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# The Law's Clock

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# ARTICLES

## The Law’s Clock

FREDERIC BLOOM\*

*Time is everywhere in law. It shapes doctrines as disparate as ripeness and retroactivity, and it impacts litigants of every status and type—the eager plaintiff who brings her case too early, the death-row inmate who seeks his stay too late. Yet legal time is still scarcely studied, and it remains poorly understood. This Article makes new and better sense of that time. It begins with an original account of time as a tool of institutional power, tracking the relocation of that power from the first western cathedrals to the earliest Supreme Court. It then links time’s revealing past to our messy doctrinal present—first by compiling an initial doctrinal tally, then by sorting the doctrine into a novel time typology. This typology splits into three core categories—all time, some time, and broken time—and it brings analytical coherence to a concept too-long ignored. Even more, it sketches a blueprint for worthwhile reform. This Article proposes four such reforms—to Hicks v. Miranda, to mootness and desuetude, to retroactivity doctrine, and to Federal Rule of Civil Procedure 60(b)—and it rethinks the courts’ most enduring time commitments. It also builds the foundation for what is to come, opening a discussion about time as a legal technology, arguing for a more critical investigation of the law’s clock.*

### TABLE OF CONTENTS

INTRODUCTION . . . . .	2
I. TIME PAST, TIME POWER . . . . .	8
A. FROM CHURCH TO CHAMBERS . . . . .	8
B. THE EARLY COURT . . . . .	11
II. TIME PRESENT . . . . .	14
A. A TALLY . . . . .	14
B. A TYPOLOGY . . . . .	18

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1. All Time . . . . .	19
2. Some Time . . . . .	23
3. Broken Time . . . . .	33
4. Four Faces Resorted, a Caution, and a Question . . . . .	36
III. TIME CHANGE . . . . .	40
A. IDEAS AND ILLUSTRATIONS . . . . .	41
1. <i>Hicks</i> . . . . .	41
2. Mootness & Desuetude . . . . .	43
3. Retroactivity . . . . .	47
4. Rule 60(b) . . . . .	51
B. TIME'S POWER RETOLD . . . . .	53
CONCLUSION . . . . .	55

#### INTRODUCTION

Courts keep the law's clock. In cases big and little, on questions large and small, judges mark the law's minutes and tend legal time. Doctrines shift with passing days or decades.<sup>1</sup> Decisions turn on hours squandered and deadlines ignored.<sup>2</sup> More than courtroom managers or conflict mediators,<sup>3</sup> judges are courthouse chronographers—firm in their temporal supremacy, largely forgotten in their hold on legal time.

This Article is about those judges and that time. It examines the forms and functions of contemporary legal horology—its unappreciated patterns, its self-interested limits, its most consequential turns—and sets out the first full account of how legal time now works. My claim is not that we have been completely time-oblivious, bumping into the law's clock only by accident, eyes forever closed. Some courts and a few careful scholars have spotted time in particular doctrines and spoken powerfully of its significance there.<sup>4</sup> But legal time is still

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1. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

2. *See, e.g.*, *Bowles v. Russell*, 551 U.S. 205, 215 (2007) (“The District Court told . . . Bowles that his notice of appeal was due on February 27 . . . . He filed a notice of appeal on February 26, only to be told that he was too late . . . .”).

3. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–413 (1982) (describing the new, growing managerial duties of judges).

4. *See, e.g.*, CAROL J. GREENHOUSE, *A MOMENT'S NOTICE: TIME POLITICS ACROSS CULTURES* (1996); Perry Dane, *Sad Time: Thoughts on Jurisdictionality, the Legal Imagination, and Bowles v. Russell*, 102 NW. U. L. REV. COLLOQUY 164 (2008); Alison LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329 (2010). Todd Rakoff has written powerfully about the intersection of time and law as well, exploring the many deep effects of law on time. TODD D. RAKOFF, *A TIME FOR EVERY PURPOSE: LAW AND*

a subject whose significance has not saved it from going mostly ignored.<sup>5</sup> This Article aims to mend that omission. It shows first and foremost how time works as a tool of institutional power—yet still sits unstudied as a lever of judicial control. It argues for an improved understanding of contemporary judicial chronography,<sup>6</sup> outlining a new and provocative perspective on the many themes and threads of time in modern doctrine. It calls for legal time to be lifted, directly and deliberately, to the doctrinal surface. And it connects timekeeping's old sectarian past to its messy legal present, providing the first sustained account of the many phases of courthouse chronology and the moving faces of the law's clock.

Those faces tell a mix of stories. One tells of Michael Richard, a Texas death row inmate executed when his request for a stay came after—just after—the clerk's office had closed.<sup>7</sup> Had that request been heard, it may well have been granted: on the morning of Richard's execution, the Supreme Court granted cert in *Baze v. Rees*, a case challenging the very death penalty protocol to be used in Texas that night.<sup>8</sup> But for reasons of clumsiness or coincidence, Richard's attorneys could not meet the clerk's 5:00 p.m. deadline—and their postclosing pleas were all tersely denied.<sup>9</sup> Richard was executed less than four hours later.

A second face tells of something different—not of capital punishment, but of civil procedure. It tells of Rhonda Willis, a human resources director fired when her employer decided she did not merit medical leave.<sup>10</sup> Willis maintained that this decision was improper, and she soon filed suit under federal law. But

THE BALANCE OF LIFE 7 (2002). My aim is different, almost inverse—not to study the effect of law on time but to understand the effect of time on law. Cf. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 5 (1987).

5. DAVID S. LANDES, *REVOLUTION IN TIME: CLOCKS AND THE MAKING OF THE MODERN WORLD* xxi (2000).

6. This judicial focus is intentional, important, and distinctive. It isolates time in and around the courts as an object of independent examination, and it sets this project apart from the compelling work done by others—notably Jacob Gersen—in the administrative and legislative realms. See, e.g., Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 925 (2008) (expertly assessing the “doctrinal, theoretical, and empirical” implications of “deadlines in administrative law”); Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 545 (2007) (articulating a compelling “theory of timing rules” that “explor[es] both the optimal timing of legislative action and the implications for attempts to constrain legislative action”). It also explains my occasional use of the term “judicial time” in the place of “legal time.”

7. Special Master's Findings of Fact at 7, *In re Hon. Sharon Keller Presiding Judge of the Tex. Court of Crim. App., Inquiry Concerning Judge, No. 96* (Tex. State Comm'n on Jud. Conduct Jan. 20, 2010), available at <http://www.scjc.state.tx.us/pdf/skeller/MastersFindings.pdf>.

8. 553 U.S. 35, 46 (2008). Richard was not alone in seeking a stay—though he may have been uniquely unsuccessful. Professor David Dow, one of Richard's attorneys, notes that “approximately one death row inmate per week [ ] had his execution stayed or his execution date withdrawn” as a result of *Baze's* cert grant—but not Richard. David R. Dow, *The Last Execution: Rethinking the Fundamentals of Death Penalty Law*, 45 HOUS. L. REV. 963, 989 (2008). But then *Baze* lost at the Court too, *Baze*, 553 U.S. at 41 (“[P]etitioners have not carried their burden of showing . . . cruel and unusual punishment.”), and executions resumed.

9. Special Master's Findings of Fact, *supra* note 7 (noting that Richard's counsel was told “not to bother coming over to the court, as the clerk's office (or the court) was closed”).

10. See *Willis v. Legal Aid Defender Ass'n, Inc.*, No. 11-11384, 2012 WL 246293, at \*2, \*4 (E.D. Mich. Jan. 26, 2012).

Willis's attempts to assemble useful evidence quickly fell apart: her depositions spilled past the permitted "[one] day of seven hours,"<sup>11</sup> and her complaints about dilatory responses failed in light of her attorneys' own neglect—their late arrivals, their redundant questions, their "excessive breaks."<sup>12</sup> Willis's request for court intervention was refused almost summarily. She lost her case the same day.<sup>13</sup>

A third face tells of something still different—not of mismanaged discovery, but of unhurried courts. It tells of Barbara Grutter, an applicant denied admission to the University of Michigan Law School.<sup>14</sup> Grutter believed that denial both unfair and misguided, informed by factors—of race, of "critical mass"—incompatible with modern law.<sup>15</sup> Even more, she claimed that the Court's contrary case law was outmoded and stale. But if Grutter aimed to update longstanding doctrine, she had simply arrived too soon. Twenty-five years later, the Court predicted, the world would be different and Grutter's claim would prevail.<sup>16</sup> But for now race and "mass" were permissible factors—and Grutter was out of Michigan Law School.

And yet a fourth face tells of something still different—not of affirmative action, but of federal-court abstention and X-rated films. It tells of Vincent Miranda, a California theater owner hoping to show *Deep Throat*. Local officials wished to keep that film from rolling, and they threatened prosecution under state obscenity law.<sup>17</sup> Miranda promptly asked a federal court to declare that law unenforceable, and prevailing First Amendment doctrine may have pointed his way.<sup>18</sup> But if Miranda hoped to avoid prosecution, he had already waited too long. State prosecutors charged him only one day later—soon enough, the Court determined, to displace his federal suit.<sup>19</sup> Miranda may have won his "race to the [federal] courthouse"<sup>20</sup>—but a state court would still hear his case first.

These four stories are by most accounts quite disparate. One describes the last harried scramble of a death row inmate, another the banal legal missteps of a (maybe) malingering litigant. One shows a strong-minded plaintiff pushing for change in Supreme Court doctrine, another a would-be defendant seeking relief

11. FED. R. CIV. P. 30(d)(1).

12. *Willis*, 2012 WL 246293, at \*1.

13. *Id.* at \*12.

14. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

15. *Id.* (internal quotation marks omitted).

16. *Id.* at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.")

17. *Hicks v. Miranda*, 422 U.S. 332, 335 (1975) ("[A]n eight-count criminal misdemeanor charge was [even] filed . . . against two employees . . .").

18. *Id.* at 340 ("[T]he three-judge [district] court issued its judgment and opinion declaring the California obscenity statute to be unconstitutional . . .").

19. *Id.* at 338–39 ("Service of the [federal] complaint was completed on January 14 . . . . Meanwhile, on January 15, the criminal complaint pending in the [state] [c]ourt had been amended by naming [Miranda] . . . ." (footnote omitted)).

20. *Id.* at 354 (Stewart, J., concurring).

under established Supreme Court law. Richard, Willis, Grutter, and Miranda are thus distinct as cases and disconnected as characters. They seem to stand alone.

But on one key ground these four stories come together: They are defined by legal time. Richard lost his life when a clerk's office closed before his papers were ready; Willis lost her case when discovery ended before her best evidence emerged. Grutter appeared in federal court too soon to spur a doctrinal rethinking; Miranda arrived too late to have his suit heard there at all. On stakes and on substance, these cases run in divergent directions. But in the end they lead to a single, long-overlooked spot. They all lead to the law's clock.

One goal of this Article is to pry that clock open. It sets out the core components of modern judicial chronography—its unstated frameworks, its primary pieces, and its pre-Court past. Others have explored a few of legal time's more salient features. They have weighed the proper timing of constitutional adjudication,<sup>21</sup> tracked the law's transitions between doctrines new and old,<sup>22</sup> traced the course of rights through moments of military conflict,<sup>23</sup> and profiled our "continuous" Supreme Court within a world of discontinuous law.<sup>24</sup> This Article does something different, something more integrative and eclectic. It studies a wider array of legal doctrines—some as familiar as mootness and ripeness, others as arcane as desuetude—and outlines the chief advantages of simultaneous study. It sets out that important space shared by concepts long-thought entirely separate—like mootness and desuetude, say, or Article III tenure and life sentences. It links two critical but still disconnected narratives—one about time as an instrument of institutional authority, the other about power in and around federal courts. And it builds a novel analytical framework, a new (and importantly provisional) legal time typology.<sup>25</sup>

A second goal of this Article, then, is to consider why the law's clock now works as it does. Individual doctrines tend to hint at their own explanations: ripeness ensures that courts hear only live cases and controversies;<sup>26</sup> judicial prospectivity provides fair notice of the law's intermittent "update[s]";<sup>27</sup> judicial sunsets soften the hard bite of doctrinal missteps;<sup>28</sup> and equitable tolling

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21. See, e.g., Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603 (1992).

22. See, e.g., Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922 (2006).

23. See, e.g., MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* (2012).

24. LaCroix, *supra* note 4.

25. As I have elsewhere, I use the term typology, not taxonomy, because this is a conceptual effort, not an exhaustive empirical one. See Frederic M. Bloom, *Information Lost and Found*, 100 CALIF. L. REV. 635, 670 n.219 (2012) (citing KENNETH D. BAILEY, *TYPOLOGIES AND TAXONOMIES: AN INTRODUCTION TO CLASSIFICATION TECHNIQUES* 4–6 (1994)).

26. See, e.g., *Kremens v. Bartley*, 431 U.S. 119, 136 (1977).

27. See Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553, 560, 620–21 (2012) (proposing a "nuanced kind of judicial prospectivity," one that gives "courts the ability to announce a new rule but not apply it").

28. See Neal Katyal, *Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237, 1245 (2004).

tempers the high costs of procedural delay.<sup>29</sup> Yet this Article reveals something these discrete accounts do not. It reveals an enduring commitment to the courts' chronological power—a sustained if unsteady devotion to judicial self-interest and a desire, from the beginning, to establish the courts' temporal control. This Article uncovers where and why.

It also makes sense of how. By itself, the idea that courts promote their own power carries a stodgy whiff of the obvious. Readers of *Marbury*,<sup>30</sup> *Hayburn's*,<sup>31</sup> and *Cooper*<sup>32</sup> might even think it trite. But those famous cases, and their enormous attendant literatures,<sup>33</sup> frame an institutional power question in only the bluntest of terms: they ask about the scope of interpretive supremacy and the reach of judicial review. I argue here for a subtler, original, finer-grained look at one of the courts' self-aggrandizing tools. In particular, I argue that modern judicial power is sometimes advanced, not by brash assertions of interpretive priority, but by something quieter and less conspicuous: the discipline of legal chronography and court control of the law's clock.

Quiet or not, that clock casts a long shadow. It reaches sensational cases and pedestrian squabbles, life-or-death matters, and soon-forgotten quarrels. It also reaches both civil and criminal law. In the last few decades, civil and criminal doctrine have become almost incomparably different—like “tangerines and socket wrenches”<sup>34</sup> or fountain pens and mountain goats. With few exceptions they are now practiced by different lawyers and studied by different groups. This Article hopes to bring the two together, assembling a detailed map of time in modern doctrine and uncovering a point of analytical contact between two divergent worlds. That point of contact is necessarily tentative—an early bridge that only stretches so far. But it joins civil and criminal law in the same way it links Richard to Willis and Grutter to Miranda: as telling examples of judicial horology and critical elements of the law's clock.

This Article examines that clock in three steps. Part I traces the clock's often tangled beginnings. It reaches back briefly to the world's first-known timepieces—those revolutionary instruments of measurement and order—and assesses these inventions, not just as groundbreaking cultural artifacts, but as mechanisms of immense social and political power.<sup>35</sup> It then tracks the (re)location of that power, both literally and symbolically, as it migrated outside

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29. Cf. Special Master's Findings of Fact, *supra* note 7 (outlining the fatal consequences of Michael Richard's tardy request for a stay of execution).

30. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

31. *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792).

