



11-1-2001

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APPLYING COASE TO *QUI TAM* ACTIONS AGAINST THE STATES

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DeeDee Baba†

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It's a good time to be a state. Over the last six years, the Supreme Court has steadily expanded state immunity from private lawsuits. The wellspring of this movement has been the Eleventh Amendment, which prohibits federal court lawsuits between a state and citizens of another

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state.¹ Appealing to principles that underlie the Eleventh Amendment, the Court has held that citizens cannot sue their own state in federal court;² states are immune from private damages actions in their own courts;³ and Congress's Article I powers cannot abrogate these immunities.⁴

As the careful reader will have noted, all of the immunities listed above involve suits by *private* plaintiffs.⁵ This is no accident: the Court has also held that states are *not* immune from lawsuits brought by the United States.⁶ Thus, while private plaintiffs may not sue states for violating such federal laws as the minimum wage requirement,⁷ the Age Discrimination in Employment Act,⁸ or the Americans with Disabilities Act,⁹ the United States may do so.

The distinction between private plaintiffs and the United States raises an important state immunity issue regarding so-called *qui tam* actions.¹⁰ In a *qui tam* action, a private actor, known as the relator, brings

1 U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.").

2 See *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

3 See *Alden v. Maine*, 527 U.S. 706, 754 (1999).

4 See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996). At this time, Congress can use its power to enforce the Fourteenth Amendment to abrogate state immunity. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); see also U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

5 Further, the immunity applies only to suits for retrospective money damages, as the Court has held that states do not have immunity from prospective orders aimed at state officials. See *Ex parte Young*, 209 U.S. 123, 159 (1908); see also I LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-27, at 556 (3d ed. 2000) (The Eleventh Amendment "does not ordinarily prevent federal courts, even in the absence of express congressional authorization, from requiring states, through their officers, to comply with prospective federal injunctions.").

6 See *United States v. Texas*, 143 U.S. 621, 646 (1892). Similarly, states are not immune from suit in federal court by *other* states. See *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904). States' immunity, however, does extend to suits by sovereigns other than the United States or one of the states, such as foreign nations and Indian tribes. See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991) (holding that states are immune from federal court suits by Indian tribes); *Monaco v. Mississippi*, 292 U.S. 313, 330 (1934) (holding that states are immune from federal court suits by foreign sovereigns).

7 See *Alden*, 527 U.S. at 754.

8 See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000).

9 See *Bd. of Trs. v. Garrett*, No. 99-1240, slip op. at 1-2 (U.S. Feb. 21, 2001).

10 The phrase *qui tam* is derived from the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who pursues this action on our Lord the King's behalf as well as his own." See *Vt. Agency of Nat. Res. v. United States*

suit against a person who allegedly violated federal law.¹¹ The relator brings suit on behalf of the United States to recover a fine, penalty, or damages owed to the United States.¹² Typically, the relator receives a percentage of any money recovered for the United States, with the remaining money going to the federal treasury.¹³ *Qui tam* actions exist only for those federal statutes where Congress has specifically authorized the practice.¹⁴ When Congress does so, it effectively invites private citizens to take part in public law enforcement.

The immunity question is whether the private relator or the United States should be deemed the plaintiff in a *qui tam* action against a state. If the relator is deemed the plaintiff, the state is immune from suit by that private party.¹⁵ If the United States is deemed the plaintiff, the state is not immune from a suit by the United States.¹⁶ Over the last decade, academic commentators, judges, and litigants have spilled much ink on this issue, reaching differing conclusions.¹⁷ Their works focus on the typical modalities of constitutional argument, mining the Constitution's text, history, structure, and the like. In short, these writers ask as an original matter what the Constitution says about state immunity from *qui*

ex rel. Stevens, 529 U.S. 765, 768 n.1 (2000) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *160).

11 See *id.* at 769.

12 *Id.*

13 *Id.* at 767–70.

14 See *id.* at 768 n.1.

15 See *United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 294 (5th Cir. 1999).

16 See *id.*

17 On case law, compare *id.* at 294 (holding state immunity barred *qui tam* suit), with *United States ex rel. Stevens v. Vt. Agency of Nat. Res.*, 162 F.3d 195, 202 (2d Cir. 1999) (holding state immunity did not bar *qui tam* suit), *rev'd on other grounds*, 529 U.S. 765 (2000), *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998) (same), *United States ex rel. Berge v. Bd. of Trs.*, 104 F.3d 1453, 1458 (4th Cir. 1997) (same), and *United States ex rel. Fine v. Chevron U.S.A., Inc.*, 39 F.3d 957, 963 (9th Cir. 1994) (same), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995). On commentary, compare James T. Blanch, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J.L. & PUB. POL'Y 701, 703 (1993) (concluding that *qui tam* actions are probably not constitutional), with Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 MICH. L. REV. 92, 95 (1999) (defining proper scope of *qui tam* actions that may overcome state immunity), and Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539, 541–42 (1995) (defending the view that *qui tam* actions overcome state immunity). The Supreme Court has received extensive briefing on the question, though it disposed of the case on another ground. See *Stevens*, 529 U.S. at 787 (holding that states are not a "person" within the meaning of the Federal False Claims Act and, thus, cannot be sued under that statute).

tam actions. One more article along those lines would add little, if anything, to the debate.

This Article takes a different tack. Instead of reviewing the question anew, we focus on provocative dicta in a recent Supreme Court case—*Blatchford v. Native Village of Noatak*¹⁸—that bears on the question. After all, from a realist perspective, even dicta reveals something about the Court's thinking on the issue, especially given that five members of the *Blatchford* majority remain on the Court.¹⁹ Any litigant or lower court would be remiss to dismiss such language, and the Court itself will likely consider, if not adopt, the position there stated.

Before describing our project, some quick background about *Blatchford* would be informative. The case involved a federal court suit brought by an Indian village against a state.²⁰ The village argued that the state was not immune: because the United States could sue states to vindicate Native American rights, the United States could statutorily delegate that authority to the village.²¹ As a matter of statutory interpretation, the Court held that Congress had never purported to delegate its power to sue states to the Indian tribes.²² Then, purely beside the point, the Court stated that the Constitution prohibits the United States from simply delegating its power to sue the states.²³ The Court did not explain either what this dicta meant or how it might apply in other contexts.

The *Blatchford* dicta raises an important question about *qui tam* actions: Are such actions best characterized as a simple delegation of the United States's power to sue the states,²⁴ or is there some other way to characterize *qui tam* actions that saves them from *Blatchford*'s non-delegation rule? An answer lies in the *Blatchford* dicta's central concern: allowing the United States unlimited authority to delegate its law

18 501 U.S. 775 (1991).

19 The Court decided *Blatchford* by a 6-3 vote. Chief Justice Rehnquist and Justices Antonin Scalia, Sandra Day O'Connor, Anthony Kennedy, and David Souter formed the *Blatchford* majority. See *id.* at 776. The sixth member of the majority, Justice Byron White, has since retired and been replaced by Justice Ruth Bader Ginsburg.

20 *Id.* at 778.

21 *Id.* at 783.

22 *Id.* at 785-86.

23 See *id.* at 785 ("We doubt . . . that that sovereign exemption [to be sued by the United States] can be delegated—even if one limits the permissibility of delegation (as respondents propose) to persons on whose behalf the United States itself might sue.").

24 The Fifth Circuit accepted this characterization of the *qui tam* statute in holding that states were immune from *qui tam* actions in federal courts. See *United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 294 (5th Cir. 1999).

enforcement power would effectively destroy the state immunities described above.²⁵ Congress could simply couch any new federal statutory private right of action as a delegation of the United States's power to police and punish the underlying conduct.

Consider an example of how Congress could recast a private lawsuit as a *qui tam* action. Assume that Congress enacts a new federal minimum wage statute. Instead of giving individual employees a private right to sue for violations, Congress makes any violation of the statute a federal offense subject to civil enforcement by the United States; each violation is subject to a penalty of \$1,000 plus the amount of wages wrongfully withheld. Then, Congress delegates the United States's enforcement power, via a *qui tam* action, to all persons aggrieved by an employer's violation of the statute. As a *qui tam* relator, the aggrieved person would sue on behalf of the United States to recover the civil penalty from the employer. As an "incentive" to bring suit, the statute awards the *qui tam* relator a portion of the United States's recovery, say ninety-nine percent, with the remainder going to the United States Treasury. While the form may differ from a simple private right of action, the substance does not. State immunity would be at an end.

Not all delegations of federal law enforcement power are intended to circumvent state immunity. For example, consider historical use of the *qui tam* action. As discussed below,²⁶ the First Congress employed *qui tam* actions to supplement the then-scarce resources of public law enforcement. Later, *qui tam* actions proved useful in detecting and punishing hard-to-discover crimes such as fraud against the government. In both cases, the *qui tam* action served a real, proven law enforcement need, and was not a simple trick to avoid state immunity.²⁷

25 See Caminker, *supra* note 17, at 134.

Where the "real party in interest" is private rather than the United States itself, *qui tam* authorization feels like something of a bootstrap; one might suspiciously view it as an effort to circumvent the *Seminole Tribe/Alden* rule that Congress cannot authorize private parties to assert their "own" interests against states.

Id.; see also Scott P. Glauber, *Citizen Suits Against States: The Exclusive Jurisdiction Dilemma*, 45 J. COPYRIGHT SOC'Y U.S. 63, 103 (1997) (describing a *qui tam* action as "little more than an end run around the Eleventh Amendment"); Henry Paul Monaghan, *The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102, 126 (1996) (expressing concern that the Supreme Court will see *qui tam* actions as an attempt to circumvent state immunity).

26 See *infra* notes 157-61 and accompanying text.

27; Indeed, the Supreme Court has held that the *qui tam* action authorized by the Federal False Claims Act—the most used *qui tam* action in current practice—by its terms does not apply to the states. See *Vt. Agency of Nat. Res. v. United States ex rel.*

So, *Blatchford's* concern with easily circumventing state immunity does not apply to all delegations of federal law enforcement power. The next question is whether we can reliably distinguish delegations intended to circumvent state immunity from delegations enacted for other reasons. Can we construct a coherent doctrine or test that judges can use to distinguish good and bad delegations? If not, each delegation of federal law enforcement power is suspect, and we have no way to tell when Congress is trying to circumvent the states' constitutional protection. The only way to save state immunity would be to forbid all such delegations.

Blatchford's challenge, then, is one of doctrine building: Can we construct a legal doctrine or test to distinguish delegations intended to circumvent state immunity from delegations enacted for other reasons?²⁸ To answer this challenge, we turn to two insights from law and economics: Ronald Coase's theory of the firm and the antitrust doctrine of ancillary restraints on trade. First, we consider Coase's classic essay *The Nature of the Firm*.²⁹ In that work, Coase explains why people form firms, such as partnerships, corporations, or other similar entities, rather than carrying on business on their own.³⁰ For example, why do some lawyers practice together in a firm, while others fly solo? And, when lawyers do form a firm, why do they hire employees to perform some work, such as secretarial tasks, but contract with outsiders to perform other work, such as copying or messenger services? Coase argues that the relative costs of the various options—law firm versus solo practice, hiring secretaries versus contracting out for secretarial services—determine the ultimate decisions.³¹

Using Coase's theory of the firm, we argue that a federal scheme that delegates a law enforcement role to private actors, such as the *qui tam* action, allows Congress to intelligently structure federal law enforcement in a way that makes the best economic sense. Like the private firm, government can weigh the relative costs of different institutional arrangements and minimize those costs. When Congress does so, it is not

Stevens, 529 U.S. 765, 788 (2000). Thus, one could not plausibly describe that statute as an attempt to circumvent state immunity.

28 As Professor Richard Fallon has demonstrated, much of constitutional law focuses on translating general principles and policies into a workable judicial doctrine. See generally Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56 (1997) (explaining how the Supreme Court crafts constitutional doctrine and arguing that Justices must sometimes set aside their own personal views on constitutional implementation).

29 See R.H. COASE, *The Nature of the Firm*, in *THE FIRM, THE MARKET, AND THE LAW* 33 (1988).

30 See *id.* at 37–51.

31 *Id.* at 40.

simply circumventing state immunity, but rather acting for another legitimate purpose. Such delegations should overcome state immunity.

We next turn to the antitrust doctrine of ancillary restraints to translate Coase's theory of the firm into a judicial doctrine. As noted above, once we determine that some delegations of federal law enforcement should be allowed, we need a doctrine or test to distinguish permissible delegations from impermissible ones. Specifically, we need a way for judges to distinguish delegations made to circumvent state immunity from delegations made to implement a Coasean allocation of enforcement resources. The doctrine of ancillary restraints provides a model for just such a doctrine.

The antitrust doctrine of ancillary restraints arises from the fundamental recognition that some restraints of trade are necessary to a working economy.³² For example, every contract restrains trade in some small way, as do associations such as partnerships. In a contract or a partnership, people agree to work together to create greater value for society. Implicit in each such agreement is the foregone opportunity to work with others. Thus, each contract and partnership restrains trade by foreclosing other possible contracts or partnerships.

