*. A second issue arises from the fact that clarification doctrine applies to both statutes *and* regulations.[25] For the most part, this Note deals with clarifications generally and does not dwell on the differences between legislatures and agencies as lawmaking bodies. Therefore, "enacting body," "legislature," and "legislative body" are used interchangeably to refer to both actual legislatures and agencies acting in a lawmaking capacity.

Finally, the terms "retro*spective*" and "retro*active* laws" can cause confusion.[26] In this Note, retrospective laws are simply laws that apply to a period

21. *See generally* Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 213–15 (1994). What makes clarifications distinct from other interpretive directives is that, unlike interpretive directions that are passed contemporaneously with the law they interpret, clarifications comment on the proper interpretation of laws enacted earlier.

22. *E.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

23. *See, e.g.*, Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13823(d), 131 Stat. 2054, 2188 (2017) (amending the tax code with the amendments to take effect on the date of the passage of the law).

24. *See, e.g.*, Leshinsky v. Telvent GIT, S.A., 873 F. Supp. 2d 582, 598–99 (S.D.N.Y. 2012) (finding that the Dodd-Frank Act's amendments to the Sarbanes-Oxley Act's whistleblower protections conformed with the intent behind the original law).

25. *E.g.*, Levy v. Sterling Holding Co., 544 F.3d 493, 506 (3d Cir. 2008).

26. Some court opinions treat the two terms synonymously, *see, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 269–70 (1994), while others draw a distinction between retroactive and retrospective, *see, e.g.*, United States *ex rel.* Lindenthal v. Gen. Dynamics Corp., 61 F.3d 1402, 1407 (9th Cir. 1995). The distinction drawn by the Ninth Circuit in *Lindenthal* is preferable because even though it departs from the indistinguishable usage of the two terms in *Landgraf*, it reinforces the point made in *Landgraf* that laws can be applied to prior events without having "genuinely retroactive effect." *Compare id.* (clarifying that retrospective laws are those that simply apply to preenactment behavior without necessarily attaching new legal conse-

before their enactment. Clarifications are necessarily retrospective because they apply back to the original enactment that they clarify. Retroactive laws, however, not only apply to preenactment events but also change the legal consequences of those events.[27] "True" clarifications, therefore, are never retroactive because they are simply restatements of the law with no new legal consequences. Therefore, the doctrine of clarifications could be restated as a means of deciding whether application of an amendment is retroactive or merely retrospective.

A. *Navigating Retroactivity: Clarifications and Substantive Changes*

Retroactivity concerns lurk around the often-hazy distinction between changes and clarifications. Common law has, for good reason, historically distrusted retroactive lawmaking.[28] Constitutional limitations enshrined in the Ex Post Facto, Takings, Due Process, and Contract Clauses reflect that distrust.[29] In the criminal context, retroactive laws vitiate the deeply held belief that fair notice of the law is a prerequisite to punishment for its violation. The Ex Post Facto Clause upholds the notions that people should be given fair warning of the law in order to structure their actions and that the government should be prevented from vindictively targeting and criminalizing past behavior.[30] In civil laws—which are the main concern of this Note—retroactive lawmaking poses similar risks, albeit with different consequences. Retroactive laws can undermine settled expectations, expose persons and businesses to suit for preenactment actions, and eliminate contract terms that were acceptable at the time the contract was formed.[31] The distrust of retroactive lawmaking is reflected in the presumption against retroactivity, a canon of interpretation that applies to all civil statutes.[32]

And yet retroactive laws often serve legitimate and important purposes.[33] A retroactive law may "respond to [an] emergenc[y], . . . correct mis-

---

quences), *with Landgraf*, 511 U.S. at 273–75, 277 (describing laws that should be applied to preenactment behavior that do not have retroactive effect).

27. *Lindenthal*, 61 F.3d at 1407.

28. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 514–15 (O.W. Holmes, Jr. ed., Boston, Little, Brown, & Co. 12th ed. 1873) (1826) ("A retroactive statute would partake in its character of the mischiefs of an *ex post facto* law, as to all cases of crimes and penalties; and in every other case relating to contracts or property, it would be against every sound principle.").

29. *Landgraf*, 511 U.S. at 266.

30. Weaver v. Graham, 450 U.S. 24, 28–29 (1981).

31. *See, e.g.*, *Landgraf*, 511 U.S. at 265–67; *cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15–18 (1976).

32. *Landgraf*, 511 U.S. at 280 ("If [an amending] statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.").

33. This was understood even in the early United States. *E.g.*, *Calder*, 3 U.S. (3 Dall.) at 391 ("[T]here are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement . . . .").

takes [in the earlier law], [or] prevent circumvention of a new statute in the interval immediately preceding its passage."[34] Recognizing these salutary purposes, legislative bodies can generally make civil laws retroactive by giving a clear statement of intent.[35] Such a statement shows a court that the legislature has considered the implications of such a law and "determined that the benefits of retroactivity outweigh the potential for disruption or unfairness."[36]

Enter clarifications, which, as restatements of the law, bypass this analysis entirely. That is what makes them powerful—and perhaps dangerous. Clarifying amendments can decide pending cases and capture preenactment behavior without undergoing the constitutional scrutiny reserved for changes to the law.[37] They can overrule previously decided cases by overturning a court's prior interpretation of the law.[38] Such amendments are common not just in federal law but in state law and regulations as well.[39] Because clarifications are understood as mere restatements of what the law has always been, they are not retroactive. The law, after all, has not actually changed—it has merely been reworded to better reflect what it already meant. Nevertheless, the application of clarifications can seem retroactive where it disposes of pending cases or leads to changes in government policies or practices.[40] And where a clarifying amendment overrules the prevailing interpretation in a jurisdiction, it *does* effect a change in the law in that jurisdiction.[41]

But clarifications also serve highly beneficial purposes. Clarifying amendments are a helpful tool in the lawmaking toolbox. With significant

34. *Landgraf*, 511 U.S. at 267–68.

35. *Id.* at 268.

36. *Id.*

37. *E.g.*, Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1283 (11th Cir. 1999).

38. *See* ABKCO Music, Inc. v. LaVere, 217 F.3d 684, 691 (9th Cir. 2000) (stating that a clarifying amendment overturned the Ninth Circuit's prior interpretation of the law). Note that such amendments cannot overturn Supreme Court rulings. DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1388 (10th Cir. 1990).

39. *See, e.g.*, Ray v. N.C. Dep't of Transp., 727 S.E.2d 675, 681 (N.C. 2012) (clarification doctrine applied to state law); Levy v. Sterling Holding Co., 544 F.3d 493, 506 (3d Cir. 2008) (clarification of a regulation).

40. *See ABKCO Music, Inc.*, 217 F.3d at 689 (clarifying amendment effectively overruled case decided prior to the clarification).

41. *Id.* at 691 (stating that it was "literally true" that a clarifying amendment that overruled a prior holding "*change[d]* the law in the *Ninth* Circuit" even though it was "a statement of what [the law] meant all along" (quoting Beverly Cmty. Hosp. Ass'n v. Belshe, 132 F.3d 1259, 1266 (9th Cir. 1997))). This is a paradox created by our constitutional structure. Laws convey instructions that courts, as agents of the legislature, are meant to follow. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5–6 (2001). Therefore, if a court *misinterprets* those instructions, it does not change the law's substantive content but rather alters its intended application. In Section III.A, this Note argues that clarifications are valuable given the dialogic model between courts and legislatures.

polarization and a regularly divided government leading to gridlock,[42] clarifications could potentially give legislatures an unobtrusive and less politically fraught means to preserve the continuity of the law and simplify its interpretation by courts and agencies.[43] Governments also limit liability for takings or contract-impairment claims if they can alter a law's language without changing its substance.[44] Clarifications simulate a dialogue between lawmaking bodies and courts in which the former help direct the latter to the proper meaning of the law. This reflects a cooperative, interbranch model of lawmaking that supports the democratic legitimacy of the tripartite system of government.[45]

For instance, in 2011, Congress passed an amendment to the Clean Water Act "to clarify" the payments federal agencies had to make to use municipal water systems.[46] The bill added two criteria used to define "reasonable service charges" that federal entities were required to pay.[47] As a result, two cities in Washington sought unpaid fees from a federal agency, claiming that, as a clarification, the 2011 amendment applied to withheld payments from prior years.[48]

The amendment in question neither mentioned retroactivity nor backdated the payments. Congress did not provide any effective date. Instead, the plaintiffs' argument hinged on Congress's use of the phrase "to clarify" in the bill's subtitle.[49] According to the plaintiffs, the government was liable for back payments because the Clean Water Act *always* required the federal government to pay reasonable service charges.[50] The court agreed. The new criteria simply clarified the intent of the original law.[51]

---

42. *See* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 330–32 (2011).

43. Gridlock leads to more ambiguities, errors, and opportunities to exploit poor drafting to accomplish political ends, Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1829–30 (2015), augmenting the importance of legislative tools that can resolve those ambiguities. But gridlock can also incentivize strategic usage of clarifying legislation. *See id.* at 1828 (stating that the presumption against retroactivity may incentivize finding faster ways to regulate).

44. *See, e.g.*, Gen. Motors Corp. v. Romein, 503 U.S. 181, 190–91 (1992). For a more comprehensive explanation, see *infra* notes 176–177 and accompanying text.