32. *Cooper v. Aaron*, 358 U.S. 1 (1958).

33. See Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 358 (2000) (noting the “mountain of scholarship” that exists atop just one piece of this “power” story—“legislative encroachment on judicial prerogatives”).

34. David A. Sklansky & Stephen E. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 684 (2006).

35. See E. P. Thompson, *Time, Work-Discipline, and Industrial Capitalism*, 38 PAST & PRESENT 56 (1967).



cathedral walls—first to fledgling townhalls and then later, in some places, to opportunistic courts. As Part I explains, this move to courts was at once slow and scattered—more halting slog than hasty sprint. But if the process was in some ways fitful, it started early all the same. Part I identifies that early start in American doctrine, recalling the Supreme Court's first considerations of legal time and its initial claims of temporal supremacy.<sup>36</sup>

Part II draws this crucial history into the complicated present. It offers first a kind of basic doctrinal accounting—a careful, if still partial, tally of modern doctrines shaped by legal time. The aim of this preliminary index is not to dive headlong into doctrinal detail. It hopes instead to underscore a range of relevant doctrines, to connect unlikely partners, and to show the considerable scale of the law's current clock. Part II then organizes these seemingly far-flung doctrines into three novel categories: one, *all time*, which treats legal time as everlasting and nonlinear; another, *some time*, which treats legal time as finite and generally fixed; and still another, *broken time*, which treats legal time as open to disruption and surprisingly negotiable. These *time* paradigms give shape to a coherent typology, a framework that allows legal time to be studied more systematically. They permit Richard, Willis, Grutter, and Miranda to be sorted more instructively. And they encourage a substantial legal rethinking, a more normative reassessment of the policies animating particular doctrines and of the courts' underlying time strategies—the subtle accumulation of institutional muscle, say, or unstated assumption of judicial influence.

Part III begins that rethinking. With Part II's typology as a guide, it reconsiders an eclectic group of doctrines—*Hicks v. Miranda*, mootness and desuetude, judicial retroactivity, and Federal Rule of Civil Procedure 60(b)—and proposes some targeted ideas for legal reform. Part III then reassesses the policies ostensibly behind our current time doctrines, arguing that these motivations, even when convincing, tell only part of a larger story. Often left out, I argue, is a thread most visible when considered from a novel perspective. Often left out, that is, is a concerted commitment to judicial control. Part III brings that commitment into clearer relief, connecting it to fuzzier notions of institutional self-dealing and linking it to more familiar accounts of judicial power.

A short conclusion then calls for more. It highlights the need to make legal time more visible, evident, and debated—not hidden, neglected, and naturalized. It emphasizes the need for doctrinal study more sensitive to the knotty, often occluded world of legal chronology. And it reminds that many of the arguments I make here are deliberately open and adaptable—more hopeful attempts to spur fresh dialogue than rigid prescriptions for legal reform. For this Article aims to be a start and not a finish—an eager call for overdue attention to, and engaged inspection of, the law's clock.

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36. LaCroix, *supra* note 4, at 1348 (calling this “judicial supremacy for assessing questions of time”).

## I. TIME PAST, TIME POWER

The oldest Western clocks belonged mostly to the church. Built by curious abbots and clever artisans,<sup>37</sup> these trailblazing timepieces measured passing hours, tracked celestial patterns, and filled cathedral halls.<sup>38</sup> The location was not accidental. Early clocks were extremely expensive, both to construct and to maintain.<sup>39</sup> Churches were among the few who could afford them.

But church money bought more than a costly contraption. It bought a promise of power—power to schedule prayer and service, to direct local custom, and to signal a long day's end. In time this power would find a more secular home, trading monks and papal councils for mayors and city boards. Once there, time's power would refocus, fixing less on scheduling worship than on prescribing social order.<sup>40</sup> And it would relocate too, shifting in important segments—as I will argue—to ready and resourceful courts.

This Part tracks that bumpy path from church to chambers—from the aisles of Salisbury Cathedral to the opinions of the Supreme Court. It begins with a necessary but condensed study of the slow, unsteady transition from church time to judicial chronography. It then turns to the roots of that chronography in American doctrine and the early opinions of the Supreme Court. This brief historical preface may at first seem elliptical, even digressive—two steps removed from my claims about American courts. But context here is crucial. Understanding time's power now requires some awareness of time's potency then—a rooted sense, if not more, of the chronological legacy our courts have come in part to inherit. This Part starts there.

### A. FROM CHURCH TO CHAMBERS

We have no sure record of the world's first clock. Historians long assumed the first clockmaker to be Gerbert, a technical savant better remembered as Pope Sylvester II.<sup>41</sup> But Gerbert's supposed tenth-century device—a kind of automated, armillary globe—left no confirming traces,<sup>42</sup> and a pair of non-Western alternatives may have predated it still.<sup>43</sup> Like so much from the Middle Ages, then, the first clock remains unknown.

37. One such artisan was Richard of Wallingford, whose "complicated astronomical mechanism . . . [was] initiated at St Albans around 1330." See LANDES, *supra* note 5, at 48.

38. *Id.*; see also CARLO M. CIPOLLA, CLOCKS AND CULTURE: 1300–1700, 33 (1978) ("In 1335 . . . the church of St. Gothard in Milan had 'a wonderful clock . . .'").

39. CIPOLLA, *supra* note 38, at 34, 44 ("[M]echanical timekeepers were very expensive . . ."); LANDES, *supra* note 5, at 82 ("The early turret clocks were very expensive, even when simple.").

40. LANDES, *supra* note 5, at 81 ("The introduction of equal hours and the habituation of urban populations to public time announcements had profound consequences for the European mentality.").

41. *Id.* at 48.

42. *Id.* at 49.

43. *Id.* at 15.

The clocks of the early fourteenth century were famous by comparison.<sup>44</sup> Roger Stoke's 1325 tower clock at Norwich Cathedral, like Richard of Wallingford's later marvel at St Albans, were physically prominent, carefully chronicled, and open to the eye and ear.<sup>45</sup> These were mechanical sensations, and these mechanical sensations were "news."<sup>46</sup> In those who saw and heard them, they stirred both conversation and admiration—a kind of proud, if tentative, awareness of time.<sup>47</sup>

That awareness was not entirely unprecedented. Popular custom was sensitive to time long before Stoke even started to build.<sup>48</sup> But almost everyone then lived on the land, subject to "agrarian rhythms, free of haste, . . . unconcerned by productivity."<sup>49</sup> Very few followed the less organic patterns of the city. Fewer still maintained an enduring interest in the quirks of complex chronology. And almost none appeared invested in a more orderly, more mechanical type of clock. But there was one: the Christian Church.<sup>50</sup>

The church was a house of "temporal discipline."<sup>51</sup> Unlike the mosque or the synagogue, it prescribed fixed times for worship—windows for prayer unlinked from looser, more natural increments like "before sunset" or "after dark."<sup>52</sup> Cistercian monks in particular drove this early focus on time specificity, matching a passion for punctuality with a strict sense of hierarchy.<sup>53</sup> But there was more to this enterprise than firm monastic duty. Monasteries were often hubs of learning and calculation, home to early libraries and the source of sophisticated "tables, charts, discussion and diagrams"—often about measurement, occasionally about time.<sup>54</sup>

The inquiry was not purely academic. Clocks and chronology offered a new way to express institutional power—to convey authority, to dictate behavior, and to exert liturgical influence. To set the clock was to control the congrega-

44. By this time, Landes explains, we were three or four "generation[s]" past the elusive first clock, if not more. *Id.* at 52.

45. *Id.* at 51 ("[T]he new clocks and their associated bells were often sited in high places—the better to hear them.").

46. *Id.*

47. *Id.* at 52 ("These great clocks were, like computers today, the technological sensation of their time.").

48. *Id.* at 53.

49. JACQUES LE GOFF, *TIME, WORK, & CULTURE IN THE MIDDLE AGES* 44 (Arthur Goldhammer trans., 1980).

50. LANDES, *supra* note 5, at 53.

51. *Id.* As Landes uses it here, temporal may carry a clever double meaning: It may mean both different than the spiritual—that divine, otherworldly realm so central to religious devotion—and relating to more quotidian matters of time. If nothing else, the first would nicely accentuate the secular character of the second. But whether or not Landes intended this play on the secular-spiritual distinction, he surely meant to speak about chronography and time measurement. *Id.* ("It is worth pausing a moment to consider this temporal discipline of Christianity . . . which distinguishes it sharply from the other monotheistic religions . . .").

52. *Id.* at 54.

53. *Id.* at 57–59.

54. *Id.* at 60.

tion, taming more natural instincts and instilling, in some, a sense of obligation and awe. Then as now, time meant power, clout, and control.

For generations, this sectarian power swelled beyond cathedral walls. Church time was city time, and civil authority typically heeded the church clock's call.<sup>55</sup> But sectarian dominance ultimately faded as two other things grew. One was secular wealth—and royal wealth in particular.<sup>56</sup> As years passed and fortunes accrued, European “elites” acquired their own conspicuous timepieces, extravagant-seeming luxuries that publicly marked their owners’ “high authority.”<sup>57</sup> The other was population—especially in urban centers. As villages expanded and markets spread, clocks became essential tools of industry, mechanical devices that both encouraged and enforced “productive activity.”<sup>58</sup> Together, wealth and population raised the demand for timepieces even as they refined the meaning of accurate time. They also helped displace the church's temporal dominion—recasting clocks as symbols, not of holy influence, but of “secular dignity and [civil] power.”<sup>59</sup>

This realignment was slow, unsteady, and ultimately incomplete. Shadows from the old church tower color our clocks even now.<sup>60</sup> But well before 1800 a transformation took hold. Time became a matter of public currency,<sup>61</sup> not churchly catechism. In fits and starts the state “borrowed the temporality of heaven . . . and [then] claimed it for itself.”<sup>62</sup> City hall supplanted the cathedral. Civil servants unseated Cistercian monks.

And work replaced worship at time's motivating core. Where once the clock served to schedule prayer and observance, it now stood to organize and discipline labor—to coordinate effort, to evaluate output, and to measure production with “bourgeois exactitude.”<sup>63</sup> Workers came to toil from shift to shift, listening for the whistle, subject to a clock-driven work-discipline.<sup>64</sup> Employers came to

55. A few examples:

[T]he Parlement of Paris met at the hour of the first Mass in Sainte-Chapelle and remained until the bell for none. In Bruges, court cases ran until noon, and appeals until vespers. . . .

The millers of Paris ceased work on Sunday from the announcement of the holy water in the chapel of Saint-Leufroy to the ringing of vespers.

*Id.* at 79–80.

56. *Id.* at 74.

57. *Id.* at 75.

58. *Id.* at 74.

59. *Id.* at 75.

60. GREENHOUSE, *supra* note 4, at 19–20.

61. Thompson, *supra* note 35, at 61, 87.

62. GREENHOUSE, *supra* note 4, at 19.

63. Thompson, *supra* note 35, at 56; *see also* FREDERICK WINSLOW TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1911) (outlining the tenets of Taylorism, an efficiency-focused manner of assembly that divided production into discrete and repetitive tasks); DANIEL NELSON, *FREDERICK W. TAYLOR AND THE RISE OF SCIENTIFIC MANAGEMENT* (1980) (elaborating Taylor's advocacy of division of labor and structured control over task performance).

64. *See* Thompson, *supra* note 35, at 56; *cf.* LANDES, *supra* note 5, at 101 (“One is reminded of the liberating effect of the clock on the medieval worker: it set off the time that was his from the time that was his employer's.”).

levy increasingly specific time demands—and to deploy evermore specialized timekeeping tools.<sup>65</sup> And civic leaders came to see all too plainly the allure, influence, and self-interest of chronological control.<sup>66</sup> Industrialized society may still evoke images of factories, steam engines, and smokestacks. But it likely owes its existence, as much as anything, to the mechanical clock.<sup>67</sup>

In this, industry was not alone. Military tactics, transportation practice, and international affairs followed the clock more carefully as well, evolving from looser, less time-specific matters into tighter, more time-precise events.<sup>68</sup> Clock-makers noted this trend, substantially increasing both the number and the nuance of their mechanical output. And people in (or aspiring to) power noted it too.<sup>69</sup> To them, clocks were both signposts of status and scaffolds of authority. They announced the possession of influence and allowed the construction of it—on the battlefield and the factory floor, at the train station and, importantly, in court.<sup>70</sup>

#### B. THE EARLY COURT

Judges were never blind to this truth. Time shaped the law, as written and as practiced, from the very start. It informed the accelerated criminal process of postindustrial Manchester<sup>71</sup> and the Speedy Trial Clause of the Sixth Amendment,<sup>72</sup> the drawn-out acquittal of alleged traitor Aaron Burr<sup>73</sup> and the quick-

65. See CIPOLLA, *supra* note 38, at 74.

66. See *id.*

67. See LEWIS MUMFORD, *TECHNICS AND CIVILIZATION* 14 (1934) (“The clock, not the steam-engine, is the key-machine of the modern industrial age.”).

68. See LANDES, *supra* note 5, at 98–101. The link between time and power is nowhere tighter, perhaps, than with the military, where sharp temporal awareness and close chronological coordination often spelled martial success. But still the “clock/watch changed military tactics [rather] slowly,” *id.* at 98, for generals were long hampered by unreliable timepieces and limited quantities for distribution among the ranks. Only when soldiers in the field could themselves know and tell time could military practice truly reform. So “not until reasonably accurate and dependable watches could be mass produced—that is, not until the American Civil War—” was there tactical change “on the company level.” *Id.* at 100.

69. See CIPOLLA, *supra* note 38, at 75 (“The idea of developing a clock and watch industry appealed to the tastes and inclinations of the enlightened rulers . . .”).

70. See, e.g., J.W. GOETHE, *ITALIAN JOURNEY: 1786–1788* (W.H. Auden & Elizabeth Mayer trans., Penguin Books 1970) (1962). Early in his travels, Goethe happened upon a trial in Venice. He found the spectacle “amusing, informal”—and he was struck by the clerk’s hourglass:

So long as the clerk is reading, the time is not counted, but if [an] advocate wishes to interrupt the reading, he is granted only a limited time. . . . As soon as the advocate opens his mouth, the hourglass is raised; as soon as he stops talking, it is laid down again.

*Id.* at 84–85.

71. See George Fisher, *The Birth of the Prison Retold*, 104 *YALE L.J.* 1235, 1263 (1995).

72. See U.S. CONST. amend. VI.

73. See R. KENT NEWMYER, *THE TREASON TRIAL OF AARON BURR: LAW, POLITICS, AND THE CHARACTER WARS OF THE NEW NATION* 7–9 (2012) (laying a timeline of Burr’s acquittal and the events surrounding it).

strike conviction of abolitionist John Brown.<sup>74</sup> But the judicial role in most of these settings was to administer, not acquire. Courts applied or enforced someone else's temporal power rather than accruing their own. They steadied the hourglass during the "amusing" trial Goethe watched in Venice.<sup>75</sup> They scheduled special hearings when Presidents demanded instant judicial review.<sup>76</sup>

But gradually, unobtrusively, American courts assembled a temporal power all their own. They did not amass this power in the way civic leaders once did—by way of wealth, royal heritage, or conspicuous display. Instead they made use of more familiar judicial tools: doctrine and rhetoric, patience and the pen. Yet if these means were different—and if the process was far from plain—the incentives were much the same. Time in court was not a trifling legal matter or a neutral public fact. It was a point of occasional conflict and a potent lever of institutional control.