Antitrust law cannot forbid all restraints of trade; to do so would effectively destroy the economy. Rather, antitrust law needs some way to distinguish the bad (and thus unlawful) restraints on trade from the good ones. Here arose the doctrine of ancillary restraints. A restraint of trade would be lawful if it was ancillary to an economic arrangement that provided value to society.³³ The word "ancillary" basically means that the restraint of trade is necessary to the success of the larger economic venture. For example, a partnership is economically beneficial because it allows different people with different skills and resources to pool together in a common, ongoing enterprise without the need to continuously contract with one another on the open market. To make the partnership work, however, the partners bind one another to work for the benefit of the partnership and forego other opportunities. The restraint is necessary to the partnership's success, making the restraint ancillary. The ancillary restraint doctrine, then, asks what the function or object of the restraint on trade is. If the object of the restraint is to enable a larger economic transaction, the restraint is valid. If the object

32 See *Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 188 (7th Cir. 1985) (holding that a "war of all against all is not a good model for any economy").

33 As noted below, this is an oversimplification of how the ancillary restraint doctrine actually works in antitrust law. See *infra* notes 114–33 and accompanying text. Because we are interested in the ancillary restraint doctrine only as a model of a type of analysis, and not in the antitrust implications of the doctrine, oversimplification does not rob the discussion of relevant substance.

of the restraint is merely to hamper competition, the restraint is not ancillary and, thus, is not valid.

The ancillary restraint doctrine provides a model for implementing the Coasean approach to delegations of federal law enforcement power. As noted above,³⁴ Congress and the Executive have determined that *qui tam* actions against states are the best enforcement mechanism for certain types of matters. In those situations, delegation of the United States's power to sue states would be ancillary to the larger attempt to efficiently structure federal law enforcement. When the delegation is ancillary, it should be upheld. If the delegation is not ancillary, it should be treated as a naked attempt to circumvent the Eleventh Amendment and struck down.

This Article proceeds in three parts. Part I reviews Coase's theory of the firm and its application to government institutions. Part II uses the antitrust doctrine of ancillary restraints to construct a judicially-administrable doctrine to implement Coase's theory. The resulting doctrine, which we call the doctrine of ancillary delegations, allows judges to distinguish delegations of federal law enforcement power made to circumvent state immunity from those delegations made to implement a Coasean structuring of government operations.

Part III takes the doctrine of ancillary delegations out for a dry run, applying it to the *qui tam* provision of the Federal False Claims Act. The Act proscribes fraud against the federal government and authorizes a *qui tam* action to enforce that proscription.³⁵ We argue that the Act's *qui tam* action can be understood as ancillary to Congress's effort to efficiently structure detection and punishment of fraud against the federal government. Congress first created this *qui tam* provision because the federal government itself could not police fraud in a cost-effective manner.³⁶ Congress encouraged private citizens to help the federal government discover and redress such fraud.³⁷ Basically, Congress

34 See *supra* note 27 and accompanying text.

35 See 31 U.S.C. §§ 3729–3730 (1994). Last term, the Supreme Court held that states are not “persons” within the meaning of the False Claims Act and, thus, cannot be sued for violations of the Act. See *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000). The issue of *qui tam* suits against states, however, remains an important question because Congress could amend the Federal False Claims Act to include states within its reach. Further, other federal statutes authorize *qui tam* actions that could be used against states. See *id.* at 790 (Stevens, J., dissenting). Thus, any analysis of the Federal False Claims Act's *qui tam* action will also apply to these other federal *qui tam* actions.

36 See *infra* notes 157–61 and accompanying text.

37 See Evan H. Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 345 (1989) (“[I]n *qui tam* actions . . . society makes individuals the representatives of the public for the purpose of enforcing a policy explicitly

considered the relative cost of all-public enforcement versus a mix of public and private enforcement and hoped the Act would minimize those costs. Over time, Congress has further minimized these costs by periodically fine-tuning the Act's *qui tam* action based on experience.³⁸ Congress's object has always been better detection and punishment of fraud against the government. Because Congress did not aim to circumvent the Eleventh Amendment, the Act does not offend *Blatchford's* dicta.

I. A COASEAN THEORY OF THE STATE

This Part develops the Coasean argument in two sections. Section A briefly sketches Coase's argument in *The Nature of the Firm*. Section B applies Coase's argument to the government context.

A. Coase's The Nature of the Firm

In his groundbreaking essay *The Nature of the Firm*,³⁹ Coase broaches a central question to microeconomics: Why do people form firms that allocate the resources of production through internal management decisions instead of market transactions?⁴⁰ To demonstrate the point, consider a law firm that needs secretarial services—typing or inputting changes to documents, preparing filings, etc. The firm can fulfill this need in many ways, but three options illustrate the point. Option One lies at one extreme: the firm could make a new contract for each and every secretarial task. If a lawyer needs to have a letter typed, she would enter the secretarial market and negotiate a contract to type the letter. Under this option, the market allocates the firm's secretarial work among different secretaries.

Option Two lies at the other extreme: instead of contracting out each secretarial assignment, the firm hires secretaries as employees.⁴¹ The firm then assigns a group of lawyers to a secretary responsible for their work. Under this option, the firm obtains secretarial help

formulated by legislation.”) (quoting *Priebe & Sons v. United States*, 332 U.S. 407, 418 (1947) (Frankfurter, J., dissenting)).

38 See, e.g., *id.* at 343–44.

39 COASE, *supra* note 29.

40 Coase defines a firm as follows: “It can, I think, be assumed that the distinguishing mark of the firm is the supersession of the price mechanism.” *Id.* at 36. Coase further explains: “Within a firm . . . market transactions are eliminated, and in place of the complicated market structure with exchange transactions is substituted the entrepreneur-co-ordinator, who directs production.” *Id.* at 35–36.

41 In this case, the firm substitutes a single set of contracts—hiring the secretaries—for many more contracts over time. As Coase has explained, “contracts are not eliminated when there is a firm, but they are greatly reduced.” *Id.* at 39.

through a single market transaction—hiring the secretaries—and the firm's administrators (*not* the market) allocate the secretarial resources.

Option Three lies somewhere in between the first two: the firm contracts with an agency for periodic secretarial services. Once a month, the firm assesses its secretarial needs and negotiates an arrangement for the next month; the agency's fee will vary depending upon the firm's history of secretarial usage.⁴² Under this option, both the market and the firm administrators allocate secretarial resources. The firm administrators allocate the work among secretaries during each month, and at the end of each month the market reallocates based on various factors.

These three options illustrate how either the market or firm administrators may allocate resources to varying degrees. Simply stated, Coase sought to explain why a firm would opt for one method of allocation over another.⁴³ In our example, why would a law firm prefer Option One, Two, or Three for providing secretarial services? Put differently, why would a firm ever take a task in house and allocate the resources administratively (Options Two and Three) instead of performing the task through a series of market transactions (Option One)?

Coase offered a straightforward answer: "The main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism."⁴⁴ Negotiating and concluding a market transaction is costly. Coase identified several types of transaction costs: the cost "of discovering what the relevant prices are";⁴⁵ "[t]he costs of negotiating and concluding a separate contract for each exchange transaction which takes place on a market";⁴⁶ and the inability to make long-term contracts that will reduce the risk of periodic market fluctuations.⁴⁷ Thus, in some cases, it might be cheaper for a firm to perform a task in house than to repeatedly engage in market transactions.

To illustrate our hypothetical law firm's choice, consider how the firm might compare Option One to Option Two. Under Option One, the firm would have to contact, negotiate with, and contract with a

42 Another variation on this theme would be for the firm to hire some secretaries full time, but also to hire temps on an as-needed basis as the workload ebbs and flows.

43 See generally COASE, *supra* note 29.

44 *Id.* at 38.

45 *Id.* Coase writes that "[t]his cost may be reduced but it will not be eliminated by the emergence of specialists who will sell this information." *Id.*

46 *Id.* at 38–39.

47 *Id.* at 39.

secretary every time it wanted to type a letter or edit a document. The multiple market transactions would waste valuable lawyer time, which would be spent securing secretarial help instead of providing fee-generating legal services to clients.⁴⁸ Under Option Two, the firm must either divert lawyer time to administrating and allocating secretarial help or hire a non-lawyer to perform that function. The question then becomes whether the lawyer time lost to contracting in Option One is greater than the cost of administering secretaries in Option Two. Since no law firm we are aware of uses Option One, it must be that contracting out individual secretarial assignments is more costly than other options. The question for the firm, then, becomes whether the cost of hiring secretaries as employees (Option Two) is less than the cost of periodically contracting with a secretarial agency (Option Three).

Firms perform the same cost comparison in deciding whether to organize other tasks in house or through market transactions. For example, will a law firm rely on the market to provide overnight document delivery services (by contracting with Federal Express for each package separately), develop its own delivery service in house, or choose some mix of the two?⁴⁹ Will a law firm perform all document reproduction in house, contract out for those services, or opt for some mix of the two? A rational firm's choice will rest on the relative cost of each option, which includes the transaction costs of each choice. In sum, Coase's main insight was that this cost comparison dictates the structure and size of a firm.

48 This is the economic idea of "opportunity cost." Simply put, the cost of any activity is not only the money spent on engaging in that activity, but also the opportunities foregone by engaging in the activity. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.1, at 6 (5th ed. 1998). So, a lawyer's out-of-pocket expenses in contracting for secretarial help might be quite small—perhaps only a few cents on phone calls or other expenses. Yet, in spending *time* on contracting (time for which the lawyer cannot bill) the lawyer forewent the opportunity to spend time performing legal services (time for which the lawyer could bill her hourly rate). So, when we factor in opportunity costs, Option One appears prohibitively expensive for a law firm.

49 As with the secretarial help example, there are many ways the law firm could mix in-house and outside delivery services. For example, the law firm could negotiate periodic flat rates with an outside provider, or the law firm could do local deliveries in house while contracting out all other deliveries.

B. *The State as a Firm*

Commentators have spilled much ink modeling the economic and other incentives that motivate government actors.⁵⁰ In each case, the commentator offers either a model that claims to describe the actual incentives at work in government decisionmaking, or offers a normative account of how government ought to work and corresponding legal rules to implement that normative vision. Either way, these commentators venture an all-encompassing model of the state, addressing all facets of state action.

Our ambition here is much more limited. We simply claim that the federal government does, in some instances, act like the firm described in Coase's work. Specifically, the federal government sometimes decides to perform one task in house and contract out another task based on the relative costs of those choices. This Section develops this limited claim.

Like a Coasean firm, government is an association of individuals formed to pursue certain goals. In the preceding Section, we considered the law firm organized to provide legal services for a profit. In this Section, consider the government charged with enforcing a specific regulatory scheme.⁵¹ Assume that the government officials have already decided that the regulatory scheme should exist;⁵²

50 See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962) (analyzing the decisionmaking methods of individuals in government); WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIAL ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 43-66 (2d ed. 1995) (describing various models of government decisionmaking); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 22 (1991) (same); see also, e.g., WILLIAM N. ESKRIDGE, JR., *An Historical and Critical Introduction to the Legal Process, in THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at li (1994) (providing an editors' introduction that reviews evolution of views on government decisionmaking).

51 This focus intentionally ignores larger questions, such as society's goals in creating a government and the appropriate ways to achieve those goals.

52 Of course, economic analysis also deals with the question of when government should intervene in the marketplace. A classic example is the argument that government must provide certain "public goods" that private actors would not otherwise provide:

National defense is a frequently-stated example of a public good. It is difficult to have private national defense. The problem is the inability efficiently to exclude consumers who receive the benefit if someone else provides the defense. If someone else has Patriot missiles in your neighborhood, you benefit without paying. Without exclusivity, many consumers get the good for free. This joint consumption of the production of national defense by both those who pay and those who do not is what leads to its characterization as a classic public good. Because those who do not have to pay for the

thus, the only question is how to enforce the regulatory scheme.⁵³

To illustrate the government's choices in designing an enforcement mechanism, consider the individual income tax. The government's main task will be to detect and punish those who pay less tax than they owe; the basic choice is whether to perform the task in house, contract the task out, or have some mix of both. If the government acts like a Coasean firm, it will decide based on the relative costs of the options, including transaction costs. To see how this decision-making process might work, let us work through some of the factors that our hypothetical government might consider.⁵⁴

First, consider how in-house enforcement affects personnel needs. Any regulatory scheme must address the twin goals of detecting and deterring violations. In deciding whether to pay their taxes, the rational taxpayer will weigh the expected cost of cheating (the probability of getting caught times the penalty/cost of getting caught) against the expected benefit of cheating (the probability of not getting caught times the amount of tax not paid).⁵⁵ Consequently, one way to deter violations is to raise the probability of detec-

good can free ride, less than the optimal amount will be provided, leading to a standard argument for government intervention.

Timothy J. Muris, *Economics and Consumer Protection*, 60 ANTITRUST L.J. 103, 103 (1991).

53 The initial decision to enact a regulatory scheme will often involve consideration of the costs of enforcing that scheme. This need not be the case. For example, one government body might be responsible for creating the regulatory scheme while another might be responsible for deciding how to enforce it. This could happen where the legislative branch enacts a broad regulatory scheme and then delegates the details of enforcement to an administrative agency. On the other hand, a government body might create a regulatory scheme with one type of enforcement mechanism, but experience may reveal that enforcement is not successful. A later legislature might then opt for a different enforcement mechanism. The Federal False Claims Act is an example of this latter type of regulatory scheme. See *supra* note 35 and accompanying text.

54 For a fuller consideration of the factors and incentives involved in using bounty programs as part of law enforcement, see generally Marsha J. Ferziger & Daniel G. Currell, *Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs*, 1999 U. ILL. L. REV. 1141 (examining the Insider Trading Act, False Claims Act, and federal income tax bounty programs).

