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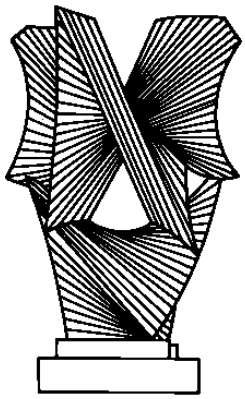

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ARTICLE

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Issues of time and temporality pervade American constitutional adjudication, at both a doctrinal and a broader, structural level. The doctrinal issue concerns the extent to which judicial decisions operate forward, backward, or some combination of both across time. The structural issue concerns the related and overarching question of how the Supreme Court, as a court, operates in time, and the temporal division of authority between courts and legislatures. In both contexts, the Supreme Court is an actor in time.

This Article examines the Court's treatment of temporal issues through three case studies: (1) a pair of early decisions in which the Court confronted both the transition from the colonial to the republican constitutional regime, and the temporal scope of legislative acts; (2) the Court's twentieth-century doctrine on adjudicative retroactivity; and (3) the recent case of Grutter v. Bollinger*, in which the Court's temporal imperialism led it to claim ever-greater power to define the relevant timeframe for antidiscrimination law. The Court's institutional self-presentation suggests that it is immortal and therefore not temporally bound, and that claim of continuity typically extends to its decisions. But the causal flow from institutional to doctrinal continuity sometimes breaks down. Perhaps not surprisingly, these moments of disjunction tend to arise when the Court chooses to allow them to. Even in situations that call into*

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question the continuity of a particular doctrine, therefore, the Court remains master of time in that it as an institution determines when and how the façade of doctrinal continuity is to be breached.

> We shed as we pick up, like travellers who must carry everything in their arms, and what we let fall will be picked up by those behind. The procession is very long and life is very short. We die on the march. But there is nothing outside the march so nothing can be lost to it.[1]

INTRODUCTION

Unlike many modern constitutional democracies, the United States is still in its first republic. This means that the entity called "the United States of America," as created by the Constitution, can be said to exist in a continuous relationship from 1789 to the present day.

Yet even to speak of the "first republic" seems odd: why use an ordinal number to denote the first and, so far, the only? But thinking of the American constitutional regime in this sense—as just one in a potential series of regimes—is useful because it calls into question one of the central assumptions of American constitutional law: the idea that the Republic of 2010 is in a fundamental sense continuous with that of 1789. This assumption is particularly evident in the Supreme Court's case law, in which the Court regularly refers to the decisions of past decades or even centuries as "our" decisions, or in the custom of tracing particular seats on the Court back to their first occupants in the late-eighteenth or early-nineteenth century. The Court's self-presentation and self-conception thus presume continuity.[2]

[1] TOM STOPPARD, ARCADIA act 1, sc. 3, at 38 (1993).

[2] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 566 (1995) ("In *Jones & Laughlin Steel* [1937], *we held* that the question of congressional power under the Commerce Clause 'is necessarily one of degree.'" (emphasis added) (citation omitted)); *id.* at 574 (Kennedy, J., concurring) ("The history of *our Commerce Clause decisions* contains at least two lessons of relevance to this case." (emphasis added)).

The Justices' rhetorical insistence that the Court is both a continuous and a unitary institution is striking, however, given the obvious changes in membership and doctrine that the Court as an institution has witnessed since its founding, as well as the relative rarity of per curiam decisions since the days of Chief Justice John Marshall. As an analytic matter, one might reasonably argue that no such entity as "the Court" exists; rather, the Supreme Court is a series of courts connected across a series of cases that exist along a series of moments in time. For the most part, however, the Justices' decisions suppress this multiplicity and discontinuity in favor of a posture of unitariness and continuity. The composition of the Court thus changes over time, but the language of the decisions that issue from the Court presumes fixedness and permanence, presenting the Court as a single continuous entity with a single lifespan.

Questions of time and temporality pervade American constitutional theory, at both a doctrinal and a broader, structural level.[3] The doctrinal issue concerns the extent to which law—in the forms of both judicial precedent and legislative action—operates forward, backward, or some combination of both across time. Implicating fundamental questions of justice, fairness, and notice, these inquiries typically involve situations in which the Supreme Court sets temporal boundaries on its own decisions or on the actions of another branch of government—usually a legislature—with important consequences for individual litigants. The structural issue concerns the related and overarching question of how the Court, as a court, operates in time, and how the Justices articulate the temporal division of authority between courts and legislatures.

[3] *See generally* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 16-32 (1991) (discussing "constitutional moments" that transformed the constitutional basis of the Republic); JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2001) (discussing the problem of constitutionalism over time); WILLIAM E. SCHEUERMAN, LIBERAL DEMOCRACY AND THE SOCIAL ACCELERATION OF TIME (2004) (critiquing the consequences of modern notions of time for liberal democracy); Lior Barshack, *Time and the Constitution*, 7 INT'L J. CONST. L. 553, 553 (2009) (describing two types of sovereignty: "immanent" sovereignty that "belongs to the living" and "transcendent" sovereignty that "belongs . . . to the dead and to those yet to be born"); Mary L. Dudziak, *Law, War, and the History of Time*, 98 CAL. L. REV. (forthcoming Oct. 2010) (manuscript at 1-4), *available at* http://ssrn.com/abstract=1374454 (discussing the meaning and significance of "wartime"); Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L.J. 1631, 1641-44 (1989) (analyzing how indeterminacies in Western notions of time are worked out in the law); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 610-11 (2008) (examining the connections between theories of constitutional authority "across generations" and methods of constitutional interpretation).

In both contexts, the Court is one among many actors, existing—as all actors must—in time. Yet the Court typically disavows this identity, presenting itself as an institution operating in a much larger temporal sphere than that of any particular human observer, in a realm continuous with the Constitution itself. For the most part, such a view comports with a general sense that the Court must operate in this way, that in fact it is precisely the function of courts as courts to stand for continuity. One need only think of the judicial norms of stare decisis and precedential reasoning to appreciate the special relationship that courts have with time.

Occasionally, however, the Court explicitly confronts the question of time—specifically, the question of change over time. These moments of confrontation occur when the Court self-consciously addresses the issue of the temporal effect, or lifespan, of a particular legislative act or judicial decision. And here is the puzzle this Article takes up. The Court's institutional self-presentation suggests that it is immortal and therefore not temporally bound, and that claim of continuity typically extends to the product of that institution—namely, its decisions. But not always. The causal flow from institutional to doctrinal continuity sometimes breaks down. Perhaps not surprisingly, these moments of disjunction tend to arise when the Court chooses to allow them to. Even in situations that call into question the continuity of a particular doctrine, therefore, the Court remains master of time in that it as an institution determines when and how the façade of doctrinal continuity is to be breached. In these moments, two stories about the Court and time emerge: first, the lifespan of any judicial or legislative act is potentially finite but unknown until the moment of its demise; second, the demise will be brought about by an entity that very likely predated, and certainly will endure after, the act in question.

To be sure, the issue of legal change is fundamental to all legal systems, especially systems founded on a written constitution. But the Court's unique role as a court bound by no other court, and bound very little (or perhaps not at all) by the decisions of any legislature, means that the Justices have a far greater power to define lifespans than do other courts. Further, it means that the scope of the Justices' power to terminate a law extends far beyond that of even the most positivist of legislatures. The fact that the Court is not bound to obey any institution, even itself, means that the question whether the particular judicial decision or legislative act under consideration has outrun its course is in some sense always potentially, and in some cases actually, before the Court.

Thus, there are important questions to ask: How does a court that regards itself and the regime in which it operates as timeless conceive itself to be functioning in these moments of change? What are the different approaches the Court uses to conceptualize the temporal scope of legal change—not with respect to substance, but with respect to time itself? To what extent does the Court view itself as controlling this temporal scope? One approach might be to view the transition from a prior legal state or rule in relative terms: as a two-part legal regime involving the law "before" and the law "after."[4] A different approach views the transition as unfolding over a more linear, chronological sweep of time, in what might be viewed as a more objective vision of how time operates.[5]

Over the course of the 221 years since our Republic began, the Court has demonstrated varied and sometimes confused views of how to understand and manage temporal transitions in the legal regime. In some cases, the Court has segmented doctrinal time into "before" and "after," devoting substantial energy to descrying the proper line between these periods. In other instances, the Court has presented its decisions as operating within a more chronological timeframe, packaging its decisions into temporal epochs and attempting to give an account of how those epochs fit together.[6]

Throughout the Court's history, explicit considerations of law's temporal effect have often accompanied the Justices' efforts to calculate the moment of a particular law's origin. These moments of change involve much more than the straightforward overruling of prior precedent. Rather, they are moments of transition not only with respect to substance but with respect to time itself. The question this Article takes up is not just the Court's own question in such situations of how to treat changes in the law, but the broader interpretive question of whether the Court adjusts—or ought to adjust—its own con-

[4] This is a perspectival approach that takes a subjective view of time akin to that described by the philosopher Hannah Arendt as "human time." *See* HANNAH ARENDT, BETWEEN PAST AND FUTURE 11 (Viking Press 1968) (1961) (associating human time with "the viewpoint of man, who always lives in the interval between past and future").

[5] Such a view has been described by Arendt as "historical time." *Id.* at 9-13 (describing historical time as a "continuum," as "biographical," and as "rectilinear temporal movement"). The historian Reinhart Koselleck also employs the phrase "historical time," albeit in a slightly different sense, referring not only to the linear march of chronology in general but also to the belief that the chronology itself comprises a series of historically recognized "units of action" such as eras or epochs. *See* REINHART KOSELLECK, THE PRACTICE OF CONCEPTUAL HISTORY ch. 6 (Todd Samuel Presner et al. trans., 2002).

[6] I am grateful to Adam Samaha for suggesting the term "packaging."

ception of how its decisions operate in time. Moments of doctrinal discontinuity, in other words, provide useful opportunities to interrogate claims of institutional continuity.

Temporal questions are therefore deeply connected in the Court's case law with questions of laws' origins. When the Court attempts to identify the moment of a particular legislative or judicial act's origin, it is in effect searching for a proper measuring moment or benchmark upon which to base its assessment of the law's lifespan. This Article examines the Court's efforts to calculate such moments of origin through three case studies: (1) a pair of cases from the early Republic in which the Court grappled with the question of the temporal effect of legislative acts; (2) the late twentieth-century debates about retroactivity in criminal law, in which the Court attempted to reorganize how its own decisions operate in time; and (3) the recent case of *Grutter v. Bollinger*, in which the Court experimented with drawing temporal boundaries around an entire body of doctrine.[7]

The Court frequently speaks as though it is not a temporally bounded institution. In some areas of case law, however, it explicitly manipulates the temporal effects of its doctrine. Obviously, the Court is a historical actor and therefore must always be operating "in time." This Article is part of a larger project that aims to understand the Court's conflicted and problematic treatment of itself in time. The goal of this Article, then, is to engage in an intellectual history of how the Court thinks about time—both in the sense of the temporal effect of its own decisions and in the context of legal transitions more broadly.[8]

I. TEMPORALITY IN THE EARLY REPUBLIC

The Court confronted foundational questions of law's temporality, and of its own institutional role in defining that temporality, within the first few years of its existence. Many of these decisions required the Court to construe provisions of the Constitution that implicated

[7] 539 U.S. 306 (2003).

[8] By referring to "the Court" as a single entity in this way, I do not mean to suggest that the Justices are always of one mind, or that the Court as an institution holds a single coherent view of how its decisions operate in time. Still, given the self-identity of the Justices as members of one Supreme Court of the United States, and the tendency of those Justices to use phrases such as "We the Court" in their opinions, this Article will treat the Court as more of an "it" than a "they." *Cf.* Kenneth A. Shepsle, *Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 239 (1992) (arguing that "[l]egislative intent is an internally inconsistent, self-contradictory expression").

deep issues of time—for example, the Ex Post Facto and Contracts Clauses of Article I.[9]

The Clauses' textual proximity suggests their conceptual connectedness, for both proceeded from the common law's premise that retroactive legislation required special scrutiny because it had the potential to violate norms of notice and fairness, as well as to blur the line between judicial and legislative functions.[10] Moreover, the fact that these provisions appear in Article I, Section 10, among the list of prohibitions on the states (no treaties, no letters of marque and reprisal, no coining money, no emitting bills of credit, no legal tender except for gold and silver) demonstrates the peril that the Founders believed would result if states had the power to pass ex post facto laws or laws impairing the obligation of contracts.[11] Both provisions thus spoke to the harms that the drafters of the Constitution feared might result from a legislature's effort to make its laws operate backward as well as forward in time.