Hard chronological questions reached the Supreme Court almost at the outset.<sup>77</sup> *Calder v. Bull*, a case construing the Ex Post Facto Clause, was decided in 1798.<sup>78</sup> *Ogden v. Saunders*, a case interpreting the Contracts Clause, was announced in 1827.<sup>79</sup> Both *Calder* and *Ogden* explore the "temporal scope" of legislative acts—a Connecticut resolution requiring new probate trials in one, a New York statute discharging insolvent debtors in the other.<sup>80</sup> Both splinter into multiple opinions. But if these cases show a Court divided at the chronological margins, they still capture a Court united at the temporal core: every Justice in *Calder* and *Ogden* assumed the Court's chronological primacy<sup>81</sup>—a kind of institutional time priority—and wrote as if that would not change.

In *Calder* that assumption went more or less unstated. The Justices did not speak about judicial power or chronological authority in grand or insistent terms. They wrote instead about the narrow limits that the Ex Post Facto Clause imposed on a single Connecticut law.<sup>82</sup> And there they spoke plainly, without dissent: the clause imposed no pertinent ex post limit, not because the state law focused solely on future conduct, but because it was entirely civil in scope.<sup>83</sup>

74. See TONY HORWITZ, *MIDNIGHT RISING: JOHN BROWN AND THE RAID THAT SPARKED THE CIVIL WAR* 207 (2012).

75. GOETHE, *supra* note 70, at 84; GREENHOUSE, *supra* note 4, at 19 (emphasizing a "core" "social fact" in Goethe's story: "when the state 'speaks,' time stops").

76. See, e.g., *Ex parte Quirin*, 317 U.S. 1, 19 (1942) ("[W]e directed that petitioners' applications be set down for full oral argument at a special term of this Court . . .").

77. See LaCroix, *supra* note 4, at 1334 (discussing "a pair of cases from the early Republic in which the Court grappled with the question of the temporal effect of legislative acts").

78. 3 U.S. (3 Dall.) 386 (1798).

79. 25 U.S. (12 Wheat.) 213 (1827).

80. LaCroix, *supra* note 4, at 1335.

81. See *id.* at 1348. Other things were still changing in *Calder*. One was the bar on ex post facto legislation, a limit *Calder* held applicable only to criminal laws. *Calder*, 3 U.S. (3 Dall.) at 396. Another was the meaning of judicial review in a pre-*Marbury* and pre-Marshall Court world. See LaCroix, *supra* note 4, at 1337–38.

82. *Calder*, 3 U.S. (3 Dall.) at 387.

83. See *id.* at 387, 399; LaCroix, *supra* note 4, at 1337–39.

The Ex Post Facto Clause, then as now, applied only to criminal laws.<sup>84</sup>

This was not *Calder*'s only distinction. The Court also split legislative acts from judicial ones, separating those prospective declarations permitted to legislatures from the retroactive duties performed by courts.<sup>85</sup> Questions about retroactivity (judicial and otherwise) would puzzle courts long after *Calder*, evolving and eventually hardening in the decades to come—as I will argue below. But even then, in 1798, the seeds of a debate were planted, initiating stubborn arguments about how far a judicial decision could go. And even then, at the founding, the Court made its claim for chronological control. It bridged old practice with new, meshing colonial custom with constitutional edict.<sup>86</sup> And it cast itself unanimously as the keeper of the law's clock.<sup>87</sup>

*Ogden* reprised that key role. But if *Ogden* brought the story three decades forward, the case still seems more dated and strange to modern eyes. For one, *Ogden* addressed the validity of a state law under the Contracts Clause, a constitutional prohibition long since drained of impact.<sup>88</sup> It also featured Chief Justice Marshall's only dissent in a constitutional case, a vigorous disagreement partly presaging two of the *time* paradigms outlined in the pages below.<sup>89</sup> Yet *Ogden*, like *Calder*, reveals less about particular state regulation than about the Court's quiet accumulation of chronological power. Like *Calder*, *Ogden* assessed the permissible backward reach of state legislation—here about insolvent debtors—and expressed a preference for state laws that looked only forward, not back. Like *Calder*, it still upheld the pertinent state law. And like *Calder*, *Ogden* thoroughly, if quietly, embraced the Court's chronological preeminence, uniting the Justices—if nowhere else—on the question of who would keep the law's clock. By 1827, then, key parts of an old church power had moved to chambers. And by 1827 all of the Justices “shared a deep belief in judicial supremacy for assessing questions of time.”<sup>90</sup>

That unity carried forward. In the days and decades that followed, the Court expressed and expanded its temporal authority—sometimes quite knowingly,

84. See, e.g., *Peugh v. United States*, 133 S. Ct. 2072, 2081 (2013) (reiterating this targeted application).

85. LaCroix, *supra* note 4, at 1342.

86. See *id.* at 1341–42 (noting *Calder*'s “deference to custom and usage”—particularly to a practice in which “provincial assemblies . . . exercised what would now be considered judicial power”); THOMAS M. ALLEN, *A REPUBLIC IN TIME: TEMPORALITY & SOCIAL IMAGINATION IN NINETEENTH-CENTURY AMERICA* 17 (2008) (“[T]he true affiliation of Americans is to the future . . .”).

87. See LaCroix, *supra* note 4, at 1332. Congress still laid claim to some chronological power here too, of course. If nothing else, *Calder* left room for retroactive civil laws. See *Calder*, 3 U.S. (3 Dall.) at 387. But legislation even in that space was subject to a superior (if coordinate) authority—a judicial prerogative on questions of legal time.

88. Bloom & Serkin, *supra* note 27, at 617 (“And the Contract Clause . . . may be a constitutional dead letter . . .”).

89. See *infra* Part II. By way of preview, *Ogden*'s majority fell squarely into what I will call *some time*, for it treated legal time as fixed and linear, a progression easy enough to plot. See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 269 (1827) (Washington, J.). Chief Justice Marshall chose instead a kind of *all time* perspective, “a less distinctly chronological view.” LaCroix, *supra* note 4, at 1347.

90. LaCroix, *supra* note 4, at 1348.

sometimes (it appears) without much deliberate thought. *Calder* and *Ogden* might seem unlikely catalysts for this doctrinal proliferation, rooted as they are in interpretive settings both outdated and ignored. But there, in those odd and early cases, lay the seeds of things to come: opinions built on quiet claims of institutional power, doctrines developed against a chronological backdrop, and a Court well-aware of time's expansive influence and sometimes assertive in its temporal control. Part II examines where that judicial energy now focuses, why it matters, and how the Court moved from then to now.

## II. TIME PRESENT

The path was far from smooth. It wobbled and wandered, full of half-stops and false starts, until it arrived—perhaps unexpectedly—at the law's current clock. Yet what started in *Calder* as an inconspicuous whisper grew all the same into more vigorous Court shouts. Old statements about legislative retroactivity spread into firm mandates about common law meaning and “new” criminal procedures.<sup>91</sup> Efforts to balance constitutional text with customary practice evolved into stern warnings about institutional function and judicial finality.<sup>92</sup>

This Part makes sense of that vibrant legal terrain. It begins with a kind of quick doctrinal tally, an intentionally condensed catalog of those modern doctrines shaped significantly (if not exclusively) by time. By its terms, this index is both preliminary and provisional. It does not pretend to include every doctrine informed by legal chronology, nor does it aim to study any entry in comprehensive detail. It hopes instead to sketch a new map's fundamental outlines, displaying both the depth and the breadth of the law's current clock. Part II then builds this doctrinal variety into a novel *time* typology. It constructs three creative *time* paradigms—*all time*, *some time*, and *broken time*—and uses those paradigms to sort, scrutinize, and synthesize existing doctrine more convincingly. It also revisits the four faces—Richard and Willis, Grutter and Miranda—first outlined in the pages above.

### A. A TALLY

But time's doctrinal tally should not start with those four. It should start instead with *Calder*, the Court's original clock-keeping moment, and the persistent puzzle of retroactive rules. A small part of that puzzle now turns on categories *Calder* never considered—namely old and new criminal rules. Even more depends on a characterization *Calder* made (between legislative and

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91. See *Teague v. Lane*, 489 U.S. 288, 303–06 (1989).

92. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (“We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority to do so.”).



judicial acts)<sup>93</sup> and a distinction *Calder* drew (between civil and criminal law). But every part of this puzzle still centers, even now, on two blunt but inevitable questions: What happens when law changes?<sup>94</sup> Who must follow the new rules—and who must adhere to the old?

I study these difficult questions, and their strange doctrinal answers, at length in the Parts that follow. But what matters for now is where else those questions emerge. They also emerge in the law of “transitional moments”—those acutely disruptive interludes in which the law changes between trial and appeal.<sup>95</sup> Contemporary retroactivity doctrine would seem to hold a clear solution to these transitions, requiring courts to apply new law on direct review.<sup>96</sup> But practice has been unpredictable, muddled by anxious judges ready to deploy harsh “forfeiture” rules.<sup>97</sup> Many who should follow the new law, then, stay strangely bound to the old.

For litigants caught in the middle, the choice could hardly be more significant. Substituting new law for old could turn a straightforward legal victory into a certain courthouse loss. But this is just one chronological question among many—for retroactivity and transitional moments are only two of the myriad doctrines that time fundamentally informs. Other doctrines likewise reflect the clock’s powerful influence—some in ways that set the timing of individual cases, others in ways that mirror the lifespan of the judge; some in texts as formal as the Federal Rules of Civil Procedure, others in pockets as nebulous as the court’s inherent power.

Consider three to start: declaratory judgments, equitable tolling, and desuetude. The first of these permits a kind of accelerated legal beginning: declaratory judgments provide for some civil litigation with an early courthouse start.<sup>98</sup> The second and third, in turn, recognize that some things must eventually come to a stop: Equitable tolling stops the clock in specific litigation.<sup>99</sup> Desuetude

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93. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 395 (1798) (“For if the power, thus exercised, comes more properly within the description of a judicial than of a legislative power . . .”). According to *Calder*, “legislative” acts were presumptively prospective while “judicial” acts were at least potentially retroactive. *Id.* at 396.

94. See Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1075 (1999) (“The question of retroactivity is what to do when the law changes.”).

95. Heytens, *supra* note 22, at 924, 928.

96. See *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993) (applying this rule in the civil context); *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (applying this rule in the criminal context).

97. Heytens, *supra* note 22, at 942, 955; see also *id.* at 943 (noting the important difference between forfeiture and waiver).

98. See *Steffel v. Thompson*, 415 U.S. 452, 475 (1974) (noting that requests for declaratory relief do not warrant federal court abstention when there is no parallel pending state prosecution).

99. See, e.g., *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1941 (2013) (Scalia, J., dissenting) (defining equitable tolling as “extending the deadline for a filing because of an event or circumstance that deprives the filer, through no fault of his own, of the full period accorded by statute”).

stops an obsolete law from remaining in force.<sup>100</sup> I examine all three of these devices at greater length in the Parts that follow. But note, for now, precisely how and where they converge: all three dip deep into the well of judicial discretion, exchanging the threat of doctrinal anachronism for the risk of judicial whim.<sup>101</sup> All three prefer substantial judicial authority to legal process that is, somehow, out-of-time. And all three cast courts as apt and able chronographers—taking shape, like *Calder*, in the long shadow of the law’s clock.<sup>102</sup>

Other doctrines tie that clock straight to Article III. Ripeness, mootness, and the bar on advisory opinions all reflect the Constitution’s demand for real “Cases” and “Controversies”—live and actual disputes focused on true and lasting injuries.<sup>103</sup> Life tenure, in turn, links judicial service to brute mortality. It guarantees federal judges terms for life on the bench, dressing them in the dark robes “of (medieval) clerics,”<sup>104</sup> insulating them from improper influence.<sup>105</sup> Assuming “good Behaviour”—and personal preference—they can serve until they die.<sup>106</sup>

These Article III doctrines thus make a law of time and a time for law. They link legal outcomes to time’s passage and put litigation (to paraphrase Henry Monaghan) within a chronological frame.<sup>107</sup> But some doctrines still resist that framing. Judicial precedent and the common law, for example, can seem the very opposite of time-bounded. They can seem almost mystically timeless<sup>108</sup>—moving both forward and backward, drawing the present into the future while keeping it anchored in the past.<sup>109</sup> A judicial opinion can set the law of today

100. See, e.g., Note, *Desuetude*, 119 HARV. L. REV. 2209, 2210 (2006) (“[D]esuetude describes the doctrine by which a legislative enactment is judicially abrogated following a long period of intentional nonenforcement and notorious disregard.”).

101. See *id.* at 2214 (“[D]esuetude permits the judiciary to encroach on powers reserved . . . to the legislature.”); see also Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 49–50 (“According to [desuetude], laws that are hardly ever enforced are said, by courts, to have lapsed, simply because they lack public support.”).

102. Of the three, though, only desuetude focuses on legal change, here by way of inaction.

103. See U.S. CONST. art. III, § 2, cl. 1; Lee, *supra* note 21.

104. Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L.J. 1631, 1644 (1989) (“The metaphor is perhaps at the heart of the matter: in the United States, the judiciary is the only robed branch. The robes . . . are those of (medieval) clerics.”).

105. See WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 16 (1964) (assessing judges’ “priestly duty” and deeming our Constitution “that holy writ”).

106. See U.S. CONST. art. III, § 1.

107. Monaghan, *supra* note 21, at 1384.

108. See Greenhouse, *supra* note 104, at 1643 (discussing how the law’s “special time” is “self-totalizing, reversible, and boundless”); cf. Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1033 (1990) (deeming philosophy—and not law—a “condition in which the temporal distinctions between past, present, and future are annulled”).

109. Professor Schauer made the point elegantly almost thirty years ago:

An argument from precedent seems at first to look backward. The traditional perspective on precedent, both inside and outside of law, has therefore focused on the use of yesterday’s precedents in today’s decisions. But in an equally if not more important way, an argument from precedent looks forward as well, asking us to view today’s decision as a precedent for

and of tomorrow—and perhaps of yesterday too.<sup>110</sup> This fact does more than breed judicial authority, giving otherwise ephemeral legal moments a kind of long-lived legal force. It empowers first-moving judges, entrenches particular positions,<sup>111</sup> and acclimates courts to “the temporal scope of adjudicative legal change.”<sup>112</sup>

That scope is not always abided. Some courts ignore controlling precedent.<sup>113</sup> Some misread opinions.<sup>114</sup> Some distinguish decisions into “practical oblivion.”<sup>115</sup> And some set their own precedential endpoints, scheduling judicial sunsets days or decades in advance.<sup>116</sup> These sunsets test the outer limits of judicial authority, raising questions of judicial capacity, court adventurism, and institutional structure—as I outline at some length below. But these sunsets may still appear, even in big cases, denoting not just when opinions will issue but when their influence will end. *Grutter*, for example, envisions its own expiration after twenty-five years.<sup>117</sup> Like discovery calendars and prison sentences, then, these sunsets proceed in plain chronological increments: fleeting hours, passing months, drawn-out decades. And like mootness and ripeness, they express a kind of time-based legal power, making and measuring doctrine against the law’s clock.