45. *See* James J. Brudney & Ethan J. Leib, *Statutory Interpretation as "Interbranch Dialogue"?*, 66 UCLA L. REV. 346, 390–92 (2019).

46. Act of Jan. 4, 2011, Pub. L. No. 111-378, 124 Stat. 4128; United States v. City of Renton, No. C11-1156JLR, 2012 WL 1903429, at *6 (W.D. Wash. May 25, 2012).

47. Act of Jan. 4, 2011. The preexisting statute stated that every federal government division "shall be subject to, and comply with . . . the payment of reasonable service charges." However, until the passage of the amendment at issue in *Renton*, "reasonable service charges" had not been defined. *Renton*, 2012 WL 1903429, at *1 (quoting 33 U.S.C. § 1323(a) (2012)).

48. *Renton*, 2012 WL 1903429, at *2–3.

49. *See id.* at *6.

50. *Id.* at *3.

51. *Id.* at *8.

The word "clarify" has significant power and, at the extreme, can function as an end run around constitutional retroactivity restrictions. Yet in spite of the ubiquity and power of clarifying amendments, "'there is no bright-line test' for determining whether an amendment clarifies existing law."[52]

B. Liquilux, Landgraf, *and the Beginning of Clarification Doctrine*

The struggle to distinguish between substantive changes and clarifications is not new. Courts have been analyzing clarifying amendments for decades.[53] As doctrines governing retroactive civil laws proliferated, a doctrine of clarifications began to take shape.

The first move toward creating a modern doctrine of clarifications at the federal level came in the early 1990s. In *Liquilux Gas Corp. v. Martin Gas Sales*, a federal district court dismissed a Puerto Rican gas wholesaler's suit against a Texas oil corporation for lack of jurisdiction.[54] The Puerto Rican antitrust statute under which the suit was brought gave original jurisdiction over a "gas enterprise" to the Public Service Commission (PSC).[55] While the lawsuit was pending, the Puerto Rican legislature amended the statute to further define "gas enterprise" as "refineries, import companies, [and] distribution-wholesale companies."[56] The law as amended would have clearly given the PSC exclusive jurisdiction over the dispute.

The question in *Liquilux* was whether the alteration, which had no effective date, indicated a substantive change in the law such that the prior law *did not* give the PSC jurisdiction.[57] The First Circuit went in a new direction: the change in language was a clarification, "effective *ab initio*."[58] The amended language simply restated what the law had always been.

Approximately two years later, the Supreme Court addressed retroactivity in the context of *changes* to existing law in *Landgraf v. USI Film Prod-*

---

52. Leshinsky v. Telvent GIT, S.A., 873 F. Supp. 2d 582, 591 (S.D.N.Y. 2012) (quoting Levy v. Sterling Holding Co., 544 F.3d 493, 506 (3d Cir. 2008)).

53. *See, e.g.*, United States v. Yancey, 827 F.2d 83, 88 (7th Cir. 1987); Lee v. Bd. of Educ., 434 A.2d 333, 337 (Conn. 1980).

54. Liquilux Gas Corp. v. Martin Gas Sales, 979 F.2d 887, 888–89 (1st Cir. 1992).

55. *Id.*

56. *Id.* at 889 (quoting P.R. LAWS ANN. tit. 27, § 1002 (1986)).

57. *Id.* at 889–90. Interestingly, this argument is the opposite of Ashley Judd's argument in *Judd v. Weinstein*. Judd argued that the addition of movie producers evidenced an intent to clarify that such professions were *always* covered by the harassment statute. Judd v. Weinstein, No. 18-CV-05724, 2019 WL 926343, at *4 (C.D. Cal. Jan. 9, 2019), *rev'd*, 967 F.3d 952 (9th Cir. 2020). *See also* United States v. Sepulveda, 115 F.3d 882, 885 n.5 (11th Cir. 1997) ("[The legislature] may, however, 'amend a statute to *clarify existing law*, to correct a misinterpretation, or to overrule wrongly decided cases. Thus, an amendment to a statute does not necessarily indicate that the unamended statute meant the opposite.'" (emphasis added) (quoting Hawkins v. United States, 30 F.3d 1077, 1082 (9th Cir. 1994))).

58. *Liquilux*, 979 F.2d at 890 (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969)).

ucts.[59] In *Landgraf*, the Court held that a presumption against retroactive application was embedded in the interpretation of all civil laws.[60] The presumption does not block all retroactive legislation, and the Court even stated that such laws often serve "benign and legitimate purposes" including "correct[ing] mistakes."[61]

Landgraf laid out three steps for analyzing a potentially retroactive statute. First, the court looks for an express statement of the law's temporal reach—generally an effective date.[62] If there is no such statement, the court then asks "whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[63] If the court finds no retroactive effect, the law can be applied to preenactment events and the analysis ends.[64] But if the court finds a retroactive effect, it looks for a clear statement of retroactive intent.[65] A clear statement authorizing retroactivity governs because it assures the court "that [the enacting body] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."[66] Absent that assurance, the law can only apply *prospectively*.

But not all laws that can be applied to preenactment behavior are retroactive. To determine if the presumption against retroactivity applies, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment . . . [by evaluating] 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."[67]

Before *Landgraf*, a court could apply an amendment retroactively based on the mere label of "clarification." Such a label (or other indicia of clarifying intent) was potentially enough to make the law retroactive even if an amendment attached new legal consequences. In *Liquilux* for example, the First Circuit suggested that this analytical move was one of the options be-

59. 511 U.S. 244, 286 (1994).

60. *Landgraf*, 511 U.S. at 286; *see also* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

61. *Landgraf*, 511 U.S. at 268. Notably, there are types of laws that are exempted from *Landgraf*'s clear-statement-of-intent requirement. *See id.* at 273–75 (mentioning changes to prospective relief, jurisdiction, and procedural rules as examples of amending legislation that should often be applied retroactively even if the enacting body did not so specify).

62. *See* Beaver v. Tarsadia Hotels, 816 F.3d 1170, 1187 (9th Cir. 2016) (citing *Landgraf*, 511 U.S. at 280).

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

64. *See id.*

65. *Tarsadia Hotels*, 816 F.3d at 1188 (citing *Landgraf*, 511 U.S. at 280).

66. *Landgraf*, 511 U.S. at 272–73. *Accord* INS v. St. Cyr, 533 U.S. 289, 316 (2001).

67. *Landgraf*, 511 U.S. at 269–70.

fore them.[68] After *Landgraf*, however, clarifications needed to bypass the presumption against retroactive statutes on post-*Landgraf* terms.[69] A mere intent to clarify by the *subsequent* enacting body could not satisfy *Landgraf*'s requirement of a clear statement of intent.[70]

Despite predating *Landgraf*, *Liquilux* offered a solution that has been replicated by many courts: clarifications are simply effective ab initio as restatements of the law that do not attach any new legal consequences. This reasoning proliferated and, as a result, much of the modern law in the federal circuits has its origin in *Liquilux*.[71] Thus, clarifications became excluded from the strong presumption against retroactive application of civil statutes set forth in *Landgraf*.[72]

C. *The Clarification Doctrine in Federal Courts*

Several courts of appeals have encountered the clarifications issue. While all except the Federal Circuit have held that clarifications bypass the *Landgraf* analysis, there is no consistent test among the circuits for distinguishing clarifications from substantive changes. Instead, several threads of analysis have emerged. While these tests share substantial similarities, subtle but important differences that influence the courts' decisions remain.

In *Liquilux*, the First Circuit laid out multiple factors to distinguish clarifications from changes in the law: whether the amendment (1) fits within the existing language of the statute; (2) "clarifies an ambiguity" and, if so, "follows fast upon the ambiguity's discovery"; and (3) affirms a prior interpretation.[73] Despite being a pre-*Landgraf* case, the *Liquilux* analysis remains good law in the First Circuit.[74]

The First Circuit's approach is most notable for its use of two of the factors: the promptness of the amendment and the existence of a preexisting

68. *See* Liquilux Gas Corp. v. Martin Gas Sales, 979 F.2d 887, 890 (1st Cir. 1992) (stating that one option would be holding that "[t]he amendment was an alteration [of the law], but was intended to be, and could be, retroactive in effect").

69. *See Landgraf*, 511 U.S. at 265, 280.

70. *But see* Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp., 99 F. Supp. 2d 1123, 1133 (E.D. Cal. 2000) (arguing that repeated use of the word "'clarification' . . . is clear, unambiguous, and commanding evidence in favor of retrospectivity").

71. *Liquilux* was cited in many of the important cases discussed. *See infra* Section I.C. In addition to still being law in the First Circuit, it influenced the development of clarifications in the Third, Fourth, Seventh, and Eleventh Circuits. *See* Bogosian v. Woloohojian Realty Corp., 323 F.3d 55, 71 (1st Cir. 2003); Levy v. Sterling Holding Co., 544 F.3d 493, 506–07 (3d Cir. 2008); Brown v. Thompson, 374 F.3d 253, 259 (4th Cir. 2004); Middleton v. City of Chicago, 578 F.3d 655, 663–64 (7th Cir. 2009); Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1283–84 (11th Cir. 1999).

72. *See, e.g.*, Beaver v. Tarsadia Hotels, 816 F.3d 1170, 1186 (9th Cir. 2016) (describing clarifications as a separate line of analysis that does not implicate *Landgraf*).

73. 979 F.2d at 890.