55 POSNER, *supra* note 48, § 7.2, at 242 ("In order to design a set of optimal criminal sanctions, we need a model of the criminal's behavior. The model can be very simple: A person commits a crime because the expected benefits of the crime to him exceed the expected costs."). This is a bit of an oversimplification. The rational taxpayer will also weigh the cost of strategies for avoiding detection or punishment, such as bribery and intimidation. See Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 2 (1974).

tion.⁵⁶ To do so, the government could increase the number of audits and thereby raise the likelihood of detection.⁵⁷ If enforcement is performed in house, the government must hire enough auditors to conduct the needed audits.

In addition to the number of audits, the detail of the audits affects the number of auditors hired. To adequately enforce the tax laws, the government must conduct the audits in a manner likely to detect violations. Otherwise, the audits will not increase the risk of detection and thus will not deter violations. The nature of the audit required will depend on how difficult it is to detect violations. How much of the needed information is available from public sources or sources other than the taxpayer? How easily may the taxpayer hide a violation? How many violations, if any, can be detected from information submitted to the government? The harder it is to detect a violation, the more detailed and extensive the audit process must be. The more detailed and time-consuming the audits become, however, the less audits a single person can perform in a given time period. Thus, the extent of the audits will also effect the number of auditors hired.

So, labor will be one cost of in-house enforcement.⁵⁸ Labor itself has many cost components, wages and benefits being the most obvious. For example, recruiting and hiring employees costs money, as does monitoring and evaluating employee performance. If the government has enough employees, it might need an entire department devoted to employment matters. Simply put, the government will face some of the same labor costs as a private company.⁵⁹

56 See Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 1, 14 (Gary S. Becker & William M. Landes eds., 1974) ("If the aim simply were deterrence, the probability of conviction . . . could be raised close to 1, and punishments . . . could be made to exceed the gain: in this way the number of offenses . . . could be reduced almost at will."). Of course, another way is to increase the penalty for the violation. As Professor Becker argues, however, increases in probability of detection and punishment have other effects on society that must be accounted for in modeling criminal law enforcement. See *id.* at 14-18.

57 Another way to accomplish a similar result would be to identify the types of returns that are most likely to underpay the taxes and to disproportionately audit those returns. In doing so, the government can raise the probability of detection for those people most likely to violate the tax laws, but with fewer audits.

58 For other factors affecting the efficacy of law enforcement, see Becker & Stigler, *supra* note 55, at 2-5.

59 The government also faces some costs not faced by private firms and does not face some costs faced by private firms. On the former, the government must not violate the Constitution when dealing with employees. For example, the government must accord its employees procedural due process before disciplining or terminating them. See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). On the latter, the govern-

In-house enforcement will also impose travel and monitoring costs. Any centralized government, whether located in the national capital or the state capital, faces the reality that not all violators are in or near the capital city. Given this fact, the government must either pay for travel to investigate violations in remote places, or maintain regional field offices that police those locations. Either option carries costs. For the traveling employee, the government bears travel and lodging costs, as well as the cost of policing employee reimbursements to prevent fraud. For the field office, the government bears the cost of acquiring and maintaining the remote facility, as well as monitoring the work of employees at the remote site.

Second, consider contracting out enforcement of the individual income tax.⁶⁰ For example, the government could contract with an accounting firm to conduct audits of suspected tax violators and a law firm⁶¹ to bring enforcement actions.⁶² The government could either hire these firms on an ongoing basis, for a specified period of time, or on a case-by-case basis, or the government could delegate these functions to private citizens through the *qui tam* action.⁶³ Each option has

ment may exempt itself from some laws that it imposes on private employers. For example, governments enjoy sovereign immunity from civil liability. See Federal Tort Claims Act, 28 U.S.C. § 2674 (1994) (defining the scope of the United States's tort liability).

60 Two commentators propose an all-out bounty system, which would allow the market to select who will enforce public laws, as opposed to in-house hiring decisions by the government (similar to those by private firms). See Becker & Stigler, *supra* note 55, at 13–16. Of course, such a scheme would require some government regulation to police abuses. See *id.* at 15–16.

61 For the first fifty years under the Constitution, the United States Government relied on private lawyers to prosecute federal crimes. See Roger Conner et al., *The Office of U.S. Attorney and Public Safety: A Brief History Prepared for the "Changing Role of U.S. Attorneys' Offices in Public Safety" Symposium*, 28 CAP. U. L. REV. 753, 755 (2000); Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1300 (2000).

62 In performing their enforcement functions, these private firms will act like the Coasean firm described above in Part I.A., deciding the proper mix of in-house and outside help based on the relative costs of each option as well as the applicable transaction costs. See *supra* notes 39–49 and accompanying text. For example, the private law firm must decide whether to contract out factual investigation to a private firm, or to provide the service from within by hiring employees to do so.

63 The current federal tax laws invite private participation in the detection of tax violations by offering a bounty to any person who provides information leading to collection of unpaid taxes. See I.R.C. § 7623 (1994).

The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefore, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniv-

transaction costs—the out-of-pocket expenses and opportunity cost of identifying, negotiating, and contracting with the private firms. Also, the government would face agency costs—the cost of monitoring the private firm so that it does not make wasteful or fraudulent charges to the government.

Third, the government might consider some mix of in-house and outside enforcement efforts. For example, the government could hire private accounting firms to conduct audits and leave enforcement actions to government lawyers. Employing the government lawyers would pose the costs associated with in-house enforcement, while contracting with the private accounting firm would pose the transaction and agency costs of outside enforcement.

The precise mix of in-house and outside contracting selected by our hypothetical, Coasean government will depend on the empirical question of how much each option costs. In the abstract, we cannot predict any per se optimal mix of in-house and outside enforcement that fits all regulatory schemes. Rather, that decision depends heavily on the costs associated with various enforcement contexts.

II. IMPLEMENTING COASE: THE DOCTRINE OF ANCILLARY DELEGATIONS

Part I revealed that delegation of law enforcement to actors outside the federal government can, in certain circumstances, play a role in structuring effective federal law enforcement. This insight answers the Court's challenge in *Blatchford*, which was to articulate some legitimate reason for delegating the United States's law enforcement power to private citizens.⁶⁴ So, whether a delegation of federal law enforcement power overcomes state immunity depends on the United States's object or purpose in making the delegation. If the United States did so in a good faith attempt to better structure federal law enforcement, the delegation should be upheld. If the United States did so mainly to circumvent state immunity, the delegation should be struck down.

To implement these ideas, we need a doctrine that properly blends Coase's essential insight with *Blatchford's* fear of circumvention.

ing at the same, in cases where such expenses are not otherwise provided for by law.

Id.; Treas. Reg. 301.7623-1(a) (1998) ("A district director may approve such reward as he deems suitable for information that leads to the detection and punishment of any person guilty of violating any internal revenue law, or conniving at the same."); *see also* Ferziger & Currell, *supra* note 54, at 1142-43 (reviewing various incentives created in federal bounty programs, including the Internal Revenue Service program).

64 *See* *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 785-86 (1991); *see also supra* notes 25-27 and accompanying text.

Specifically, we need a doctrinal model borrowed from another area of law that has three important features. First, the doctrine must test the legality of a specific type of conduct. Here, the conduct would be delegation of the United States's power to sue the states. Second, the doctrine must recognize that the suspect conduct is lawful when engaged in for certain reasons, but unlawful when engaged in for other reasons. Here, the delegation is allowed if done to better structure federal law enforcement, but not allowed if done to circumvent state immunity. Third, the doctrine must provide a rule or mode of analysis to distinguish cases where the suspect conduct is engaged in for permissible reasons from cases where the conduct is engaged in for impermissible reasons.

As Part II explains, the antitrust doctrine of ancillary restraints supplies an apt doctrinal model. First, the doctrine applies to a suspect class of conduct—restraints of trade. Second, the doctrine recognizes that restraints of trade are lawful if created for permissible reasons, but unlawful if created for forbidden reasons. Third, and most importantly, the doctrine provides a mode of analysis for distinguishing conduct undertaken for permissible reasons from conduct undertaken for impermissible reasons.

This Part has two sections. Section A explains the relevant contours of the antitrust doctrine of ancillary restraints, as well as how the doctrine fits the three criteria needed for our model doctrine. Section B then uses the model to construct a doctrine of ancillary delegation out of the Coasean theory of government arrangements discussed in Part I.B.

One caveat about the discussion in Section A—our purpose is to use the antitrust doctrine of ancillary restraints to model a similar test in the state immunity context. We focus on the doctrine's main features and how the doctrine works in practice. We do *not* venture any descriptive or normative claims about the doctrine's role within antitrust, as that would be well beyond the scope of this Article. Rather, regardless of its acceptance within the antitrust community, we offer the ancillary restraint doctrine to illustrate a mode of analysis we find useful in addressing this Article's state immunity issue.

A. *The Doctrine of Ancillary Restraints*

A fundamental dilemma of American antitrust law is that its basic statutory prohibition cannot possibly mean what it says. The Sherman Act, our first antitrust statute, begins: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is de-

clared to be illegal."⁶⁵ A textual literalist could argue that this statute means what it says: *every* contract, combination or conspiracy that *restrains trade* is illegal. The problem with this view, however, is that *all* contracts and combinations restrain trade because they legally bind the contracting or combining parties to deal with one another and not with other potential parties.⁶⁶ The literalist reading, then, would outlaw all contracts, as well as all combinations such as partnerships and joint ventures.⁶⁷ The Sherman Act would effectively outlaw economic activity and bring the United States economy to a halt.⁶⁸

Fortunately, with one exception,⁶⁹ the Supreme Court has refused to apply this interpretation of the Sherman Act.⁷⁰ Rather, early on, the Court interpreted the Act's broad language to prohibit only *unreasonable* restraints of trade.⁷¹ Of course, this rule required some further standard or doctrine to distinguish reasonable and unreasonable restraints of trade. The ancillary restraint doctrine is one method of doing so.⁷² In its first Sherman Act case, the Court explained that a

65 15 U.S.C. § 1 (1994).

66 See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 135-36 (1978) ("When men join together in corporations or partnerships, or in any economic unit of more than one person, they either explicitly or tacitly accept the elimination of market rivalry between themselves. Joint effort organized by administrative direction replaces the forces of the marketplace.").

67 See *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is their very essence. The true test of legality is whether the restraint imposed is such as merely regulates or perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Id.

68 See BORK, *supra* note 66, at 135-36 ("Since cooperation and division of labor within such economic units is essential to the tasks of production and distribution, it is impossible to enforce a legal rule that makes the agreed elimination of rivalry unlawful.").

69 In its first Sherman Act case, the Court read the Act to prohibit *all* restraints of trade. See *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 339-41 (1897). This interpretation lasted only a year, with the Court adopting a narrower approach in *United States v. Joint-Traffic Ass'n*, 171 U.S. 505, 567-68 (1898).

70 Even avid textualists such as Justice Antonin Scalia criticize such a contextual literalism. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23-24 (1997).

71 Both historical and economic reasoning support the Supreme Court's rejection of the literalist reading. See BORK, *supra* note 66, at 50-71, 107-15.

72 American antitrust law has developed a wide range of tests and doctrines to determine whether different types of restraints are lawful. See *generally* LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK*

contract or combination was not unlawful if its restraint of trade was “an indirect result, however inevitable and whatever its extent,” but only if the restraint was “the object of the contract, combination, or conspiracy.”⁷³ Three years later in *United States v. Addyston Pipe & Steel Co.*,⁷⁴ Chief Justice Taft, while a judge on the Sixth Circuit, elaborated on this approach. He wrote that a restraint of trade is valid if “the covenant embodying it is merely ancillary to the main purpose of a lawful contract,” and the restraint is “necessary” to achieving that contract’s purpose.⁷⁵ Under a rule of reason approach, if the restraint “exceeds the necessity presented by the main purpose of the lawful contract, it is void.”⁷⁶

So, a contract or combination is illegal if its main *object* or *purpose* is to restrain trade. The Court has referred to such restraints as “naked restraints of trade.”⁷⁷ For example, a cartel agreement, where the parties’ main object is to eliminate price competition, is a classic naked restraint of trade.⁷⁸ When a cartel does so, it raises prices and restricts output, thus harming consumers, without providing any offsetting benefit to consumers. The cartel’s restraint of trade is “naked” because it stands alone, unadorned with any pro-competitive benefits.

Conversely, if the restraint’s main object or purpose is to promote an economically beneficial transaction, the restraint is likely to be valid.⁷⁹ The Court has referred to such restraints as “ancillary” to an

165–449 (2000) (discussing various approaches to incorporating restraints in antitrust law, ranging from the *per se* rule to the “rule of reason”).

⁷³ *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895).

⁷⁴ 85 F. 271 (6th Cir. 1898), *aff’d*, 175 U.S. 211 (1899).

⁷⁵ *Id.* at 282.

⁷⁶ *Id.*

⁷⁷ *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)

⁷⁸ See BORK, *supra* note 66, at 66–67. Judge Richard Posner describes the effect of the Sherman Act on cartels:

[T]he illegality of cartels under the Sherman Act was established in the early years of the act; and, since cartels are difficult to conceal, the act, despite its rather feeble sanctions and lackluster enforcement, apparently succeeded in virtually eliminating them from the industries subject to it. The elimination of the formal cartel from those industries is an impressive, and remains the major, achievement of American antitrust law.