In *Calder v. Bull*,[12] decided in 1798 during the Chief Justiceship of Oliver Ellsworth, and again in *Ogden v. Saunders*,[13] the 1827 decision that featured Chief Justice John Marshall's only dissent in a constitutional case, the Court addressed issues of time at both the doctrinal and institutional levels. Both cases called upon the Court to assess the temporal scope of a legislature's actions—in *Calder*, a resolution of the Connecticut legislature setting aside a probate court's decree,[14] and in *Ogden*, a New York insolvency act.[15] The cases might therefore seem to have little to say about the Court's conception of itself in time. Yet in each case, the Court's extensive analysis of the legislation in question led it to consider not only the propriety of retroactive (or "retrospective," in contemporary parlance) lawmaking, but also the institutional

[9] *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . .").

[10] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *46 (criticizing ex post facto laws for failing to give parties notice that an action is illegal).

[11] *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 393-429, 471-518 (1969) (discussing the influence of the political and economic turmoil of the Confederation period—in particular, the controversy over wartime debts—on the drafters of the Constitution). The Constitution prohibits Congress, as well as the states, from passing bills of attainder or ex post facto laws. U.S. CONST. art. I, § 9, cl. 3. Only the states, however, are prohibited from passing laws impairing the obligation of contracts. U.S. CONST. art. I, § 10, cl. 1.

[12] 3 U.S. (3 Dall.) 386 (1798).

[13] 25 U.S. (12 Wheat.) 213 (1827).

[14] 3 U.S. (3 Dall.) at 386.

[15] 25 U.S. (12 Wheat.) at 214.

role of courts, as well as the specific role of the Court in policing temporal boundaries.[16]

Moreover, *Calder* and *Ogden* can themselves be historicized.[17] Both cases illustrate the conflicts in early American legal thought between early republicans' simultaneous commitments to legislative power and to the idea that the judicial power existed in part to protect vested rights (sometimes from the selfsame legislative power). The specter of property rights being manipulated by the government as tools of political oppression, familiar to eighteenth-century Anglo-Americans from their constitutional history of the Tudor and Stuart periods, continued to haunt some early republicans. As Morton Horwitz puts it, "At the heart of the post-Revolutionary American constitutional system was the principle that all retroactive lawmaking was an interference

[16] *See, e.g.*, *Calder*, 3 U.S. (3 Dall.) at 387-95 (opinion of Chase, J.) (discussing the nature of, and constitutional prohibition on, ex post facto laws); *Ogden*, 25 U.S. (12 Wheat.) at 221 ("In every system of jurisprudence such [retrospective] laws are considered as contrary to the first principles of natural justice . . . .").

[17] Scholars in a variety of disciplines have identified the period from the late eighteenth to the early nineteenth century as witnessing significant transitions in European and American notions of time and temporality, from both a technological and an ideological perspective. *See generally* THOMAS M. ALLEN, A REPUBLIC IN TIME: TEMPORALITY AND SOCIAL IMAGINATION IN NINETEENTH-CENTURY AMERICA (2008) (exploring the changing conceptions of time in nineteenth-century American culture); LYNN HUNT, MEASURING TIME, MAKING HISTORY (2008) (describing nineteenth-century developments in the measurement of time, including the adoption of time zones; the adoption of Greenwich, England, as the source of the prime meridian; and changing philosophical attitudes toward history, modernity, and time); LEWIS MUMFORD, TECHNICS AND CIVILIZATION 196-99 (1934) (describing how the industrial revolution of the late eighteenth century and nineteenth century increased emphasis on "the regimentation of time"); DEREK PARFIT, REASONS AND PERSONS 149-86 (1984) (offering a philosophical account of personal identity across time); WILLIAM H. SEWELL JR., LOGICS OF HISTORY (2005) (examining the impact of history on the social sciences and describing changing conceptions of temporality); MARK M. SMITH, MASTERED BY THE CLOCK: TIME, SLAVERY, AND FREEDOM IN THE AMERICAN SOUTH (1997) (describing clock time's arrival in, and influence on, the agricultural south during the eighteenth and nineteenth centuries); J. DAVID VELLEMAN, SELF TO SELF (2006) (examining temporal elements of personal identity emerging from Kantian ethics); Keith Tribe, *Introduction* to REINHART KOSELLECK, FUTURES PAST: ON THE SEMANTICS OF HISTORICAL TIME, at x (Keith Tribe trans., 1985) (describing Koselleck's denomination of the period between approximately 1750 and 1850 as the "Sattelzeit," or saddle-time); J.G.A. Pocock, *Modes of Political and Historical Time in Early Eighteenth-Century England* (exploring the creation of "public time" in England during this period and describing how conceptions of time in eighteenth-century England shifted away from a belief that "time and its events were the creation of God"), *in* 5 STUDIES IN EIGHTEENTH-CENTURY CULTURE 87 (Ronald C. Rosbottom ed., 1976); E.P. Thompson, *Time, Work-Discipline, and Industrial Capitalism*, PAST & PRESENT, Dec. 1967, at 56 (analyzing how changes in the conception of time affected labor discipline and industrialization).

with property rights."[18] A version of this principle lay behind the Ex Post Facto and Contracts Clauses. In construing these constitutional provisions, the *Calder* and *Ogden* decisions illustrate the connections between the idea of vested rights and contemporary notions about the nature of judicial and legislative power.

A. Calder v. Bull

Calder occupies an unusual place in the constitutional law canon. Cases predating Marshall's Chief Justiceship seem to fit awkwardly into the traditional story of a powerful, empire-building Court that steadily expanded judicial review into judicial supremacy.[19] When *Calder* does make its way into casebooks, it is typically presented as an example of early American debates about higher law as a basis for judicial review and for the proposition that the Ex Post Facto Clause applies only to criminal statutes.[20]

This is part of the story of *Calder*, to be sure, but not the whole story. The four seriatim opinions in the case do indeed display a variety of attitudes toward judicial review. Taking a strong stance in favor of broad judicial authority, Justice Samuel Chase argued that "[a]n act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact; cannot be considered a rightful exercise of legislative authority."[21] Justice James Iredell, in contrast, endorsed a more modest vision of the role of courts. Justice Iredell argued that if Congress or a state legislature "shall pass a law, within the general scope of their constitutional power, the Court cannot pro-

[18] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 149 (1992). Of *Calder* specifically, Horwitz notes, "How could one bar all retroactive laws while still managing to avoid the absurd conclusion that every governmental action that interferes with settled expectations is unconstitutional?" *Id.* at 149-50.

[19] Robert McCloskey has made a similar point, noting that

> [i]t is hard for a student of judicial review to avoid feeling that American constitutional history from 1789 to 1801 was marking time. The great shadow of John Marshall . . . falls across our understanding of that first decade; and it has therefore the quality of a play's opening moments with minor characters exchanging trivialities while they and the audience await the appearance of the star.

ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 19 (Sanford Levinson ed., 4th ed. 2005). McCloskey concludes that "[s]uch an impression is not altogether unjustified." *Id.*

[20] *See, e.g.*, KERMIT L. HALL ET AL., AMERICAN LEGAL HISTORY 139 (3d ed. 2005) (describing the *Calder* decision as "the clearest and most definitive expression of higher-law doctrine to emanate from the United States Supreme Court").

[21] *Calder*, 3 U.S. (3 Dall.) at 388 (opinion of Chase, J.) (emphases omitted).

nounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice."[22] Justices Chase and Iredell thus took different views of the basis on which the Court might invalidate legislation, and therefore of the scope of the Court's claims to judicial review.[23]

But to read *Calder* ahistorically, as a precursor to the Court's robust claims of judicial review in *Marbury v. Madison*,[24] is to ignore the case's importance as one of the Court's earliest meditations on temporality. *Calder* must be seen as a transitional case in which pre-Revolutionary ideas about time and institutions were explicitly held to have ongoing significance for a constitutional order that expressed strong views on temporality, such as those underpinning the Ex Post Facto Clause. In other words, *Calder* demonstrates that the temporal commitments of the new republic were integrally related to those of the previous Anglo-American legal regime.[25]

The dispute in *Calder* centered on a resolution passed by the Connecticut legislature in 1795 that set aside the decree of a probate court and granted a new hearing in a will contest.[26] The question for the Supreme Court was whether the Connecticut legislation was an ex post facto law and therefore unconstitutional.[27] A unanimous Court held that the Connecticut legislation was not an ex post facto law and therefore permitted the resolution to stand.

In reaching their decisions, the Justices focused on the extent of the Ex Post Facto Clause's prohibition on retroactive legislation. The plaintiffs in error had based their challenge to the Connecticut legislation on the claim that "the awarding of a new trial, was the effect of a legislative act, and that it is unconstitutional, because an ex post facto law."[28] The Justices appear to have been unmoved by this argu-

[22] *Id.* at 399 (opinion of Iredell, J.).

[23] On judicial review in the period before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), see PHILIP HAMBURGER, LAW AND JUDICIAL DUTY ch. 13 (2008), which explores how judicial review manifested itself through discussions of judicial duty in early American law.

[24] 5 U.S. (1 Cranch) at 137.

[25] One prominent example of this inter-regime continuity was the federal government's assumption in 1790 of the states' Revolutionary War debts. *See* Claire Priest, *Law and Commerce, 1580–1815* (describing Alexander Hamilton's fiscal plans as Treasury Secretary), *in* 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 400, 437-41 (Michael Grossberg & Christopher Tomlins eds., 2008).

[26] 3 U.S. (3 Dall.) at 386 (opinion of Chase, J.).

[27] *Id.* at 387.

[28] *Id.* at 396 (opinion of Paterson, J.) (italics omitted).

ment, holding instead that the Ex Post Facto Clause barred only criminal, not civil, retrospective laws.[29] All agreed that the prohibition on ex post facto lawmaking applied only in the criminal context, for only in those cases did a retroactive law rise to the level of interfering with settled expectations that Anglo-American law had traditionally associated with ex post facto laws.[30] Moreover, as Justice Chase noted, had the drafters of the Constitution intended the ex post facto ban to extend to civil cases, "the two prohibitions, not to make any thing but gold and silver coin a tender in payment of debts; and not to pass any law impairing the obligation of contracts, were improper and unnecessary."[31]

For our purposes, the more interesting part of the decision was the debate among the Justices as to whether the Connecticut legislature's act should be characterized as essentially legislative or judicial. Justice Iredell suggested that the legislature had behaved like a court by setting aside the probate court's decree and ordering a new trial. The power of the legislature to "superintend the Courts of Justice . . . is judicial in its nature; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority," Justice Iredell argued.[32] Justices William Paterson and William Cushing, for their parts, allowed that it was an open question whether the act was judicial or legislative.[33] Although the plaintiffs had not based their challenge to the legislature's action on a claim that it was judicial in nature, the fact that three Justices considered this question suggests that the Court acknowledged some misgivings about this type

[29] *See id.* ("The words, *ex post facto*, when applied to a law, have a technical meaning, and, in legal phraseology, refer to crimes, pains, and penalties.").

[30] *See id.* at 391 (opinion of Chase, J.) ("Every ex post facto law must necessarily be retrospective; but every retrospective law is not an ex post facto law: The former, only, are prohibited. . . . There is a great and apparent difference between making an unlawful act lawful; and the making an innocent action criminal, and punishing it as a crime." (emphases omitted) (italics omitted)).

[31] *Id.* at 393. As several scholars have pointed out, the neatness of the doctrinal rule that emerged from *Calder* obscures the fact that precedents existed in colonial and early national law for treating civil as well as criminal cases as susceptible to ex post facto objections. *See* 8 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 98 (Maeva Marcus ed., 1985) (discussing early national precedents for applying Ex Post Facto Clause to civil matters); 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 324-51 (1953) (arguing that the "true meaning" of the Ex Post Facto Clause extended to both civil and criminal matters).

[32] *Calder*, 3 U.S. (3 Dall.) at 398 (opinion of Iredell, J.).