74. *See* United States *ex rel.* Westmoreland v. Amgen, Inc., 812 F. Supp. 2d 39, 52 (D. Mass. 2011).

interpretation that the amendment affirms. The first criterion helps ensure that the legislature meant to clarify the prior law. If the amendment follows fast upon the discovery of an ambiguity, it is more likely that the legislative body wanted to weigh in before settled expectations built around erroneous interpretations. The second criterion assures the court that the amendment accurately restates the prior law. If the "clarification" affirms an interpretation already rendered by a court or agency, then it seems more likely to be a fair restatement of the original law and poses less risk of unfairness.

The Ninth Circuit created its own clarification doctrine in *Beverly Community Hospital Association v. Belsh* that was refined in *ABKCO Music, Inc. v. LaVere*.[75] Cases in the Ninth Circuit have generally looked for (1) language in the amendment that expressed an intent to clarify the law;[76] (2) legislative history that indicated the subsequent legislature's intent to clarify;[77] and (3) an ambiguity in the law that the amendment helped resolve.[78] Unlike the approaches taken by the other circuits, the Ninth Circuit's approach emphasizes subsequent legislative history to decide whether to uphold the amendment as a clarification. While subsequent legislative history can provide guidance to answer the primary inquiry of whether the second enacting body *intended* to clarify, it is "a hazardous basis for inferring" that the subsequent enactment merely restates the preenactment law.[79]

The most broadly cited approach to the clarifications problem was developed by the Eleventh Circuit in *Piamba Cortes v. American Airlines*, which has been adopted in the Fourth and Seventh Circuits as well.[80] The *Piamba* court identified several relevant factors, including (1) whether there was a preexisting ambiguity or conflicting interpretations among the courts; (2) whether there was a declaration of the subsequent enacting body's intent to clarify; and (3) whether the legislative history of the *amendment* is consistent with the prior law and *its* legislative history.[81] Subsequent courts have hewed closely to the three factors outlined by *Piamba*, often treating them as

---

75. Beverly Cmty. Hosp. Ass'n v. Belshe, 132 F.3d 1259, 1265 (9th Cir. 1997) ("Because Congress thus has such authority to *change* the law as to pending cases, its power to *clarify* the law—to confirm what the law has always meant—follows a fortiori."); ABKCO Music, Inc. v. LaVere, 217 F.3d 684, 689–91 (9th Cir. 2000).

76. *See Beverly*, 132 F.3d at 1265–66.

77. *See ABKCO*, 217 F.3d at 690–91.

78. *See Beverly*, 132 F.3d at 1265–66; *see also* Beaver v. Tarsadia Hotels, 816 F.3d 1170, 1185–87 (9th Cir. 2016) (following the doctrinal steps set forth in *Beverly* and *ABKCO*).

79. *See* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117–18 (1980) (quoting United States v. Price, 361 U.S. 304, 313 (1960)). While this remains the mode of analysis in the Ninth Circuit, the court seems to be more guarded about its use in recent cases. *See Tarsadia Hotels*, 816 F.3d at 1186–87.

80. 177 F.3d 1272 (11th Cir. 1999). The doctrinal analysis stemming from *Piamba* has been used in the Fourth and Seventh Circuits in addition to the Eleventh. *See* Brown v. Thompson, 374 F.3d 253, 259–61 (4th Cir. 2004); Middleton v. City of Chicago, 578 F.3d 655, 663–65 (7th Cir. 2009). It was also followed in an influential district court case in the Second Circuit. *See* Leshinsky v. Telvent GIT, S.A., 873 F. Supp. 2d 582, 589–91 (S.D.N.Y. 2012).

81. *Piamba*, 177 F.3d at 1283–84.

effectively comprising a three-factor test.[82] The Eleventh Circuit's most valuable contribution was in expressly requiring a comparison of the amendment's legislative history with the prior law's text and legislative history. Debates about legislative history aside, the *Piamba* approach reflects particular care in ensuring that the purported clarification is "consistent with a reasonable interpretation of the prior enactment."[83]

The Third Circuit took a different approach in *Levy v. Sterling Holding Co.*, outlining four factors that are particularly important for determining whether an amendment clarifies or changes:

> (1) whether the text of the old regulation was ambiguous, (2) whether the new regulation resolved, or at least attempted to resolve, that ambiguity, (3) whether the new regulation's resolution of the ambiguity is consistent with the text of the old regulation, and (4) whether the new regulation's resolution of the ambiguity is consistent with the agency's prior treatment of the issue.[84]

The Third Circuit was interpreting a regulation in *Levy*, but its analysis has been applied to statutes.[85] The court distinguished its own analysis not on the statute–regulation distinction but rather on its judgment that titles and responsiveness to court precedent were not very significant.[86] This differs significantly from the approaches taken by the other circuits. The Third Circuit did not explain *why* it considers titles to be less illuminating. While titles are often considered to be of limited use,[87] they are particularly helpful in clarification doctrine as a means of determining whether the subsequent legislature really intended to clarify the preexisting law.

The significant outlier among the courts of appeals is the Federal Circuit, which has no separate doctrine of clarifications and insists that all amending legislation must be analyzed under *Landgraf*.[88] In rejecting clarifications, the Federal Circuit described the binary of clarifications versus changes as "unhelpful."[89] It stated that the categorical exercise "provides little insight into whether a retroactive effect would result in a particular

82. *See, e.g.*, *Leshinsky*, 873 F. Supp. 2d at 591.

83. *Piamba*, 177 F.3d at 1284.

84. Levy v. Sterling Holding Co., 544 F.3d 493, 507 (3d Cir. 2008) (citations omitted).

85. *See* United States v. Meehan, 798 F. App'x 739, 741 (3d Cir. 2020); *Leshinsky*, 873 F. Supp. 2d at 590.

86. *See Levy*, 544 F.3d at 507 ("[W]e note that there are two other factors on which some courts of appeals rely that we do not find to be all that significant.").

87. *See, e.g.*, Brotherhood of R.R. Trainmen v. Balt. & Ohio R.R. Co., 331 U.S. 519, 528–29 (1947).

88. Princess Cruises, Inc. v. United States, 397 F.3d 1358, 1363 (Fed. Cir. 2005) ("We find the binary analysis—change or clarification—advanced by the government largely unhelpful."). The D.C. Circuit seems to recognize clarifications as a separate category that does not implicate retroactivity restrictions, but the D.C. Circuit's analysis is hard to distinguish from *Landgraf* given its examination of "settled expectations." *See* Cookeville Reg'l Med. Ctr. v. Leavitt, 531 F.3d 844, 846–49 (D.C. Cir. 2008).

89. *Id.*

case. . . . [A] clarification, in fact, 'changes the legal landscape,' because 'a precise interpretation is not the same as a range of possible interpretations.' "[90]

The concern of the Federal Circuit seems to be that clarifications, even if appearing benign, will nevertheless affect the preamendment choices of good-faith actors attempting to interpret the law. By narrowing to a precise interpretation, the enacting body captures preamendment behavior that may have been based on a reasonable interpretation of the prior language. The value of this approach is that it maximizes fair notice and minimizes the disruption of settled expectations.[91] And by minimizing legislatures' authority to issue interpretive directives to courts, the Federal Circuit's approach upholds a rigid separation of powers.[92]

II. COMPLEXITIES AND CHALLENGES IN CLARIFICATION DOCTRINE

Clarifications raise a number of questions, but two issues loom particularly large. The first issue is the separation of powers between courts and legislative bodies. Courts say what the law means. But clarifications potentially allow legislative bodies to encroach on that authority. Clarifications also present a means by which a subsequent body can surreptitiously change the meaning of the prior law without running into retroactivity problems. If judges are "faithful agents," to which legislature should they be faithful?[93] Section II.A explains this issue further, looking at how functionalist and formalist lenses enable or limit the use of clarifications.

The second issue is interpretation—which is to say, what *evidence* ought to be used to distinguish clarifications from changes? The various approaches in the courts of appeals respond to this issue. But different philosophies in statutory interpretation mean that the validity and utility of certain factors are up for debate. Moving toward any sort of consistent approach requires wrestling with the implications of textualist or intentionalist thinking. Since clarifications require interpretation across two laws, the original enactment and the purported clarification, those divides are exacerbated. Section II.B addresses this issue.

---

90. *Princess Cruises*, 397 F.3d at 1363 (quoting Health Ins. Ass'n of Am., Inc. v. Shalala, 23 F.3d 412, 423–24 (D.C. Cir. 1994)).

91. FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012).

92. *See generally* Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 867–70 (2009) (defining a statutory directive as an instruction from the legislature to judges about how to interpret a statute).

93. *See* Manning, *supra* note 41, at 5 ("In our constitutional system, it is widely assumed that federal judges must act as Congress's faithful agents.").

A. *Functionalist and Formalist Approaches to Clarifications*

Agencies, courts, and subsequent legislatures are always involved in an interpretive exercise, mapping their own understandings and intentions onto the words of prior legislatures. One issue that clarification doctrine raises is whether subsequent legislative bodies should play a role in interpreting prior enactments and, if so, how far that deference should extend.[94] Agencies, for instance, have been given substantial deference in interpreting their own regulations.[95] Although that deference does not permit agencies to trample *Landgraf* protections,[96] it raises the question of how much courts should trust the enacting body's declaration of the meaning of the original enactment.