That same power also reaches more prosaic judicial questions—to hear cases or to end them, to reopen decisions or to keep them closed. Appellate jurisdiction, for one, regulates the timing of superior-court intervention, divesting the

tomorrow’s decisionmakers. Today is not only yesterday’s tomorrow; it is also tomorrow’s yesterday. A system of precedent therefore involves the special responsibility accompanying the power to commit the future before we get there.

Frederick Schauer, *Precedent*, 39 *STAN. L. REV.* 571, 572–73 (1987) (citation omitted).

110. *See id.*

111. On entrenchment in the law more generally, see Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 *AM. B. FOUND. RES. J.* 379; Rebecca M. Kysar, *Lasting Legislation*, 159 *U. PA. L. REV.* 1007 (2011); Jon D. Michaels, *Privatization’s Pretensions*, 77 *U. CHI. L. REV.* 717, 739–44 (2010); Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 *U. CHI. L. REV.* 879 (2011).

112. Jill E. Fisch, *The Implications of Transition Theory for Stare Decisis*, 13 *J. CONTEMP. LEGAL ISSUES* 93, 95 (2003).

113. *See* Frederic M. Bloom, *State Courts Unbound*, 93 *CORNELL L. REV.* 501, 503 (2008).

114. *See* Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 *U. CHI. L. REV.* (forthcoming 2015) (manuscript at 13).

115. Bloom, *supra* note 113, at 511 (internal quotation marks omitted).

116. Some in this instance may mean only one: *Grutter*. *See* *Grutter v. Bollinger*, 539 U.S. 306, 343 (2006). My discussion of sunsets generally, then, may be more a study of a single illustration than an examination of a manifold trend. But these sunsets should not be elided simply because they appear, for now, infrequently. They connect, for one, to other prominent episodes of judicial self-limitation. *See, e.g.,* *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam) (“Our consideration is limited to the present circumstances . . .”); Guido Calabresi, *In Partial (but Not Partisan) Praise of Principle*, in *BUSH v. GORE: THE QUESTION OF LEGITIMACY* 67, 80 (2002) (“Will history hail the courage—the willingness to risk obloquy of Justices O’Connor and Kennedy in writing an opinion that was designed to self-destruct?”). And their existence recalls an interesting legislative sibling too. *See* Tom Ginsburg et al., *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 *U. CHI. L. REV.* 291, 294 (2014) (“imagining” and examining “regulations that include an expiration date”).

117. *See Grutter*, 539 U.S. at 343.

higher court of authority if an appeal arrives too late or too soon.<sup>118</sup> Finality doctrine dictates when cases are completed,<sup>119</sup> keeping all others from reopening court decisions once judges have deemed them closed.<sup>120</sup> And Federal Rule of Civil Procedure 60(b) grants courts a power no other branch can share: to “relieve a party . . . from final judgment” and start litigation anew.<sup>121</sup>

In the pages ahead I examine many of these doctrines in greater detail. I survey how these familiar and far-flung pieces sometimes fit together, how they occasionally fall into conflict, how they fail at times on their own terms, and how they mesh with still other “time” elements—statutes of limitation, the default “computing” processes of Federal Rule of Civil Procedure 6,<sup>122</sup> or the “relation back” provision of Federal Rule of Civil Procedure 15(c).<sup>123</sup> I also propose some targeted places for productive reform.

But this initial tally is still as critical as it is quick and incomplete. It helps outline the expansive scope and scale of contemporary judicial horology. And it anchors the important analytical steps that follow, beginning with the move from eclectic tabulation to arranged typology.

#### B. A TYPOLOGY

The roots of this typology are not exclusively legal. They grow too from cultural history and contemporary anthropology, work-based sociology, and western ethnography.<sup>124</sup> More than contemporary legal scholarship, these social-science disciplines engage and examine the clock—assessing the inevitable “conflict” between “public” and “private” chronologies,<sup>125</sup> discussing the elusive “paradox” of time as both fixed and “negotiable,”<sup>126</sup> conceptualizing “time

118. See *Bowles v. Russell*, 551 U.S. 205, 215 (2007); 28 U.S.C. § 1291 (2012).

119. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 443 (1963) (asking not just when a case is done, but when “justice” has been done); William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 792 (2007) (“The litigation finality question is . . . but one manifestation of an even more general, recurring, and nearly rhetorical inquiry: When are we prepared to accept that anything—a sentence, a law review article, our reading of a law review article—is done?”).

120. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995); see also Vermeule, *supra* note 33, at 418 (“*Plaut* established the flat rule that legislation may never require courts to reopen damages judgments that had previously become final under then-obtaining statutory rules of finality.”).

121. FED. R. CIV. P. 60(b).

122. FED. R. CIV. P. 6(a) (“The following rules apply in computing any time period . . .”); FED. R. CIV. P. 6(b)(i) (“[T]he court may, for good cause, extend the time . . .”).

123. FED. R. CIV. P. 15(c)(1) (“An amendment to a pleading relates back to the date of the original pleading when . . .”).

124. See, e.g., ANDREW ABBOTT, *TIME MATTERS: ON THEORY AND METHOD* 295 (2001) (“[T]he notion of time as a series of overlapping presents of various sizes . . . provides a foundation for further argument.”); BARBARA ADAM, *TIME AND SOCIAL THEORY* 4 (1990) (“Social science . . . has a long tradition of explaining on an either/or basis and the focus on time forms no exception.”); GREENHOUSE, *supra* note 4; Umberto Eco, *Times*, in *THE STORY OF TIME* 11 (2000) (“The fact is that we can measure time, but this gives us no guarantee that we understand what time is . . .”).

125. STEPHEN KERN, *THE CULTURE OF TIME AND SPACE: 1880–1918*, at 16, 33 (2003).

126. GREENHOUSE, *supra* note 4, at 24, 175.

**Table 1: A (Partial) Tally**

Appellate Jurisdiction
FRCP 60(b)
Finality
Prison Sentences
Discovery Calendars
Judicial Sunsets
Judicial Precedent
The Common Law
Lifetime Tenure
Ban on Advisory Opinions
Mootness
Ripeness
Declaratory Judgments
Equitable Tolling
Statutes of Limitation
FRCP 6
FRCP 15(c)
Desuetude
Transitional Moments
Retroactivity and Prospectivity

as a series of overlapping presents,”<sup>127</sup> and asking how “past and future can exist if the past is no longer and the future is not yet.”<sup>128</sup>

The typology I build here is neither so metaphysical nor so grand. It delves into the muck and mess of modern doctrine and peers through the sometimes-occluding fog of judicial strategy. But these other disciplines still provide an indispensable anchor, an instructive theoretical mooring for a new perspective on (and a budding conversation about) law, time, and *time*'s typology.

That typology divides into three parts: *all time*, *some time*, and *broken time*. Each of these categories holds particular normative commitments, institutional convictions, and baseline conceptions of judicial authority. Each asks its own open questions. And each captures some of the doctrines surveyed above and studied below.

### 1. All Time

The first category—*all time*—is the most ethereal. It treats law as timeless, immanent, holistic, and nonlinear. It tells a legal story, not of inexorable progress, but of unflagging endurance—a sort of static teleology in which law is now as it has always been. Laws are not made here, but found.

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127. ABBOTT, *supra* note 124, at 295.

128. Eco, *supra* note 124, at 11.

At the heart of this *all time* paradigm is a kind of temporal unity. True “law” in *all time* is the same today as it was yesterday and will be tomorrow—an ageless certainty resting on an “ideal plane.”<sup>129</sup> What parties do and courts say might reach this ideal; they might not. But the law itself remains a “timeless constant,” an “apotheosized immutable” in which “old” and “new” converge.<sup>130</sup> Past, present, and future join here as one.

Courts in *all time* thus neither make law nor improve it. They merely seek out a clearer vision of what law has always been. Judges are not “delegated to pronounce a new law,” in Blackstone’s famous adage, “but [simply] to maintain and expound the old one.”<sup>131</sup> They are discoverers and sometimes declarers, but never creators.

This “declaratory”<sup>132</sup> role reflects an odd institutional perspective. It connotes in part a kind of judicial vanity: a sense that judges can decipher the law’s “brooding omnipresence” and explain away legal change.<sup>133</sup> Yet it also suggests a sort of judicial humility: a sense that judges are merely excavators and that the law transcends all courts. What courts tell us about law is—in Justice Story’s familiar phrasing—simply evidence of law, not true law itself.<sup>134</sup> Opinions may splinter; interpretations may sway. But in *all time* the law, normatively if not descriptively, remains unchanged.

In practice much of *all time* faded when *Swift v. Tyson* fell.<sup>135</sup> In its day, *Swift* endorsed a kind of judicial independence, a federal-court freedom to reinterpret substantial portions of state common law.<sup>136</sup> Acting here as “living oracles”—as profits of some pure and perfect legal substance—federal courts could find law anew, unconcerned about institutional limit, unbothered by conflicting state-court precedent. And so they did, greatly expanding key pockets of federal

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129. See James Gleick, *Time Regained!*, N.Y. REV. BOOKS, Jun. 6, 2013, at 48 (reviewing LEE SMOLIN, *TIME REBORN: FROM THE CRISIS IN PHYSICS TO THE FUTURE OF THE UNIVERSE* (2013)) (“Three weeks before his death, in 1955, Einstein wrote, ‘People like us, who believe in physics, know that the distinction between past, present, and future is only a stubbornly persistent illusion.’”).

130. Roosevelt, *supra* note 94, at 1083. This description suggests that there may also be a counter-category, a kind of nihilist response to *all time*’s apotheosis: *no time*. Here there would be no timeless ideal or universal template. There would be nothing—no truth, no objectivity, no law. Far from being unified, past, present, and future would not exist at all. Cf. Gleick, *supra* note 129, at 48 (“[I]f nothing changes, time has no meaning.”). I leave this *no time* notion to the side here, not least because, if true, it would make everything (and not just this typology) both futile and meaningless.

131. 1 SIR WILLIAM BLACKSTONE, KNT., *COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS* 69 (1893); see also Harry Shulman, *Retroactive Legislation*, in 13 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 355, 356 (Edwin R. A. Seligman & Alvin Johnson eds., 1954) (calling decisions that overrule old decisions “not . . . new law but an application of what is, and therefore had been, the true law”).

132. Roosevelt, *supra* note 94, at 1082.

133. *Id.* at 1083.

134. See *Swift v. Tyson*, 41 U.S. 1, 18 (1842).

135. See *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (“Thus the doctrine of *Swift v. Tyson* is . . . ‘an unconstitutional assumption of powers . . .’”).

136. See *id.* at 71 (noting that *Swift* left federal courts “free to exercise an independent judgment as to what the common law of [a] state is—or should be”).

common law and, in turn, their own prerogative.<sup>137</sup> Yet perceptions of *Swift* would eventually deteriorate. After close to a century, in fact, the case came to signify something heretical: a “Blackstonian” understanding of legal doctrine and a judicial commitment to natural law.<sup>138</sup> In 1938, then, *Erie* dismantled *Swift* at this core. It declared *Swift* not just wrong but unconstitutional—an affront to judicial federalism and a threat to separation of powers.<sup>139</sup> Even more, *Erie* signaled the arrival of a reordered philosophical agenda—an explicit commitment to legal positivism in place of natural law.<sup>140</sup> This positivist commitment understood law as the proclamations made by government sovereigns, not the phantoms found by privileged courts.<sup>141</sup> And so it treated *Swift*, and *all time* with it, as fundamentally wrong.

Yet some hints of *all time* still carry on. Some hints appear in “Neo-Blackstonian” (or “Dworkinian”) conceptions of the common law—those ambitious modern accounts treating legal decisions as simply enforcing “pre-existing rights.”<sup>142</sup> In those tellings, judicial opinions do not make new laws or change the old. They simply provide “the best reading”<sup>143</sup> of the law as it already was.

And still more hints appear in retroactivity doctrine, that resilient legal riddle reaching all the way back to *Calder*. The central question of retroactivity, again, is one of chronological reach: How far back should a judicial decision go? *All time* seemed to say that the decision should go back to the very start. A decision finding law should apply to all conduct—events after the decision and before it, too—not because courts are infallible, but because in *all time* the law does not change. When judges make new (even conflicting) decisions, they do not alter the law in its pertinent form. They merely bring “the doctrine into line” with what was already and forever true.<sup>144</sup> Opinions may still vary, but the law remains unchanged. It would thus make no sense not to apply new decisions both prospectively and retroactively in *all time*—both all the way forward and all the way back. The law is always the same.

But this is far from present practice. Retroactivity doctrine today is not categorical but selective, allowing backward application only in some places

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137. See Frederic M. Bloom, *Unconstitutional Courses*, 83 WASH. U. L. Q. 1679, 1696–97 (2005).

138. Roosevelt, *supra* note 94, at 1083 (“The Blackstonian model, in its full metaphysical glory, is something of a legal unicorn. Its transcendently brooding common law does not exist now, and never really did, although there are still rare reported sightings . . .”); cf. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984) (arguing that *Swift* was hardly as anomalous as generally believed).

139. See Bloom, *supra* note 137, at 1699–700.

140. See *id.* at 1694 (“To many, *Swift* represents the apotheosis of an utterly misguided conception of law, a sophism of legal thought.”); *id.* at 1698 (“In *Erie*, *Swift*’s supposed philosophical ‘fallacy’ was exposed . . . As the *Erie* Court understood it, *Swift*’s very existence depended on a profound misconception of the way law is spoken and understood.”).

141. See *id.*

142. See Roosevelt, *supra* note 94, at 1104; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81–85 (1978).

143. See Roosevelt, *supra* note 94, at 1105.

144. LaCroix, *supra* note 4, at 1350.

and in some ways. A kind of retroactive application persists, for example, for the parties themselves in most modern litigation,<sup>145</sup> because “it is the basic role of courts,” Paul Mishkin has noted, “to decide disputes after they have arisen.”<sup>146</sup> When a court decides that a particular statement is not libelous, for example, it does so only after the relevant statement was made.<sup>147</sup>

And a kind of retroactivity persists too in civil and criminal precedent, though with less traction today than perhaps before. Until the late 1960s, “the [Supreme] Court adhered to a general rule of adjudicative retroactivity.”<sup>148</sup> It understood its decisions to apply in both directions simultaneously, reaching conduct that occurred both before and after the court ruled.<sup>149</sup> A judicial revision of felony-murder doctrine, say, would apply to events that postdated the judicial revision and to events that preceded it too. Until the late 1960s, then, the Court’s retroactivity doctrine tracked a strong version of *all time*.

But as the administrative state expanded and the “Warren Court revolution”<sup>150</sup> took form, deep misgivings about this approach to retroactivity emerged. Some worried that new rules, like the “search and seizure” mandate of *Mapp v. Ohio*,<sup>151</sup> would prove unwieldy in retroactive application.<sup>152</sup> Others feared that anxiety about rule administration might discourage tentative judges from updating the law, nudging them against bold action and thereby stifling the development of substantive rules. In both the civil and criminal contexts, then, the Court pulled back. It fashioned rules, not of “maximum” retroactivity, but of “selective prospectivity”—doctrines that applied new decisions to conduct in the future but not always from the past.<sup>153</sup> It retreated to a kind of modified *all time*.