[33] *See id.* at 395-96 (opinion of Paterson, J.); *id.* at 400-01 (opinion of Cushing, J.).

of institutional crossover, even at the level of state government.[34] Indeed, Justice Iredell's statement that the Court could not invalidate legislation based only on a sense that it violated natural justice followed just a few sentences after he pronounced the Connecticut legislature's action judicial, not legislative—a proximity that points toward a belief that legislatures acting like courts did in fact offend principles of natural justice.[35]

Moreover, underlying Justice Iredell's and Justice Paterson's suggestions that the Connecticut resolution amounted to a judicial act was an assumption about temporality—specifically, the appropriate temporal scope of different institutions' actions. This is the relevance of the vested-rights discussion: the concern that, as Justice Chase put it, "the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws . . . ."[36] Ex post facto criminal laws were understood to be clear violations of vested rights in the most fundamental sense—i.e., takings of the person—and, as such, the Justices considered them to be the intended target of the language in Article I, Sections 9 and 10. But the Justices' opinions demonstrate that they were also uneasy with ex post facto civil laws based on a belief that the rights of individuals were imperiled when legislatures acted like courts by granting retroactive relief. The Court's discussion of vested rights signals an inquiry into the temporal effect of legal action, in particular, action by a legislature. As the Marshall Court would later emphasize in cases such as *Fletcher v. Peck*[37] and *Trustees of Dartmouth College v. Woodward*,[38] the Court in this period was troubled by the prospect of legislatures reaching back to invalidate settled distribu-

[34] Such mixing of legislative and judicial functions by a legislature would later become a red flag to the Court in separation of powers and delegation cases. Take, for example, Justice Powell's reasoning in *INS v. Chadha*:

> On its face, the House's action appears clearly adjudicatory. The House [of Representatives] did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria. . . .
>
> The impropriety of the House's assumption of this function is confirmed by the fact that its action raises the very danger the Framers sought to avoid—the exercise of unchecked power.

462 U.S. 919, 964-66 (1983) (Powell, J., concurring).

[35] *See Calder*, 3 U.S. (3 Dall.) at 398-99 (opinion of Iredell, J.).

[36] *Id.* at 394 (opinion of Chase, J.) (emphases omitted).

[37] 10 U.S. (6 Cranch) 87 (1810) (invalidating a Georgia law repealing prior land sales by the state).

[38] 17 U.S. (4 Wheat.) 518 (1819) (invalidating the New Hampshire legislature's efforts to substantially alter the college's charter).

tions of property and contract rights among private parties. In 1798, the Justices demonstrated a version of this unease by asking whether a civil ex post facto law amounted to a judicial act and was therefore beyond the scope of a legislature's power.

Given the Justices' shared sense that the Connecticut legislature had wandered into the province of the judiciary by ordering a new will hearing, what explains their willingness to uphold the legislature's action? Even allowing that separation-of-powers concerns are more of an obsession for modern constitutional law than they were in the early Republic, the repeated references in the *Calder* opinions to the distinction between legislative and judicial power suggest that to ask this question is not to project modern concerns backward onto an earlier period. The Justices in *Calder* seem to be saying, "Yes, what the Connecticut legislature is doing looks judicial, and that seems potentially problematic, but we will permit it." The reason for this indulgent attitude lay in what Justice Iredell termed "the established usage of Connecticut."[39] As Justice Paterson explained,

> The Constitution of Connecticut is made up of usages, and it appears that its Legislature have, from the beginning, exercised the power of granting new trials. . . . And the fact is, that the Legislature have, in two instances, exercised this power since the passing of the law [creating the superior and county courts] in 1762. . . . [I]t appears, that the Legislature, or general court of Connecticut, originally possessed, and exercised all legislative, executive, and judicial authority . . . .[40]

Indeed, during the colonial period, provincial assemblies had regularly exercised what would now be considered judicial power; one need only consider that the Massachusetts legislature is still called "the General Court" to see the lasting effect of this mixing of powers on current institutions.[41]

This deference to custom and usage lies at the heart of *Calder*'s significance as a transitional case. The opinions are striking in that

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[39] *Calder*, 3 U.S. (3 Dall.) at 398 (opinion of Iredell, J.) (italics omitted).

[40] *Id.* at 395 (opinion of Paterson, J.) (italics omitted).

[41] *See* Mark DeWolfe Howe & Louis F. Eaton, Jr., *The Supreme Judicial Power in the Colony of Massachusetts Bay*, 20 NEW ENG. Q. 291, 294 (1947) (discussing the fact that the "General Court" traditionally considered legislative, judicial, and executive matters); *see also* CHARLES HOWARD MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY, at viii (1910) (describing the medieval English Parliament as having "both 'legislated' and 'adjudicated,'" although "until modern times no clear distinction was perceived between these two kinds of activity"); Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157, 1168 (1976) (discussing the changing nature of Parliament between the sixteenth and eighteenth centuries from king's council to legislature).

they show the Justices consciously mediating between the colonial constitutional order and the new order established in 1789. In contrast to the common image of the early Court as operating on a blank slate, and looking only to the Constitution for guidance, *Calder* demonstrates the degree to which colonial practice influenced early republican law.

Calder is thus a transitional case in two ways: first, for defining institutional action, and second, for illustrating the Court's working-out of how it ought to treat pre-1789 constitutional custom and usage.[42] In the context of institutional action, the decisions demonstrate that the institutional temporal connection between, on the one hand, legislatures operating prospectively, and on the other hand, courts operating retroactively, was beginning to harden but had not yet set. Hence, the case exhibits a combination of unease with the Connecticut legislature's action and a grasp at colonial custom and usage as a way of avoiding the bigger issues the case presented.

The question of how the new republican legal regime ought to treat pre-1789 judicial decisions and legislation is manifest in *Calder* and may account for the odd place that the case occupies in American constitutional law.[43] Other than its holding that the Ex Post Facto Clause applies only in the criminal context, the case seems like an outlier, a relic of a particular moment when another regime's law had to be taken into account. But if we historicize the case, looking at it on its own terms, it has much to tell us about how the Court in its earliest days understood the range of possibilities that were open to it as it attempted to harmonize a vast body of Anglo-American customary and common law with the principles set forth in the new constitution. In *Calder*, the Court chose to privilege the practice of the previous regime over any potential bar that the new regime's founding document might present to those practices. The fact that such a choice required the Court to overlook possible separation of powers problems—or even beliefs about the appropriate division of power between courts and legislatures that might have been more accessible at that time—

[42] *Cf.* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 8-10 (1975) (discussing early Americans' self-conscious efforts to incorporate some but not all aspects of English common law into the U.S. legal system).

[43] On the issue of the law's operation in moments of transition, see Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922 (2006); Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761 (2004); Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680 (2006); and see generally Symposium, *Legal Transitions: Is There an Ideal Way to Deal with the Non-Ideal World of Legal Change?*, 13 J. CONTEMP. LEGAL ISSUES 1 (2003).

demonstrates the common law mentality of the early Court, and the underlying conviction that the relevant temporal baseline for the common law originated well before 1789.[44] Thus, colonial custom and usage (and the underlying colonial constitution that informed them) outweighed the *Calder* Court's evident discomfort with allowing a state legislature to behave in such a court-like manner.

The decision in *Calder* thus illustrates the Court's early interest in investigating questions of laws' origins. Rather than treating the Connecticut legislature's action as entirely a separation of powers issue or as a mechanical question of legislative retroactivity, the Court undertook a two-tiered analysis, considering both the timeframe of the regime that created the legislative act and the temporal effect of the act itself. Justice Chase's and Justice Iredell's opinions in particular raised the issue of origins writ large by analyzing the relationship between the institutional capacities of courts and legislatures in the old empire and the new Republic, as well as the appropriate contours of judicial review in the wake of the transition from a system of parliamentary sovereignty to one based on the higher law of a constitution. In addition to these metaorigins questions, the Court also considered the more workaday question of the common law origins of the Connecticut legislature's power to order a new hearing in a will contest. The Court's temporal analysis in *Calder*, in other words, was bound up in its quest to legitimize the new regime as well as to reach the proper common law result.

B. Ogden v. Saunders

Discomfort with retroactive legislation persisted after *Calder* had settled the issue of the scope of the ex post facto ban. In the early decades of the nineteenth century, the Court wielded the Contracts Clause as a kind of "civil anti-retroactivity provision."[45] Yet there were limits to the impediments the Court was willing to place in the way of legislatures. As Justice Chase had noted in *Calder*, a literal construction of the ex post facto prohibition that "prohibit[ed] the

[44] *Cf.* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (arguing that the common law approach of constitutional interpretation, which looks to evolving legal standards over time rather than to any particular authoritative source, provides a better explanation of American practices of constitutional interpretation than textualism or originalism).

[45] *See* HORWITZ, *supra* note 18, at 150 ("[T]he more important aspect of the vested rights doctrine was that it enabled courts to avoid the *reductio ad absurdum* that every change in legal rules constituted an interference with property rights.").

enact[ment of] any law after a fact" would "greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen."[46] In the subsequent decades, the Court drew on the vested rights doctrine in an attempt to limn a boundary between widespread civil antiretroactivity on one hand and neutralizing the Contracts Clause on the other.[47]

The centerpiece of this balancing act was the Court's doctrine on state bankruptcy laws. In two cases, *Sturges v. Crowninshield*[48] and *Ogden v. Saunders*,[49] the Court considered the question whether the Contracts Clause forbade states from passing laws discharging insolvent debtors. In *Sturges*, the law at issue was a New York statute that discharged the debtor from debts incurred prior to the law's passage.[50] Chief Justice Marshall, writing for the Court, held that the statute violated the Contracts Clause.[51] The opinion was not Marshall's clearest, but at a minimum, the retroactive nature of the New York statute appeared to offend the Court:

> The principle was the inviolability of contracts. This principle was to be protected in whatsoever form it might be assailed. . . . The plain and simple declaration, that no State shall pass any law impairing the obligation of contracts, includes insolvent laws and all other laws, so far as they infringe the principle the Convention intended to hold sacred, and no farther.[52]

Sturges resulted in great uncertainty on two issues: first, whether the states might pass bankruptcy laws at all, or whether this was an area of exclusive federal power; second, whether the New York law at issue was unconstitutional because of its retroactive application. Both these issues came before the Court eight years later in *Ogden v. Saunders*, which involved a challenge to another New York insolvency act.[53] *Ogden* placed the temporal-effect question squarely before the Court: did an insolvency law that applied only to contracts made after the law was passed violate the Contracts Clause, or did such a law become incorporated into those contracts as an implied term?[54] That is, was the

[46] 3 U.S. (3 Dall.) 386, 393 (1798) (opinion of Chase, J.) (emphases omitted).

[47] *See* HORWITZ, *supra* note 18, at 150 (discussing the role of the vested rights doctrine).

[48] 17 U.S. (4 Wheat.) 122 (1819).

[49] 25 U.S. (12 Wheat.) 213 (1827).

[50] 17 U.S. (4 Wheat.) at 122.

[51] *Id.* at 206-08.

[52] *Id.* at 200 .

[53] 25 U.S. (12 Wheat.) at 215.

[54] *Id.* at 243-44.

Court's objection to the earlier New York law in *Sturges* based on its retroactive application, or on some broader conviction that bankruptcy laws by their very nature ran afoul of the Contracts Clause?

The Court in *Ogden* returned to its pre-Marshall practice of issuing seriatim opinions, a marker of the deep divisions among the Justices that the case revealed. Justices Bushrod Washington, William Johnson, Smith Thompson, and Robert Trimble held the New York law to be valid, putting to rest the questions that had lingered since *Sturges* regarding the states' power to legislate in the bankruptcy area and the appropriate temporal effect of such laws. In *Ogden*, Justice Washington wrote:

> [W]hich ever way we turn, whether to laws affecting the validity, construction, or discharges of contracts, or the evidence or remedy to be employed in enforcing them, we are met by this overruling and admitted distinction; between those which operate retrospectively, and those which operate prospectively. In all of them, the law is pronounced to be void in the first class of cases, and not so in the second.[55]

Working through the Contracts Clause analysis, the majority placed great weight on the Constitution's use of the phrase "impairing the Obligation of Contracts" rather than simply "impairing contracts" in describing the prohibited activity. The inclusion of the word "obligation," Justice Washington argued, made the prohibition apply only to laws affecting contracts already made—e.g., retroactive bankruptcy laws.[56] Had the Article I language referred simply to "impairing contracts," then the restriction would have extended to prospective laws as well, since under such analysis "the agreement of the parties . . . would be impaired as much by a prior as it would be by a subsequent bankrupt[cy] law."[57] Justice Washington concluded, however, that the states would not have stood for such a broad restraint on their own power at the time of ratification.[58] Moreover, the prospective operation of the statute meant that it became part of every subsequent contract and so could not be regarded as impairing obligations under those contracts.[59]

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[55] *Id.* at 262 (opinion of Washington, J.).

[56] *Id.* at 269.

[57] *Id.*

[58] *See id.* ("[T]he extensive operation [of such a broad restraint on state power] . . . would have *hazarded*, to say the least of it, the adoption of the constitution by the State conventions.").

[59] *Id.* at 260.