When a court declares that an amendment clarifies a prior law, that court effectively ratifies the current legislature's understanding of a past legislature's enactment. When a court declares that an amendment changes a prior law despite the current legislature's intention to only clarify, that court is elevating its own understanding of the prior enactment above the understanding of the current legislature. In either instance, the court is forced to resolve the problem by deciding whose interpretation deserves greater deference: its own or that of the current legislature.[97]

This issue implicates the classic divide between formal and functionalist approaches to law. Formalists and functionalists disagree about how strictly courts should police the lines between the separate branches of government. Functionalists allow for greater overlap in the roles that the three branches play, emphasizing "the need to maintain pragmatic flexibility" in modern government; formalists attempt to strictly separate the branches in the exer-

---

94. *Compare* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." (quoting United States v. Price, 361 U.S. 304, 313 (1960))), *with* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380–81, 381 n.8 (1969) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."). *See also* W. Sec. Bank, N.A. v. Superior Ct. of L.A. Cnty., 933 P.2d 507, 514 (Cal. 1997) ("Ultimately, the interpretation of a statute is an exercise of the judicial power . . . . Indeed, there is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment when a gulf of decades separates the two bodies.").

95. Auer v. Robbins, 519 U.S. 452, 461 (1997).

96. *See* Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155–56 (2012); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208–09 (1988). *But see* Decker v. Nw. Env't Def. Ctr., 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part) (arguing that *Auer* deference encourages agencies to be vague, "so as to retain a 'flexibility' that will enable 'clarification' with retroactive effect").

97. For example, where long-standing interpretations by courts and agencies differ from the legislative amendment, those interpretations may be given greater deference than the legislature insofar as what qualifies as clarifying. *See* Beaver v. Tarsadia Hotels, 816 F.3d 1170, 1186–87 (9th Cir. 2016) ("Post-hoc labeling as a 'clarification' by bill supporters of what otherwise appears to be a change . . . is not controlling given the long interpretive history of the statute.").

cise of their core functions.[98] The separation of powers is a potent issue hiding within clarifications because clarifications direct the court toward a particular interpretation even though interpreting the law is a core function of the courts.[99]

A functionalist approach to the doctrine of clarifications gives more latitude to the later legislature by giving greater deference to its interpretive directives.[100] It assumes that because interpretation influences the substance of the law, legislative bodies must retain some power to address interpretive issues as a means of protecting the law's substance.[101] By allowing later legislative bodies to clarify previous enactments, the functionalist approach would give greater leeway to the interpretive directives of the legislature. A formalist approach, in contrast, would significantly diminish or reject the subsequent legislature's power to clarify. Since interpretive directives encroach on the courts' core function, a strictly formalist approach would not accept a lawmaking body's efforts to direct judicial outcomes.[102] While the formalist approach would not dispense with clarifications entirely—a court, in theory, could still find that the amendment restates the law without considering what the subsequent legislature thinks or intends—it would eliminate the subsequent legislature's prerogative to "declare" the meaning of the prior law.

A functionalist approach has the substantial advantage of allowing legislatures to adapt statutory language to contemporary circumstances without running afoul of *Landgraf*. Ashley Judd argued for this approach.[103] When the original California legislature referred to "professional relationships," it may well have meant to include a relationship between an actress and a movie producer who guides her career and enables her access to opportunities.[104] The original law defined professional relationships as "including, but not limited to" a list of twenty examples.[105] The legislative report summarized the subsequent amendment as "almost certainly declaratory of existing

98. *See* Jellum, *supra* note 92, at 854–55.

99. *Id.* at 881 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); *see id.* at 840–41.

100. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 11–12 (1994) ("Because it is hard to enact statutes, the ones that are enacted have to last a long time. As they encounter unanticipated circumstances, the statutes are bound to change. . . . The sequential and hierarchical structure of statutory interpretation means . . . *that the expectations of the current legislature might be more important than those of the enacting one*." (emphasis added)).

101. Bernard W. Bell, *Metademocratic Interpretation and Separation of Powers*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 28 (1999).

102. Jellum, *supra* note 92, at 890–92.

103. *See supra* notes 6–10 and accompanying text.

104. The Ninth Circuit eventually overruled the District Court and held that the pre-amendment law covered Judd and Weistein's relationship because it was "substantially similar" to the examples given in the statute. But the court stopped short of holding that producer-actor relationships were covered in general. *See* Judd v. Weinstein, 967 F.3d 952, 959 (9th Cir. 2020).

105. CAL. CIV. CODE § 51.9(a)(1) (West 2000) (amended 2019).

law."[106] The complexities of drafting and the natural shortcomings of human foresight likely meant that the original legislature did not realize that such relationships would be excluded from the law, despite the intent to include them. Preventing the amendment of a later legislature from applying retrospectively would impose the impossible task of being perfectly clear on the prior legislature.[107]

This approach has intuitive appeal because it seems to acknowledge the human limitations of legislators and reflect the realities of human communication, where literal words must shift to accommodate context without altering their fundamental meaning. A functionalist approach to clarifications could help legislatures respond to rapidly changing culture (and language) while preserving the continuity of the law.[108] Consider, for example, the clarification at issue in *ABKCO Music, Inc. v. LaVere*.[109] The Ninth Circuit had previously created a circuit split and contradicted the prevailing interpretation of a provision in the Copyright Act in *La Cienega Music Co. v. ZZ Top*.[110] After *La Cienega*, Congress amended the statute to effectively overrule the interpretation adopted by the Ninth Circuit.[111] Assume that the later Congress's interpretation of the statute was correct. Then, in overruling the Ninth Circuit's holding via clarification, Congress preserved the meaning of the law without creating a disjunctive gap between the pre-*La Cienega* law and the post-clarification law.[112] Allowing subsequent legislatures to clarify endows them with a tool to protect the law's substantive meaning in an unpredictable interpretive conversation with courts.[113]

However, there are issues with the functionalist approach. *Landgraf* recognized that retroactive legislation has a "potential for disruption or unfairness."[114] Deference to interpretive directives from legislative bodies already encroaches on the courts' function as interpreters. And greater deference to

106. S. RULES COMM., SENATE FLOOR ANALYSES OF S.B. 224, 2017–2018 Sess., at 4 (Cal. 2018).

107. *See* Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism [https://perma.cc/7TBT-5AAB] ("Ignoring the limitations of foresight . . . the textual originalist demands that the legislature think through myriad hypothetical scenarios and provide for all of them explicitly rather than rely on courts to be sensible.").

108. *See* Jellum, *supra* note 92, at 881–82 ("When the legislature defines (or even redefines) a term, the legislature's act is 'part of the ongoing dialogue between [the] legislature and court over the original legislation's meaning.'" (quoting William D. Araiza, *The Trouble with* Robertson*: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1064 (1999))).

109. 217 F.3d 684 (9th Cir. 2000).

110. *ABKCO Music*, 217 F.3d at 688–90 (describing the circuit split created by *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950 (9th Cir. 1995)).

111. *Id.* at 690.

112. *See id.* at 691.

113. *See* Brudney & Leib, *supra* note 45, at 391.

114. Landgraf v. USI Film Prods., 511 U.S. 244, 268 (1994).

the subsequent enacting body's declared meaning entails a greater risk of unfairness. Deference does not seem so problematic when the enactments may be separated by a session or two, but when the original enactment and amendment are separated by several years or even decades, courts are right to become more suspicious of the ability to clarify.[115] If the legislature changes the law under the guise of a clarification, such an action would go against the retroactivity principle found throughout the common law.[116] If we assume that the prior legislature *did not intend* the subsequent clarification, then the functionalist approach privileges the subsequent legislature and its "clarification" over the prior legislature and its original law.

The advantages of a functionalist approach to interpreting clarifications may not seem worth the risks, especially since legislators have another pathway to retroactivity beyond the clarification doctrine.[117] As a result, some prefer a formalist approach.[118] In practice, a court employing the formalist approach would look suspiciously at the legislative body's efforts to influence its interpretive prerogative. A formalist approach presumes that the prior legislature was able to convey what it meant in the original text and resolves ambiguities against a purported clarification.[119] Such an approach has two significant benefits: it closely guards the interpretive function of the courts and maximizes fair notice for regulated persons, at least among courts that accept clarification doctrine.

Beaver v. Tarsadia Hotels provides an example of the formalist approach. At issue in *Tarsadia Hotels* was an amendment stating in its title that the law sought "to clarify how the [earlier law] applies to condominiums."[120] Multiple supporters of the bill stated that the amendment was meant to clarify the scope of the original enactment.[121] Despite the title and legislative history indicating that the amendment was a clarification, the Ninth Circuit rejected that interpretation: "Post-hoc labeling as a 'clarification' by bill supporters of what otherwise appears to be a change . . . is not controlling given

115. *See* Judd v. Weinstein, No. 18-CV-05724, 2019 WL 926343, at *4 (C.D. Cal. Jan. 9, 2019) ("[T]he views of the 2018 Legislature on the meaning of a statute enacted in 1999 are surely entitled to . . . less weight."), *rev'd*, 967 F.3d 952 (9th Cir. 2020).

116. *See Landgraf*, 511 U.S. at 270; *see also* Araiza, *supra* note 108, at 1064 ("[The interpretive quality of declaratory statutes] is especially pronounced in the case of redefinitions, which have the effect of altering the reach of the statute without purporting to change its substance.").

117. Under *Landgraf* a statute can be made retroactive through an "express command" by the legislature. 511 U.S. at 280.