RICHARD A. POSNER, *ANTITRUST: AN ECONOMIC PERSPECTIVE* 39 (1976).

⁷⁹ A finding that a restraint of trade is ancillary to an economically beneficial transaction means that the restraint is reviewed under the less stringent rule of reason analysis. The rule of reason test is fairly deferential, and courts usually uphold the challenged restraint of trade. See E. THOMAS SULLIVAN & JEFFREY L. HARRISON, *UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS* § 4.05, at 122 (3d ed. 1998) (characterizing a restraint as *per se* illegal or subject to rule of reason “in many respects determines the result” of the case); see also Val D. Ricks & R. Chet Loftis, *Seeing*

otherwise lawful enterprise.⁸⁰ For example, a computer software company may hire a trainee with the agreement that the trainee not compete with the company when she leaves.⁸¹ The parties' main objective is to complete an economically beneficial transaction—the trainee will receive compensation, valuable training, and perhaps proprietary information, and the software company will receive the trainee's services. But, that transaction will not occur without the non-compete agreement, which is a restraint of trade. For, if the trainee can simply get the training and proprietary information and seek a better job elsewhere, the software company has no incentive to provide training. The non-compete clause (the restraint of trade) is necessary for the economically beneficial transaction. In antitrust parlance, the restraint of trade is *ancillary* to the pro-competitive transaction.

While logically sound, the ancillary-naked restraint distinction needs elaboration if judges are to implement it in deciding cases. In reducing the theoretical distinction to a working doctrine, courts have developed a two-step analysis. First, the party defending the challenged restraint must show that the restraint is part of a larger transaction that has economically beneficial, pro-competitive aspects.⁸² Second, the restraint must be necessary to achieve the pro-competitive aspects of the transaction.⁸³ If the challenged restraint survives these two steps, it is deemed an ancillary restraint.⁸⁴

the Diagonal Clearly: Telling Vertical from Horizontal in Antitrust Law, 28 U. TOL. L. REV. 151, 155 (1996).

Rule of reason cases are often not brought; they are too expensive to prosecute, especially given the significant chance that the defendant might prevail. In fact, in the area of market allocations, because rule of reason analysis so often ultimately permits vertical market allocations, the horizontal/vertical determination may be the key issue in a case.

Id. We do not discuss the rule of reason above because it is not germane to our Eleventh Amendment analysis. Recall that in the Eleventh Amendment context, our concern is whether Congress's object or purpose in delegating law enforcement authority is to circumvent the Eleventh Amendment. So, in constructing a doctrine to answer that question, we are looking to an antitrust doctrine that performs a similar function: determining the purpose or object of a challenged restraint of trade. The ancillary restraint doctrine described in the text, and not the rule of reason analysis, performs that function.

⁸⁰ See *Addyston Pipe*, 85 F. at 282.

⁸¹ See *id.* at 85 F. at 281 (noting that a partner's covenant not to compete with other members of a partnership is a valid ancillary restraint).

⁸² *Id.* at 282.

⁸³ *Id.*

⁸⁴ As noted above, a court will uphold an ancillary restraint only if it survives scrutiny under the "rule of reason" test. See *supra* notes 75–81 and accompanying text. "Rule of reason" is shorthand for analysis of whether an agreement's pro-com-

To see how this doctrine works in practice, consider the Seventh Circuit's decision in *Polk Bros., Inc. v. Forest City Enterprises*.⁸⁵ That case involved an agreement between a home furniture and appliance retail sales firm and a home improvement (tools, lumber, building materials, etc.) retail sales firm.⁸⁶ The firms agreed to occupy a single building divided into two retail sales spaces, with each firm operating out of a single retail space with its own entrance.⁸⁷ Further, the firms agreed not to sell certain goods within the other firm's product line.⁸⁸ When the home improvement firm threatened to violate the agreement by selling home appliances, the home furniture and appliance firm brought suit to enjoin the home improvement firm from doing so.⁸⁹ The home improvement firm argued that the parties' agreement was an unlawful horizontal agreement prohibiting product line competition.⁹⁰ On appeal, the question was whether this restraint of trade was valid.⁹¹

The Seventh Circuit held that the product line restraint was a valid ancillary restraint.⁹² The court first asked whether the challenged restraint was part of a larger pro-competitive transaction.⁹³ The home furniture and appliance firm defended the restraint as part of a joint venture that both expanded retail space and increased customer convenience.⁹⁴ The joint venture produced over 130,000 additional square feet of retail space, adding to competition in the firms' respective markets.⁹⁵ Moreover, because the firms' product lines complemented one another—customers in the market for furniture could

petitive aspects outweigh the harm to competition imposed by the ancillary restraint of trade. This test is fairly deferential and usually leads to upholding the restraint. *See, e.g., Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 372-78 (1933) (upholding an exclusive selling agreement intended to bolster the ailing coal industry during the Depression).

85 776 F.2d 185 (7th Cir. 1985).

86 *Id.* at 187.

87 *Id.*

88 *Id.* For example, the home furnishing and appliance firm agreed not to sell items such as lawn mowers, building materials, and lumber, while the home improvement firm agreed not to sell items such as major appliances and furniture. *Id.*

89 *Id.* at 187-88.

90 *Id.*

91 *Id.* at 188.

92 *Id.* at 191.

93 *Id.* at 188-89 ("A court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are a part of a larger endeavor whose success they promote.").

94 *Id.* at 189-90.

95 *See id.* at 187, 189-90.

browse home appliances, and vice versa—the firms increased consumer convenience by providing a single site with a “full line of goods for furnishing and maintaining a home.”⁹⁶ Because of the increased retail space and customer convenience, the firms’ overall venture was pro-competitive and likely benefited consumers.⁹⁷

Second, the court determined that the challenged restraint promoted the venture’s pro-competitive benefits.⁹⁸ In reaching this conclusion, the court considered the circumstances *at the time the parties made their agreement*, without the benefit of hindsight.⁹⁹ From that vantage point, the product line restraint made the deal possible. The court explained:

[The home furniture and appliance firm] spent substantial sums in advertising to attract customers to its stores, where it displayed and demonstrated the appliances. It might be tempting for another retailer to take a free ride on these efforts. Once [the home furniture and appliance firm] has persuaded a customer to purchase a color TV, its next door neighbor might try to lure the customer away by quoting a lower price. It could afford to do this if, for example, it simply kept the TV sets in boxes and let [the home furniture and appliance firm] bear the costs of sales personnel and demonstrations. [The home furniture and appliance firm] would not continue to do the work while its neighbor took the sales. It would do less demonstrating and promotion, to the detriment of consumers who valued the information.¹⁰⁰

Without the product line restraint, neither firm would have an incentive to do the promotion or advertising necessary to attract customers to their unique arrangement. The joint venture, with its pro-competitive benefits of increased retail space and customer convenience, would not have occurred. Thus, the court concluded that the product line restraint was an ancillary restraint.¹⁰¹

96 *Id.* at 187.

97 *See id.* at 190 (“As the district court put it, the parties ‘hoped to attract more customers because of the proximity of two stores, selling different but complimentary items for home sale.’”).

98 *Id.* at 189–90.

99 *See id.* at 189.

100 *Id.* at 190.

101 *See id.* at 190–91. After holding that the product line restraint was ancillary to a pro-competitive joint venture, the next question was whether this ancillary restraint passed the rule of reason test. As the Seventh Circuit noted, the first question under rule of reason analysis is usually whether the parties to the restraint had substantial market power in the relevant market. *Id.* at 191. “Unless the firms have the power to raise price by curtailing output, their agreement is unlikely to harm consumers, and it makes sense to understand their cooperation as benign or beneficial.” *Id.* In *Polk*

While *Polk Bros.* illustrates the ancillary restraint doctrine in action, it also raises questions about how aggressively courts scrutinize claims that a restraint is ancillary. Specifically, if we are to frame a judicially applicable doctrine, we need to know how closely courts scrutinize parties' claims that (1) the challenged restraint is part of a larger, economically beneficial transaction, and (2) the challenged restraint promotes the pro-competitive aspects of that transaction. Both *Polk Bros.* and relevant Supreme Court decisions suggest the judicial stance toward these issues.

First, language in *Polk Bros.* suggests that the Seventh Circuit accepts a party's facially rational argument that its transaction has pro-competitive aspects. "[A] court must be *very sure* that a category of acts is anti-competitive before condemning that category" as a naked restraint of trade.¹⁰² Similarly, the Supreme Court has explained that "[i]t is only after considerable experience with certain business relationships that courts classify them as [unlawful naked restraints]."¹⁰³ Until that time, the court will treat the restraint as ancillary.¹⁰⁴

Bros., however, the home improvement firm challenged the product line restraint solely on the ground that it was an unlawful naked restraint. *Id.* Thus, the court in *Polk Bros.* never applied the rule of reason.

102 *Id.* at 189 (emphasis added).

103 *United States v. Topco Assocs.*, 405 U.S. 596, 607–08 (1972).

104 *See Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 9–10 (1979) (quoting the language used in *Topco*); *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49–50 (1977) (holding that a restraint is a per se illegal naked restraint only if the restraint is "manifestly anticompetitive"). Using a similar rationale, the District of Columbia Circuit recently rejected per se treatment of the United States's claim that Microsoft had illegally tied purchase of its Windows operating system to purchase of its Internet Explorer web browser. *United States v. Microsoft Corp.*, 253 F.3d 34, 84–95 (D.C. Cir. 2001). Current Supreme Court precedent treats product tying as per se illegal when the tying company has market power in the tying product market, and the product tie forecloses a substantial amount of commerce. *See Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 461–62 (1992); *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 12–18 (1984). The court agreed that Microsoft had market power in the operating system market, that the Windows operating system and Internet Explorer web browser were separate products, and that Microsoft had tied the purchase of Windows to the purchase of Internet Explorer. *See Microsoft*, 253 F.3d at 81–89. Yet, the court nonetheless rejected per se treatment because the evidence showed the possibility of substantial efficiencies when a software developer integrates an applications platform, here, the operating system, with "complementary software functionality," here, features of the web browser. *See id.* at 89–90 ("Applying per se analysis to such an amalgamation creates undue risks of error and of deterring welfare-enhancing innovation."). Given this uncertainty, the court held that it was better to apply a rule of reason analysis to such conduct, rather than flatly reject the conduct and its possible accompanying efficiencies. *See id.* at 89–95.

Second, *Polk Bros.* suggests that courts should defer to the parties' decision that the restraint promoted their pro-competitive transaction.¹⁰⁵ For example, *Polk Bros.* states that a court must ask whether the restraint "arguably" promoted the pro-competitive transaction.¹⁰⁶ Similarly, the Supreme Court has suggested that a restraint be treated as ancillary if it may promote competition, or if the court has "some doubt" that the challenged conduct is a naked restraint.¹⁰⁷ These passages suggest that courts should accept rational arguments and not require strong showings.

Not surprisingly, in determining whether the restraint was necessary to accomplish the parties' pro-competitive transaction, the Supreme Court has considered whether the parties could have done so without the restraint. If obvious alternative means would achieve comparable benefits, the restraint was not necessary. For example, in *NCAA v. Board of Regents of University of Oklahoma*,¹⁰⁸ the Court addressed NCAA rules that restricted member schools' ability to contract for broadcast of the their school's football games. The NCAA defended the rules as necessary to foster competition among schools, which would make the NCAA's product—here, college football games—more attractive to viewers and thus better able to compete in the marketplace of entertainment.¹⁰⁹ While the Court accepted this goal as legitimate, it concluded that the NCAA's broadcast restrictions were not necessary to do so.¹¹⁰ The Court rested its conclusion, in part, on its observation that other NCAA rules, which did not restrain trade, were "clearly sufficient" to achieve the NCAA's goals.¹¹¹

Judicial review of each step of the ancillary restraint analysis is quite deferential. This deference is prudential, recognizing limits in

105 See *Polk Bros.*, 776 F.2d at 189 (noting that the new venture was meant to expand output and likely to benefit consumers).

106 See *id.*

107 See *Broad. Music*, 441 U.S. at 23.

108 468 U.S. 85 (1984).

109 See *id.* at 117.

110 See *id.* at 119. The Court explained the point as follows:

The television plan is not even arguably tailored to serve such an interest [in equalizing competition among teams and divisions]. It does not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs, whether derived from the sale of television rights, the sale of tickets, or the sale of concessions or program advertising. The plan simply imposes a restriction on one source of revenue that is more important to some colleges than to others.

Id.

111 See *id.*

both judicial expertise and fact-finding ability. Courts are not experts in economic analysis.¹¹² While microeconomic theory derives from simple assumptions about rational human behavior, the theory becomes difficult to apply in complicated market settings, with economists even disagreeing about the proper analysis.¹¹³ Because federal judges are not professional economists, they ought not referee economic debates in deciding cases. Further, real world markets are dynamic, and even the best litigation process cannot reconstruct all the factors surrounding the challenged conduct. For these reasons, courts uphold the challenged conduct unless their limited economic expertise and fact-finding ability clearly indicate otherwise.

In sum, the doctrine of ancillary restraints gives judges a tool to distinguish those restraints created with a purpose to defeat competition from those that only incidentally restrict competition in the service of a larger pro-competitive transaction. The doctrine does so by asking judges to apply a two-step analysis:

- (1) Is the challenged restraint part of a larger transaction with pro-competitive effects? The party defending the challenged restraint bears the burden with respect to this question.
- (2) Is the challenged restraint necessary to achieve the pro-competitive aspects of the larger transaction? The court should ask this question from the parties' perspective at the time they entered the challenged agreement. After considering possible alternatives, the court should defer to a plausible argument for necessity.