Writing for a trio of dissenters that included Justices Joseph Story and Gabriel Duvall, Chief Justice Marshall argued that the New York act was invalid and that the majority's prospective-retroactive distinction was misguided.[60] The majority's theory that the New York law operated only prospectively was erroneous, Marshall argued, because his brother Justices had looked to the wrong temporal frame for analyzing how the law operated. The view that the insolvency statute operated only prospectively assumed that the relative moment of operation was the time of the act's passage; on such a view, the only constitutionally impermissible bankruptcy laws were those that sought to reach debts contracted prior to the act's passage. But Marshall contended that the relevant moment of operation for the statute was "not the time of the passage of the act, but of its action on the contract."[61] On that analysis, any application of an insolvency law would necessarily implicate the preexisting debts of that particular debtor. In Marshall's view, the state's discharge of such debts amounted to interference with the obligations of contract, and therefore meant that the statute was unconstitutional.[62]

According to the Chief Justice's view, the drafting of a contract should be understood as distinct from the legal regime in which that drafting took place. Marshall argued that permitting bankruptcy laws that operated prospectively according to the majority's view would allow a state to pass legislation "declaring that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe."[63] Such an analysis would eviscerate the protections that the Contracts Clause was intended to afford to private parties. The availability of these protections did not depend on the categorization of a particular state law as retroactive or prospective, Marshall claimed; Contracts Clause analysis should not become simply

[60] *Id.* at 336-37 (Marshall, C.J., dissenting).

[61] *Id.* at 337; *cf.* Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1115-16 (1999) (distinguishing between "transaction-time" and "decision-time" models of retroactivity).

[62] *Ogden*, 25 U.S. (12 Wheat.) at 337 (Marshall, C.J., dissenting).

[63] *Id.* at 339. Marshall's forecast proved accurate in a slightly different context. Following the Court's decision in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), that a state legislature's modification of a charter amounted to impairment of the obligation of contracts, some states enacted statutes or constitutional provisions that expressly reserved to the state the power to amend corporate charters, while other states included such reservations in individual charters. *See* STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE *CHARLES RIVER BRIDGE* CASE 62-63 (1971); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, at 627 (1988).

an inquiry into an act's temporal framework. The majority's construction "would change the character of the provision, and convert an inhibition to pass laws impairing the obligation of contracts, into an inhibition to pass retrospective laws."[64] Finally, the fact that the Contracts Clause was grouped with the prohibitions on bills of attainder and ex post facto laws should not be read to confound the obviously retrospective nature of those devices with the less temporally delimited restriction on impairing the obligation of contracts.[65]

Despite Marshall's claims that his view did not depend on the retroactive/prospective distinction, his emphasis on selecting the relevant moment for purposes of the Contracts Clause inquiry demonstrates the importance of temporal framing for his analysis. The majority argued that concerns of notice and fairness were satisfied by the New York law in *Ogden* in a way that had not been the case in *Sturges*, insofar as the *Ogden* law applied only to contracts made after the law was passed. Thus, unlike the *Sturges* scenario, a creditor was presumed to be on notice that the debtor might turn to the state insolvency law for relief; this was the insight behind the majority's assertion that the law in effect at the time of the contract's creation was incorporated into the contract itself. For the majority Justices, the passage of the insolvency statute could be plotted at time one and applied to all subsequent contracts plotted further down the temporal line.

Marshall, in contrast, took a less distinctly chronological view of the relevant events. For the Chief Justice, each creditor-debtor interaction subject to the insolvency act contained its own temporal dynamics and relationships. A one-time announcement by the state legislature that subsequent debts might be discharged was insufficient to cure the impairments that took place in each creditor-debtor relationship as the insolvency law was applied with respect to those particular debts. To put it another way, consider that even the nominally "prospective" act at issue in *Ogden* operated retroactively with respect to any particular creditor-debtor relationship, in that it permitted a debtor to escape liability for his debts by virtue of the operation of state law. True, the statute in *Ogden* was not maximally retroactive, since it did not apply to debts entered into prior to the act's passage, as had the

[64] *Ogden*, 25 U.S. (12 Wheat.) at 355-56 (Marshall, C.J., dissenting); *see also* HORWITZ, *supra* note 18, at 151 (noting Marshall's view that "all state bankruptcy laws, whether they operated on past or future contracts, were unconstitutional. Marshall maintained that virtually all established expectations, including the expectation of the power to contract in the future, were vested property rights").

[65] *Ogden*, 25 U.S. (12 Wheat.) at 335-36 (Marshall, C.J., dissenting).

law in *Sturges*. Viewed from the temporal frame of the legal and economic system, then, the *Ogden* act operated only prospectively. But the law nevertheless permitted a significant degree of retroactivity within a given creditor-debtor grouping when the debtor's request for relief brought her prior contracts under the state's protection.

Under the *Ogden* statute, then, each creditor-debtor relationship contained a potential before-and-after dynamic, with the contractual basis of the relationship functioning very differently after a debtor sought protection than it had before that moment. According to Marshall's robust view of the Contracts Clause, this was where the real concern regarding the impairment of the obligations of contract lay—not in setting up the wrong chronology of legislative action and private contract, but in the potential for legislative action suddenly to enter into and upset particular contracts.

The opinions in *Ogden* thus articulated distinctive views of which temporal frameworks counted for purposes of Contracts Clause analysis. Despite this divergence, the Justices appear to have shared a deep belief in judicial supremacy for assessing questions of time. As was also the case in *Calder*, the Court in *Ogden* presented itself as the final authority on issues of temporal effect, especially with respect to legislation. This judicial imperialism where questions of time were concerned continued into the twentieth century, when the Court launched an extensive body of retroactivity doctrine—this time referring to the temporal effect of the Court's own decisions.

II. JUDICIAL RETROACTIVITY IN THE TWENTIETH CENTURY

The special relationship between the Supreme Court and time is evident in the modern Court's doctrine on the problem of retroactive application of judicial decisions, a complex issue that has forced the Court self-consciously to confront the relationship between adjudication and time.[66]

This Part examines the Court's experiments in the twentieth century with limiting the retroactive effect of its own decisions. The doctrine of adjudicative retroactivity[67] dates from the Court's efforts in the

[66] My use of the phrase "the problem of retroactive application" is not meant to suggest that retroactivity itself is the heart of the problem; the real problem for the Court has been the distinction between retroactivity and prospectivity. On these terms, see generally Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997), which discusses the Court's struggles with retroactivity doctrine.

[67] This Part does not explore the related but distinct issue of legislative retroactivi-

1960s to claim greater discretion to control the application of its decisions, especially in the criminal context.[68] Many commentators have criticized this effort as resulting in "doctrinal confusion and incoherence."[69]

Regardless of their holdings, the majority of the Supreme Court's cases dealing with adjudicative retroactivity view the choice of retroactivity as implicating the dichotomy between what the Court has termed the Blackstonian or "declaratory" model of law[70] and the Austinian or "positive law" model.[71] The Court has described the declaratory theory as a claim that "[t]he judge rather than being the creator of the law [is] but its discoverer,"[72] and that therefore "the courts are understood only to find the law, not to make it."[73] The theory forms one of the central justifications for adjudicative retroactivity: if the

ty. *See, e.g.*, United States v. Carlton, 512 U.S. 26, 32 (1994) (holding that due process was not violated by retroactive application of an amendment to the Internal Revenue Code); General Motors Corp. v. Romein, 503 U.S. 181, 187, 191 (1992) (upholding retroactive regulatory legislation against Due Process and Contracts Clause challenges); Fisch, *supra* note 66, at 1063-66 (describing the Court's decisions regarding legislative retroactivity); Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2145 (1996) (arguing that the Court's different treatment of retroactivity in the criminal and civil contexts is due to interest group theory); *cf.* John F. Manning, *Clear Statement Rules and the Constitution*, 100 COLUM. L. REV. 399 (2010) (offering a critique of approaches that treat nonretroactivity as a canonical constitutional value).

[68] *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1738 (1991) ("The Warren Court confronted the question of retroactivity in criminal cases while embarked on a fundamental restructuring of constitutional doctrines regulating criminal procedure.").

[69] *See* Roosevelt, *supra* note 61, at 1136-37 (arguing that the current Court has been "partially successful" at clarifying the Warren Court's retroactivity doctrine).

[70] *See* 1 BLACKSTONE, *supra* note 10, at *69-70 (explaining that the duty of courts is not to "pronounce a new law, but to maintain and expound the old one"). Although the Court generally refers to Blackstone as the "foremost exponent" of the declaratory theory, it occasionally also cites Sir Matthew Hale's earlier HISTORY OF THE COMMON LAW, first published in 1713. *See, e.g.*, Linkletter v. Walker, 381 U.S. 618, 623 n.7 (1965) (referring to SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND (Charles M. Gray ed., Univ. Chicago Press 1971) (1713)).

[71] *See* 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 35-37 (Robert Campbell ed., London, John Murray 4th ed. 1873) (examining declaratory and positive law theories); *see also Linkletter*, 381 U.S. at 623-24 ("Austin maintained that judges do in fact do something more than discover law; they make it interstitially by filling in with judicial interpretation the vague, indefinite, or generic statutory or common-law terms that alone are but the empty crevices of the law."). The *Linkletter* Court's characterization of this view as associated with Austin has been called "somewhat unconventional[]." Paul J. Mishkin, *The Supreme Court 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 58 (1965).

[72] *Linkletter*, 381 U.S. at 623.

[73] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535-36 (1990).

Court is declaring what the law is and has always been, then that declaration must have been the case at all earlier times, even if contemporary case law suggests otherwise. On this view, retroactive application ought to be regarded as "fixing" old mistakes and bringing the doctrine into line with the correct rule. The Austinian theory, in contrast, posits a more creative role for judges, carrying with it an assumption that "when the Court changes its mind, the law changes with it."[74] Generally understood to provide for an exclusively forward-looking dynamic, this view is most often marshaled in defense of prospective application. It does not contemplate courts correcting the mistakes of the past; on the contrary, the overruling is understood to affect only those cases that have yet to be decided.

Quaint though the invocation of Blackstone as jurisprudential authority has become, one should not simply dismiss the declaratory theory as an anachronistic relic of a less sophisticated era. As Paul Mishkin pointed out, judicial decisions necessarily operate with some degree of retroactivity, given that the fundamental duty of courts is to decide disputes that have already arisen.[75] Moreover, these decisions must reflect preexisting shared societal rules or values; otherwise, retroactivity would be an "intolerable" imposition of new rules on prior conduct.[76] In other words, the idea that there exists some body of as yet unarticulated—but nonetheless viable—law is implicit in the practice of retroactive application, regardless of one's views on Blackstone. We cite Blackstone historiographically: not for the truth of what he thought but as evidence of the centrality of the declaratory theory to Anglo-American common law.

Although the declaratory/positivist distinction does not completely capture the nuances of the retroactivity question, it does raise several thorny issues that touch on the underlying meaning of the Court's power to overrule a prior judgment. Clearly, the theories contemplate different conceptions of the act of overruling. The positivist's claimed ability to make law means that her decision to overrule creates a new law in and of itself, while the declaratory theorist's striv-

[74] *Id.* at 550 (O'Connor, J., dissenting).

[75] *See* Mishkin, *supra* note 71, at 60 ("[I]t is the basic role of courts to decide disputes after they have arisen. That function requires that judicial decisions operate . . . with retroactive effect.").

[76] *See id.* ("[U]nless [judicial] decisions . . . reflect preexisting rules or values, such retroactivity would be intolerable."). Indeed, a completely prospective judicial decision—one that did not apply to the parties before the court—would likely run afoul of the constitutional prohibition on advisory opinions.

ing toward a preordained perfection means that the act of overruling is a corrective device aimed at purging the law of a deviant wrong turn. In other words, the positivist concerns herself with making each law complete and correct in itself, while the declaratory theorist sees his role as that of custodian of a holistic law in danger of being tainted by momentary expediency. The Austinian makes no claim to having better or more "right" knowledge than her predecessors; what worked before simply does not work today, and rather than deeming one approach fundamentally wrong, she accepts the existence of conflicting articulations of the law because they are separated by the passage of time. The Blackstonian, in contrast, sees his judgment as the most perfect articulation (to date) of a single section of the great firmament of the law, only one piece of which is visible at any given moment. Under either approach, the court is clearly mediating between two points in time—namely, the point before we had discovered (the declaratory view) or created (the positivist view) the new incarnation of the law and the point after that discovery or creation.[77]

Even without the additional complication of a law's situation in time, the act of overruling is itself fraught with theoretical complexity. Outside the retroactivity debate, the practice of judicial overruling is the subject of significant controversy with respect to both its limits and its implications for stare decisis and the rule of law.[78] With the addition of the retroactivity variable, the fundamental question of the meaning of overruling becomes more urgent, requiring the Court not only to overcome the hurdle of overturning an area of law thought to be settled but also to determine whether its actions should be characterized as negation or as something less permanent and more benign,

[77] This is, to be sure, a highly schematized version of the two views. As the writings of the Revolutionary-era American lawyer James Otis demonstrate, even during the heyday of Blackstone and Austin few people adopted one or the other view categorically. Compare Otis's statement in 1764 that "[t]he power of Parliament is uncontrollable but by themselves, and we must obey" with his observation in the same pamphlet that "Parliament cannot make 2 and 2, 5: omnipotency cannot do it." JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 59, 70-71 (Boston, Edes & Gill 1764) *reprinted in* 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750–1776, at 409, 448, 454 (Bernard Bailyn ed., 1965).