118. *See* Romero, *supra* note 21, at 223.

119. For an example of what a formalist approach might look like, see *Beaver v. Tarsadia Hotels*, 816 F.3d 1170, 1186–87 (9th Cir. 2016) (holding that the amendment changed, rather than clarified, the law, despite being described as a clarification by individual members of Congress and using the word "clarify" in the bill title).

120. *Id.* at 1187.

121. *Id.* at 1186–87.

the long interpretive history of the statute."[122] *Tarsadia Hotels* does not represent a strictly formalist approach to clarifications because the court did not wholly disregard the subsequent enactment but simply said that its label and legislative history were insufficient to overcome other factors suggesting a change in the law. Even so, the case does provide an example of a court resisting the subsequent legislature's authority to dictate the court's interpretation.

By rejecting the ability of subsequent legislative bodies to have a voice in the interpretive process, a strict formalist doctrine of clarifications demands that legislatures get it right on the first try. A formalist approach would impose an unrealistic standard of clarity in the original enactment. It would also put a substantial burden on enacting bodies to quickly enact a law expressly covering a novel set of circumstances or overrule an unfavorable interpretation in order to preserve legal continuity.[123] Statutes are frequently, if not always, the result of compromises and last-minute negotiations that can complicate the text ultimately adopted.[124] The nature of legislating, especially at the national level, turns on so many political compromises that it often crawls at a snail's pace, preventing a legislature from overruling a judicial or administrative decision before others follow suit.[125]

Clarifications should be seen as "the two branches work[ing] in partnership to accomplish the legislative agenda," rather than an encroachment on core judicial functions, acknowledging the inherent impossibility in being perfectly clear on the first try.[126] Courts should still impose guardrails, but those guardrails should not impose rigidity on democratic institutions that require flexibility to engage in a meaningful conversation with the courts.[127]

B. *Clarifying the Interpretive Problems*

The second major issue presented by clarification doctrine is what evidence ought to be used to decide whether the amendment restates the prior law. Clarifications bypass *Landgraf* analysis because they do not attach any new legal consequences to prior events.[128] To distinguish between an

122. *Id.*

123. *Cf.* Bell, *supra* note 101, at 18–20.

124. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons* (pt. 1), 65 STAN. L. REV. 901, 934 (2013) (discussing how the political interests involved in crafting legislation can lead to redundancy and the inclusion of specific phrases desired by interest groups).

125. *See* Leshinsky v. Telvent GIT, S.A., 873 F. Supp. 2d 582, 593–95 (S.D.N.Y. 2012) (describing conflicting ALJ decisions interpreting Sarbanes-Oxley text over several years prior to the clarification).

126. Jellum, *supra* note 92, at 882.

127. *See infra* Section III.B.

128. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 269–70 (1994) (holding that to determine if the presumption against retroactivity applies, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment"); Beverly

amendment that changes the law and one that clarifies requires asking first if the legislature intended for the amendment to merely clarify the law,[129] and second if the amendment *functions* as a restatement of the prior law.[130] To make matters worse, two laws are involved in the analysis: the original statute and the new amendment. Answering the second question requires interpreting the original enactment and discerning its relationship to the later amendment.[131] In other words, clarifications require the court to conduct two statutory analyses simultaneously.

The first question asks whether the subsequent legislature was trying to clarify the existing law. Because all statutory-interpretation cases are filtered through the arguments of self-interested litigants, the court needs objective criteria to decide whether the amendment was even meant to clarify the earlier statute. The second, and harder, question goes to substance. An amendment may announce itself clearly as a clarification even though it substantively changes the law—a change in sheep's clothing.[132] But even when an amendment significantly alters the original language, the alteration does not necessarily indicate that the amendment changes the law.[133] Thus courts need objective criteria to answer the second question as well. The diversity of approaches makes that challenging.

For example, consider the longstanding debate over legislative intent. Not only is legislative intent often used in clarification doctrine, but it is also expressly part of the analysis in cases decided in the Fourth, Seventh, Ninth, and Eleventh Circuits.[134] Legislative history can be very helpful to answering the preliminary question of whether the enacting body truly meant to clari-

---

Cmty. Hosp. Ass'n v. Belshe, 132 F.3d 1259, 1266 (9th Cir. 1997). *But see* Princess Cruises, Inc. v. United States, 397 F.3d 1358, 1363 (Fed. Cir. 2005) (declining to recognize distinction between clarifications and changes regarding retroactivity).

129. *See* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.").

130. *Cf.* Araiza, *supra* note 108, at 1064 (suggesting that statutes that redefine terms should relate back to the passage of the original enactment "[i]f such interpretive acts reflect plausible readings of the original statute").

131. *See* Leshinsky v. Telvent GIT, S.A., 873 F. Supp. 2d 582, 592–601 (S.D.N.Y. 2012) (attempting to establish legislative intent of both the Dodd-Frank Act's amendments to the Sarbanes-Oxley Act *and* the original intent of Sarbanes-Oxley itself).

132. *See* Pope v. Shalala, 998 F.2d 473, 483 (7th Cir. 1993) ("In determining whether a rule is a clarification or a change in the law, the intent and interpretation of the [enacting body] . . . is certainly given great weight. They are not, however, dispositive. If they were, an [enacting body] could make a substantive change merely by referring to a new interpretation as a 'clarification.'"), *overruled on other grounds by* Johnson v. Apfel, 189 F.3d 561 (7th Cir. 1999).

133. Brown v. Thompson, 374 F.3d 253, 259 (4th Cir. 2004) (citing Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1283 (11th Cir. 1999)).

134. *See supra* Section I.C.

fy.[135] But even the usage of legislative history in this context may be fraught absent other text-based corroborating evidence. Legislative intent is a legal fiction;[136] legislative bodies comprising dozens if not hundreds of members "will lack collective intent on any question worth worrying about."[137] Even where the legislative history seems to indicate that the legislature intended to clarify the law, danger lurks where that intent is not reflected in the text itself. Courts that put great weight on legislative history may find themselves not only ignored by textualist judges[138] but also duped by crafty legislators.

The problem with a purely text-based approach, however, is that clarification doctrine exists because laws are not always easily intelligible. The plain text of a statute cannot always reveal the intent of the enacting body.[139] And if the words on the page are the only way to infer legislative intent,[140] then definitively establishing the meaning of particularly vague statutory text becomes particularly challenging.[141] Courts regularly come to different interpretations of the same statute, including when conducting clarification analysis, undermining the notion that courts can simply look to the text to determine the enacting body's intent to clarify.[142] To illustrate the problem of interpretation, this Note will discuss three indicia of intent to clarify—legislative history, titles, and response to changing circumstances.

For example, multiple courts reached different outcomes when interpreting a Dodd-Frank Act (DFA) amendment to the Sarbanes-Oxley Act (SOX) for exactly this reason. SOX protected whistleblowers reporting fraud to the federal government from retaliation by their employers.[143] The DFA amendment clarified that those protections extended to employees within wholly owned subsidiaries of companies that were regulated by SOX.[144] There was one serious hurdle: the amendment was not labeled as a clarifica-

135. *See, e.g.*, *Leshinsky*, 873 F. Supp. 2d at 592 (noting the terms "make clear" and "clarification" in the Senate report accompanying the purported clarification).

136. Gluck & Bressman, *supra* note 124, at 915.

137. John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1912 (2015).

138. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 397 (2012).

139. *See, e.g.*, Yates v. United States, 574 U.S. 528, 531–32 (2015).

140. *See* SCALIA & GARNER, *supra* note 138.

141. *See, e.g.*, Beverly Cmty. Hosp. Ass'n v. Belshe, 132 F.3d 1259, 1266 (9th Cir. 1997).

142. *See* Cookeville Reg'l Med. Ctr. v. Leavitt, 531 F.3d 844, 848 (D.C. Cir. 2008) ("We believe the pre-Act law was not as clear as the Ninth Circuit thought it to be."); Messenger v. Rice, No. CV-05-0053, 2006 WL 276933, at *7 (E.D. Wash. Jan. 31, 2006) (finding the Eleventh Circuit's interpretation of the same statute to be "aberrational" without giving reasoning).

143. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, sec. 806, § 1514A, 116 Stat. 745, 802–04 (2002).

144. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 929A, 124 Stat. 1376, 1852 (2010) (amending 18 U.S.C. § 1514A to expressly cover the employees of "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company").

tion.[145] In *Leshinsky v. Telvent GIT, S.A.*, a federal district court undertook an extensive analysis of the legislative histories and purposes of both bills before concluding that the DFA amendment clarified SOX and could be applied to pre-DFA situations.[146] Another court came to the opposite conclusion in *Mart v. Gozdecki, Del Giudice, Americus & Farkas LLP*, repeatedly criticizing the *Leshinsky* court for its failure to undertake a "plain language" analysis of DFA.[147] According to the *Mart* court, because the amendment did not explicitly label itself a clarification, the *Leshinsky* court could hardly hold it as such.[148]

And yet titles themselves are controversial. The same courts that look to legislative history also generally look to the title of the amending section as an important indication of intent to clarify.[149] For the courts following the Eleventh Circuit's approach in *Piamba*, a declaration of intent to clarify provides substantial evidence that the subsequent legislative body intended the amendment as a clarification rather than a change.[150] This factor may help determine the first question—whether the legislature intended to clarify the existing law.