The next section uses this model to construct a doctrine of ancillary delegations for state immunity.

B. *The Doctrine of Ancillary Delegations*

The Sherman Act did not outlaw all restraints of trade.¹¹⁴ Rather, the Supreme Court distinguishes restraints of trade based on their purpose. Those used to achieve an impermissible purpose, harming competition, are invalid naked restraints. Those used to achieve a

112 See *United States v. Topco Assocs.*, 405 U.S. 596, 609 (1972) ("The fact is that courts are of limited utility in examining difficult economic problems."). The Court has also decided that conduct that is "plainly anticompetitive" is per se illegal. *Broad. Music*, 441 U.S. at 7-8. By designating certain conduct as per se illegal, the Court avoids an extended economic inquiry into each instance of the conduct, which inquiry courts are generally ill-suited to perform. See *Topco*, 405 U.S. at 609-10. The Court has also recognized its limited economic expertise outside the antitrust context. See *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 308-09 (1997) (noting that judges are not qualified to do complex economic analysis in dormant Commerce Clause cases).

113 See *Gen. Motors*, 519 U.S. at 308-09.

114 See *supra* notes 65-76 and accompanying text.

permissible purpose, promoting competition, are valid ancillary restraints. The doctrine of ancillary restraints helps courts determine which type of restraint a case presents.

Similarly, state immunity should not prohibit all delegations of federal law enforcement power, only those enacted for an impermissible purpose. To formulate a state immunity non-delegation doctrine, then, we need to identify permissible and impermissible purposes. Recall from our discussion above that Congress and the President have a legitimate interest in creating effective institutional arrangements, including effective law enforcement arrangements.¹¹⁵ Conversely, the states have an interest in Congress not deputizing private parties solely to circumvent state immunity. These are our contrasting purposes. On the one hand, a delegation made to circumvent state immunity is invalid. Drawing on antitrust terminology, call this a “naked delegation.” Conversely, a delegation made as part of a larger effort to efficiently structure federal law enforcement would be valid. Call this an “ancillary delegation.”

Next, courts will need a doctrine to distinguish naked and ancillary delegations in specific cases. We can model such a doctrine after the two-step ancillary restraint doctrine in antitrust. The first step of the antitrust doctrine asks whether the restraint is part of a larger, pro-competitive transaction. In the state immunity context, the analogous question is whether a delegation of federal law enforcement power to private actors is part of a larger effort to structure effective federal law enforcement. As in antitrust, the burden should be on the party supporting the challenged action to answer this question. In antitrust, the burden is on the defendant; for state immunity, the burden should be on the party seeking to overcome state immunity.¹¹⁶ If the delegation is not ancillary, then the delegation stands alone, with no other purpose than to circumvent state immunity. Such naked delegations should be invalid.

115 See *supra* notes 50–63 and accompanying text.

116 This burden is consistent with the general constitutional law requirement that the government must offer some purpose behind its challenged conduct. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (noting that government must have a legitimate purpose behind a law that burdens an ordinary liberty interest); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (“A land use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’ and does not ‘den[y] an owner economically viable use of his land.’”) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440–41 (1985) (noting that government must offer some legitimate purpose in support of a law that discriminates on a basis other than race or gender).

The party seeking to overcome state immunity cannot satisfy the first step simply by claiming that the delegation of law enforcement power saves money by decreasing the workload of federal law enforcement officials. All such delegations potentially do so by shifting the cost of detecting and litigating legal violations to private parties.¹¹⁷ Rather, the federal government must show a specific law enforcement problem posed by the context in which the delegation is made. For example, to justify the delegation made by the False Claims Act,¹¹⁸ the federal government must identify a specific law enforcement problem associated with detecting and prosecuting false claims against the federal government. As we will see below, such fraud may be hard to detect, creating a specific need for institutional arrangements designed to ferret out offenders.¹¹⁹

The second step of the antitrust doctrine asked whether the challenged restraint on trade was necessary to achieve the pro-competitive aspects of the larger transaction. In the state immunity context, the analogous question is whether the challenged delegation is necessary to solve the specific law enforcement problem posed by the regulatory context. For example, in the False Claims Act, is the *qui tam* action necessary to address the specific problem of detecting fraud against the government? As in the antitrust context, this question should be answered *on the information available at the time the challenged decision was made*. In antitrust, this means at the time the parties created the challenged restraint of trade; for state immunity, this means at the time Congress enacted the challenged delegation.¹²⁰

The only real question left is how carefully courts should scrutinize the federal government's claim of necessity. The same prudential limitations that counseled deference in the antitrust context counsel deference in the state immunity context. Courts are not experts in tailoring effective law enforcement arrangements. Further, courts are not well situated to perform the factual inquiry necessary to judge the government's decision whether delegation was feasible.

117 As discussed above, *see supra* notes 39–49 and accompanying text, whether a specific delegation actually saves money depends on the relative transaction costs of in-house and outside enforcement.

118 *See infra* Part III.A.3. The Federal False Claims Act targets private contractors who defraud the federal government. The Act allows the government and private individuals acting on behalf of the government to file suit against parties allegedly defrauding the federal government.

119 *See infra* notes 157–81 and accompanying text.

120 *Cf. Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, 463–64 (1981) (noting that an equal protection challenge is decided on information available to government at the time it acted).

This does not mean that courts should ignore whether non-delegation alternatives were available. Indeed, the availability of obvious alternatives may undercut the plausibility of the government's case for necessity. However, in the end, for institutional reasons, courts should defer to a plausible government argument for necessity.

C. *The Ancillary Delegation Doctrine Stated and Applied*

Before turning to the False Claims Act, we offer a quick summary of the newly minted ancillary delegation doctrine as well as an illustrative application. First, the doctrine is as follows:¹²¹

- (1) Is the challenged delegation part of a larger effort to address specific law enforcement problems posed by the given regulatory context? Heavy federal law enforcement work load is *not* a specific law enforcement problem. The party seeking to overcome state immunity bears the burden with respect to this question.
- (2) Is the challenged delegation of federal law enforcement power necessary to solve the specific law enforcement problem? The court should answer this question based on the information before Congress at the time it acted. After considering possible alternatives, the court should defer to a plausible argument for necessity.

Second, let us take this new doctrine out for a spin by applying it to the facts in *Blatchford v. Native Village of Noatak*,¹²² the case that gave us the non-delegation dicta. In *Blatchford*, an Alaskan Native village brought a federal suit against the State of Alaska challenging the constitutionality of an allegedly discriminatory municipal funding scheme.¹²³ The trial court dismissed the suit, holding that the Eleventh Amendment protected Alaska from the village's federal court suit.¹²⁴

In the Supreme Court, the village argued that state immunity should not apply because the United States had delegated its federal

121 Our proposed ancillary delegation doctrine is similar in structure to the Supreme Court's current test for reviewing federal legislation enacted under Section 5 of the Fourteenth Amendment. Section 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. In deciding whether a challenged statute enforces the Fourteenth Amendment, the Court asks two questions. See *City of Boerne v. Flores*, 521 U.S. 507, 530-32 (1997). First, has Congress identified a pattern of Fourteenth Amendment violations that require remedy or deterrence? *Id.* at 530-31. Second, is the challenged statute tailored to punishing or deterring the identified constitutional violations? *Id.* at 532.

122 501 U.S. 775 (1991).

123 *Id.* at 778.

124 *Id.*

law enforcement power to the Indian tribes.¹²⁵ Earlier this century, the Supreme Court had held that the United States could file suit on behalf of an Indian tribe to protect the tribe's rights, and state immunity would not bar the United States from bringing such suits in federal court.¹²⁶ The village argued that Congress subsequently delegated this power to litigate for the Indian tribes back to the tribes.¹²⁷ The village relied on the following statute:

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.¹²⁸

For our immediate purposes, the question is whether this statute should be considered a valid ancillary delegation of the United States's power to sue the states in federal court.

The statute in *Blatchford* fails the first step of the ancillary delegation doctrine. Under the first step, the village must demonstrate that Congress enacted the above-quoted statute in response to a unique law enforcement need in the area of tribal rights. The village would fail for three reasons. First, the statute's text does not identify any specific area of law enforcement need. Rather, the statute allows suit for *all* arising under claims brought by Indian tribes, regardless of whether the claims relate to uniquely tribal interests. The statute's focus is *who* brings the suit, not *what* the suit involves.

Second, the statute's legislative history does not mention any special law enforcement need arising in the tribal context.¹²⁹ This silence is fatal because the ancillary delegation doctrine places the burden on the party challenging immunity to show that the statute had such a purpose. Unless Congress identifies some unique law enforcement need, a party cannot carry its burden under step one.

Third, the statute's history suggests that it was not aimed at remedying any law enforcement need. At the time Congress enacted the statute, federal law placed a jurisdictional minimum of \$10,000 on

125 See *id.* at 783. The village pressed two other arguments against state immunity. First, the village argued that state immunity did not apply against other sovereigns, such as the sovereign Indian nations. See *id.* at 779. Second, the village argued that Congress had abrogated the state's immunity. See *id.* at 786. The Court rejected both contentions. *Id.* at 780–82, 786–88.

126 See *United States v. Minnesota*, 270 U.S. 181, 195 (1926).

127 *Blatchford*, 501 U.S. at 783.

128 28 U.S.C. § 1362 (1994).

129 See H.R. Rep. No. 2040 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3145.

arising under suits.¹³⁰ The statute's title suggests that Congress simply removed the jurisdictional minimum for federal arising under suits brought by Indian tribes: "To amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the \$10,000 limitation, and for other purposes."¹³¹

Even if some unique law enforcement need existed in the tribal context, the statute fails the second prong of the ancillary delegation doctrine because it is not tailored to any conceivable law enforcement need. The statute grants tribes jurisdiction in the broad category of all "civil actions . . . aris[ing] under" federal law.¹³² This grant indiscriminately mixes private rights of action with actions affected with a public law enforcement character. Congress made *no* effort to limit the delegation to any subset of federal laws. Such a generic, blanket delegation evinces no tailoring whatsoever.

The statute in *Blatchford* rather clearly fails the ancillary delegation doctrine. This is not surprising since the best explanation for the statute had nothing to do with fixing a problem in federal law enforcement. This example should illustrate that an ancillary delegation doctrine offers states strong protection from accidental or mistaken delegations of federal law enforcement power. Unless Congress expressly identifies a unique problem in federal law enforcement, either in statutory text or legislative history, the analysis never gets past step one. Step one, then, applies a kind of clear statement rule to delegations of federal law enforcement power. Such clear statement rules are a standard device the Supreme Court uses to protect states from inadvertent federal encroachment on their sovereignty.¹³³

III. THE FEDERAL FALSE CLAIMS ACT AS ANCILLARY DELEGATION

Part I explained that some delegations of federal law enforcement power should overcome state immunity, and Part II crafted a doctrine of ancillary delegations to implement this insight. Part III now applies the doctrine to the Federal False Claims Act's *qui tam* action. Section A traces the evolution of the *qui tam* action from its

130 See 28 U.S.C. § 1331(a) (1964).

131 Act of Oct. 10, 1966, Pub. L. No. 89-635, 80 Stat. 880 (codified at 28 U.S.C. § 1362 (1994)). The Supreme Court has also credited this as the purpose of the statute. See *Blatchford*, 501 U.S. at 784.

132 28 U.S.C. § 1362 (1964).

133 See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 287-89, 326 (1994) (discussing the Supreme Court's federalism-based canons of statutory construction); Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1283-86 (1998) (discussing various clear statement rules the Supreme Court uses to protect the states).

English origins through its current American incarnation. Section B then applies the doctrine of ancillary delegations in light of this history.

A. *The History of the Federal False Claims Act*

1. English Origins

The *qui tam* action has roots in the English common law and was practiced as early as the thirteenth century.¹³⁴ Under English practice, private citizens could bring actions to enforce the law, even when they had no personal stake in the litigation.¹³⁵ Initially, *qui tam* actions arose as forum shopping devices.¹³⁶ Ordinarily, local English courts had jurisdiction over private wrongs,¹³⁷ but those courts were reputedly ineffective and unjust.¹³⁸ The *qui tam* action allowed private litigants to escape the local courts: private parties would sue in the King's name, thereby allowing them access to the royal courts.¹³⁹

Slowly, Parliament replaced the English common-law *qui tam* action with *qui tam* statutes.¹⁴⁰ As Parliament did so, the focus of the *qui tam* action shifted from forum shopping to supplementing law enforcement.¹⁴¹ This trend began when a version of the *qui tam* action known as an "informer's action" became common.¹⁴² The informer's action authorized private informers to bring suit to redress public wrongs; in return, the informer received a bounty calculated as a percentage of the amount recovered from the wrongdoer.¹⁴³ This incen-

134 See J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 567-68 (2000); Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 83.

135 See Beck, *supra* note 134, at 552-53 (summarizing Blackstone's description of a *qui tam* statute).

136 See Note, *supra* note 134, at 85.

137 *Id.*

138 See *id.* (describing the "adequacy and fairness" of local courts as "uneven at best").

139 *Id.*; see also Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455, 458 (1998).