The retreat was neither graceful nor unanimous.<sup>154</sup> It might still be unfinished too.<sup>155</sup> But in fits and starts, over sometimes-stinging dissent,<sup>156</sup> a different

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145. One exception is declaratory judgment suits, in which parties seek a proactive declaration of their rights and obligations, not a retrospective consideration of an injury already sustained. *See Steffel v. Thompson*, 415 U.S. 452, 478 (1974) (Rehnquist, J., concurring) (“[T]he legislative history of the Declaratory Judgment Act of 1934 suggests that its primary purpose was to enable persons to obtain a definition of their rights before an actual injury . . . occurred . . .”).

146. 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, 60 (1965).

147. *See, e.g., N.Y. Times, Co. v. Sullivan*, 376 U.S. 254 (1964).

148. LaCroix, *supra* note 4, at 1355; *see also* Roosevelt, *supra* note 94, at 1089 (“[I]t was not until the late 1960s . . . that the question of retroactivity truly emerged.”).

149. Roosevelt, *supra* note 94, at 1089.

150. Akhil Reed Amar, *American Constitutionalism—Written, Unwritten, and Living*, 126 HARV. L. REV. F. 195, 203 (2013).

151. 367 U.S. 643, 654–55 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949)).

152. *See* LaCroix, *supra* note 4, at 1357.

153. *Id.* at 1352 (discussing “a maximalist version of retroactivity” in which a new decision does not displace an old one so much as bring the doctrine “close[r] to a transcendent body of law”).

154. Nor did it mirror the default rule for legislative prospectivity. Legislation was and is assumed to be prospective only. *See Martin v. Hadix*, 527 U.S. 343, 357 (1999) (noting “the usual rule that legislation is deemed to be prospective”).

155. *See, e.g., Chaidze v. United States*, 133 S. Ct. 1103, 1107 (2013) (discussing *Teague* and retroactivity once again).



retroactivity approach has emerged. In criminal cases, judicial decisions apply retroactively only if the “new” rule is applied in the case that announced it—and even then only in other cases already “pending on direct review.”<sup>157</sup> In civil cases, the approach is quite similar,<sup>158</sup> though with understandably less emphasis on questions of collateral review.<sup>159</sup> And in both, the Court’s decisions can thus reach forward and reach backward—but not always or without limit.

These, then, are the rules of contemporary adjudicative retroactivity. Critics have called them confused and inconsistent, marked by a kind of “intellectual poverty.”<sup>160</sup> Others have found them too slippery and uncertain, readily side-stepped by judges equipped with “strict forfeiture rules.”<sup>161</sup> I will contend that they have grown unnecessarily complex and cumbersome—and propose some revisions in the pages below.<sup>162</sup> But if the doctrine remains at once pliable and perplexing, it sketches *all time* just the same. In some doctrinal spaces, courts treat law as timeless and nonlinear—a place where past, present, and future occasionally merge as one. Here they view law as eternal and static. Here they blend a sense of judicial grandeur with a strange dose of judicial modesty. And here they assert the “power to define the boundaries of law in time”<sup>163</sup>—something they do in a second category, *some time*, too.

## 2. Some Time

This second category is by far the most familiar. It treats law as dynamic, adaptable, evolving, synthetic. It tells a legal story, not of unwavering stability, but of sometimes-clumsy change—a process of quick starts, brusque stops, and conspicuously ticking clocks.

Unlike *all time*, *some time* does not fuse present with past or future. It splits time instead into segments, dividing now from later as well as from before. What the law required yesterday may mean little today, at least in some cases—and what it says today may mean even less tomorrow.<sup>164</sup> Law here can

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156. See, e.g., *Teague v. Lane*, 489 U.S. 288, 327 (1989) (Brennan, J., dissenting) (“I cannot acquiesce in this unprecedented curtailment of the reach of the Great Writ . . .”).

157. *Griffith v. Kentucky*, 479 U.S. 314, 326 (1987).

158. See *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993).

159. *Teague*, 489 U.S. at 301. There is something recursive about this patch of doctrine. To understand the newer cases, one must read the older. But to make sense of those older cases—and to see, in particular, how even these older cases themselves have seemed to change over time—one must also read the newer. There is no obvious place to start or to finish, but rather a kind of self-complicating loop. See LaCroix, *supra* note 4, at 1366 (“Circularity replaces rectilinearity as the temporal relationships between cases double back and overlap each other.”). And this circularity is only odder—and perhaps a shade ironic—for coming in cases that mean to clarify how the law operates.

160. Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1058 (1997).

161. Heytens, *supra* note 22, at 991.

162. See *infra* Part III.

163. LaCroix, *supra* note 4, at 1361.

164. See, e.g., *Schauer*, *supra* note 109, at 573–74; see also *Bush v. Gore*, 531 U.S. 98, 109 (2000) (“Our consideration is limited to the present circumstances . . .”); Samuel Issacharoff, *Political*

**Table 2: All Time**

Conception of Law	Timeless Nonlinear Unified Unchanging
Judicial Authority	Potent But Not Creative Law External to Courts
Doctrinal Illustrations	Retroactivity (in Part) Natural Law (Swift) The Common Law (Blackstonian & Neo-Blackstonian)

adapt, adjust, improve—separating then from now and old from new.<sup>165</sup> Identical litigants can be treated differently simply by “quirk” of legal timing.<sup>166</sup> The law can shift between one day and the next. And legal change can appear both inevitable and personal, subject to the politics and the preferences of an ever-shifting bench. Here the law moves—and when the court “changes its mind, the law changes with it.”<sup>167</sup>

Courts in *some time* are thus more than mere declarers. They are updaters and creators. Judges in *some time* do not purport to draw the law ever closer to some grand and otherworldly template. They make law themselves, dramatically or “interstitially,”<sup>168</sup> crafting operational rules and imposing enforceable demands. In this sense, then, judicial opinions are just like statutes and executive orders: commands of a powerful sovereign. And so they are, in the words of John Austin, “law simply and strictly so called.”<sup>169</sup>

One core feature of *some time* is this confidence in institutional power. Here the Supreme Court sets its own hours, protects its own decisions,<sup>170</sup> directs the law’s chronology, and controls the clock. With little doubt or debate—and often without even stray comment—courts in *some time* assert a bold chronological authority. They carve out common law exceptions to legislative mandates<sup>171</sup>

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*Judgments*, 68 U. CHI. L. REV. 637, 650 (2001) (deeming *Bush v. Gore* “the classic ‘good for this train, and this train only’ offer”).

165. See Bloom & Serkin, *supra* note 27, 554.

166. *City of Richmond v. United States*, 422 U.S. 358, 384 n.12 (1975). See, e.g., *Hicks v. Miranda*, 422 U.S. 332, 354 (1975) (Stewart, J., dissenting) (“There is, to be sure, something unseemly about having the applicability of the Younger doctrine turn solely on the outcome of a race to the courthouse.”).

167. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 550 (1991) (O’Connor, J., dissenting).

168. *Linkletter v. Walker*, 381 U.S. 618, 624 (1965).

169. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 378 (1832).

170. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 211 (1995).

171. See 28 U.S.C. § 1291 (2012); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (crafting collateral-order doctrine).

and schedule their dockets to advance institutional self-protection.<sup>172</sup> They count or excuse “intermediate” weekends as they see fit under Federal Rule of Civil Procedure 6,<sup>173</sup> and they control both the substance and the timing of constitutional meaning in *Grutter*—announcing a decision and then predicting, at their whim, when that decision should come to an end.<sup>174</sup> This is the essence of *some time*, an unapologetic (and sometimes unconscious) sense of the courts’ chronological power. And like church power centuries before it, it is an expression of institutional control.

But courts exhibit a certain modesty here too. They accept that the law can be fickle, not fixed, shifting along with an ever-changing judicial mind.<sup>175</sup> And they admit the enduring power of the personal (and the personnel) in legal process, conceding that no judge serves “forever” and that court composition makes a real difference.<sup>176</sup> Where *all time* envisions impersonal stasis, *some time* acknowledges interpersonal change—a belief that the law can get better (or worse) and that it matters who judges are.<sup>177</sup>

In modern doctrine, *some time* now stretches remarkably far. It covers many of the doctrines listed in the tally above and examined at greater length in the pages below. It reaches rules anchored in far-flung statutes, in the Constitution, and in the common law. It focuses on litigation mechanics, human biology, and the subtle tools of judicial self-aggrandizement. And it addresses three different *some time* durations—lifetimes, other times, and later times—as the sections that follow will show.

*a. Lifetimes.* In some places some time follows lifetimes. Here the law’s clock draws unlikely connections, linking hardened criminals to the very federal judges that (sometimes) sentence them. And here the law mirrors mortality, tuned to a measure of full lifespans, not fixed years: Article III allows federal judges to serve for life, assuming “good Behaviour”;<sup>178</sup> life sentences condemn certain felons to prison until they die. In both places time moves forward, deliberately and relentlessly, inching ever-closer to an inexorable end. But that end is variable, personal, idiosyncratic—the law’s clock set to biology and modern medicine.<sup>179</sup>

172. Cf. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–98 (1962) (outlining the “passive virtues” of not deciding particular questions).

173. FED. R. CIV. P. 6(a). The choice to excuse “intermediate” weekends may also hint at *broken time*, a category outlined *infra* Part II.B.3.

174. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

175. “How to inform the judicial mind,” Justice Frankfurter once said, “is one of the most complicated problems.” Transcript of Oral Argument, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), reprinted in ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952–55, at 63 (Leon Friedman ed., 1969).

176. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 943 (1992) (Blackmun, J., concurring in part, dissenting in part) (“I am 83 years old. I cannot remain on this Court forever . . .”).

177. *See id.*

178. U.S. CONST. art. III, § 1.

179. Note here the faint echo of a more natural, less regimented notion of time—of periods measured by organic rhythms, not mechanical minutes. In this, at least, lifetimes recall part of a

There are good arguments for this “lifetime” approach. Life sentences help to rein in our most dangerous offenders, protecting future victims and deterring future crime.<sup>180</sup> Life tenure helps to insulate federal judges, blunting majoritarian prejudice and muting popular whim.<sup>181</sup> Behind both there is a worry of something pernicious, so in both lifetimes act as a kind of shield: Were our worst offenders released from prison, they would harm more innocents, and so we incarcerate them indefinitely. Were federal judges worried about election or reappointment, they would seek out political favor, and so we remove them from brute politics. Lifetimes here are a social cure.

But this chronological cure may also have its costs.<sup>182</sup> Life sentences can impose heavy financial and logistical burdens—and levy hard psychological tolls.<sup>183</sup> Life tenure can make federal judges aloof and unaccountable, distorting the judicial enterprise and deforming appointment strategy.<sup>184</sup> The best response, some say, is thus to limit the former and eliminate the latter—to mete out life sentences very rarely and to replace Article III’s life tenure with a fixed term of, say, eighteen years.<sup>185</sup> Some say the best response, that is, is to constrain the use of lifetimes in law.

But if this response is understandable, it does not capture current doctrine. Now as ever, life sentences are possible but unusual, yet still more common than sentences of death.<sup>186</sup> And now as ever, federal judges serve for indefinite periods, dying in office or resigning when they choose. This is *some time* linked

pre-Stoke, preclock world. *See supra* Part I.A. But lifetimes here are neither incoherent nor incalculable: Like all of *some time*, in fact, they depend on a sharp sense of chronological order—of pasts preceding presents and presents postdating pasts. And though they stake out periods not always easily measured *ex ante*, they turn on periods that are ultimately measurable all the same.

180. *See Harmelin v. Michigan*, 501 U.S. 957, 1003 (1991) (“[T]he . . . Legislature could with reason conclude that the threat posed to the individual and society . . . is momentous enough to warrant the deterrence and retribution of a life sentence without parole.”).

181. THE FEDERALIST NO. 78 THE JUDICIARY DEPARTMENT: INDEPENDENT JOURNAL, SATURDAY, JUNE 14, 1788 [Alexander Hamilton] 395 (arguing, *inter alia*, that a “temporary duration in office” would make impossible the “arduous . . . duty” of upholding the law and “discourage” those most able from joining the bench).

182. *Cf.* Seana Valentine Shiffrin, Essay, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1214 (2010) (showing that legal standard’s familiar costs—lack of clarity, lack of predictability—are also potential benefits).

183. *See, e.g.*, GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON 63 (1958).

184. *See, e.g.*, Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 771–72 (2006) (arguing that life tenure today decreases the number of Court vacancies, limiting “the efficacy of the democratic check that the appointment process provides” and increasing the intensity of the few appointment battles that occur).

185. *See id.* at 773.

186. Unusual still, but increasing. *See* THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 1 (2013), available at [http://sentencingproject.org/doc/publications/inc\\_Life%20Goes%20On%202013.pdf](http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf) (“As of 2012, there were 159,520 people serving life sentences, an 11.8% increase since 2008.”); *cf.* David R. Dow, *Life Without Parole: A Different Death Penalty*, THE NATION (Oct. 26, 2012), <http://www.thenation.com/article/170852/life-without-parole-different-death-penalty> (“[I]n 2011 American juries sent seventy-eight people to death row, the first time since 1976 that new arrivals on death row dipped below 100.”).

to lifetimes—a strange point of convergence between federal judges and our most egregious prisoners, and an enduring if neglected facet of the law's clock. It is also quite different from those doctrines, studied next, that are hitched to other lengths and terms.

*b. Other Times.* The majority of some time doctrines track these other lengths and terms. Some are longer, others shorter. Some are connected to the Constitution, others to statute, common law, or federal rule. But here, in these “other time” contexts, *some time* submits more fully to judicial control.<sup>187</sup> Here the law's clock follows judicial pronouncement, not biological fact. Many of these other time doctrines concern judicial mechanics—the “when” and “what kind” of modern litigation.<sup>188</sup> And two grow out of Article III.<sup>189</sup> Ripeness, for one, assures that federal cases and controversies do not arrive too early—that federal courts do not entangle themselves in disputes too “abstract” and “remote” for judicial intervention.<sup>190</sup> Mootness, for another, assures that cases and controversies do not stay too late—that federal parties (and especially plaintiffs) maintain a “personal stake” in their disputes for the duration of the case.<sup>191</sup> Only parties with real and ripe conflicts will have the incentive to litigate vigorously, and only parties with “live” and nonmooted interests will pursue those incentives to the end.<sup>192</sup> Only ripe and nonmooted cases, then, present courts with the best arguments, made by the most eager adversaries, built on the most pertinent facts.<sup>193</sup> So only ripe and nonmooted cases fulfill these complementary requirements of “when.”

Yet as the tally above suggested, ripeness and mootness are not completely alone. Other doctrines likewise set litigation in a “time frame,”<sup>194</sup> sometimes by statute, others by common law or rule. Consider three to start: statutes of limitations, of course, place a kind of expiration date on certain types of claims or cases, declaring those late-filed actions legally time-barred.<sup>195</sup> Rules about

187. Not all other time doctrines defer adjudication to some other point or place, though many (like mootness and ripeness) do. *Cf.* *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1434 (2012) (Sotomayor, J., concurring) (discussing “many longstanding doctrines under which considerations of justiciability or comity lead the courts to abstain deciding questions whose initial resolution is better suited to another time”).

188. *Lee*, *supra* note 21, at 606.

189. Some say, at least. *See DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam) (holding that the “inability of . . . federal [courts] ‘to review moot cases derives from the requirement of Art. III’”). But others disagree, as I do at length below. *See infra* Part III.A.2.