The Ninth Circuit goes beyond that, however, by implying that the subsequent legislature's label can affect the interpretation of the prior law.[151] Thus, the Ninth Circuit seems to allow declarations by the subsequent legislature to inform the *second*, *substantive* question. The Ninth Circuit is willing to defer to the legislature's interpretation of the original statute given "the extraordinary difficulty that the courts have found in divining the intent of the original [legislature]."[152]

While the Ninth Circuit gives great weight to the title of an amendment, the Third Circuit's approach expressly devalues titles or captions as meaningful indications of the enacting body's intent to clarify.[153] The court may be concerned that labeling a substantive change in the law as a clarification

145. Leshinsky v. Telvent GIT, S.A., 873 F. Supp. 2d 582, 592 (S.D.N.Y. 2012).

146. *Id.* at 591–601.

147. Mart v. Gozdecki, Del Giudice, Americus & Farkas LLP, 910 F. Supp. 2d 1085, 1095 (N.D. Ill. 2012).

148. *Id.* at 1094.

149. *See, e.g.*, Baldwin v. City of Greensboro, 714 F.3d 828, 838 (4th Cir. 2013); Brown v. Thompson, 374 F.3d 253, 259 (4th Cir. 2004).

150. *Brown*, 374 F.3d at 259.

151. *See* Beverly Cmty. Hosp. Ass'n v. Belshe, 132 F.3d 1259, 1265 (9th Cir. 1997) ("It has been established law since nearly the beginning of the republic . . . that congressional legislation that thus expresses the intent of an earlier statute must be accorded great weight." (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367, 381–82, 381 n.8 (1969))). *But see* notes 120–122 and accompanying text. *Tarsadia Hotels* does not seem to reject the proposition that the subsequent legislature's views are entitled to deference but rather bases its decision on other factors. *See* 816 F.3d 1170, 1186–87 (9th Cir. 2016).

152. *Beverly*, 132 F.3d at 1266.

153. Levy v. Sterling Holding Co., 544 F.3d 493, 507 (3d Cir. 2008) (citing United States v. Marmolejos, 140 F.3d 488, 493 (3d Cir. 1998)).

could be a sneaky end run around *Landgraf* that results in retroactive application of new law.[154] Courts are concerned that the meaning of the original law might be subverted by the alleged clarification of a subsequent legislature.[155] By approaching the subsequent legislature's labels with skepticism, the court protects the law from unprincipled actions by the later legislature.

This problem can be avoided by ensuring that the amendment "must also comport with other attributes of 'clarifying' legislation to avoid being a substantive change in the law."[156] While the Third Circuit is right to be cautious in putting great weight on the labeling of the amendment, the already-challenging problems posed by clarifications makes it unwise to wholly dispense with a given piece of objective evidence.

Courts also take different approaches to amendments that clearly respond to new events. S.B. 242 explicitly responded to sexual harassment and assault scandals in Hollywood, and the court in *Judd v. Weinstein* assumed that this meant that the law was likely changed.[157] Additionally, both the amendments in question in *Tarsadia Hotels* and *Leshinsky* responded to the 2008 financial crisis.[158] But, in *Tarsadia Hotels*, the Ninth Circuit viewed the amendment with suspicion, inferring that altering the law's language in response to new circumstances indicated that the law was changed while being labeled "post hoc" as a clarification.[159] On the other hand, the *Leshinsky* court drew no such inference. The *Leshinsky* court found that the fact that DFA responded to remarkably similar circumstances as the original enactment in SOX weighed *in favor* of the amendment being clarifying.[160] Courts worry that certain political environments pressure the legislature into capturing preenactment behavior without arousing political or legal scrutiny that would accompany an expressly retroactive law. The response is that clarifying legislation is not changing the law to fit new situations but rather adapting the language to explicitly handle interpretive ambiguities brought to light by contemporary events. But even this response reveals the need for rules and guidance to break the circularity.

---

154. Pope v. Shalala, 998 F.2d 473, 483 (7th Cir. 1993) (stating that if the stated intent of the later enacting body were given dispositive weight, it "could make a substantive change merely by referring to a new interpretation as a 'clarification' "), *overruled on other grounds by* Johnson v. Apfel, 189 F.3d 561 (7th Cir. 1999).

155. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980).

156. Middleton v. City of Chicago, 578 F.3d 655, 664 (7th Cir. 2009). *Accord* Baldwin v. City of Greensboro, 714 F.3d 828, 838 (4th Cir. 2013).

157. Judd v. Weinstein, No. 18-CV-05724, 2019 WL 926343, at *4 (C.D. Cal. Jan. 9, 2019), *rev'd*, 967 F.3d 952 (9th Cir. 2020).

158. *See* Beaver v. Tarsadia Hotels, 816 F.3d 1170, 1186 (9th Cir. 2016); Leshinsky v. Telvent GIT, S.A., 873 F. Supp. 2d 582, 588 (S.D.N.Y. 2012); *Wall Street Reform: The Dodd-Frank Act*, WHITE HOUSE, https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform [https://perma.cc/WN69-625U].

159. 816 F.3d at 1186–87.

160. *Leshinsky*, 873 F. Supp. 2d at 591–601.

Clarifications analysis, as it has developed, still lacks clear principles and objective indicators that would serve legislators, agencies, and judges.[161] We need a better doctrine.

III. TOWARD A CONSISTENT DOCTRINE OF CLARIFICATIONS

Given these challenges, why allow clarifying amendments at all? And if we do have a doctrine of clarifications, what should it look like? Section III.A discusses the purpose of the clarification doctrine and argues that it is a useful tool for legislative bodies. Section III.B argues for specific criteria to be used by courts in making the distinction, namely, a declaration of intent, an identifiable ambiguity in the original law, and consideration of the effect on prior interpretations.

A. *The Purpose of Clarification Doctrine*

Clarification doctrine poses risks to settled expectations and the separation of powers. The Federal Circuit manages without clarifications, at least as an exclusion to *Landgraf*.[162] And, since enacting bodies have the power to make laws retroactive under *Landgraf* by including a clear statement of intent, it's not obvious that clarifications should allow a second bite at the retroactivity apple. So why is the doctrine worth it?

In declining to recognize a doctrine of clarifications at all, the Federal Circuit reasoned that clarifying amendments always lead to new legal consequences simply by limiting the range of possible interpretations.[163] By narrowing meaning to a "precise interpretation," the enacting body captures preamendment behavior that may have been based on a reasonable interpretation of the prior language.[164] Therefore, rejecting the clarification doctrine maximizes fair notice and minimizes the disruption of settled expectations.[165] It would also uphold a rigid separation of powers, supporting a formalist approach by limiting the legislature's encroachment.

And yet, the Federal Circuit is wrong. Clarifications should not always go through the *Landgraf* analysis to be given their proper scope. Such an approach equates an individual's personal interpretation of the law with an established (but erroneous, in the eyes of the legislature) interpretation of a

161. Lisa Schulz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons* (pt. 2), 66 STAN. L. REV. 725, 774–75 (2014) (finding that a majority of congressional staffers would change drafting practices to conform to court interpretive canons *if* those canons were applied *consistently*).

162. Princess Cruises, Inc. v. United States, 397 F.3d 1358, 1363 (Fed. Cir. 2005).

163. *Id.* (quoting Health Ins. Ass'n of Am., Inc. v. Shalala, 23 F.3d 412, 423–24 (D.C. Cir. 1994)).

164. *Id.*

165. *See* FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012).

court or agency.[166] Courts and agencies have authority to interpret and create law, and clarification doctrine must account for disruption where a clarifying amendment would "literally" change the law in a jurisdiction. To gesture at such protection for individuals' "range[s] of possible interpretations," however, is a step too far.[167]

The Constitution already provides void-for-vagueness protections where laws are unintelligible.[168] Protections rarely exist for individuals' mere *bad interpretations* of the law.[169] Reading and understanding law is always an interpretive exercise and an exercise that entails risks. *Landgraf*'s retroactivity limitations are about the law itself, not protecting individuals' variant prior interpretations of the law.[170] The Supreme Court in *Landgraf* wanted to prevent legislative bodies from changing the law without expressing a firm intent to do so.[171] The Court's concern was rooted in "settled expectations"[172] and "vested rights."[173] No one has a vested right to an erroneous interpretation of the law, even if made in good faith.

Requiring every amendatory act to go through the *Landgraf* analysis would be a solution worse than the problem it addresses. Such a requirement would do three things. First, the requirement would impose on subsequent legislatures any interpretations of the law that, if declared erroneous, might "change[] the legal landscape."[174] The inquiry would shift from what the law *always was* to what the law has since been taken to mean by good-faith actors. Consideration of private actors' reliance on their own interpretations would have the effect of "locking in" a particular interpretation of the law and incentivizing private actors to use the courts rather than the political

166. Where "erroneous" interpretations are grounded in rulings from courts or administrative rules, however, the purported clarification should be treated with less deference. *See* Section III.B.

167. *Princess Cruises*, 397 F.3d at 1363 (quoting Health Ins. Ass'n of Am. v. Shalala, 23 F.3d 412, 423–24 (D.C. Cir. 1994)).

168. Void-for-vagueness doctrine tends to be more lenient in the construction of civil statutes than criminal. Its protections still apply, however. *See* Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497–99 (1982).

169. *See* Barlow v. United States, 32 U.S. (7 Pet.) 404, 411–12 (1833) ("Mistakes in the construction of the law, seem as little intended to be excepted . . . as accidents in the construction of the law."); *see also* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 582 n.5 (2010).

170. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 269–70 (1994) ("A statute does not operate 'retrospectively' merely because it . . . upsets expectations based in prior law." (citation omitted)).

171. *See id.* at 280.

172. *Id.* at 270.

173. *Id.* at 268–69 (quoting Soc'y for the Propagation of Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156)).

174. Princess Cruises, Inc. v. United States, 397 F.3d 1358, 1363 (Fed. Cir. 2005) (quoting Health Ins. Ass'n of Am., Inc. v. Shalala, 23 F.3d 412, 423 (D.C. Cir. 1994)).

process to impose their preferred meaning.[175] It would be one thing for a court to say that California's sexual harassment law did not apply to Harvey Weinstein. It would be another to accept *Weinstein's* interpretation as limiting the legislature.

Second, a broad *Landgraf* requirement could have the perverse effect of suggesting that the law was, in fact, changed. exposing the government to more lawsuits alleging Takings, Due Process, or Contract Clause violations. When a law or regulation diminishes the use or value of private property, the government may be liable to compensate the owner for the reduced value under regulatory-takings jurisprudence.[176] Similarly, if a law impairs preexisting rights or duties, the government may be enjoined from enforcing that law.[177] If the amendment merely clarifies, however, then it does not cause either a diminution in property value or an impairment of contract rights. That value, right, or obligation never existed to begin with. The problem is that courts are not sure what to infer from an amended law. In *Weinstein v. Judd*, the court stated that the amendment may itself be evidence that the meaning of the law had been altered.[178] But other courts warn against this inference.[179] Running every purported clarification through *Landgraf* analysis would lead courts to assume that the act of amending signals an intention to change the law, further increasing the likelihood that legislative bodies will be locked in by private actors' interpretations of the law. A desire to

175. *Cf.* Jon Connolly, Note, Alaska Hunters *and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 COLUM. L. REV. 155, 173–74 (2001) (describing a similar dynamic in the agency law context).

176. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 325–26 (2002). Two factors may combine to make regulatory-takings claims at the federal level particularly burdensome going forward. The first is the indefinite nature of the regulatory-takings test. *See* Danaya C. Wright, *A Requiem for Regulatory Takings: Reclaiming Eminent Domain for Constitutional Property Claims*, 49 ENV'T L. LEWIS & CLARK L. SCH. 307, 317–18 (2019) (describing the "shifting sands on which regulatory takings doctrine rests"). The second, recent development is the elimination of the state-remedy exhaustion requirement to pursue a takings claim in federal court. *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2167 (2019). These two aspects of takings jurisprudence will lead to a proliferation of complex, protracted takings litigation in federal courts in the coming years, raising the stakes for clarifying legislation.

177. The Contract Clause prevents the impairment of *contractual* rights or duties by state law. *See, e.g.*, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 249–50 (1978). Amendments that clarify the criteria for a law's applicability would be particularly easy targets for such claims. *Cf. supra* notes 46–51 and accompanying text. The Due Process Clause lacks bite in this context because *Landgraf* made clear that retroactive lawmaking is constitutionally permissible. *See supra* note 61 and accompanying text; *see also* United States v. Carlton, 512 U.S. 26, 30–31 (1994) (stating that retroactive economic regulations need only have a rational basis to survive due process analysis). Therefore the Due Process Clause is more of a theoretical limitation on retroactivity than a functional one.

178. No. 18-CV-05724, 2019 WL 926343, at *4 (C.D. Cal. Jan. 9, 2019) ("[T]he fact that the Legislature found it necessary to amend the statute . . . is evidence that it may have had some doubts as to whether these relationships were covered by existing law."), *rev'd*, 967 F.3d 952 (9th Cir. 2020).

179. *See, e.g.*, United States v. Sepulveda, 115 F.3d 882, 885 n.5 (11th Cir. 1997); Callejas v. McMahon, 750 F.2d 729, 731 (9th Cir. 1984).

avoid litigation (and possible compensation) would disincentivize minor but otherwise valuable clarifying amendments, undercutting the value in retrospective lawmaking.

Finally, requiring every clarifying act to satisfy *Landsgraf* would be a significant burden to place on legislators and already-lengthy bills. At the extreme, legislatures, wary of the possibility that even their rote textual amendments could be interpreted as causing a retroactive "effect," would be incentivized to add express statements of retroactive intent throughout the bill.[180] Most clarifying amendments make mundane changes to the law that are unlikely to ever be litigated.[181]

The arguments in favor of a clarification doctrine are more compelling. The most fundamental is that we want clear laws. Since the legislature is the body responsible for the law's *substance*, clarifications preserve continuity in the law's substantive meaning while accepting the fallibility of courts as interpreters.[182] Clarifications allow legislative bodies and courts to mutually refine legal texts so that laws more successfully communicate their substantive content.[183] Circuit splits, for example, can also upset settled expectations and prevent fair notice where a party that travels or does business across multiple jurisdictions is subject to divergent interpretations of the same law.[184] By clarifying the law's meaning, Congress can improve notice and settle expectations by providing uniformity.

Moreover, clarifying amendments better reflect actual human communication. To better express their ideas in speech and writing, people edit, revise, add specific examples, or eliminate confusing words. Revisions that seem to conveniently change the original statement are often viewed with suspicion.[185] Clarification doctrine transposes this common human dynamic onto the highly complex field of debating and drafting legislation and trusts courts to be able to tell the difference.

Legislatures also have a significant foresight problem. Legislators cannot safely predict how a law will be interpreted or ensure that those interpreta-

180. Some bills already do this as a failsafe, making their clarifying amendments comply with *Landgraf*. *See, e.g.*, S. 1703, 116th Cong. § 206(c) (2019).

181. *See, e.g.*, John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 913, 132 Stat. 1636, 1923 (2018) (amending "military strategic and operational risks" in 10 U.S.C. § 153(b)(1)(d)(iii) to "military risk").

182. *See supra* notes 108–113 and accompanying text.

183. *See* Brudney & Leib, *supra* note 45, at 391.

184. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 855–56 (1994).

185. *See, e.g.*, Quinta Jurecic & Benjamin Wittes, *What's So Hard to Understand About What Trump Has Said?*, ATLANTIC (Apr. 21, 2020), https://www.theatlantic.com/ideas/archive/2020/04/trump-contains-multitudes/610300/ [https://perma.cc/A3S8-JY77]; Timothy Noah, *Bill Clinton and the Meaning of "Is,"* SLATE (Sept. 13, 1998, 9:14 PM), https://slate.com/news-and-politics/1998/09/bill-clinton-and-the-meaning-of-is.html [https://perma.cc/B8UX-6HSV].

tions will hew closely to the law's intended meaning.[186] Recognizing a clarification doctrine in the courts ultimately empowers the legislature to answer the range of interpretations that a law may inspire without creating a "new" law with each revision. Courts have long extended laws to applications that may not have been anticipated at the time.[187] Clarification doctrine gives the legislature a means to weigh in on extensions or contractions in the application of existing law without causing a break in the continuity of the law's substantive meaning. This function of clarifications is particularly important at the federal level where only the Supreme Court and Congress can definitively resolve interpretive divides among the fifty states and thirteen circuits.[188] Given the resource constraints of a nine-member body presiding over more than 300 million people, the Supreme Court is not well situated to decide every interpretive question that arises out of federal law.

Finally, clarification doctrine already addresses fair-notice concerns. In each of its forms, the current doctrine has guardrails to limit the enacting body's amendment to the scope of the original law.[189] The distinction between a clarification and a change, in a vacuum, *is* unhelpful and conclusory. But the point of the doctrine is not "[m]erely categorizing rules or applications of rules" but deciding what the law was and whether the legislature has changed it.[190] Since only changes implicate *Landgraf*, to subject every amendment to *Landgraf* analysis is to apply the wrong tool. The tests proposed by other circuits have given guidance on how to navigate the ambiguity. However, clarification doctrine does have a consistency problem. The next Section provides factors that can fulfill the doctrine's goals while also curbing its significant risks.

B. *Clarifying the Doctrine of Clarifications*

Statutory interpretation is sometimes thought of as a conversation between legislatures and courts.[191] Courts interpret laws passed by legislatures according to directions given by the legislature.[192] When necessary, the legislature can correct or endorse the courts' interpretations through further leg-

186. *Cf.* Missouri v. Holland, 252 U.S. 416, 433 (1920) ("[W]e must realize that [the words of the law] have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.").

187. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998) (extending Title VII protections to same-sex harassment despite it not being "the principal evil Congress was concerned with when it enacted Title VII").

188. *See* Braxton v. United States, 500 U.S. 344, 347–48 (1991).

189. *See supra* Section I.C.

190. Princess Cruises, Inc. v. United States, 397 F.3d 1358, 1363 (Fed. Cir. 2005).

191. *See generally* Brudney & Leib, *supra* note 45.

192. *See* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982).

islation.[193] Clarification doctrine has an important role to play within this conversation, allowing legislatures to maintain a law's continuity while rising to meet new circumstances or overrule errant judicial decisions.[194] Legislatures should have the power to clarify the law because such a power allows them to support the interpretive exercise conducted by courts.[195] If legal meanings were always clear, there would be no need for courts' interpretive powers. Clarifying legislation reflects the fallibility of human communication, which consistently calls for greater specificity, nuance, or context in order to discern meaning.[196]

Courts play the role of watchdog. Courts, like skeptical interlocutors, help recognize purported clarifications that actually aim to shift the law or impose new meanings on old acts.[197] They help defend settled expectations and guard the intent of prior legislatures, forcing new language to fit within the preexisting meaning of the law. But another important role of the courts is setting the ground rules for the conversation.