[78] *See, e.g.*, OLIVER P. FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE ch. 6 (1935) (considering the stare decisis and res judicata difficulties presented by overruling the law); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1034 (1990) (discussing the tension between philosophy and the legal practice of adhering to precedent); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 604-05 (1987) (arguing that precedent ought to constrain the decisions of "institutions of restraint," but not "institutions of progress").

such as suspension. One's view of the status of an overruled decision thus depends on one's attitude toward retroactivity.

The Court has at times embraced a maximalist version of retroactivity. On this view, "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[79] In line with the declaratory theory, this view proceeds from the assumption that the most recent discovery of the law[80] is the most correct one, the one closest to a transcendent body of law. Therefore, if this new interpretation contradicts an earlier one, the earlier one is per se illegitimate for the simple reason that it would not otherwise have needed to be revisited and amended. If the earlier interpretation is illegitimate now, it has necessarily always been illegitimate, for according to the baseline presumption of the declaratory theory, the law is unchanging. Thus, the earlier statement of the law becomes a misstatement—a nullity that at this point is declared never to have been law—and the new articulation is held to be the true representation of the law.[81] In this sense, the declaratory theory rejects

[79] Norton v. Shelby County, 118 U.S. 425, 442 (1886).

[80] Although both *Norton* and the example of the Attorney General's opinion, discussed *infra* in note 84 and its accompanying text, both deal explicitly with the overruling of a statute rather than an earlier Court decision, the basic points about the effect of a finding of unconstitutionality remain the same. In both cases, the issue is the reach of the Court's finding, not the retroactivity or prospectivity of the statute as it was passed.

[81] The declaratory theory creates, but never satisfactorily resolves, a lingering ambiguity: what if courts are mistaken in their "discovery" the law? The whole theory rides on the idea that each decision represents a new and accurate statement of the law, but what happens if there is a "right" law in existence and the courts simply fail to articulate it correctly, or to apprehend it at all?

Also unclear is the status of the law in the time between the earlier, now-discredited judgment and the new, corrected one. As a historical matter, the status of the law in that time was what it was: people depended on the earlier decision because at that time they had no way of knowing that it would someday be superseded and declared erroneous. Certainly this is the desired effect, for otherwise the declaratory theory would not permit any law to be relied upon or accorded full legitimacy because there would always be the possibility of overruling at some later point in time—and along with overruling, the possibility of total nullification. Yet from the momentary, synchronic standpoint of human time, the status of the law in that time can only be determined in its static relationship to a later temporal vantage point. That is to say, in *Norton*, the earlier law was good law as long as the vantage point predates the particular moment in 1886 when the *Norton* decision was handed down; from that point onward, the earlier law was a nonentity. Further concentric circles of confusion arise if one considers a scenario in which, 150 years after the *Norton* decision, the Court finds that the 1886 decision was mistaken and the earlier law was actually correct. Now what would be the essential state of the law between the initial act and the 1886 decision?

efforts to historicize judicial decisions insofar as those efforts view decisions as emerging from a particular temporal context.

Prospective application of judicial decisions operates on a different set of premises. In an opinion concerning the status of the District of Columbia's minimum wage law in 1937, following the overruling of *Adkins v. Children's Hospital*[82] by *West Coast Hotel Co. v. Parrish*,[83] Attorney General Homer Cummings noted that

> [t]he decisions are practically in accord in holding that the courts have no power to repeal or abolish a statute, and that notwithstanding a decision holding it unconstitutional a statute continues to remain on the statute books; and that if a statute be declared unconstitutional and the decision so declaring it be subsequently overruled the statute will then be held valid from the date it became effective.[84]

Cummings thus suggested that although the D.C. minimum wage law had been ruled unconstitutional in *Adkins* in 1923, when the Court reversed *Adkins* in 1937 in *West Coast Hotel*, it in essence revived the D.C. law, which had lain dormant in a kind of fourteen-year legislative suspended animation. In a prospective universe, therefore, judicial time moves forward in fits and starts, punctuated by repeated revisits to and reinterpretations of earlier moments. In contrast to the declaratory theory's gradual emergence of a preexisting law, the positivist theory implies the rejection of a progressive, evolutionary view of time. Rather than denying the possibility of fundamental legal change, the positivist theory embraces change but characterizes it as a series of doings, undoings, and redoings.

In addition to deemphasizing chronological time, the declaratory and positivist theories share another important assumption: a vision of legal change that privileges the moment of judicial decision and transforms that moment into a dividing line between old and new understandings of the law. Shifting the emphasis from a more historical view of change in which each decision must be comprehended as both a slice across its own time and a section of the path of the law forward in time, both theories turn the gaze inward by suggesting, first, that each act of adjudication creates a division between the world before

Between 1886 and 2036? Perhaps more important, what was the real-life state of the law in those periods, during which no one had any idea that the rule they knew as law would later be deemed incorrect?

[82] 261 U.S. 525, 558 (1923) (striking down a District of Columbia minimum wage statute because it "arbitrarily" shifted a societal burden to employers).

[83] 300 U.S. 379 (1937) (upholding a state law setting a minimum wage for female employees).

[84] 39 Op. Att'y Gen. 22, 22-23 (1937).

and after, and, second, that this confrontation between old and new requires a theory of assimilation.

In this sense, the retroactivity/prospectivity analysis in the adjudication context resembles two points and a betweenness, a *Time One* and a *Time Two* with an interval of uncertainty between them.[85] The initial decision emerges at *Time One*, but at *Time Two* we learn that the earlier decision is incomplete and requires additional explication with respect to the temporal effect of its reach. Remedying this problem gives rise to another double dynamic, for the sweep of time now includes the original decision, the secondary decision recasting that decision, and the reformulated original decision; in addition to the relationship between *Time One* and *Time Two*, there is now a relationship between *Time Two* and *Time One Revisited*. But, rather unsurprisingly, this does not capture the full complexity of the new pair, for in spite of the ordinal precedence its name suggests, *Time One Revisited* actually comes after *Time Two*. Try as it might, *Time One Revisited* can never negate the interim between the original *Time One* and *Time Two*; rather, it must be content with creating a "new" *Time One* whose existence is contingent on the fact of *Time Two*'s having occurred. This is the case regardless of whether retroactive or prospective application is embraced at *Time Two*, for ultimately retroactivity doctrine unravels, not as a result of the temporal application the Court selects, but rather because of the impossibility of extracting the doctrine from the spirals of time between original and secondary decision.

Both retroactivity and prospectivity therefore posit a measuring moment, for both require a definite point relative to which the chosen temporal effect will operate. Yet the Court's retroactivity doctrine dodges the issue of providing a consistent account of this baseline point against which both past and future are to be defined. Thus, one cannot say with certainty whether the fundamental moment in which the case revealed its true nature came at the time of the original decision or at the time of a later holding that the original decision would or would not apply retroactively; one only perceives in *Time Two* that

[85] In some situations, as in the *Adkins–West Coast Hotel* scenario, the Court must take three moments into account when considering the temporal effect of a series of its decisions: an initial *Time One* in which a statute is passed (e.g., the D.C. minimum wage law), followed by *Time Two* in which the Court determines the validity of the statute (*Adkins*, striking down the statute), followed by *Time Three* in which the Court revisits that earlier determination (*West Coast Hotel*, overruling *Adkins*).

the two cases are necessarily related by virtue of the fact that each is incomplete without the other.[86]

Although the Court emphasizes temporal relativity in its retroactivity doctrine, the Court functions in historical, chronological time owing to its institutional character. Yet the Court's self-conception centers on continuity, most notably the conviction that the body deciding today's cases is the same entity as the one that convened in New York's Royal Exchange on February 2, 1790.[87] The Court's own vision of itself as an institution is thus largely ahistorical, suggesting a mode of judicial time characterized not by change but by continuity.

For most of its early history, the Court adhered to a general rule of adjudicative retroactivity: its decisions operated both forward and backward in time.[88] In the nineteenth century, a few cases arose—dealing with nonconstitutional, noncriminal state law—in which the Court deviated from its traditional path and declared a prospective rule.[89] In the early twentieth century, prospective overruling received serious attention from judges and legal theorists. Justice Benjamin Cardozo was a prominent proponent of prospectivity in certain categories of cases.[90] In *Great Northern Railway Co. v. Sunburst Oil & Refin-*

[86] *See, e.g.*, Roosevelt, *supra* note 61, at 1117-18 (distinguishing the decision-time model, in which courts apply the law as understood at the time the case is decided, and the transaction-time model, in which the law at the time of the transaction is applied).

[87] For example, in *United States v. Lopez*, the Court's 1995 decision that revived judicial scrutiny of congressional action under the Commerce Clause, the Court listed nearly a century's worth of case law in describing the "wide variety of congressional Acts regulating intrastate economic activity" that "we have upheld." 514 U.S. 549, 559-60 (1995).

[88] *See* Harper v. Va. Dept. of Taxation, 509 U.S. 86, 107 (1993) (Scalia, J., concurring) (noting that the concept of prospectivity "would have struck John Marshall as an extraordinary assertion of raw power"); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years."); *see also* Fisch, *supra* note 66, at 1059 (describing the "general rule of adjudicative retroactivity" and the Court's eventual departure from it). This is in contrast to the general rule of legislative prospectivity.

[89] *See, e.g.*, R.R. Co. v. McClure, 77 U.S. (10 Wall.) 511, 515 (1870) (declining to hear a contract case dealing with the collection of state bonds); Havemeyer v. Iowa County, 70 U.S. (3 Wall.) 294, 303 (1865) (asserting that cases "long posterior to the [case] . . . can have no effect upon [the Court's] decision"); Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 205-06 (1863) (declining to apply a recent case decided by the highest state court when the contested bonds were issued and marketed before the case was decided).

[90] *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 146-49 (1921) ("I think it is significant that when the hardship is felt to be too great or to be unnecessary, retrospective operation is withheld."); Note, *Prospective Overruling and Re-*

ing Co., the Court endorsed the Montana Supreme Court's decision to limit its holding to "forward operation."[91] Cardozo wrote for the Court:

> This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the Constitution of the United States is infringed by the refusal.
>
> We think the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.[92]

It was in the context of the Warren Court's vast expansion of the rights of state criminal defendants, however, that the Court's willingness to contemplate prospective application wrought the most revolutionary changes and exposed the complexity of determining laws' temporal effects.[93] Introduced as a means of limiting the application of newfound constitutional rights to defendants convicted after the rights' announcement,[94] the new option of prospectivity (or "nonretroactivity," as it was often termed) made its debut in 1965 in *Linkletter v. Walker*.[95] Arising out of a state prisoner's habeas corpus proceeding, *Linkletter* considered the question whether the rule of *Mapp v. Ohio*, which binds the states through the Due Process Clause of the Fourteenth Amendment to follow the Fourth Amendment's exclusionary

troactive Application in the Federal Courts, 71 YALE L.J. 907, 911 (1962) (describing Justice Cardozo as "the major advocate of prospective overruling").

[91] 287 U.S. 358, 364 (1932); *see also* Linda Meyer, *"Nothing We Say Matters":* Teague *and New Rules*, 61 U. CHI. L. REV. 423, 427 n.11 (1994) (describing how the Court in *Great Northern Railway Co.* "sustain[ed] prospective state judicial decisions against due process attacks").

[92] 287 U.S. at 364.

[93] *See* Meyer, *supra* note 91, at 427-29 (describing changes in criminal law doctrine before 1965 as "incremental and evolutionary" and explaining the effects of the changes in the Court's perspective on retroactivity during the mid-1960s).