190. *See* Kenneth Culp Davis, *Ripeness of Government Action for Judicial Review*, 68 HARV. L. REV. 1122, 1122 (1955); *see also* Gene R. Nichol Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 161 (1987) (“The basic rationale of the ripeness requirement is to prevent courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements . . .” (internal quotation marks omitted)).

191. *Lee*, *supra* note 21, at 611, 623.

192. *See id.*

193. *See* Nichol, *supra* note 190, at 161.

194. Monaghan, *supra* note 21, at 1384.

195. As Justice Jackson wrote some seventy years ago:

appellate timing, in turn, dictate precisely when cases can move from one court to the next.<sup>196</sup> And the doctrine of desuetude permits courts to declare laws unduly anachronistic, so “hopelessly out of touch” with prevailing cultural convictions that they should no longer be enforced.<sup>197</sup> West Virginia once had a prohibition, for example, on displaying red flags.<sup>198</sup>

These devices still differ at the margins. Rules of appellate timing are expressly jurisdictional—and thus sometimes “merciless,” “rigid,” “mandatory,” even “sad.”<sup>199</sup> Desuetude, by contrast, is discretionary, nebulous, and often ignored.<sup>200</sup> Statutes of limitation tend to grow out of legislation.<sup>201</sup> Desuetude is largely, and perhaps troublingly,<sup>202</sup> court-made. But like ripeness and mootness before them, these doctrines are at once *some time* illustrations and other time examples—legal instruments set to particular time terms. And like ripeness and mootness before them, they share an anchor in legal chronology and a commitment to judicial control.

Finality shares these traits too. But instead of addressing matters of appeal or late filings, it asks when litigation ends: when may witnesses scrub their memories, litigants focus elsewhere, and courts declare litigation done?<sup>203</sup> These “nearly rhetorical”<sup>204</sup> inquiries may seem simple enough to answer—when a trial ends, say, or when appeals are through. But they have in fact produced uneven and complex responses. Judicial decisions are deemed final in

Statutes of limitations, like the equitable doctrine of laches, . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is . . . that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944).

196. See, e.g., 28 U.S.C. §§ 1291, 1292 (2012); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (outlining collateral order doctrine).

197. Sunstein, *supra* note 101, at 27.

198. See WEST VA. CODE § 61-1-6 (2005) (repealed 2010) (“It shall be unlawful for any person to have in his possession or to display any red or black flag . . .”).

199. Dane, *supra* note 4, at 167, 175.

200. See Note, *supra* note 100, at 2209 (“[D]esuetude is a concept that occasionally appears in the criminal law literature but usually remains dormant.”).

201. By name, of course, statutes of limitations would seem to have more than a tendency to be legislative. They would seem to be legislative by very definition. But there are real, if subtle, complications here—narrow gaps for the occasional assertion of judicial prerogative. To note: Federal courts sometimes need to pick among competing statutes of limitation or craft their own. See, e.g., Donna A. Boswell, *The Parameters of Federal Common Law: The Case of Time Limits on Federal Causes of Action*, 136 U. PA. L. REV. 1447, 1468 (1988) (discussing “when federal courts borrow from a general statute of limitations to impose a time limitation on a federal cause of action”).

202. See Note, *supra* note 100, at 2213–14 (discussing a separation-of-powers objection to desuetude—namely that it allows courts to usurp a legislative function). I discuss, and criticize, this objection *infra* Part III.A.2.

203. See Bator, *supra* note 119, at 441 (assessing when courts inscribe that “irrevocable *finis*”); Rubenstein, *supra* note 119, at 792 (noting that the measure cannot be perfect justice, for then a case would never be done).

204. Rubenstein, *supra* note 119, at 792.

some places and not in others; relitigation is forbidden in one case but allowed in the next. In the class litigation context, for example, the law remains intractably unsettled—some courts permitting almost wholesale reassessment, others adhering to strict finality rules.<sup>205</sup> In the criminal context, by contrast, the law is resolved but unsparing: a court's decision is deemed final upon verdict and sentencing but then can be subject to a narrow version of collateral review.<sup>206</sup> When a case is “done,” then, often varies by court and by circumstance—and finality can seem as much a “normative conclusion” as an “objective reality.”<sup>207</sup>

But some things about finality are nonetheless clear. One is that finality is about more than litigation management. It is also about relations between judges. Finality defines the rights of litigants, discourages serial filings, and delimits the lifespan of claims. But it also regulates judicial interaction: shaping rules of appellate timing, reinforcing legal hierarchies and institutional structures, and allocating “political authority” within and between the courts.<sup>208</sup> Finality's focus is not merely if a court will resolve a particular dispute, but also when and which one. In this it is both an assertion and a division of court power.

Yet finality splits power in another way too: it apportions political authority between Congress and the courts. Part of this allocation comes by way of jurisdictional statutes, particularly the appellate directive of 28 U.S.C. § 1291. There, in two plain sentences, Congress regulates judicial behavior, allowing courts of appeal to hear cases only after a “final decision” from the court below.<sup>209</sup> But section 1291 also omits as much as it includes: it nowhere defines the crucial final decision phrase, and it says nothing about common-law exceptions, broad or narrow. Such gaps may be unexceptional, even inevitable, in a tersely written statute. But they still leave space for self-interested interpretation, judicial intervention, and doctrinal invention.<sup>210</sup>

The Court's finality case law occupies that space with confidence. It holds, among other things, that Congress may not require federal courts to reopen already-final damage judgments.<sup>211</sup> Courts themselves may revisit those decisions as the pages ahead will show. But for reasons of history and “prophylactic” separation of powers, the Court in *Plaut v. Spendthrift* announced a “flat,”

205. *Id.* at 794 & n.8, 819.

206. *See* Bloom, *supra* note 113, at 541 (arguing that modern habeas doctrine “creates space for state courts to disregard binding Supreme Court precedent . . . [and] to [get decisions] *wrong*”).

207. Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 615 (1985).

208. *Id.*

209. *See* 28 U.S.C. § 1291 (2012).

210. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

211. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995); Vermuele, *supra* note 33, at 418. *See also* Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL'Y 809, 876–77 (1997) (noting that *Plaut* presented an “important” debate about a “core constitutional concept[]”—here the scope of Article III's judicial power—and provided an occasion as well to examine the Supreme Court's “turn to history” (internal quotation marks omitted)).

“sweeping,” and perhaps “overprotective” finality rule: once a judicial decision is final, Congress may not force courts to consider it again.<sup>212</sup> This is institutional territorialism. It is also a form of other time within *some time*—a particularized expression of the Court’s chronological control. *Plaut* carves out a space of complete judicial authority, linking court power directly to the law’s clock. To define finality, *Plaut* says, is to set the law’s clock and to exercise judicial power. That is the courts’ role alone.

But this same power can do more than prioritize courts or displace Congress. It can also appear to pare back doctrinal influence, recasting judicial opinions as consequential only in a particular time. Consider here, again, judicial sunsets. These sunsets stamp end-dates on judicial decisions, prospectively declaring that certain opinions will “lapse as binding precedent.”<sup>213</sup> Affirmative action may be constitutional now, but not (perhaps) in twenty-five years.<sup>214</sup> Equal protection may demand one thing in 2000 but something else in 2003.<sup>215</sup> Judicial sunsets make court decisions finite, expiring. They make the doctrine of today deliberately not the law of tomorrow.<sup>216</sup>

And in some cases that may be good. Judicial sunsets may help limit the costs of judicial blunders, keeping court errors from being frozen into law.<sup>217</sup> They may smooth otherwise unsettling transitions, cushioning the bumps of dramatic legal change.<sup>218</sup> And they may encourage healthy reassessment, demanding occasional reevaluation of particular doctrines.<sup>219</sup> Facts change; social preferences shift. Sunsets may provide occasion for courts to rethink old decisions in newer light.

But they may invite judicial “adventurism” too, promoting unwise doctrinal experimentation because the costs seem low.<sup>220</sup> They may destabilize legal precedent, increasing doctrinal uncertainty and unsteading the rule of law. And they may conflict with the general outlines of judicial retroactivity—the rules governing when court decisions look forward and when they look back.<sup>221</sup> For all the good judicial sunsets may do, then, they may still come at too high a cost.

212. See Vermeule, *supra* note 33, at 418, 423 (noting that this is an institutional prohibition that applies even where no “specific harm, or risk of specific harm, can be identified”—and so it seems overprotective and potentially distorting (internal quotation mark omitted)).

213. Katyal, *supra* note 28, at 1237.

214. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

215. See *Bush v. Gore*, 531 U.S. 98, 109 (2000).

216. See Calabresi, *supra* note 116, at 80 (describing the justices as having written “an opinion that was designed to self-destruct”).

217. See Katyal, *supra* note 28, at 1245–47. This explanation assumes some judicial attention to, or at least awareness of, the potential costs of a legal blunder.

218. See Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O’Connor’s Closing Comments in Grutter*, 30 HASTINGS CONST. L.Q. 541, 550 (2002).

219. See Katyal, *supra* note 28, at 1246.

220. *Id.* at 1248; cf. Bloom & Serkin, *supra* note 27, at 556 (proposing “civil suits against the courts when the costs of legal change are too high”).

221. See Katyal, *supra* note 28, at 1251.



But judicial sunsets, good or bad, are not subtle expressions of judicial humility. They are not modest admissions of institutional limitation or selfless concessions of authority to later generations. They are, in fact, emphatic assertions of contemporary control. Judicial sunsets dictate both constitutional meaning and doctrinal timing. They tell us, not just what the law is now, but how long that law will stand. They tell us what the Fourteenth Amendment says now about affirmative action, for example, and when it may say something different.<sup>222</sup> Like finality doctrine, then, judicial sunsets are an example of *some time* conveyed through “other times”—chronological power hitched to fixed and finite terms. And they are, like so many *some time* doctrines, a sign of “temporal imperialism”<sup>223</sup>—a proof of court power before a case, during it, and long after it too. In *some time* courts do not simply make law or make schedules. They make both.

*c. Later Time.* Two more doctrines—declaratory judgments and the bar on advisory opinions—shape both law and time too. But these two doctrines shift out of “other time” and into “later time”—into events and disputes that may not have happened yet. At their core, these doctrines still position courts at the center of the law’s chronological story, expressing and occasionally advancing the courts’ temporal control. But here the timing is changed: it is not passive or reactive but prospective and anticipatory, focused by definition on what lies ahead.

Hints of this later time idea can be seen in other places. Judicial sunsets, for one, influence litigation that may not begin for decades—and thus, like declaratory judgments, train the law’s eye on what is yet to come. Ripeness, for another, dictates that some disputes are not yet ready for court review—and thus, like the bar on advisory opinions, requires judicial intervention to come later (if at all).

It is no surprise, then, that the bar on advisory opinions echoes much of what ripeness says: federal courts will not resolve conjectural or hypothetical grievances, issuing opinions that may have no impact in the world.<sup>224</sup> Those courts will resolve only real, live, and adversarial disputes—actual cases and controversies under Article III. Both ripeness and the bar on advisory opinions thus work as judicial prohibitions, keeping underdeveloped conflicts out of federal court. Both claim a constitutional anchor, draw on established doctrine, and rely on an approving Court too.<sup>225</sup> But the two doctrines are still different: where ripeness focuses on parties and concreteness, the bar on advisory opinions concentrates on judges and effect. That is, where ripeness looks to party injury and grievance, the bar on advisory opinions considers judicial consequence. Ripeness asks if the parties’ dispute is adequately joined. The bar on advisory opinions

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222. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

223. LaCroix, *supra* note 4, at 1372.

224. See, e.g., *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792).

225. See *id.*; Davis, *supra* note 190, at 1122; Nichol, *supra* note 190, at 161.

asks if a judicial decision will have sufficient impact. It stays the courts' hand, not because the parties are unready, but because court opinions are meant to have some real-world effect. An opinion dispensing only advice may have no real effect at all.

Declaratory judgments do have real effect, though in an atypical way. They define rights and obligations in the world, the "status and other legal relations" of the parties to a case.<sup>226</sup> And they "afford relief" to litigants, much as more conventional court decisions do.<sup>227</sup> But here the court speaks early, prospectively, before the occurrence of an actual injury. And here the court deploys a "milder" remedy, an unusual half-step between judicial inaction and full-fledged injunctive relief.<sup>228</sup> Proponents argue that this half-step has noble potential to conserve resources, to protect litigants, and to reduce legal uncertainty, all while averting incipient disputes.<sup>229</sup> But even these proponents admit this half-step has its costs. For one, it risks reorienting the role of American judges, positioning them, not as reactive problem-solvers, but as proactive problem-avoiders—preemptive law-enforcers stopping harms before they start.<sup>230</sup> For another, it raises hard questions about preclusion and the effect of judgments. Do these half-step declaratory judgments have full *res judicata* impact, precluding related follow-on litigation? Or are they mere suggestions, there to be abided or ignored?<sup>231</sup> Some say the former, others the latter. Some say, that is, that declaratory judgments allow federal courts to give guidance and suggestions—advice for events that may follow.<sup>232</sup> So some say, inevitably, that these judgments sit in tension with ripeness, the bar on advisory opinions, and the supposed demands of Article III.<sup>233</sup>

In practice, the Court has mostly sidestepped this tension. It has required declaratory judgment suits to present "actual controversies" consistent with Article III<sup>234</sup>—and has thus brought declaratory judgments superficially in line with more traditional federal suits. That requirement may be entirely hortatory,

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226. Unif. Declaratory Judgments Act § 12, 12 U.L.A. 595 (1968).

227. *Id.*

228. *Perez v. Ledesma*, 401 U.S. 82, 111 (1970) (Brennan, J., concurring in part, dissenting in part).

229. *Id.*

230. *Cf.* Neal Devins & Saikrishna B. Prakash, Essay, *Reverse Advisory Opinions*, 80 U. CHI. L. REV. 859 (2013) (discussing courts seeking advice, not giving it).

231. *Compare* *Steffel v. Thompson*, 415 U.S. 452, 477 (1974) (White, J., concurring) ("I would anticipate that a final declaratory judgment . . . should be accorded *res judicata* effect . . ."), *with id.* at 482 (Rehnquist, J., concurring) ("A declaratory judgment is simply a statement of rights, not a binding order . . .").

232. *Id.* at 482.

233. *See, e.g., Note, Judicial Determinations in Nonadversary Proceedings*, 72 HARV. L. REV. 723, 729 (1959) ("The problem of ripeness is more acute since the declaratory judgment confers a right of action before the controversy would have been held ripe for adjudication under the common-law tests.").

234. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–40 (1937) ("The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense.").

a toothless demand skirted by judges whenever they wish.<sup>235</sup> But it reveals something broader and more instructive all the same: declaratory judgments may be creatures of statute, a legislative solution to a perceived problem in court. But they function now as chronological exceptions and exercises of judicial muscle. Here the courts decide what issues are ready for judicial engagement. Here the courts filter *some time* through later time, controlling what happens now as well as what happens next. And here *some time* begins to blend with something different, a strange world of disrupted chronology and diluted court clocks—the category of *broken time*.