The best approach would start from the two basic questions hiding in clarification doctrine. Courts need objective indicators to help them decide whether an amendment is meant to clarify and, subsequently, whether that amendment merely restates or substantively changes the prior law. The first question—whether the subsequent legislature intended to clarify—must be answered in the affirmative before even examining the substance of the two laws. If the enacting body did not clearly signal its intent to clarify the law, then a litigant should not be able to impose the amendment on the preenactment text just because it seems to be reasonably consistent with the prior meaning. But even if the subsequent legislature seemingly *did* intend to clarify, the second inquiry—whether the amendment restates, rather than changes, the original enactment—remains unanswered. Rather, an independent analysis must be undertaken to prevent strategic usage of clarifications to avoid retroactivity restrictions.

---

193. *See, e.g.*, ABKCO Music, Inc. v. LaVere, 217 F.3d 684, 691–92 (9th Cir. 2000) (holding that the clarification overruled the prior interpretation in *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950 (9th Cir. 1995)).

194. *See* William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 650–51 (1990).

195. *See* Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 281–82 (2019) ("[C]ourts need to understand and respect the limited capacity of the legislature to 'speak' clearly and determinately while seeking to realize an ideal of governmental legitimacy that has important, but not exclusive, democratic wellsprings."); Jellum, *supra* note 92, at 882.

196. *See, e.g.*, The Editors, *The Best of Lowercase*, COLUM. JOURNALISM REV. (Dec. 31, 2019), https://www.cjr.org/the_lower_case/best-of-lowercase-2019.php [https://perma.cc/EM58-EZK7].

197. *See, e.g.*, Judd v. Weinstein, No. 18-CV-05724, 2019 WL 926343, at *4 (C.D. Cal. Jan. 9, 2019) ("But . . . the views of the 2018 Legislature on the meaning of a statute enacted in 1999 are surely entitled to even less weight. Statutory interpretation is the province of the judiciary, not the legislature."), *rev'd*, 967 F.3d 952 (9th Cir. 2020); Brudney & Leib, *supra* note 45, at 356–57.

First, courts should examine the title and subtitle of the amendment to determine whether the subsequent enactment was meant to clarify. This factor not only helps answer the first part of the clarification inquiry but also helps the court screen litigants' arguments. Where the enacting body has not labeled an amendment as a clarification, the litigant so claiming should bear a much higher burden of proof the rest of the way. Legislative history may be consulted, as necessary, but the history should be so consistent as to indicate that the lack of a label was a drafting error.[198] Such a requirement also sets a clear norm for legislatures that mirrors the "clear statement" rule in *Landgraf*.[199] And even if the amendment *has* been clearly labeled as a clarification, this should not be sufficient to end the inquiry.

Second, the court should seek to locate an ambiguity in the original enactment that the amendment resolves or attempts to resolve. The language of the original enactment must reasonably apply to the behavior explicitly captured by the subsequent amendment. Doing so will help ensure that, as a substantive matter, the amendment simply restates the preexisting law. Unclear laws also result in fewer settled expectations, so efforts to clarify such ambiguities are not likely to result in unfairness.[200]

Finally, the court should examine preamendment judicial interpretations, if any exist. The more consistent the amendment is with those interpretations, the more likely that the amendment is a mere restatement of the law. If a long series of decisions interpreted the law differently than the purported clarification, the court should be much more wary of treating the amendment as clarifying. The hard cases occur when the previous interpretations are mixed. In that situation, courts should defer to the legislature, assuming that the amendment is accurately labeled as clarifying and attempts to resolve an identifiable ambiguity. Though this inevitably allows some legislative encroachment, the safeguards provided by the other two factors should sufficiently protect considerations of fairness. A certain amount of deference acknowledges the significant constraints on legislatures, especially their limited ability to anticipate judicial interpretations.[201] Clarification doctrine protects not only continuity in the law but also its functionality.

These three factors—clear labeling, ambiguity resolved by the amendment, and consistency with prior interpretations if they exist—are factors used by the current approaches, though not universally so.[202] The Third Circuit's rejection of labels, for instance, eliminates a crucial piece of evidence

198. The lack of a label should not be dispositive but should require a fairly rigorous analysis showing that the legislature understood that it was clarifying the law. For an example of what this would look like, see *Leshinsky v. Telvent GIT, S.A.*, 873 F. Supp. 2d 582, 591–601 (S.D.N.Y. 2012).

199. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 272 (1994).

200. Kenneth Culp Davis, *Administrative Rules—Interpretive, Legislative, and Retroactive*, 57 YALE L.J. 919, 953–54 (1948).

201. *See supra* notes 186–187 and accompanying text.

202. *See supra* Section I.C.

for deciding whether the enacting body intended to clarify the law.[203] Alternatively, the Ninth Circuit's approach puts too much emphasis on the subsequent amendment and legislative intent behind it, creating a risk that courts will allow the subsequent legislature's intent to impose retroactive effect without complying with *Landgraf*'s clear statement requirement.[204]

Other factors should not be heavily considered in the analysis. For example, the promptness with which a legislature responds to an adverse court interpretation may seem helpful in establishing the subsequent legislature's intent, but it takes for granted the legislature's ability to be constantly aware of court interpretations and move quickly to counter them.[205] Whether an amendment upholds a prior interpretation also represents a shaky basis for inferring that the amendment clarifies.[206] While courts should be suspicious of a purported clarification that runs contrary to a long line of decisions, clarifications frequently overrule court interpretations. Fewer preexisting court interpretations means fewer settled expectations built around them, which should give legislative bodies more flexibility to clarify whether or not they choose to adopt what a court has already said.

This three-factor test, therefore, strikes a balance between, on the one hand, preserving flexibility and allowing participation in the interpretive dialogue between courts and legislatures and, on the other hand, protecting settled expectations and fair notice. By using factors that are already being considered by the federal circuits, the test could be uniformly adopted without greatly disrupting the existing judicial approaches.

Judicial uniformity creates predictable norms for legislatures. Legislators are aware of some of the interpretive canons used by courts and draft laws accordingly.[207] Under a consistent doctrine, members of the legislature, anticipating how courts will evaluate their amendments, will be able to better signal their intent and express why they think the amendment is an accurate

---

203. *See supra* notes 85–87 and accompanying text.

204. Some courts have drawn this inference. *See, e.g.*, Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp., 99 F. Supp. 2d 1123, 1133 (E.D. Cal. 2000) (finding that repeated use of the word "clarification" is "clear, unambiguous, and commanding evidence in favor of retrospectivity"). Legislatures sometimes label an amendment as a "clarification" but provide a *prospective* effective date, further undermining the label as a sufficient indicator of retroactive intent under *Landgraf*. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2303(c)–(d), 124 Stat. 119, 296 (2010).

The situation is different when an amendment both is labeled as a "clarification" *and* contains an express statement of retroactive effect, perhaps through a retrospective effective date. *See, e.g.*, S. 1703, 116th Cong. § 206 (2019). In such an instance, the amendment *already* passes the *Landgraf* test, making a deeper clarification analysis beside the point. *See supra* notes 62–66 and accompanying text.

205. *Contra* Liquilux Gas Corp. v. Martin Gas Sales, 979 F.2d 887, 890 (1st Cir. 1992) (finding significant whether a clarifying amendment "follows fast upon the ambiguity's discovery").

206. *Contra id.*

207. Gluck & Bressman, *supra* note 124, at 928–29.

restatement of the existing law.[208] Under the current doctrine, legislators and other lawmakers have to adjust their drafting to express intended statutory meaning to courts that have different methods of interpretation. This is a particular problem for Congress, which makes laws that must anticipate the variant modes of analysis in thirteen federal appellate circuits.

A consistent doctrine would also help courts by making it easier to adjudicate litigants' claims. When courts interpret statutes or regulations, they are usually weighing the merits of the *litigants'* interpretations. The conversation between legislatures and courts necessarily runs through litigants as intermediaries. If a consistent doctrine leads to more normalized drafting practices by legislatures—through clearer labeling of clarifications, for instance—then judges will be able to evaluate cases more expeditiously and private actors will be able to more easily interpret the law as it applies to them. The clarification doctrine currently suffers from a lack of clarity. By moving toward a consistent set of factors, courts can help fix that.

CONCLUSION

This Note has clarified[209] a little-studied but important emerging doctrine. Courts have not given legislatures and litigants consistent guidance on how to draft laws or interpret an amendment's applicability. The courts themselves suffer from a lack of doctrinal clarity, failing to cogently explain and apply the doctrinal analysis involved in clarifications. The adoption of the multifactor test proposed here would help ameliorate this problem.

Despite the wonky and ostensibly dry nature of interpreting amendments to legislation, there are real winners and losers in these statutory interpretation battles. Retroactivity only increases the stakes. Courts fulfill an important purpose in setting the rules for how we read and understand the applicability of statutes and regulations. Courts should provide something currently missing in this emerging doctrine: clarity.

208. *See* Bressman & Gluck, *supra* note 161, 774–75.

209. My editors made me do it, I swear.