[94] *See* Fallon & Meltzer, *supra* note 68, at 1734 ("Even the Warren Court might have hesitated to move as far and as fast as it did if each decision recognizing a 'new' right required opening the prison gates for all victims of past violations."); Fisch, *supra* note 66, at 1059 (describing the Court's hesitance to apply changes in criminal procedure to free previously convicted defendants); K. David Steele, Note, *Prospective Overruling and the Judicial Role After* James B. Beam Distilling Co. v. Georgia, 45 VAND. L. REV. 1345, 1349 (1992) (explaining the Court's refusal to apply *Mapp v. Ohio* retroactively, which would have had the potential to overturn thousands of criminal convictions). The Warren Court chose prospective application for several of its most expansive criminal cases. *See, e.g.*, Johnson v. New Jersey, 384 U.S. 719, 721 (1966) (declaring that the *Miranda* and *Escobedo* decisions were not retroactive).

[95] *See* 381 U.S. 618, 619-20 (1965) (holding that *Mapp v. Ohio* did not apply retroactively).

rule,[96] operated retrospectively upon cases that had reached a final decision prior to the *Mapp* decision.[97] The temporal effect of two prior cases was thus at issue in *Linkletter*: *Mapp* and the case it had overruled, *Wolf v. Colorado*.[98] Justice Clark held for the Court that retrospective application of the *Mapp* rule was not required, citing Justice Cardozo's opinion in *Sunburst* for the proposition that "the Constitution neither prohibits nor requires retrospective effect."[99]

Rejecting the Court's prior assertion that a finding of unconstitutionality negates a law's existence,[100] Clark emphasized the historical fact of *Wolf*, insisting that "the existence of the *Wolf* doctrine prior to *Mapp* is an operative fact and may have consequences which cannot justly be ignored."[101] These consequences required a three-part inquiry into "the purpose of the *Mapp* rule; the reliance placed upon the *Wolf* doctrine; and the effect on the administration of justice of a retrospective application of *Mapp*."[102] As this functionalist language suggests, the focus of the Court had shifted from a formal consideration of the essential quality of an overruled law to a struggle with the practical effect of the act of overruling. In this case, the administrative difficulty of applying *Mapp* retroactively proved to be the deciding factor for the Court.[103]

Rather than establishing a rule of prospectivity, the *Linkletter* holding is best understood as providing for a discretionary approach to retroactivity in criminal cases. In so doing, the Court in *Linkletter* opened the door for itself to exercise a general power of prospective

[96] 367 U.S. 643, 657-60 (1961).

[97] *Linkletter*, 381 U.S. at 619-20.

[98] *Mapp* overruled *Wolf v. Colorado*, 338 U.S. 25, 26 (1949), insofar as *Wolf* had failed to apply the exclusionary rule to the states. *Mapp*, 367 U.S. at 654-55. For more on the question of retroactivity with respect to *Mapp* and *Wolf*, see Paul Bender, *The Retroactive Effect of an Overruling Constitutional Decision:* Mapp v. Ohio, 110 U. PA. L. REV. 650, 650-51 (1962).

[99] *Linkletter*, 381 U.S. at 629 ("As Justice Cardozo said, 'We think the Federal Constitution has no voice upon the subject.'" (quoting Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932)).

[100] *See, e.g.*, Norton v. Shelby County, 118 U.S. 425, 442 (1886) ("An unconstitutional act is . . . in legal contemplation, as inoperative as though it had never been passed."); *see also supra* notes 79-81 and accompanying text.

[101] *Linkletter*, 381 U.S. at 636 (internal quotation marks omitted).

[102] *Id.*

[103] *See id.* at 637 ("To make the rule of *Mapp* retrospective would tax the administration of justice to the utmost.").

limitation.[104] Writing for the Court, Justice Clark was careful to distinguish pure prospectivity from the type of nonretroactivity its holding contemplated. The Court noted that the application of the rule in *Mapp* to reverse the defendant's conviction rendered moot the question whether *Linkletter* would apply *Mapp* prospectively, since "[a] ruling which is purely prospective does not apply even to the parties before the court."[105] Instead, the primary issue before the *Linkletter* Court was the effect of *Mapp* on convictions that had reached final judgment before *Mapp* was decided. Finding what was basically a limited form of prospective limitation, the Court held that *Mapp* applied to the facts of that case, that *Mapp* applied to all other convictions on direct review and not yet final at the time of the *Mapp* decision, and that the Court was not required to overturn convictions that became final prior to *Mapp*.[106]

Despite the conventional understanding of *Linkletter* as the seminal case announcing a possibility of prospectivity, its actual holding was not terribly revolutionary.[107] *Linkletter*'s contribution to the retroactivity/prospectivity debate was its assertion that each decision announcing a "new" constitutional rule provides an occasion for the Court to decide what degree of retroactivity will apply.[108] The decision thus added another level of metadiscourse to the Court's growing consciousness of itself as more than simply the enunciator of constitutional truths; it became necessary for the Court to pronounce not just the rule but the specific time boundaries in which the rule would op-

[104] *See* Fisch, *supra* note 66, at 1059 n.15 (characterizing the Court's application of retroactivity as discretionary); Mishkin, *supra* note 71, at 72 (discussing the Court's "ability to prescribe any limited degree of retroactivity").

[105] *Linkletter*, 381 U.S. at 621-22.

[106] *See id.* at 622, 639-40. Besides the fact that *Mapp* had already been applied to Ms. Mapp, the Court noted that it had also been applied to cases pending on direct review at the time it was rendered. *See id.* at 622 & n.4 (citing Stoner v. California, 376 U.S. 483 (1964); Fahy v. Connecticut, 375 U.S. 85 (1963); Ker v. California, 374 U.S. 23 (1963)). The Court defined "final" to mean cases "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp v. Ohio*." *Linkletter*, 381 U.S. at 622 n.5.

[107] *See* Mishkin, *supra* note 71, at 77 (referring to *Mapp*'s retroactivity under *Linkletter* as "normal"); *see also* United States v. Johnson, 457 U.S. 537, 543 (1982) (characterizing the post-*Linkletter* norm as retroactive application of all newly declared constitutional criminal procedure rules to convictions not yet final when the rules were established); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 413-19 (1966) (applying *Linkletter*'s analysis to hold the rule of *Griffin v. California* inapplicable to judgments made final before *Griffin* was decided).

[108] *See Linkletter*, 381 U.S. at 629 (arguing that the Constitution's silence on retroactivity necessitates case-by-case decisions regarding the retroactive application of new rules).

erate. *Linkletter* therefore signaled a shift from an implicit presumption of retroactivity to a new power in the Court to delineate the precise temporal boundaries of a decision's operation.

The reach of *Linkletter*'s prospectivity was quickly expanded in *Stovall v. Denno*[109] and *Desist v. United States*.[110] In those cases, the Court moved even further toward a rule of pure prospectivity, according to which the rule announced in a given case would apply only to subsequent cases. Dissenting in *Desist*, Justice Harlan set forth the array of rules governing limited retroactivity that had mushroomed since *Linkletter*,[111] concluding that by applying decisions wholly prospectively the Court had strayed from the original principles of nonretroactivity that case had articulated: "*Linkletter* was right in insisting that all 'new' rules of constitutional law must . . . be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down."[112]

The dissent was the first time Harlan had argued against prospectivity,[113] and the language of his dissent suggests a genuine epiphany. A self-conscious meditation on the various levels of the retroactivity problem, Harlan's dissent considered both the temporal relationships among the various cases and the second-order doctrinal dynamic between his former and his current views on prospective application. In struggling with multiple layers of the past, both his own and the Court's, Harlan set the stage for a mounting unease with the Court's

[109] 388 U.S. 293, 296 (1967) (holding that two previous decisions in favor of defendants' right to counsel at lineups would apply only in those two cases and to cases decided after *Stovall*, but not to the *Stovall* defendant).

[110] 394 U.S. 244, 246 (1969) (holding that *Katz v. United* States, 389 U.S. 347 (1967), applied only to the defendant in that case and to cases in which the surveillance occurred after the date of that decision).

[111] *Id.* at 256-57 (Harlan, J., dissenting).

[112] *Id.* at 258; *see also* Mackey v. United States, 401 U.S. 667, 677 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) ("What emerges from today's decisions is that in the realm of constitutional adjudication in the criminal field the Court is free to act, in effect, like a legislature, making its new constitutional rules wholly or partially retroactive or only prospective as it deems wise."); Steele, *supra* note 94, at 1351 (summarizing Harlan's argument). Richard Fallon and Daniel Meltzer note that Justice Harlan's reconsideration of the issue began with the article by Paul Mishkin cited *supra* at note 71. Fallon & Meltzer, *supra* note 68, at 1743. Like Mishkin, Fallon and Meltzer noted, Harlan distinguished between direct review and habeas corpus, arguing for retroactive application for all cases on direct review and on habeas only for certain new rules. *Id.* at 1743-44.

[113] *See* Fallon & Meltzer, *supra* note 68, at 1743 ("[T]he *Stovall* regime suffered an important defection in 1969, when Justice Harlan joined the opposition.").

scattershot use of prospectivity, an unease that would culminate in the Rehnquist Court's reformulation of the retroactivity rule.

Notwithstanding Harlan's vigorous dissents, prospectivity spread rapidly from the criminal to the civil context, starting in 1971 with *Chevron Oil Co. v. Huson*.[114] At issue in *Chevron* was the application of a rule regarding statutes of limitations that the Court had handed down while pretrial discovery proceedings were underway in *Chevron*.[115] Agreeing with respondent Huson that the prior decision should not be applied retroactively to bar actions filed before the date of its announcement, the Court enunciated a three-part test to be applied to cases dealing with what it now termed a question of "nonretroactivity":

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."[116]

Two things are striking about this opinion: first, its explicit rejection (by allowing the possibility of a new principle of law) of any notion of a declaratory theory of law; second, the subtle shift in norms evidenced by the test's suggestion that "discretion" had changed sides and now referred to the ability to apply a holding retroactively—as if the rule had become nonretroactivity (i.e., prospectivity), with some leeway remaining for retroactive application.[117]

The preference for prospectivity in the civil context did not carry over to the criminal arena, however. Beginning with *United States v. Johnson*[118] and culminating in *Griffith v. Kentucky*,[119] the Court began to retreat from prospectivity and to shift toward retroactivity in the criminal context, adopting Harlan's argument that "failure to apply a new-

[114] 404 U.S. 97 (1971).

[115] *Id.* at 98-99.

[116] *Id.* at 106-07 (alteration in original) (citations omitted) (quoting *Linkletter*, 381 U.S. at 629; Cipriano v. City of Houma, 395 U.S. 701, 706 (1969)).

[117] *Cf.* Fisch, *supra* note 66, at 1059 (describing the *Chevron* Court as having "adopted a discretionary approach to adjudicative retroactivity in the civil context").

[118] 457 U.S. 537 (1982).

[119] 479 U.S. 314 (1987).

ly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."[120] In these cases, the Court portrayed itself as rescuing *Linkletter* from the years of misreading that had followed it, reclaiming the decision and assimilating it back into the retroactivity tradition where it belonged.[121] Indeed, this reading of *Linkletter* as belonging on the retroactivity side of the debate seems more appropriate when one considers that the holding of that case was basically unremarkable; recall that it simply found that new rules for the conduct of criminal prosecutions applied retroactively to all cases either pending on direct review or not yet final.[122]

The divergent interpretations of *Linkletter* and *Griffith* can be explained by the specific historical and doctrinal context in which each decision arose. Despite their identical holdings, *Linkletter* and *Griffith* faced each other across a twenty-two-year gulf of case law, political shifts, and changes in the makeup of the Court itself. Compared to the historic rule of retroactivity articulated in *Norton*, or even to the first allusion to prospectivity in *Sunburst*, *Linkletter* was revolutionary in its bald assertion of judicial power to define the boundaries of law in time. Compared to the prospectivity cases' endless splintering of time according to the precise dates of past decisions, *Griffith* undoubtedly resembled a throwback to Blackstonian retroactivity. As an analytical matter, the principal distinction between the cases is the degree to which they foreclose the option they do not select: *Linkletter* explicitly allowed for the possibility of retroactive effect despite its rhetoric of prospectivity,[123] while *Griffith* mandated retroactive application and thus effectively eliminated prospective application of new rules for the conduct of criminal prosecutions.[124] Thus, the decision in *Linkletter* was fundamentally an expansive one, in contrast to the more restrictive holding of *Griffith*.[125]

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[120] *Id.* at 322.

[121] *See, e.g.*, *id.* at 328 (Powell, J., concurring) (describing the Court's decision as "an important step toward ending the confusion that has resulted from applying *Linkletter v. Walker* on a case-by-case basis" (citation omitted)). In a sense, then, the Rehnquist Court subscribed to the declaratory theory writ large by rehabilitating a decision to correct past "mistakes."

[122] *See supra* text accompanying notes 107-108.