**Table 3: Some Time**

Conception of Law	Fixed Often Positivist Finite Adaptive Forward-looking
Judicial Authority	Substantial and Established Law Made by Courts
Doctrinal Illustrations	<u>Lifetime</u> Article III Tenure Life Sentences
	<u>Other Time</u> FRCP 6 Mootness Ripeness Appellate Jurisdiction Finality Judicial Sunsets
	<u>Later Time</u> Bar on Advisory Opinions Declaratory Judgments

### 3. Broken Time

This third and final category is the most elusive, unconventional, and doctrinally obscure. It treats law as both nonlinear and nonuniversal—neither Austin's sovereign edicts nor Blackstone's otherworldly commands. It tells a legal tale, not of pristine truth or plodding improvement, but of lapses, blips, and

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235. See Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 465 n.352 (1996) (“Although the Burger and Rehnquist Courts have never officially endorsed Bickel’s [passive virtues] thesis, as a practical matter they have followed his approach by developing malleable justiciability doctrines that enable the Court to exercise or decline jurisdiction based largely on unarticulated pragmatic considerations.”).

inversions—an erratic chronology of frozen minutes, sporadic change, and *broken time*.

At the core of this *broken time* concept is an essential flexibility. Law here is pliable, lithe, elastic—a technology courts can manipulate and mold. Doctrines expressly invite judicial intervention; rules permit courts to act for “any . . . reason that justifies relief.”<sup>236</sup> As in *some time*, then, the law in *broken time* changes, mutates, even grows. But here the shifts are irregular, awkward, and often deeply fact-bound.

The result is an odd legal power. Courts in *broken time* can ignore missed deadlines, excuse lost weekends, or reset *status quo antes*—resetting the law’s clock case-by-case. And they can do all of this at their discretion, guided less by established legal precedent than by nuance, instinct, or whim. Federal Rule of Civil Procedure 6(b) allows courts to “extend . . . time” for whatever they deem “good cause.”<sup>237</sup> Federal Rule of Civil Procedure 15(c) allows courts to “relate” time-barred claims back to timely filed ones—and thus to evade applicable statutes of limitations—whenever the court says, at its discretion, that the two are connected enough.<sup>238</sup> This flexibility may permit a close attention to detail, leaving space for judges to accommodate the fine distinctions between one case or claim and the next. But it has proven unpredictable and inconsistent in practice—and it works, without exception, to burnish the courts’ chronological control. Here courts do more than replace past with present or trade then for now. They decide when and where to break linear time—and how. *Broken time* may thus hint at a kind of judicial modesty, a sense that legal rules can be imperfect and that the clock must sometimes yield. But it gestures more broadly at a brand of court vanity, a belief that judges hold a near-exclusive<sup>239</sup> right to regulate legal chronology, to bend particular doctrines, and to set certain things aright. Fairness may demand particular outcomes. Justice may call for relief. But here, almost always, it is the courts’ call alone.

But still most *broken time* doctrines remain neglected or ignored. Equitable tolling, Federal Rule of Civil Procedure 15(c), and Federal Rule of Civil Procedure 60(b)(6) are deployed haphazardly and debated even less. One reason, perhaps, is their explicit doctrinal reticence—their careful, built-in warnings against their own (over)use. Equitable tolling, for example, allows courts to manage or manipulate time—to bypass statutes of limitations and to

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236. FED. R. CIV. P. 60(b)(6).

237. FED. R. CIV. P. 6(b).

238. FED. R. CIV. P. 15(c). Both Rule 15 and Rule 6 were promulgated pursuant to 28 U.S.C. § 2072, the so-called Rules Enabling Act. That Act gives the Supreme Court the “power to prescribe general rules of practice and procedure,” *id.*—and, as it does, it lends congressional sanction to some court control of legal time.

239. Pardons and other forms of executive clemency may be the exception. See Harold J. Krent, *Conditioning the President’s Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1666 (2001) (arguing that courts may participate in some pardon decisions too).

extend time-windows when “fundamental fairness”<sup>240</sup> so requires. But it cautions judges to use this power “only sparingly,” at most to meet extraordinary circumstances or to combat evident fraud.<sup>241</sup> Judges have still found these circumstances in disparate places, applying equitable tolling in habeas cases and Title VII suits, Truth-In-Lending-Act filings, and immigration claims.<sup>242</sup> But even there the courts have been uneven and perhaps unprincipled, sparking circuit splits,<sup>243</sup> spurring angry dissents, and sowing the seeds of doctrinal confusion—both about what should count as extraordinary and about when the law’s clock should stop or start.<sup>244</sup>

In this, at least, equitable tolling is not alone. At least three other doctrines also leave the bending and breaking of time to the wide discretion of courts: Federal Rule of Civil Procedure 60(b)(6) permits federal courts, and only federal courts, to upset standard legal chronology, reopening final judgments and hearing old matters anew.<sup>245</sup> Federal Rule of Civil Procedure 15(c), in turn, allows federal courts to resurrect time-barred claims, breathing new life into expired causes of action—so long as they “relate back” to a claim filed on time.<sup>246</sup> And the writ of *coram nobis* permits judges to retrofit criminal verdicts, conforming the “judgments of courts . . . to the judgments of history” long after the fact.<sup>247</sup> Like equitable tolling, these doctrines all grow from a sense of injustice—of civil judgments inappropriately entered, of civil claims unnecessarily barred, of criminal defendants (like Fred Korematsu<sup>248</sup>) unfairly sentenced and accused. Like equitable tolling, these three erect deeply daunting barriers to

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240. See, e.g., *Morris v. Gov’t Dev. Bank of P.R.*, 27 F.3d 746, 750 (1st Cir. 1994). Equitable tolling first appeared at the Court in *Bailey v. Glover*, an 1875 case about the Bankruptcy Act of 1867. 88 U.S. (21 Wall.) 342 (1874). Since then, the doctrine has only grown—and the Court has “read [it] into every federal statute of limitation.” *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946).

241. See, e.g., *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990) (rejecting an equitable tolling argument built on “a garden variety claim of excusable neglect”).

242. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (Title VII); *Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir. 2000) (habeas); *Lopez v. INS*, 184 F.3d 1097, 1100 (9th Cir. 1999) (immigration); *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 708 (11th Cir. 1998) (TILA).

243. See David Zhou, *Making Up for Lost Time: A Bright-Line Rule for Equitable Tolling in Immigration Cases*, 118 YALE L.J. 1245, 1247 (2009) (“The courts of appeals are split over when and how to apply equitable tolling.”)

244. See, e.g., *Carey v. Saffold*, 536 U.S. 214, 219 (2002) (“California’s reading of the word ‘pending’ . . . is not consistent with the word’s ordinary meaning.”).

245. See FED R. CIV. P. 60(b).

246. FED. R. CIV. P. 15(c).

247. *Hirabayashi v. United States*, 828 F.2d 591, 593 (9th Cir. 1987); see also *United States v. Denedo*, 556 U.S. 904, 911 (2009) (finding that “a writ of *coram nobis* can issue to redress a fundamental error” in criminal convictions, though only if no “alternative remedies, such as habeas corpus, are available”).

248. See *Korematsu v. United States*, 584 F. Supp. 1406, 1419 (N.D. Cal. 1984) (“[The writ] is available to correct errors that result in a complete miscarriage of justice and where there are exceptional circumstances.”). But cf. David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One’s Name*, 2009 BYU L. REV. 1277, 1279 (arguing that “those convictions would still be on the books today had [Hirabayashi and Korematsu] faced the restrictive *coram nobis* jurisprudence favored by a majority of federal courts”).

relief.<sup>249</sup> And like equitable tolling, these three feature case law that is frustrating, foggy, and hard to rationalize.<sup>250</sup> But here, in these strange and scattered doctrines, are the outlines of a category very different from those sketched above. Here both linear and universal time can be forgotten or forsaken. Here judges can suspend, invert, and distort chronology. And here courts can rewrite history, replacing past with present, breaking legal time.

Not all *broken time* examples are quite this dramatic. Some depend, not on revived claims or retrofitted judgments, but on rarefied judicial opinions and unconventionally defined terms. These latter illustrations may at first seem marginal, even trivial—esoteric blips in dusty corners of the law. But for some, like Vincent Miranda, they make all the difference, and they build chronological context for *broken time* overall. The pages ahead thus reconsider Vincent Miranda’s story—as well as the very different stories of Barbara Grutter, Michael Richard, and Rhonda Willis. These stories flesh out crucial pieces of our *all time*, *some time*, and *broken time* paradigms. They provide real-world examples of time-pinched litigants, fateful chronological choices, and sometimes-morbid ends. And they shed bright and early light on where my *time* typology works seamlessly, clumsily, or perhaps not at all.

**Table 4: Broken Time**

Conception of Law	Pliable Elastic Sporadically Changing
Judicial Authority	Significant But Subtle Time Manipulated by Courts
Doctrinal Illustrations	Equitable Tolling FRCP 60(b)(6) <i>Coram Nobis</i> FRCP 15(c)

#### 4. Four Faces Resorted, a Caution, and a Question

So recall Vincent Miranda—one face, I will argue, of *broken time*. His story started with all the sordid elements of 1970s pulp noir: a seedy movie theater, a vague state statute, aggressive law enforcement, and a pornographic film. Miranda wanted to show *Deep Throat* to paying audiences in his San Diego theater; California authorities wanted to ban the film as

249. See, e.g., *Ackermann v. United States*, 340 U.S. 193, 199–202 (1950) (“Neither the circumstances of petitioner nor his excuse for not appealing is so extraordinary as to bring him within . . . Rule 60(b)(6).”).

250. See Nichol, *supra* note 190, at 156 (“[The] marriage of ripeness and Article III is flawed.”); Wolitz, *supra* note 248, at 1280–81 (critiquing “the majority approach to *coram nobis*”).

obscene. In the years to come these authorities would give up their enforcement efforts and obscenity prosecutions would drift out of view. But *Miranda*, like two of his employees, still landed in court. And his fate there turned on something neither squalid nor pornographic, but doctrinally abstruse: it turned on *Younger v. Harris*,<sup>251</sup> a 1971 Supreme Court decision requiring abstention in some cases by federal courts.

*Younger*'s rule may at first sound simple. It instructs federal judges to refrain from hearing particular requests for injunctive relief, even when the court has jurisdiction, when those requests might interfere with a pending state criminal case.<sup>252</sup> *Younger*'s rule may also sound prudent. It finds support in two venerable legal sources: ancient maxims of equity jurisdiction and the basic tenets of "Our Federalism"—that powerful, if peculiar, construct of American government.<sup>253</sup> But *Younger*'s rule, simple and prudent, still has its problems. One is that it hinges entirely on the meaning of a single word: pending.

One plausible definition of pending turns on the order of filing: a state case is only pending under *Younger* if it is actually filed first. In those state-first cases, the related federal action simply arrives too late. A valid and adequate state case is already underway, so opening a federal suit could only cause equitable and federalist strain. Here and only here, then, the federal court must abstain: it must defer to the pending state action, even if doing so simply encourages strategic federal plaintiffs to race to file first.

A second definition, by contrast, turns on something different—not on the order of filing, but on "proceedings of substance"<sup>254</sup> in federal court. A state case is pending under *Younger* when it is filed first and when it is filed second, so long the federal court has not yet done much work. A federal court must abstain, that is, when a state action precedes it and when a state action postdates it, so long as the state case starts before proceedings of substance in federal court have occurred. A state prosecutor can thus preempt a federal action by filing charges first in state court. Or she can displace the federal action, even after it is filed, by bringing charges prior to any federal proceedings of substance—a phrase still undefined by the Court. Here one elusive term would pile on top of another, the meaning of pending pinned to proceedings of substance. Here the race to the courthouse would swerve but does not stop—for states could now "leave the mark later, run a shorter course, and [still] arrive first at the finish line."<sup>255</sup> Yet here, in *Hicks v. Miranda*, the Supreme Court found its choice.

*Hicks* reads pending to include both first-filed and second-filed state cases. Some federal cases start too late, then, even when they start before anything else does. This curious definition may acknowledge litigation reality—a concern

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251. 401 U.S. 37 (1971).

252. *Id.* at 46.

253. *Id.* at 44 (internal quotation marks omitted).

254. *Hicks v. Miranda*, 422 U.S. 332, 349 (1975).

255. *Id.* at 354 (Stewart, J., dissenting).

about opportunistic plaintiffs, say, or a sense that some cases sit fallow for long stretches, months or years, after they are filed. But *Hicks*'s interpretation also does more than that. It alters institutional structure, tilting the doctrine in favor of state court litigation, criminal prosecution, and the prerogatives of state prosecutors—for it allows these prosecutors to relocate filed cases from federal to state courts. It limits litigant strategy, eliminating access for some would-be plaintiffs to lower federal tribunals. And it warps legal chronology, quietly resequencing one pocket of legal time. Under *Hicks*, linear order can be inverted: first can be second; second can be first. A case can be pending on Monday even when it was filed on Wednesday. Under *Hicks*, that is, federal courts can—and apparently must—break time. They must declare something pending when it chronologically and commonsensically is not. So while Vincent Miranda may simply have wanted to screen an adult movie, his case says less about 1970s pornography than it does about the law's clock. He gives a face to *broken time*.<sup>256</sup>

Barbara Grutter, Michael Richard, and Rhonda Willis are different. They are faces of *some time*, not *broken time*—deliberate clocks, not inverted ones. And of the three, Barbara Grutter is the most familiar. In 1997, recall, Grutter sued the University of Michigan, arguing that its law school admission program violated the Equal Protection Clause.<sup>257</sup> She claimed, more particularly, that Michigan's version of affirmative action worked an unconstitutional discrimination against her on the basis of race. Were it not for the University's race-conscious admissions policies, Grutter asserted, her application would have fared better. Were it not for the University's affirmative action program, that is, she would have been accepted to Michigan's Law School.

The Court did not agree. It held, by slim majority, that Michigan's admissions program was permissible if imperfect—no affront to the Fourteenth Amendment, at least for now.<sup>258</sup> But then the Court added something curious. It suggested, at the end, that Grutter's claim might eventually be valid—but that it had simply come too soon.<sup>259</sup> Programs like Michigan's were lawful, perhaps even essential, in 2003. But in twenty-five years, the Court predicted, these programs would be just the opposite: “no longer . . . necessary” and perhaps no longer legal.<sup>260</sup> At that point *Grutter*'s decision could and would sunset.

In one crucial way, then, Barbara Grutter resembles Vincent Miranda. Both found federal courts unable (or at least unwilling) to offer relief. But in many other ways the two are fundamentally different. In terms of access, context, and chronological category, in fact, the two look almost nothing alike. Where *Hicks* declared district courts off-limits now and later, *Grutter* said merely that the right time had not yet come. Where *Hicks* assumed a static legal setting, *Grutter*

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256. I will argue more directly that *Hicks* should be overruled in the pages below, *infra* Part III.A.1.

257. *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003).

258. *See id.* at 343.

259. *See id.* at 341–42 (“[R]ace-conscious admissions policies must be limited in time.”).

260. *Id.* at 343.



presumed that real-world facts would change. And where *Hicks* broke time and bent the definition of pending, *Grutter* counseled patience and counted decades, believing time would inch us slowly toward a better world. Much as *Hicks* shows *broken time*, then, *Grutter* shows *some time*—even if the Court believed that she brought her case too soon.