140 See Note, *supra* note 134, at 85-86.

141 See Beck, *supra* note 134, at 565-66 ("Prior to the advent of modern law enforcement and the development of the regulatory state, England relied heavily upon *qui tam* informers to perform many tasks that today are the work of police officers, prosecutors, and administrative officials."); see also Note, *supra* note 134, at 86 ("In the early stages of English criminal law, enforcement of penal statutes was limited by the lack of an effective public police force.").

142 See Note, *supra* note 134, at 87-88.

143 See JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 1-8 (2d ed. 2000, Supp. 2000, & Supp. 2001).

tive would push private citizens to supplement the then-spotty system of public law enforcement. One commentator described the situation as follows:

Legislation important to the national sovereign was not always a high priority to local officials; in fact, enforcement of national law was particularly difficult when such national legislation undermined local officials' interests. Faced with limited public enforcement resources and the difficulty of implementing national policies over numerous, geographically separated, local jurisdictions, Parliament began during the fourteenth century to turn increasingly to *qui tam* enforcement as the most practical means to police compliance with regulatory requirements.¹⁴⁴

The False Claims Act's *qui tam* provision is a modern day example of an informer's action.

Over time, English experience revealed weaknesses in the *qui tam* enforcement scheme as various abuses emerged. In each case, Parliament learned from the experience and fine-tuned the *qui tam* statutes. Consider the following example.¹⁴⁵ Some wrongdoers would instigate collusive *qui tam* actions to foreclose later punishment.¹⁴⁶ At the time, *qui tam* judgments barred future prosecution for the same offense. To take advantage of this rule of preclusion, a wrongdoer would find a sympathetic private litigant to bring a *qui tam* action. The wrongdoer and the *qui tam* informer would then either settle the action—executing a release from future liability—or the informer would take a nominal judgment.¹⁴⁷ “The judgment or release in the collusive action would then bar good faith attempts to enforce the statute.”¹⁴⁸

In response to the collusive suits, Parliament made two changes to the *qui tam* action. First, if a litigant could prove that a prior *qui tam* judgment was collusive, the prior judgment would not bar later prosecution.¹⁴⁹ Second, any person who colluded with a *qui tam* in-

144 Beck, *supra* note 134, at 567. One example of lax local law enforcement related to national price restrictions on certain goods. *Id.* at 568. If the local officials were themselves selling a regulated commodity, Parliament feared that those officials might shirk their duty to enforce the national price restriction. *Id.*

145 For a detailed discussion of other *qui tam* abuses, see *id.* at 573–608.

146 See *id.* at 574.

147 See *id.*; see also Note, *supra* note 134, at 89 (“A friend of the wrongdoer would bring suit and either obtain a confessed judgment for a small part of the penalty or permit the wrongdoer to prevail at a feigned trial.”).

148 Beck, *supra* note 134, at 574.

149 See *id.*

former could be punished by two years in prison.¹⁵⁰ Parliament met *qui tam* abuse with measures calculated to stop the abuse.¹⁵¹

Ultimately, a number of factors combined to make the English *qui tam* actions obsolete. First, the royal courts were opened to all legal disputes, eliminating the incentive to forum shop.¹⁵² Second, informers gained a negative reputation and were distrusted based on often unscrupulous motivations for economic gain.¹⁵³ Third, and most important for present purposes, the need for private enforcement suits diminished as the English public police force grew more effective in dealing with public wrongs.¹⁵⁴

The English *qui tam* experience yields two relevant observations. First, the informer's action variation on the traditional *qui tam* action addressed a real need in English law enforcement. English officials saw a problem with detecting and punishing those who violated public law. The *qui tam* action, with its incentive to informers, addressed this need. Second, Parliament continuously adapted the *qui tam* action to changing circumstances. When informers or wrongdoers began to abuse the action, Parliament fine-tuned the *qui tam* statutes to prevent further abuse. Moreover, when the law enforcement need subsided, so did the *qui tam* action.¹⁵⁵ As we will see below, the American *qui tam* experience followed a similar pattern of adapting *qui tam* to changing needs over time.¹⁵⁶

150 See *id.*

151 See Note, *supra* note 134, at 89–90 (describing Parliament's efforts to address *qui tam* abuses).

152 See *id.* at 85.

153 See Beck, *supra* note 134, at 575–85 (describing tactics that indicate informers' bad reputations).

154 See *id.* at 601 ("The decline of *qui tam* enforcement coincided with the development of modern police departments and the proliferation of public prosecutors.").

155 See Meador & Warren, *supra* note 139, at 458 ("[T]he *qui tam* suit became less popular as England developed an effective public police force.").

156 Of course, given the experiential nature of *qui tam* evolution, we should not be surprised to find scholarly suggestions for further refining, or even replacing, the *qui tam* action. See, e.g., Michael Abramowicz, *Market-Based Administrative Enforcement*, 15 YALE J. ON REG. 197, 209 (1998) (suggesting replacement of *qui tam* actions with a private enforcement scheme that avoids *qui tam*'s incentive for "profiteering"). See generally Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) (reviewing the public-private relationship in law enforcement).

2. American Evolution of the *Qui Tam* Action

The *qui tam* action entered American jurisprudence during the colonial period,¹⁵⁷ and was popular with the First Congress, with ten of the first fourteen federal statutes incorporating the *qui tam* enforcement scheme.¹⁵⁸ As in England, early American governments enacted the *qui tam* action to supplement poorly developed public law enforcement.¹⁵⁹ Further, as in England, “[a]s the country developed, *qui tam* actions became less common.”¹⁶⁰ Thus, from the beginning, American *qui tam* actions were creatures of necessity.¹⁶¹

The following sections pick up the American *qui tam* story during the Civil War, when Congress enacted the first version of the False Claims Act. The discussion shows how Congress repeatedly amended the Act in response to experience, as abuses emerged and law enforcement needs changed. Throughout these changes, however, Congress’s purpose has remained the same: to tailor the False Claims Act’s *qui tam* provision to the unique law enforcement problems posed by the detection and punishment of fraud against the federal government.

157 See Note, *supra* note 134, at 93–97 (describing early American adoption of and experience with *qui tam* actions); see also Raoul Berger, *Standing To Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 825–27 (1969) (describing informer actions in English law, as evident in the colonies, prior to the Constitution).

158 BOESE, *supra* note 143, § 1-9 (“At least ten of the first 14 statutes enacted by the first United States Congress relied on some sort of *qui tam* action to supplement the enforcement role of government agents. . . . [T]hese actions were popular among legislators for the same reason giving rise to their use in England: lack of an effective public policing force.”); see also Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1406–09 (1988) (describing *qui tam* legislation enacted by first two Congresses); Caminker, *supra* note 37, at 342 (“*Qui tam* actions were routinely authorized by the First and subsequent early Congresses.”).

159 See Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 296–303 (1989).

160 Meador & Warren, *supra* note 139, at 458; see also Francis E. Purcell, Jr., Comment, *Qui Tam Suits Under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression*, 42 CATH. U. L. REV. 935, 940 (1993) (describing how statutory restrictions and judicial monitoring combined to decrease the number of *qui tam* suits).

161 See Note, *supra* note 134, at 99–100 (“So long as *qui tam* was necessary to enforce the penal laws, it was utilized.”).

a. The Original Federal False Claims Act

During the Civil War, the federal government experienced rampant fraud at the hands of defense contractors.¹⁶² Army officers had reported numerous incidents where the federal government had paid for certain supplies only to receive defective goods or nothing at all.¹⁶³ For example, “[t]he Army had received small arms that inspection revealed to be useless and artillery shells filled with sawdust rather than explosives.”¹⁶⁴ A House of Representatives Report characterized the problem as follows: “An unpardonable eagerness to make the misfortunes of the nation the source of personal aggrandizement, as in the case of other officials who became directly or indirectly connected with the large and lucrative government contracts elsewhere mentioned, is unfortunately too manifest”¹⁶⁵ Congress feared that many instances of fraud went either undetected or unpunished, costing the federal government substantial amounts of money.¹⁶⁶ The main law enforcement problem was that information about such fraud was uniquely in the possession of the wrongdoers.¹⁶⁷ The urgency of the dilemma was further exacerbated by the belief that some public law enforcement officials participated in and profited from the frauds.¹⁶⁸ Because such fraud was difficult to detect and punish, it was pervasive in scope and “massive” in amount.¹⁶⁹ Unchecked, such

162 See CONG. GLOBE, 37th Cong., 3d Sess. 952 (1863) (statements of Sen. Howard) (“The country, as we know, has been full of complaints respecting the frauds and corruptions practiced in obtaining pay from the Government during the present war.”); see also Meador & Warren, *supra* note 139, at 458.

163 See S. Rep. No. 99-345, at 8 (1986), reprinted in 1986 U.S.C.A.N. 5266, 5273.

164 Beck, *supra* note 134, at 555; see also CONG. GLOBE, 37th Cong., 3d Sess. 952–56 (debating the form of the bill to address various abuses by defense contractors).

165 H.R. REP. NO. 37-2, pt. ii-a, at XXXVIII–IX (1862).

166 See *id.* at III (explaining that after the House condemned certain practices by government contractors the practices were “more secretly pursued and more difficult of detection, and at the same time more flagrant, if possible, and injurious to the public interests”).

167 *Id.*

168 See Caminker, *supra* note 37, at 351 (“In 1863, many public officials were thought to be intimately involved in the corrupt practices of Civil War defense contractors, and Congress feared that public law enforcement officers might therefore hesitate to prosecute offenses diligently.”); see also Comment, *Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions*, 67 NW. U. L. REV. 446, 453–54 n.32 (1972).

169 *United States v. Bornstein*, 423 U.S. 303, 309 (1976); see also 1 FRED A. SHANNON, *THE ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY 1861–1865*, at 58 (Peter Smith ed., 1965) (1928) (describing the “astounding amount of illegal and fraudulent activities” in defense contracting during the Civil War).

fraud would set back the North's war effort at a critical time.¹⁷⁰ Under these circumstances, Congress turned to the *qui tam* action to once again supplement federal law enforcement.

In 1863, the Thirty-Seventh Congress passed the first incarnation of the False Claims Act (1863 Act).¹⁷¹ The 1863 Act targeted the private contractors who were defrauding the Union government,¹⁷² as well as state officials who did so in procuring supplies for state troops.¹⁷³ To catch the wrongdoers, the 1863 Act relied on a partnership between United States Attorneys¹⁷⁴ and private citizens, known as *qui tam* relators, to hail the fraudfeasors into court.¹⁷⁵ The 1863 Act allowed suits by any person with knowledge of fraud against the government and encouraged relators to bring suit by giving them a share of any money recovered in the suit.¹⁷⁶ Indeed, the potential recovery was so great that even those engaging in fraud were expected to bring *qui tam* actions.¹⁷⁷ Congress based the *qui tam* provision "upon the

170 See CONG. GLOBE, 37th Cong., 3d Sess. 953 (1863) (statements of Sen. Howard) ("[I]t is entirely clear that without the employment of contractors for the purpose of procuring [arms and other supplies], the Army itself would be totally worthless and useless.").

171 See United States *ex rel.* Stevens v. Vt. Agency of Nat. Res., 162 F.3d 195, 205 (2d Cir. 1998). The original 1863 Act was called "[a]n Act to prevent and punish Frauds upon the Government of the United States." Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-98 (codified as amended at 18 U.S.C. § 287 (1994) and 31 U.S.C. §§ 3729-3733 (1994)).

172 See James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the United States* *ex rel.* Gravitt v. General Electric Co. *Litigation*, 18 OHIO N.U. L. REV. 35, 35-36 (1991); see also Sharon A. Jenks & Brian Kaplan, *False Claims*, 34 AM. CRIM. L. REV. 555, 555 (1997); John Terrence A. Rosenthal & Robert T. Alter, *Clear and Convincing to Whom? The False Claims Act and Its Burden of Proof Standard: Why the Government Needs a Big Stick*, 75 NOTRE DAME L. REV. 1409, 1419 (2000) ("The incredible surge in war spending during this period, coupled with a lack of sufficient federal law enforcement organizations, created the impetus for Congress to legislate the Act in an effort to curb [defense contractor fraud].") (citations omitted).

173 See H.R. REP. NO. 37-2, pt. ii-a, at I-II (1863) (discussing abuses by state officials).

174 The 1863 Act predated the creation of the Department of Justice.

175 See Lisa Estrada, Case Note, *An Assessment of Qui Tam Suits by Corporate Counsel Under the False Claims Act*: United States *ex rel.* Doe v. X Corp., 7 GEO. MASON L. REV. 163, 165 (1998).

176 See Act of Mar. 2, 1863, ch. 67, § 1.

177 See Beck, *supra* note 134, at 556 ("The provision for *qui tam* enforcement was designed to encourage participants in fraudulent schemes to bring the wrongdoing to light."); see also James T. Blanch, Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J.L. & PUB. POL'Y 701, 703-04 (1993). The Act provided for a \$2000 penalty for each false claim plus double damages. See Meador & Warren, *supra* note 139, at 459. The private relator who initiated a *qui tam* action also stood to

old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue' which is the safest and most expeditious way . . . of bringing rogues to justice."¹⁷⁸

Early on, a federal district judge described the theory behind this *qui tam* provision in *United States v. Griswold*.¹⁷⁹ That case emphasized the importance of the *qui tam* plaintiff, reasoning that the federal government could not release a defendant from paying damages owed to an informer even though damages owed to the government could be released.¹⁸⁰ The court stated:

The statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, *based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain.* Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.¹⁸¹

Early federal precedent recognized that the practical problems associated with detecting and punishing fraud on the government required private involvement in the enforcement process. The 1863 Act's *qui tam* provisions responded to that acknowledged necessity.

b. The 1943 Amendments to the Federal False Claims Act

After the Civil War, the 1863 Act fell into disuse for several decades until a new law enforcement need arose.¹⁸² In the 1930s, the New Deal and United States military intervention created new oppor-

collect fifty percent of the total recovery and forfeitures. *See id.* The buying power of \$2,000 in 1863 would have been close to \$18,000 in 1986. H.R. REP. NO. 99-660, at 17 (1986). The figure was based on the Consumer Price Index as reported by the Congressional Research Service. *Id.*

178 *See* CONG. GLOBE, 37th Cong., 3d Sess. 956 (1863) (statements of Sen. Howard).