[123] *See* Linkletter v. Walker, 381 U.S. 618, 629 (1965).

[124] *See Griffith*, 479 U.S. at 328 ("[A] new rule for the conduct of criminal prosecuctions is to be applied retroactively to all cases . . . with no exception . . . .").

[125] Then again, one could mount a convincing argument that because *Griffith* retroactivity requires the application of new laws to a much wider sweep of time—i.e., all time, past and future—than *Linkletter*'s from-this-point-onward application, it is actually the *Griffith* holding that is the more expansive of the two.

Whatever its scope, however, the specter raised in *Griffith* of "new rule[s]" and "newly declared constitutional rule[s]"[126] returned to form the foundation of the Court's ruling in *Teague v. Lane*.[127] Focusing exclusively on habeas petitions, *Teague* held that petitioners were not entitled to the benefit of decisions handed down after their trials if the decisions were "new."[128] In other words, *Teague* limited the rule of full retroactivity announced in *Griffith*, but only with respect to habeas review.[129] Relying upon Harlan's argument that "new rules generally should not be applied retroactively to cases on collateral review,"[130] Justice O'Connor defined a "new" rule as one that "breaks new ground or imposes a new obligation on the States or the Federal Government" or that "was not *dictated* by precedent existing at the time the defendant's conviction became final."[131]

While these developments unfolded in the criminal context, the Court had remained silent on the issue of civil retroactivity, continuing to apply the *Chevron* test and refusing to limit prospectivity in civil cases.[132] The silence ended with *James B. Beam Distilling Co. v. Georgia*, however, a case that considered three different types of temporal effect and ultimately resulted in five separate opinions, none garnering the support of more than three Justices.[133] Writing for a plurality of the Court, Justice Souter held that a prior ruling of the Court "should apply retroactively to claims arising on facts antedating that decision."[134] Souter then proceeded to outline three possible solutions to the problem of temporal effect: full retroactivity, pure prospectivity,

[126] *Griffith*, 479 U.S. at 322, 328.

[127] 489 U.S. 288 (1989).

[128] *See id.* at 315-16; *see also* Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 97 (1993) (describing the Court's distinction in *Teague* between "old" and "new" law); Meyer, *supra* note 91, at 423-25 (criticizing *Teague*'s "new rule" doctrine for endangering the process of common law adjudication).

[129] Even prior to *Teague*, there had been discussion of the special role of retroactivity in habeas petitions. *See* Mishkin, *supra* note 71, at 77-92 (examining the effect of full retroactivity on habeas cases).

[130] *Teague*, 489 U.S. at 305 (citing Mackey v. United States, 401 U.S. 667, 682 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)).

[131] *Id.* at 301.

[132] *See* United States v. Johnson, 457 U.S. 537, 563 (1982) ("[A]ll questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron* . . . ."); *see also* Am. Trucking Ass'ns v. Smith, 496 U.S. 167 (1990) (declining to limit prospectivity in civil cases).

[133] 501 U.S. 529 (1991).

[134] *Id.* at 532 (plurality opinion).

and selective prospectivity.[135] The first two were given their usual significance. In contrast to full retroactivity, which applies "both to the parties before the court and to all others by and against whom claims may be pressed" and is "overwhelmingly the norm,"[136] Souter described pure prospectivity as deciding the case under the old law but making it "a vehicle for announcing the new, effective with respect to all conduct occurring after the date of that decision."[137]

Selective (or modified) prospectivity, however, was something altogether different: the power of a court to "apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement."[138] According to Souter, this had been the rule in Warren Court era criminal cases; and although the rule was subsequently abandoned in *Griffith*,[139] the issue of whether it could be employed in the civil context was before the Court in *Beam*.[140] Connecting the Court's criminal jurisprudence to its civil counterpart, Souter stated, "*Griffith* cannot be confined to the criminal law. Its equality principle, that similarly situated litigants should be treated the same, carries comparable force in the civil context. Its strength is in fact greater in the latter sphere."[141] Yet despite this apparently strong statement in favor of full retroactivity in the civil sphere, Souter's opinion emphasized the nar-

[135] *Id.* at 535.

[136] *Id.*

[137] *Id.* at 536; *see, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982) (holding the Bankruptcy Reform Act's extensive jurisdictional grant to bankruptcy judges unconstitutional and requiring that the ruling be applied prospectively only); Cipriano v. City of Houma, 395 U.S. 701, 706-07 (1969) (holding certain Louisiana election laws unconstitutional and requiring the ruling to be applied prospectively only); England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411, 422-23 (1964) (holding that abstention doctrine terminates a litigant's right to return to federal court if she submits federal claims for a decision in state courts, but requiring the ruling to be applied prospectively only).

[138] *Beam*, 501 U.S. at 537 (plurality opinion).

[139] *See id.* at 538 ("[W]e abandoned the possibility of selective prospectivity in the criminal context in *Griffith v. Kentucky* . . . ."). In this part of the opinion, Souter seems to leave pure prospectivity out of the question entirely, stating that the *Griffith* Court abandoned selective prospectivity in the criminal context in favor of complete retroactivity. Given that the term "selective prospectivity" appears not to have been used prior to *Beam*, it is difficult to know whether this is an accurate representation of the *Griffith* decision. In a way, this becomes a question of retroactivity writ small: if "selective prospectivity" had not yet been identified as such at the time of *Griffith*, can *Griffith* really be said to have "abandoned" it by choosing retroactivity?

[140] *See id.* at 538 (plurality opinion) ("[S]elective prospectivity appears never to have been endorsed in the civil context.").

[141] *Id.* at 540 (citation omitted).

rowness of the plurality decision and the fact that it did "not speculate as to the bounds or propriety of pure prospectivity."[142] Thus, even with respect to the issue of selective prospectivity itself—not just as manifested in the particular facts of *Beam*—the holding of the Court remained murky.

The other opinions set forth the entire spectrum of the retroactivity debate. Concurring in the judgment, Justice White nevertheless took issue with Souter's refusal to speculate as to the propriety of pure prospectivity, commenting that because the issue of prospective application in the civil arena was settled, to "'speculate' about the issue is only to suggest that there may come a time when our precedents on this issue will be overturned."[143] Justice Blackmun, with whom Justices Marshall and Scalia joined in concurring in the judgment, cited Harlan's position in the earlier criminal cases for the proposition that refusal to apply a newly declared rule to cases pending on direct review "violates basic norms of constitutional adjudication."[144] Justice Scalia, joined in concurrence by Justices Marshall and Blackmun, invoked the declaratory theory:

> I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it *as judges make it*, which is to say *as though* they were "finding" it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.[145]

Finally, Justice O'Connor, joined in dissent by Chief Justice Rehnquist and Justice Kennedy, cited *Marbury v. Madison*[146] for the proposition that "when the Court changes its mind, the law changes with it"[147] and found no requirement of retroactive application.[148]

If ever a case ignored the linear movement of historical time, *Beam* is that case. In it, the Justices offer up multiple conceptions of how judge-made law operates in time. The five opinions appear to struggle both within themselves and with each other in a battle of formalisms. Moreover, the linguistic and structural confusion of the decision reflects a profound doctrinal and philosophical confusion which the

[142] *Id.* at 544.
[143] *Id.* at 546 (White, J., concurring in the judgment).
[144] *Id.* at 547 (Blackmun, J., concurring in the judgment).
[145] *Id.* at 549 (Scalia, J., concurring in the judgment).
[146] 5 U.S. (1 Cranch) 137 (1803).
[147] *Beam*, 501 U.S. at 550 (O'Connor, J., dissenting).
[148] *See id.* at 559 (arguing that *Bacchus* should not be applied retroactively).

Court seems to have been aware of but unable to remedy while still clinging to its old notions of temporal effect.

The indeterminate nature of the decision in *Beam* proved no impediment to the Court's endeavor to tease a holding out of the case at a later date. Indeed, the lack of consensus in *Beam* appears to have invited multiple glosses on the topic. The next salvo came in *Harper v. Virginia Department of Taxation*.[149] The Court, per Justice Thomas, held that a prior decision of the Court applied retroactively.[150] Although only two Justices in *Beam* (Scalia and Blackmun) had voiced definite opposition to prospectivity while four (White, O'Connor, Rehnquist, and Kennedy) had reaffirmed their support for it, the *Harper* Court stated that in *Beam*, "a majority of Justices agreed that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law."[151] To be sure, while no single opinion in *Beam* carried more than three votes,[152] six Justices disapproved of selective prospectivity,[153] a fact that bolstered Justice Thomas's claim that the *Harper* holding flowed directly from the result in *Beam*.[154] Yet as Justice O'Connor's dissent noted, the *Harper* decision extended beyond *Beam*'s foreclosure of selective prospectivity insofar as it suggested that pure prospectivity might also be prohibited.[155] Indeed, *Harper* has been widely interpreted to reestablish a rule of retroactivity in civil cases,[156] although this result is certainly not obvious from the actual holding of the case.

Perhaps most troubling in *Harper* is the majority's apparent willingness to parlay ambiguous words into new concepts. Yet in many respects, this is the inevitable consequence of the way that retroactivity

[149] 509 U.S. 86 (1993).

[150] *Id.* at 90.

[151] *Id.* at 96.

[152] *See id.* at 113 (O'Connor, J., dissenting) (emphasizing that while *Beam* "yielded five opinions . . . no single writing carried more than three votes").

[153] *Id.* at 114. The six Justices were Souter, Stevens, White, Blackmun, Marshall, and Scalia. *Id.* at 96-97 (majority opinion).

[154] *See id.* at 97 (reasoning that *Beam* controlled the case).

[155] *See id.* at 115 (O'Connor, J., dissenting) (supporting this argument by citing references in the majority opinion to "basic norms of constitutional adjudication" and the "fundamental rule of retrospective operation of judicial decisions" (internal quotation marks omitted)).

[156] *See* Landgraf v. USI Film Prods., 511 U.S. 244, 279 n.32 (1994) (citing *Harper* for a "firm rule of retroactivity"); Horwitz, *supra* note 128, at 94 (observing that "[t]he Court in *Harper* has now also restored the norm of retroactivity in civil cases"); *see also* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 752 (1995) (citing *Harper* as the basis for holding that a prior Court decision finding a statute unconstitutional was retroactively applicable to the present case).

doctrine has developed. For example, *Harper* repeatedly refers to "selective application of new rules,"[157] a phrase that implicates both *Beam*'s prohibition of selective prospectivity and *Beam*'s articulation of the *Griffith* principle that "similarly situated litigants should be treated the same."[158] This combination is confusing on several levels and stems from the uncertainty of *Beam* itself, an uncertainty that is magnified by *Harper*'s reliance on it. Because the term "selective prospectivity" was not employed prior to *Beam*, Souter's claim in *Beam* that *Griffith* "abandoned the possibility of selective prospectivity"[159] is difficult to evaluate, in terms of both its accuracy and its consequences for *Griffith*'s civil progeny. If *Griffith* did somehow prohibit selective prospectivity in the criminal context (even though the issue had not yet been identified in that way), then *Beam* would simply be the civil-side analogue to *Griffith*, as Souter's opinion implies.[160] But if *Griffith* did not deal with selective prospectivity, one of two possibilities emerges: either that this species of temporal limitation had not yet been discovered and was therefore not available for consideration, or that it was available but the Court deliberately chose to focus on the more extreme case of pure prospectivity. In any event, the meaning of *Harper*'s reference to "selective application of new rules" remained cloudy, and with it the relationship among *Griffith*, *Beam*, and *Harper*.

Here is another difficulty with the Court's doctrine concerning adjudicative retroactivity: in order to understand the most recent case, one must reach back and grasp the foundational cases upon which it is built—*Griffith*, *Beam*, and *Linkletter*. Yet to comprehend the foundational cases, one must read forward to discern the way in which their meanings changed in later interpretations. Circularity replaces rectilinearity as the temporal relationships between cases double back and overlap each other.

To be sure, case law in virtually every area of doctrine is susceptible to similar interpretive complications. One cannot, for example, understand the Court's 1995 interpretation of Congress's power under the Commerce Clause in *United States v. Lopez*[161] without working

[157] *Harper*, 509 U.S. at 95 (quoting Griffith v. Kentucky, 479 U.S. 314, 323 (1987)).

[158] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 540 (1991) (plurality opinion).

[159] *Id.* at 538.

[160] *See id.* (explaining that while "*Griffith* was held not to dispose of the matter of civil retroactivity[,] . . . [t]his case presents the issue." (citations omitted)).