179 24 F. 361 (D. Or. 1885), *aff'd*, 30 F. 762 (C.C.D. Or. 1887).

180 *See* BOESE, *supra* note 143, § 1-12 (Supp. 2000).

181 *Griswold*, 24 F. at 366 (emphasis added). The Supreme Court has quoted this same passage in an opinion broadly construing the *qui tam* provision of the False Claims Act. *See* *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943); *see also* *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). (quoting the same passage from *Griswold*).

182 *See* Christopher C. Frieden, Comment, *Protecting the Government's Interests: Qui Tam Actions Under the False Claims Act and the Government's Right To Veto Settlements of Those Actions*, 47 EMORY L.J. 1041, 1045 (1998).

tunities for government contractors to profit from fraud against the federal government.¹⁸³ This new round of *qui tam* actions exposed a flaw in the 1863 Act: relators could bring suit based on public information obtained from criminal fraud indictments.¹⁸⁴ Courts allowed these suits because the 1863 Act did not require a *qui tam* action to be based on a relator's independent, first-hand knowledge of fraud.¹⁸⁵ These "parasitic" lawsuits

created the predictable and undesirable outcome that whenever a criminal indictment was issued, there was a frenzied rush to file civil suits and claim *qui tam* awards. *Because these suits were based on information the government already had, they did nothing to further the qui tam provision's purpose of bringing to light fraud that the DOJ could not discover on its own. Parasitic suits served only to decrease what the government could recover from FCA defendants and to enrich qui tam relators who did nothing more than learn through the news media of a criminal indictment.*¹⁸⁶

Parasitic suits showed that the 1863 Act's *qui tam* provision did not tailor federal law enforcement efforts as well as it could. While non-parasitic suits uncovered and prosecuted fraud the government would not have otherwise discovered, parasitic suits served no law enforcement need, instead simply giving away government money to private actors who provided no useful service.¹⁸⁷

183 See, e.g., BOESE, *supra* note 143, § 1-10 to 1-12; Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 389 ("Beginning in the 1930s, however, the New Deal and World War II greatly expanded the role of the federal government in the national economy, and commensurately expanded the opportunities for unscrupulous contractors to defraud the government."); Gary W. Thompson, *A Critical Analysis of Restrictive Interpretations Under the False Claims Act's Public Disclosure Bar: Reopening the Qui Tam Door*, 27 PUB. CONT. L.J. 669, 673-74 (1998) (*Qui tam* actions "increased . . . with the rise in federal spending during the New Deal and in preparation for World War II.").

184 See Frieden, *supra* note 182, at 1045.

185 See *id.*

186 Blanch, *supra* note 177, at 704 (citation omitted) (emphasis added). Attorney General Francis Biddle registered a similar complaint with Congress: Such *qui tam* actions were "mere parasitical actions, occasionally brought only after law-enforcement officers [had] investigated and prosecuted persons guilty of a violation of law and solely because of the hope of a large reward." Letter from Francis Biddle to Hon. Frederick Van Nuys, Chairman, Committee on the Judiciary, United States Senate (Aug. 28, 1942), in S. REP. NO. 77-1708, at 2 (1942).

187 The United States experienced a similar problem during the War of 1812 with privateers, "that is, civilian ships licensed by the government to prey on enemy merchant shipping." ROBERT LECKIE, *FROM SEA TO SHINING SEA* 232 (1993). While such deputized sailing vessels "would seem . . . a great asset of the United States Navy," they were actually a hindrance because of the great financial incentive in capturing

In 1943, Congress amended the 1863 Act to address parasitic suits. The 1943 Amendment denied federal courts jurisdiction over a *qui tam* action “based on evidence or information the Government had when the action was brought.”¹⁸⁸ By closing this loophole, Congress better tailored the *qui tam* action to the law enforcement need that was its *raison d’être*.¹⁸⁹

c. The 1986 Amendments and the Current Federal False Claims Act

Unfortunately, the 1943 Amendment had an unintended effect that undercut Congress’s enforcement scheme. The amendment barred all *qui tam* actions based on public information, even when *the relator was the original source of the information*.¹⁹⁰ For example, in *United States ex rel. Wisconsin v. Dean*,¹⁹¹ the Seventh Circuit relied on the 1943 Amendment to dismiss a *qui tam* action brought by the State of Wisconsin.¹⁹² Wisconsin’s *qui tam* suit alleged Medicaid fraud that the State itself had discovered and disclosed to the federal government.¹⁹³ When Wisconsin later brought a *qui tam* action based on those same allegations, the 1943 Amendment barred the suit, even though the State was the original source of the information.¹⁹⁴ While Wisconsin had detected fraud the federal government would not have uncovered, the State could not benefit from the *qui tam* action because it had disclosed the fraud to the federal government *before* filing the *qui tam* action.¹⁹⁵ Thus, the 1943 Amendment undercut the Act’s overall

foreign merchant ships and their cargo. *Id.* Given the lucrative nature of privateering, the United States Navy had difficulty recruiting sailors away from such service. *See id.* Also, given the competitive nature of privateering, privateers were reluctant to share information they believed gave them an advantage. *See id.* at 232–33. One commentator summarized the point this way: “[T]he U.S. Navy was at war with the Royal Navy, the privateers were at war for money.” *Id.* at 233. As with the early False Claims Act, poor tailoring of an incentive scheme lead to undesirable unanticipated consequences.

188 31 U.S.C. § 3730(b)(4) (1982) (superseded 1986).

189 At one point, opposing forces in Congress wanted to either repeal the Act altogether or leave it unamended. *See* Beck, *supra* note 134, at 558–60. The final legislation was a “compromise” that targeted the abusive, parasitic *qui tam* suits. *See id.* at 560–61.

190 *See* Blanch, *supra* note 177, at 704–05.

191 729 F.2d 1100 (7th Cir. 1984).

192 *See id.* at 1106–07.

193 *Id.* at 1103–04.

194 *See id.* at 1106–07.

195 *See id.* at 1106.

purpose of rewarding relators who helped detect fraud that the United States would not have otherwise discovered.¹⁹⁶

In 1986, Congress again amended the 1863 Act to refine the incentives offered to private citizens.¹⁹⁷ This time, Congress provided that *qui tam* relators could bring suit if they were the "original source" of information that later became public.¹⁹⁸ In addition, Congress refined other aspects of the *qui tam* action, better tailoring the statute to the federal government's law enforcement needs.¹⁹⁹ For example, the 1986 Amendments added provisions to protect whistle-blowers,²⁰⁰ increased damages from double to triple, and allowed attorney's fees²⁰¹

196 See Frieden, *supra* note 182, at 1046-47.

197 See H.R. REP. NO. 99-660, at 23 (1986); Caminker, *supra* note 37, at 343-44 & 344 n.13.

198 Blanch, *supra* note 177, at 705 (citing United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 n.4 (N.D. Cal. 1989), quoting 31 U.S.C. § 3730(e)(4)(A) (1994)).

199 One commentator has described three motivating factors behind the 1986 Amendments:

First, Congress recognized that one reason "most fraud goes undetected" is because of the Government's "weak internal controls and the fact that government auditors do not pay adequate attention to possible fraud."

Second . . . , Congress expressed concern that "there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action."

Third . . . , Congress recognized that the Government, working alone, simply has insufficient resources to detect and prosecute the level of fraud being committed, especially given the growth and diversification of federally funded programs

Thompson, *supra* note 183, at 677-78 (citations omitted); see also Beck, *supra* note 134, at 562-63 (citing similar reasons behind the 1986 Amendments).

200 One commentator describes how the whistle-blower protection helped better tailor the False Claims Act to detect fraud against the federal government:

Prior to the 1986 amendments, the protection of the employment status of a person involved in a false claims case depended upon the widely varying law of the state where the person resided. The new amendments provide a federal standard that will strongly deter employers from taking any action against a *qui tam* plaintiff that could be considered to have a negative effect on his or her employment status.

John Phillips & Janet Goldstein, *The False Claims Act in Practice, in QUI TAM: BEYOND GOVERNMENT CONTRACTS* 469, 480 (PLI Litig. & Admin. Practice Course, Handbook Series No. H-456, 1993); see also S. REP. NO. 99-345, at 4 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5269 ("Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity."); Beck, *supra* note 134, at 563 ("Government investigators in some cases can uncover fraud by their own efforts, but in other circumstances, they need inside information to detect and punish fraudulent schemes.").

201 See Phillips & Goldstein, *supra* note 200, at 479-80.

and an increased monetary incentive (from ten to fifteen percent of the recovery) for a successful relator.²⁰² In sum, the 1986 Amendments show Congress once again adjusting the *qui tam* action based on experience.²⁰³

3. The *Qui Tam* Action of the Federal False Claims Act

The preceding Section described how the False Claims Act got where it is today. The evolution showed Congress adapting the Act to meet changing law enforcement needs. This Section completes the picture by briefly describing the main substantive and procedural features of the current False Claims Act's *qui tam* action. The discussion shows how the *qui tam* action is designed to combat the problems posed by detecting and punishing fraud against the federal government.

A False Claims Act violation has three elements; a person must (1) knowingly;²⁰⁴ (2) present a claim for payment or approval to the United States;²⁰⁵ and (3) the claim must be false or fraudulent.²⁰⁶ In substance, the False Claims Act targets a specific class of conduct—false claims made against the United States. Procedurally, the Act is tailored to the specific law enforcement needs posed by that conduct.

The first procedural step in a False Claims Act *qui tam* action is for the private plaintiff, known as the relator, to serve the complaint and turn over “substantially all material evidence and information the

In addition to whatever percentage of the recovery the attorney negotiates with his client, the new amendments also provide for attorneys' fees paid by the defendant based upon hours reasonably spent. This is especially important in smaller cases such as Medicare fraud where a percentage of the plaintiff's potential recovery may be insufficient to encourage attorneys to file meritorious cases.

Id.

202 *Id.* at 479 (“The old law allowed the *qui tam* plaintiff to recover ‘up to 10%’ of the amount received by the government. Thus, even in a successful case, the plaintiff could receive nothing. The new law guarantees a minimum of 15% recovery.”).

203 For a more detailed discussion of important 1986 Amendments that facilitate *qui tam* actions, see Frieden, *supra* note 182, at 1047–58.

204 A person acts “knowingly” if she “has actual knowledge of the information; acts in deliberate ignorance of the truth or falsity of the information; or acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.” 31 U.S.C. § 3729(b)(1) (1994); see also Meador & Warren, *supra* note 139, at 462.

205 A claim is “any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded.” 31 U.S.C. § 3729(c).

206 *Id.* § 3729(a).

person possesses" to the United States government;²⁰⁷ the action is then filed in federal district court *in camera* and under seal for at least sixty days.²⁰⁸ During that sixty-day period,²⁰⁹ the United States must decide whether to intervene in the action.²¹⁰ To make an informed decision, the government must have time to investigate the relator's claims, and the sixty-day *in camera* period keeps the relator's allegations out of the public domain while the government does so.²¹¹ The 1986 Amendments, while allowing private initiation of lawsuits, also allow the executive an opportunity to share responsibility for prosecution of such claims.²¹²

Depending on whether the United States intervenes, the case will follow one of two tracks. If the United States intervenes, the relator will remain a party to the suit, but the United States will become responsible for prosecuting the suit "and shall not be bound by an act of the person bringing the action."²¹³ Conversely, if the United States does not intervene, the *qui tam* relator may bring a civil action in the name of the United States.²¹⁴ How much the *qui tam* relator may recover, how the litigation is conducted, and how it may be resolved all depend to some degree on which track the case takes.

First, the amount of the relator's recovery varies depending on whether the United States intervenes in the case. On the one hand, if the United States intervenes, the relator is limited to between fifteen percent and twenty-five percent of the United States's recovery.²¹⁵ The precise percentage "depend[s] upon the extent to which the person substantially contributed to the prosecution of the action."²¹⁶ On

207 *Id.* § 3730(b)(2). The materials are served on the United States Attorney General and the United States Attorney for the federal district where the suit is filed. *Id.*

208 *Id.*

209 Upon "good cause shown," the United States may apply for an extension of the sixty-day period. *See id.* § 3730(b)(3).

210 *See id.* § 3730(b)(2).

211 *See* Gabriel L. Imperato, *International Investigations, Government Investigations, Whistleblower Concerns: Techniques To Protect Your Health Care Organization*, 51 ALA. L. REV. 205, 232 (1999) ("The lawsuit remains sealed for 60 days (and usually much longer) to allow the government time to investigate the claims and determine if it wishes to join as a plaintiff in the case."); *see also* Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 155 (5th Cir. 1997); Wercinski v. IBM Corp., 982 F. Supp. 449, 452 (S.D. Tex. 1997).