[161] *See* 514 U.S. 549, 551 (1995) (holding that the Gun-Free School Zones Act was beyond Congress's power under the Commerce Clause).

through its earlier interpretations in *Wickard v. Filburn*[162] and *Gibbons v. Ogden*,[163] from 1942 and 1824, respectively. Moreover, if one reads *Gibbons* and *Wickard* with an awareness of what was to come in *Lopez*, one will almost certainly focus on different elements of each decision. Yet the problem of doctrinal circularity is even more acute in the context of adjudicative retroactivity. This is because the temporal ordering of the cases themselves matters a great deal more when the cases are attempting to enunciate metarules about how law operates in time.

An attempt to analyze the holding in *Beam*, for example, illustrates this conundrum. Reading *Beam* forward demonstrates that the form of retroactivity doctrine replicates its substance: each decision operates as a static element, its meaning determined by the interpretation working upon it at that moment. That interpretation, in turn, is subject to virtually endless redefinitions based on the decision's temporal relationship to other decisions, many of which postdate the original. *Beam* had one meaning (albeit not a clear one) when it was decided in 1991. It received another meaning when it was incorporated into *Harper* in 1993, and the *Beam-Harper* combination took on yet another meaning in *Landgraf v. USI Film Products* in 1994.[164] In the time between the decisions, there somehow emerged a "firm rule"—here, "of retroactivity"[165]—which will remain the rule until the next redefining moment comes along.

III. DOCTRINAL TIME HORIZONS

Although the Court has distanced itself from its doctrinal forays into adjudicative retroactivity, it has nevertheless continued to experiment with designing the time frames in which its decisions will operate. In these recent instances of thinking explicitly about time, the Court has also continued to assert its own supremacy as the creator of temporal frameworks. In contrast to the early Court's consideration of transitions between legal regimes, the nineteenth-century Court's attacks on certain species of retroactive legislation, and the twentieth-century Court's efforts to take a realist approach to time by attempting prospective application of its own decisions, the current Court's inter-

[162] *See* 317 U.S. 111, 128-29 (1942) (upholding the Agricultural Adjustment Act of 1938 as a valid exercise of Congress's commerce power).

[163] *See* 22 U.S. (9 Wheat.) 1, 239-40 (1824) (holding that Congress has the power to regulate the navigation of interstate waters under the Commerce Clause).

[164] 511 U.S. 244 (1994); *see also supra* note 156 and accompanying text.

[165] *Landgraf*, 511 U.S. at 279 n.32.

est in time appears to center on issues of time horizons and temporal packaging.

One of the Court's most ambitious efforts to control change over time came in its 2002 decision in *Grutter v. Bollinger*.[166] In *Grutter*, the Court was confronted with a challenge to the University of Michigan Law School's use of race in admissions decisions.[167] The law school had adopted an official admissions policy that specifically aimed to achieve diversity in its student body by enrolling a "critical mass" of students from underrepresented minority groups.[168] Pursuant to the policy, admissions officers undertook a "flexible assessment of applicants' talents, experiences, and potential to contribute to the learning of those around them."[169] The policy did not enumerate specific criteria for achieving diversity but did emphasize the law school's "longstanding commitment" to "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers."[170] A white female Michigan resident who had been denied admission brought suit, claiming that the law school's policy amounted to racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.[171]

Writing for the Court, Justice O'Connor held that the law school's use of race in its admissions process withstood scrutiny under the Equal Protection Clause insofar as it was "narrowly tailored . . . to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."[172]

As part of her opinion, Justice O'Connor stated,

> We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend

[166] 539 U.S. 306 (2003).
[167] *Id.* at 311.
[168] *Id.* at 316.
[169] *Id.* at 315 (internal quotation marks omitted).
[170] *Id.* at 316.
[171] *Id.* at 316-17.
[172] *Id.* at 343.

> this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all "race-conscious programs must have reasonable durational limits."[173]

Race-conscious programs, Justice O'Connor continued, therefore required a "termination point" in order to convey to the nation that "the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter."[174]

Justice O'Connor followed these general statements concerning the need for sunset provisions in race-conscious admissions policies with a specific prognosis for what the duration of those policies might be. "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education,"[175] she wrote, referring to the Court's 1978 decision in *Regents of the University of California v. Bakke*.[176] Noting the trend of increasingly well-qualified minority applicants, Justice O'Connor concluded, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[177]

As Vikram David Amar and Evan Caminker have noted, this statement from Justice O'Connor is "jurisprudentially unusual" in that it attempts to set up "a transitional state of constitutional affairs."[178] Amar and Caminker regard this "judicial transitioning" as distinct from a prospective decision, in that the O'Connor approach seems to assume that the law today and the law twenty-five years from now are the same, but that the Court will impose a hiatus before recognizing that law.[179] In prospective application, by contrast, the law changes as of "now" and then carries forward continuously. Amar and Caminker

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[173] *Id.* at 341-42 (citation omitted) (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)).

[174] *Id.* at 342 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 510 (1989)).

[175] *Id.* at 343.

[176] 438 U.S. 265 (1978).

[177] *Grutter*, 539 U.S. at 343.

[178] Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O'Connor's Closing Comments in* Grutter, 30 HASTINGS CONST. L.Q. 541, 551 (2003).

[179] *See id.* at 552 ("[T]here is but a fine line between saying, 'Today the law is X but tomorrow the law will be Y,' and saying, 'Today the law is Y but we will delay implementing that law until tomorrow.'").

hypothesize that the transitioning approach might be used strategically to defuse resistance to a particularly controversial legal change.[180]

Whatever its motivation, Justice O'Connor's statement lent itself to a variety of interpretations by the other Justices. In her concurrence, Justice Ginsburg agreed that "race-conscious programs must have a logical end point," citing international anti-discrimination accords.[181] But Justice Ginsburg questioned the majority's selection of twenty-five years as the relevant time frame for terminating such programs. In the twenty-five years since the Court's decision in *Bakke*, she noted, the status of race-conscious admissions policies had remained unsettled; in addition, the Court had declared public school segregation unconstitutional only twenty-five years before *Bakke*.[182] Both these facts, Justice Ginsburg hinted, suggested that in the long history of racial discrimination in America, twenty-five years might not be sufficient time for meaningful societal change to occur.[183] Justice Ginsburg ended her concurrence by recasting Justice O'Connor's expectation of a twenty-five-year time horizon: "[O]ne may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."[184]

In separate dissents, Justice Thomas and Chief Justice Rehnquist offered critiques of the twenty-five-year time frame. Justice Thomas joined the concluding sentence of Justice O'Connor's opinion, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today";[185] however, he added that this agreement was based on a conviction that the law school's admissions policies were already unconstitutional.[186]

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[180] *See id.* at 553 (noting the prevalence of judicial transitioning in the context of legal changes involving race, pointing to, as examples, the Constitution's prohibition on ending the slave trade before 1808, U.S. CONST. art. I, § 9, and the Supreme Court's use of the phrase "all deliberate speed" in the second *Brown v. Board of Education* decision, 349 U.S. 294, 301 (1955)). On the widespread, but understudied, use of sunset or "duration" provisions in legislation, see generally Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247 (2007).

[181] 539 U.S. at 344 (Ginsburg, J., concurring) (internal quotation marks omitted).

[182] *See id.* at 345 (describing this evolution to suggest that racial bias "remain[s] alive in our land").

[183] *Id.*

[184] *Id.* at 346.

[185] *Id.* at 343 (majority opinion); *see id.* at 351 (Thomas, J., dissenting) ("I agree with the Court's holding that racial discrimination in higher education will be illegal in 25 years.").

[186] *Id.* at 375 (Thomas, J., dissenting).

Moreover, Justice Thomas's opinion exposed disagreement among the Justices as to the doctrinal status of the twenty-five-year timeframe. Justice Thomas referred to "the Court's holding that racial discrimination will be unconstitutional in 25 years,"[187] but Justice Ginsburg termed it a "hope,"[188] and Chief Justice Rehnquist called it a "limitation."[189] Given that the choice of the twenty-five-year timeframe, as opposed to a general statement that race-conscious programs must have some finite duration, was not itself essential to the Court's decision, Justice Thomas's suggestion that it formed part of the case's holding does not seem entirely accurate.[190]

Perhaps what is so striking about Justice O'Connor's opinion in *Grutter* is its insistence on a linear progression of judicial time and on the symmetry between judicial and societal time.[191] The twenty-five-year timeframe represents an attempt by the Court to set an explicit time horizon, a temporal boundary in which all subsequent statements by the Court will be enclosed. In other words, with the tolling of the twenty-five-year period, whether a forecast, a hope, or a prediction, the era of race-conscious admissions policies in higher education will come to an end. In Reinhart Koselleck's terms, the Court is consciously attempting to define one of the "social and political units of action" characteristic of historical time.[192] The era of race-conscious

[187] *Id.* at 376.

[188] *Id.* at 346 (Ginsburg, J., concurring).

[189] *Id.* at 386 (Rehnquist, C.J., dissenting) ("The Court suggests a possible 25-year limitation on the Law School's current program.").

[190] *See* Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in* Grutter, 67 OHIO ST. L.J. 83, 92 (2006) (arguing that "the Court certainly did not put a twenty-five year 'limit' on race-conscious admissions programs"); *cf.* Christopher J. Schmidt, *Caught in a Paradox: Problems with* Grutter*'s Expectation that Race-Conscious Admissions Programs Will End in Twenty-Five Years*, 24 N. ILL. U. L. REV. 753, 761 (2004) (calling Justice O'Connor's timeframe "an aspiration rather than a description of reality" and "[a]n arbitrary line in the sand"). *But see* Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 181 (2004) (referring to "the new 25-year limit on affirmative action").

[191] The same equation of judicial and societal time is evident in Justice O'Connor's subsequent writings following her resignation from the Court. *See, e.g.*, Sandra Day O'Connor & Stewart J. Schwab, *Affirmative Action Over the Next Twenty-Five Years: A Need for Study and Action* ("When the time comes to reassess the constitutionality of considering race in higher-education admissions, we will need social scientists to clearly demonstrate the educational benefits of diverse student bodies, and to better understand the links between role models in one generation and aspirations and achievements of succeeding generations."), *in* THE NEXT TWENTY-FIVE YEARS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA 58 (David L. Featherman et al. eds., 2010).

[192] KOSELLECK, *supra* note 5, at 110.

admissions policies, on this view, can be neatly contained within the fifty-year period between the *Bakke* decision and some potential, future decision in 2028 in which the Court will pronounce the era's end.

In this sense, *Grutter* represents the high-water mark of the Court's temporal imperialism. Indeed, the apparently effortless chain of reasoning by which Justice O'Connor arrives at the twenty-five-year timeframe surpasses even the Court's twentieth-century retroactivity doctrine in the confidence it displays toward the Court's ability to reframe and rearrange temporal issues. The "before" of the long history of racial discrimination in American society, and law's efforts first to uphold and then to combat such practices, is erased. Instead, the majority opinion presents an almost technocratically derived model of how long a remedial regime ought to endure, choosing as a starting point the Court's own previous decision and suggesting a forward march of progress from that point onward. Prospectivity is the method; teleology is the theory; and the Court is the sole arbiter of when the goal has been reached.

CONCLUSION

This Article has examined the different approaches the Court uses to conceptualize change and transition, against the backdrop of the Court's overarching commitment to and narrative of continuity over time. The three case studies discussed—the early republican decisions construing the Ex Post Facto and Contracts Clauses; twentieth-century retroactivity doctrine; and the Court's recent decisions on temporal framing in the antidiscrimination context—demonstrate that the operation of law in time has been a central theme for the Court since its earliest days.

As these examples from across more than two centuries of constitutional decisionmaking illustrate, the Court's institutional commitment to continuity exists in tension with its general doctrinal commitment to precedent. Occasionally, the Court engages in intense scrutiny of the temporal effect of its decisions, and these moments demonstrate the complex causal and rhetorical relationship between the Court's institutional continuity on one hand, and its power to create doctrinal discontinuity on the other hand. The posture of institutional endurance may in fact make constitutional law transitions, both doctrinal and conceptual, more palatable.

The Court's efforts throughout its history to evaluate the temporal effect of legislation, to engage in segmentation of its decisions forward

and backward in time, and to package its doctrine into discrete epochs are striking because they show the Court consciously creating moments of temporal disjunction against a backdrop of self-described institutional stability. Examination of the Court's explicit forays into thinking about time offer a lens through which we can understand how the Court thinks about the related issues of its own institutional role, the question of when and how law originates, and the nature of legal change more broadly. Paradoxically, from the 1790s through the early twenty-first century, the Court's treatment of temporal issues has been consistent insofar as it has insisted on its own historical and institutional continuity as well as its power to create and manage doctrinal discontinuity.

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