212 *See* Caminker, *supra* note 37, at 350-51.

213 31 U.S.C. § 3730(c)(1).

214 *See id.* § 3730(b)(1) ("The action shall be brought in the name of the Government."); *see also id.* § 3730(b)(4)(B) ("[T]he person bringing the action shall have the right to conduct the action [if the Government does not intervene].").

215 *See id.* § 3730(d)(1).

216 *Id.*

the other hand, if the United States does not intervene, the relator will recover between twenty-five and thirty percent of the action's proceeds, including treble damages plus penalties per each false claim submitted.²¹⁷ The precise percentage depends on what "amount . . . the court decides is reasonable for collecting the civil penalty and damages."²¹⁸ In either case, the remainder of the recovery from the action returns to the federal treasury.²¹⁹

Second, who controls the litigation depends on whether the United States intervenes. As noted above, if the United States intervenes, it will control the course of litigation.²²⁰ This means that the United States makes final decisions regarding discovery, the filing of motions, and the conduct of the trial. The relator, however, "shall have the right to continue as a party," subject to restrictions.²²¹ The United States may ask the court to restrict the relator's participation "[u]pon . . . showing . . . that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment."²²² Further, the defendant may ask the court to restrict the relator's participation if such participation "would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense."²²³ Possible restrictions include "(i) limiting the number of witnesses the person may call; (ii) limiting the length of testimony of such witnesses; (iii) limiting the person's cross examination of witnesses; or (iv) otherwise limiting the participation by the person in the litigation."²²⁴ Consequently, a benevolent and cooperative relator could participate fully in all phases of the action, even to the extent of calling witnesses at trial. Ultimately, though, the United States may dismiss the suit without the relator's consent.²²⁵

If the United States does not intervene, the *qui tam* relator dictates the course of litigation. The relator "uses her own resources; she writes the briefs, argues the motions, and, most importantly, controls

217 See *id.* §§ 3729(a) (treble damages and penalty), 3730(d)(2) (percentage of proceeds).

218 *Id.* § 3730(d)(2).

219 *Id.* §§ 3730(d)(1) (if the government does intervene), 3730(d)(2) (if the government does not intervene).

220 See *supra* text accompanying note 213.

221 31 U.S.C. § 3730(c)(1).

222 *Id.* § 3730(c)(2)(C).

223 *Id.* § 3730(c)(2)(D).

224 *Id.* § 3730(c)(2)(C).

225 See *id.* § 3730(c)(2)(A). The United States must give the relator notice and an opportunity to be heard on the United States's motion to dismiss. See *id.*

the litigation strategy."²²⁶ Also, the relator drafts all pleadings, conducts discovery, and conducts the trial. The United States's participation is minimal: it may file briefs with the trial court and retains the right to "be served with copies of all pleadings filed in the action and . . . with copies of all deposition transcripts."²²⁷ Also, the United States may seek a stay of the relator's discovery if the discovery "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts."²²⁸ Otherwise, "at least for procedural purposes, [the United States] is as a nominal party plaintiff."²²⁹

Even if the United States declines intervention at the outset, it may intervene later "upon a showing of good cause."²³⁰ But even here, intervention will not limit or constrict in any way "the status and rights of the person initiating the action."²³¹ The role of the United States in the *qui tam* action, however, seems to be that of an overseer. The United States may dismiss the *qui tam* action over any objections by the relator²³² and never forfeits its right to stay informed of all proceedings.²³³

Third, who may settle the litigation depends on whether the United States intervenes. If the United States intervenes, it may settle the litigation without the relator's consent if the district court finds "that the proposed settlement is fair, adequate, and reasonable under all the circumstances."²³⁴ Conversely, if the United States does not intervene, there is debate as to the relator's right to settle the litigation with the court's approval. The circuits are currently split over whether the United States has an absolute veto over the relator's right to settle.²³⁵

226 Valerie R. Park, Note, *The False Claims Act, Qui Tam Relators, and the Government: Which Is the Real Party to the Action?*, 43 STAN. L. REV. 1061, 1070 (1991).

227 31 U.S.C. § 3730(c)(3).

228 *Id.* § 3730(c)(4).

229 Park, *supra* note 226, at 1071.

230 31 U.S.C. § 3730(c)(3) ("When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.").

231 *Id.*

232 *See id.* § 3730(c)(2)(A).

233 *See id.* § 3730(c)(3).

234 *Id.* § 3730(c)(2)(B).

235 Compare United States *ex rel.* Doyle v. Health Possibilities, P.S.C., 207 F.3d 335, 339-40 (6th Cir. 2000) (United States has absolute veto power over relator's settlement), and Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 158-60 (5th Cir. 1997) (same), with United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715, 723

The numbers indicate that the False Claims Act has been effective at detecting fraud against the United States, leading to more than \$4 billion in recoveries.²³⁶ In fiscal year 2000, relators filed 366 *qui tam* actions and recouped over \$1.2 billion for the United States.²³⁷ Since the 1986 Amendments, through fiscal year 1999, the average recovery in a successful *qui tam* action is \$5.8 million, and the average relator's award is \$1.0 million.²³⁸ Based on this data, as well as assumptions about the incidence of fraud, a 1996 study also calculated the deterrent effect of *qui tam* actions:

Deterrence of fraud due to the 1986 Amendments for their first ten years of existence (1986–1996) is estimated as between \$147.9 billion and \$295.8 billion, and for their second ten years of existence (1996–2006) is estimated as between \$240.2 billion (23% of the fraud projected to be committed over that period) and \$480.3 billion (46% of the fraud projected to be committed over that period), even assuming a conservative estimate of deterrent effect.

Deterrence of fraud due to the *qui tam* provisions of the amended Act for their first ten years of existence (1986–1996) is estimated as between \$35.6 billion and \$71.3 billion, and for their second ten years of existence (1996–2006) is estimated as between \$105.1 billion and \$210.1 billion, even assuming a conservative estimate of deterrent effect.²³⁹

Thus, in addition to detecting and punishing fraud against the government, *qui tam* actions arguably deter further fraud, compounding the law enforcement benefits of the tool.

Considering that states and state agencies are large recipients of federal funds, they often find themselves as defendants in False Claims Act *qui tam* actions: “[F]ederal grants to state and local governments more than doubled from \$108 billion in 1987 to \$228 billion in

(9th Cir. 1994) (limiting the United States's power to veto a settlement). The controversy surrounds the following provision of the False Claims Act: “The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.” 31 U.S.C. § 3730(b)(1). The question is whether this provision applies to a stipulated dismissal in conjunction with a settlement. If so, the Attorney General may effectively veto any settlement by the relator.

236 See Taxpayers Against Fraud, *Qui Tam Statistics (As Reported by DOJ: FY Ending September 30, 2000)*, at <http://www.taf.org/statistics.html> (last visited Aug. 28, 2001).

237 *Id.*

238 *Id.*

239 WILLIAM L. STRINGER, THE 1986 FALSE CLAIMS ACT AMENDMENTS: AN ASSESSMENT OF ECONOMIC IMPACT, *Executive Summary* (1996), reprinted in FALSE CLAIMS ACT AND QUI TAM Q. REV. (Taxpayers Against Fraud, Washington D.C.), Oct. 1996, at 30, available at <http://www.taf.org/publications/PDF/oct96qr.pdf> (last visited Aug. 28, 2001).

1996."²⁴⁰ This drastic increase in funding brings with it increased opportunities for fraud. Consequently, states have been called as defendants under the False Claims Act, for example, for allegedly falsifying information on grant applications,²⁴¹ and submitting false claims when receiving federal incentive funding and reimbursements.²⁴² States are part of the law enforcement problem targeted by the False Claims Act.

B. *The Federal False Claims Act as Ancillary Delegation*

It is now time to ask whether the False Claims Act's *qui tam* action is a naked or an ancillary delegation. Before turning to the analysis, we once again state the applicable test:

- (1) Is the challenged delegation part of a larger effort to address specific law enforcement problems posed by the given regulatory context? Heavy federal law enforcement work load is *not* a specific law enforcement problem. The party seeking to overcome state immunity bears the burden with respect to this question.
- (2) Is the challenged delegation of federal law enforcement power necessary to solve the specific law enforcement problem? The court should answer this question based on the information before Congress at the time it acted. After considering possible alternatives, the court should defer to a plausible argument for necessity.²⁴³

In tracing the history of the False Claims Act, the preceding Section set forth the details relevant to this test. Thus, rather than rehash that material, this Section briefly summarizes the case for treating the Act's *qui tam* action as an ancillary delegation. We now consider each question in turn.

First, the *qui tam* action itself is a product of necessity. England and later the American colonies turned to the *qui tam* action to supplement weak public law enforcement.²⁴⁴ As public law enforcement evolved, the *qui tam* action played a more limited role, supplementing

240 United States *ex rel.* Zissler v. Regents of the Univ. of Minn., 154 F.3d 870, 874 (8th Cir. 1998) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. FES/96, FEDERAL EXPENDITURES BY STATE FOR FISCAL YEAR 1996, at 46, tbl.11 (1997)).

241 See Wilkins *ex rel.* United States v. Ohio, 885 F. Supp. 1055, 1062 (S.D. Ohio 1995) ("Allegedly, defendants falsely certified that the grant monies would be used for certain specified purposes and that the State of Ohio would provide proper monitoring of the use of funds by community action agencies.").

242 See United States *ex rel.* Graber v. City of New York, 8 F. Supp. 2d 343, 346 (S.D.N.Y. 1998) ("State [d]efendants . . . sued for accepting federal foster care funding to which they supposedly knew or should have known they were not entitled.").

243 See *supra* text accompanying note 121.

244 See *supra* notes 141-44, 157-214 and accompanying text.

public law enforcement in specific areas. The False Claims Act is just such a case, with Congress enacting and maintaining the Act's *qui tam* action to address the unique law enforcement needs posed by fraud on the government.²⁴⁵ During the Civil War and World War II, fraud by military contractors proved hard to detect and punish, harming the United States's war efforts. Today, private actors and state governments routinely deal with some arm of the federal government, and those dealings provide opportunities for fraud and self-dealing. Our massive, unwieldy federal bureaucracy has become difficult to police, leaving the federal government vulnerable to wrongdoers. From the Civil War to the modern administrative state, the False Claims Act's *qui tam* action has targeted this pressing law enforcement need.

Second, experience has shown that the False Claims Act is necessary to effective detection and punishment of fraud against the government. Since its inception, the Act has been a work in progress, with Congress periodically tailoring the *qui tam* provision to better achieve federal law enforcement needs. The 1863 Act was Congress's response to reports of rampant fraud on the Union's Civil War effort. Contractors promised quality arms and supplies, but often delivered shoddy or non-existent goods. The local military commanders had their hands full fighting a war and could not police such misconduct. Thus, using the *qui tam* action, Congress deputized ordinary citizens to detect and punish the fraud.

Passed during wartime, the 1863 Act was a hasty response drafted with little precision. Consequently, the 1863 Act was subject to abuse, as with the parasitic lawsuits brought during the first half of the twentieth century. The 1943 Amendments tweaked the 1863 Act, trying to stop parasitic suits by barring *qui tam* suits based on information already in the federal government's possession. But, the 1943 Amendments proved too strong medicine, barring not only parasitic suits but also legitimate *qui tam* suits where the relator was the source of the government's information. So, in 1986, Congress again refined the False Claims Act by allowing *qui tam* suits where the relator was the source of the government's preexisting information.²⁴⁶ The 1986 Amendments also addressed new law enforcement challenges posed by ever-increasing public-private interaction within federally funded programs. Congress observed that often times the only witnesses to the fraud would be the wrongdoers themselves. To police these ex-

245 See *supra* notes 157–203 and accompanying text.

246 See *supra* notes 197–98 and accompanying text.

panding, hidden opportunities for fraud, the 1986 Amendments increased incentives for *qui tam* relators.²⁴⁷

From 1863 through 1986, the story of the False Claims Act is a story of Congress's ongoing struggle with fraud against the government. Over time, the law enforcement problem has changed and abuses have arisen. Throughout that time, however, the *qui tam* action has been a central character in the narrative. And, with Congress's aid, *qui tam* has proved a compelling protagonist, growing and changing with each twist and turn in the plot.

CONCLUSION

History supports a credible story of the False Claims Act's *qui tam* provision as an ancillary delegation. Whether this story is the most persuasive account of the Act is not our main point. That is a descriptive question beyond the scope of the present effort. Rather, we defend two points, one doctrinal and the other weakly descriptive. Doctrinally, state immunity should not bar all delegation of the United States's power to sue the states. Rather, when Congress delegates federal law enforcement power as part of a larger, good faith effort to better structure federal law enforcement efforts, such a delegation ought to overcome state immunity. The ancillary delegation doctrine provides a judicially administrable test that implements this idea.

Descriptively, we offer *an* account of the False Claims Act's *qui tam* action that satisfies the ancillary delegation doctrine. We do not claim that our account is *the* account; that was not our goal. Rather, we sought to re-frame the analysis. We did so by exposing the fear underlying the Supreme Court's dicta in *Blatchford v. Native Village of Noatak*,²⁴⁸ that delegations of the United States's law enforcement power will circumvent state immunity. Ancillary delegations do not raise that fear, and the False Claims Act is a credible candidate for such treatment.

247 See *supra* notes 199–203 and accompanying text.

248 501 U.S. 775 (1991).