Rhonda Willis and Michael Richard are faces of *some time* too. But while *Grutter* reveals the perils of reaching court too early, Willis and Richard display the risks (petty and dire) of doing things too slowly or too late: Willis ignored time limits set by the Federal Rules of Civil Procedure—and lost her case almost immediately; her depositions spilled over the allotted seven hours, and the district court punished these dilatory tactics. Richard missed a deadline for filing a request to stay his execution—and lost his life that night; his papers arrived just after the clerk office's closing, and the state court refused to hear any unpunctual request. These results share little in terms of gravity or permanence. But they share one central theme and unite at one chronological place: They are stories, like *Grutter*, of *some time*—of legal time as linear, forward-moving, and sometimes implacable.

They also knit two broader threads together. Willis and Richard connect theory to practice—categorical constructs to on-the-ground facts. Like *Miranda* and *Grutter*, they give practical shape to novel concepts like *some time* or *broken time*. They make the law's clock real, personal, applied—adding distinctly human substance to the bare bones of taxonomic abstraction.

But there are two pieces these stories still miss. One is a real-world face for *all time*. None of the four faces studied above show law as timeless, unified, and nonlinear. But others do. The parties in *Swift v. Tyson*,<sup>261</sup> for example, were *all time* litigants. They found a Court committed to a vision of law as universal and ideal—a seamless “brooding omnipresence” simply waiting to be found.<sup>262</sup> What courts said under *Swift* did not make law but discovered it—and this rightful law was, by Justice Story's measure, always and forever true.<sup>263</sup> It was law in and for *all time*. Before *Erie*'s “revolution,”<sup>264</sup> in fact, countless judges operated in this *all time* realm—sure of the existence of an eternal legal order, confident in their ability to find everlasting law.<sup>265</sup> In these courts, law was multidirectional and temporally unified—the same yesterday as tomorrow. In

261. 41 U.S. 1 (1842).

262. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

263. See *Swift*, 41 U.S. at 18 (contending that judicial decisions are not laws but “only evidence of what the laws are”).

264. Stephen B. Burbank, Semtek, *Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1030 (2002).

265. More recently too, criminal defendants persuaded judges to apply *Atkins v. Virginia*, 536 U.S. 304 (2002), retroactively, extending the Court's ban on executing mentally retarded offenders both forward and back. See, e.g., *Pickens v. Oklahoma*, 74 P.3d 601, 603 (Okla. Crim. App. 2003); see also Cara H. Drinan, *Graham on the Ground*, 87 WASH. L. REV. 51, 55 (2012) (arguing that *Graham v. Florida*, 560 U.S. 48 (2010), “is retroactively applicable to all inmates who received a life-without-parole sentence for a non-homicide juvenile crime”).

these courts, then, were the real-world faces of *all time*.

A second piece is more cautionary. It is a warning against typological overconfidence. The chronological categories I develop here are meant to keep like things together and pull unlike things apart, uncovering fruitful connections unaddressed until now.<sup>266</sup> They are also meant to be separate and independent, each defined distinctly and deployed differently by courts. At the margins, though, these categories inevitably<sup>267</sup> drift together—*some time* overlapping with *broken time*, retroactivity touching on finality, Barbara Grutter looking a bit like Vincent Miranda. Intersections like these do not undermine my tentative *time* categories but rather accentuate them, setting the distinctions between (say) *all time* and *some time* in even sharper relief. They also signal the need for more—more sustained academic attention, more systematic study.

They also prompt a question: What next? The categories of *all time*, *some time*, and *broken time* do much that is useful already: They bring order to a flood of doctrinal messiness, inviting coordinated and systematic thinking about doctrines as disparate as mootness and retroactivity. They challenge, clarify, and concentrate our legal-chronological thinking, raising pointed questions about doctrinal intersection and court commitments. They show time as a ready implement of judicial power, highlighting an institutional tool at once impressively potent and mostly ignored. And they shed sharp light on themes and theories too-long elided, recalling debates that reach back to the Court's very start. Without these *all time*, *some time*, and *broken time* categories, legal time was at once incoherent and invisible, both jumbled and unseen. With them, perhaps, it can be the opposite: intelligible and apparent, studied and understood.

But might these categories also move us forward practically? Might they help us identify areas and avenues for productive legal reform?

In the pages ahead I offer an early, optimistic answer to these questions. Using my *time* typology as guide, I rethink a number of modern doctrines—some familiar, some elusive—and propose some preliminary ideas for doctrinal change. As a part of that rethinking, I also reconnect the end to the beginning, revisiting the courts' most enduring time strategy: their quiet commitment to chronological control. That commitment marks much of our muddled doctrinal present, as the pages above have illustrated. But it also links our uncertain doctrinal future to our persistent legal past, drawing the long thread of legal time out of yesterday, through today, and well into tomorrow.

### III. TIME CHANGE

This thread reaches back to our doctrinal beginnings—to *Calder*, to *Ogden*, and to a nascent Supreme Court. There, in two early and splintered cases, the Court first asserted its chronological prominence, taking as indisputable its

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266. Cf. BAILEY, *supra* note 25, at 1 (discussing classification).

267. See KERN, *supra* note 125, at 3 (“[T]he division of the flux of time into three discrete parts distorted its essentially fluid nature . . .”).

priority on matters of legal horology. And there, almost without recognition, a compelling chronological story both extended and took root, adding a new chapter to the history of time as social power, planting itself resolutely inside American courts. In the centuries since then, legal time has only expanded. It has shaped doctrines as seemingly disparate as retroactivity and life sentences, and it has informed the fates of litigants as ostensibly diverse as Michael Richard, Rhonda Willis, Vincent Miranda, and Barbara Grutter. It also played its part in some enduring mistakes.

This Part aims to repair a number of those blunders. It returns first to the muddy doctrinal trenches, proposing some targeted ideas for practical reform. It then connects those ideas to a larger, often-heated discussion about judicial authority, reorienting the courts' chronological commitments within a broader frame of institutional self-interest. My proposals here are intentionally varied and eclectic, designed to reinforce both the unappreciated depth and remarkable breadth of legal chronology. But they do not pretend to be comprehensive or perfect. Nor do they aim in all cases to strip or to enhance the courts' chronological power—for that power is not, in any normative sense, uniformly good or bad. My ideas here aim instead to call attention to time's power and to its use—to rethink overcomplicated doctrines, to bring matters of legal time to the surface, to encourage judicial transparency, and to align doctrines that should chart more compatible paths. My ideas also hope to prompt additional discussion, stirring meaningful reassessment and more disciplined engagement with the law's clock overall.

#### A. IDEAS AND ILLUSTRATIONS

The pages above attempted to anchor that discussion. They sketched a unique map of *time's* doctrinal territory, built an original *time* typology, and coined a new legal vocabulary—a new way of talking about time in the law. In part those pages hoped to instill a different mindset, updating and improving our ways of thinking about legal time. But they also hoped to carve out meaningful space in the dirt, clearing out room for worthwhile change on the ground—as the four proposals below will show.

##### 1. *Hicks*

The first proposal can be stated bluntly: *Hicks v. Miranda* should be overruled. Pending should be defined, not according to some amorphous phrase like “proceedings of substance” (as *Hicks* now has it), but according to something simpler and more concrete: a state case should only be pending if it is actually filed first.

There are good reasons why. For one, this redefinition would give pending a more neutral and natural connotation,<sup>268</sup> a meaning free of *Hicks's* state-friendly

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268. And conventional too. Before *Hicks*, courts read pending to mean filed-first for almost one hundred years. See, e.g., *Belle Terre v. Boraas*, 416 U.S. 1, 3 n.1 (1974); *Cline v. Frink Dairy Co.*, 274

“double standard.”<sup>269</sup> Pending in the *Younger* context would have the same meaning it has in common parlance: already in process, not already in process for a sufficient duration. And it would entail the same thing for plaintiffs that it does for state-defendants. Overruling *Hicks* would thus rebalance the race to the courthouse, ensuring that all parties start in the same spot, run the same distance, and finish in the same place. Even more, it would reduce a batch of bad incentives, thwarting the ability of state prosecutors to use criminal indictments as tools of forum-shopping. State prosecutors could no longer charge (perhaps even overcharge) federal plaintiffs merely to remove particular cases to state court.<sup>270</sup> State parties could no longer arrive in federal court second but still finish first. And federal courts would no longer be required to break time.

There is also good reason to act now. *Hicks*'s doctrinal foundation is more precarious than ever—the weight it bears getting heavier, the collateral support it depends on almost shrinking out of view. In the four decades since *Hicks* was decided, *Younger* doctrine has expanded, reaching out to require federal-court abstention in more cases and more contexts—including some in which the pending state action was a civil (not a criminal) suit.<sup>271</sup> At the same time habeas corpus has shriveled, scaling back to a place of severely restricted collateral review.<sup>272</sup> The first of these changes only increases a state's ability to disrupt and displace ongoing federal litigation, thereby adding to the weight that *Hicks* now shoulders. The second only decreases the possibility and intensity of any other federal court intervention, thereby diluting the strength of any ancillary support. Yet *Hicks*, now more than ever, only exacerbates this tension. It makes state disruption easier while shuttering scarce avenues for federal review. A plaintiff today could file a federal suit before any state action had started and still spend no time litigating in federal court—because the state filed a civil or criminal case in state court sometime later, because the federal court abstained under *Hicks* and *Younger*, and because there were no available avenues for federal review. A change in the definition of pending would put an end to this

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U.S. 445, 453 (1927); *In re Sawyer*, 124 U.S. 200, 211 (1888); see also *Carey v. Saffold*, 536 U.S. 214, 219 (2002) (“California’s reading of the word ‘pending,’ . . . is not consistent with the word’s ordinary meaning.”).

269. Aviam Soifer & H. C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1195 (1977). The double standard is this: If a state files a case first—in state court or, in theory, in federal court too—the case is pending and must stay there. If a would-be state defendant files a case first in federal court, by contrast, the case may well not be pending and may still be moved elsewhere.

270. To be precise, this is not formal removal. In fact, it relocates a case in the opposite direction of formal removal—not from state court to federal, but from federal court to state. See 28 U.S.C. § 1441 (2012) (regulating removal from state to federal court). But the underlying dynamic is otherwise identical, for it allows a defendant to second-guess a plaintiff’s forum selection. And it may create a perverse incentive of its own—to charge (or overcharge) state defendants that might not be charged otherwise.

271. See, e.g., *Juidice v. Vail*, 430 U.S. 327, 337 (1977) (applying *Younger* in civil contempt context).

272. See Bloom, *supra* note 113.

doctrinal peculiarity. And it would recognize the need to act soon.

But it would not necessarily empower federal courts. It would allow those courts to retain particular cases, like Vincent Miranda's, and so it may grant them a slim measure of increased authority. But overruling *Hicks* might help to discipline those courts too. It might steer them away from self-serving interpretation, making this pocket of legal time more predictable as well.

At its core *Hicks* hinges on a slippery phrase: "proceedings of substance."<sup>273</sup> The phrase is meant to square federalist deference with judicial investment—to balance respect for state process against active engagement by federal courts. If there has been no such engagement, no proceedings of substance, then *Younger* abstention applies "in full force"—or so *Hicks*'s logic goes.<sup>274</sup> But *Hicks*'s key phrase does more than strike this balance. It leaves a subtle space for self-dealing, a narrow gap that allows federal courts to sidestep substantive questions and to skirt jurisdictional directives—all while shunning good-faith litigants.<sup>275</sup> A federal court could use *Hicks* to duck a thorny First Amendment conflict, for example, and to dismiss a case within its federal-question jurisdiction—all while dodging a theater owner it may well think uncouth. That may be a foreseeable (if severe) response to an overcrowded docket. But it is not *Younger*'s equitable restraint or federalist respect for state process. It is instead a kind of self-interested chronological mischief, a separation-of-powers problem as well as a chronological pretense. It lets courts dictate their own jurisdictional boundaries, even at the expense of sharp congressional mandate. And it sacrifices *some time*'s linear coherence for *broken time*'s erratic turns.<sup>276</sup> Sacrifices of that kind may be defensible elsewhere, as I attempt to show below. But they are not defensible here. Here both hard fact and *time* typology argue for a cleaner, less "cavalier"<sup>277</sup> understanding of pending. They argue for *Hicks* to be overruled.

## 2. Mootness & Desuetude

A second proposal argues for coordination, not overruling. It argues for a union—both practical and conceptual—of mootness and desuetude.

The pairing is not obvious. Mootness is a well-known justiciability doctrine, a limit on federal litigation ostensibly anchored in Article III.<sup>278</sup> Desuetude is an

273. *Hicks v. Miranda*, 422 U.S. 332, 349 (1975).

274. *Id.* at 349.

275. Cf. Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 974 (2009) (noting that misleading jurisdictional doctrines "may focus adjudicative energy, encourage judicial caution, constrain jurisdictional discretion, and ease inter-branch tension").

276. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 89–90 (1984) (condemning judicial restraint of this type in the face of congressional disagreement).

277. Soifer & Macgill, *supra* note 269, at 1194.

278. See Lee, *supra* note 21, at 611 ("The marriage of Article III to mootness doctrine was remarkably casual."); Nichol, *supra* note 190, at 156 ("[The] marriage of ripeness and Article III is flawed.").

obscure tool of judicial abrogation, an unusual stopgap rooted (most likely) in Roman law.<sup>279</sup> Mootness has sharp critics and avid defenders.<sup>280</sup> Desuetude has few interested observers at all.<sup>281</sup> But if mootness and desuetude differ in both source and attention, they still connect at their chronological cores: both depend on the idea of something being too late—mootness on disputes that reach courts too late for adjudication, desuetude on regulation that grows too late (or old) to fit cultural demands. In this, if not more, mootness and desuetude are more than proper partners—and so they should be drawn together analytically too.

One way to draw them together could be through Article III. Mootness is already thought an extension of that Article's "case or controversy" language—a phrase read to require legal disputes to remain "live" for the duration of a suit.<sup>282</sup> If a dispute somehow evaporates after filing—because a law student graduates,<sup>283</sup> say, or because a law gets changed—there is nothing left for a court to consider, no case or controversy for that court to resolve. Judicial intervention might once have been appropriate, but now it is too late. The case is moot.

Desuetude could fit this Article III logic too. It depends, like mootness, on changed or changing circumstances—shifts in social fact that make judicial intervention inappropriate. And it turns, like mootness, on the absence of a now-justiciable claim—a sense that it might once have been appropriate to apply certain laws (criminal prohibitions on collecting seaweed, say, or bans on displaying black or red flags),<sup>284</sup> but now it is too late. Facts have changed; the law is obsolete. Desuetude could thus follow mootness, linking up to Article III, tracking the language and the logic of case or controversy.

But there is a problem with this solution: Article III hardly fits as an anchor for mootness, let alone for desuetude. In part it fits poorly because of constitutional text and history. The link between mootness and Article III relies on strained textual analysis, saddling the brisk and malleable case or controversy language with a debatable chronological burden—a timing requirement nowhere found in Article III. The link also calls on dubious history, embracing an unnecessarily crabbed understanding of mootness's prior use—an understanding

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279. See Note, *supra* note 100, at 2211 ("The legal foundation of desuetude begins with the Roman jurist Julian . . ."); see also *State v. Donley*, 607 S.E.2d 474, 480 (W. Va. 2004) (noting that desuetude "is founded on the constitutional concept of fairness embodied in federal and state constitutional due process and equal protection clauses" (internal quotation marks omitted)).

280. See, e.g., Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 298 (1979) (arguing that Article III's "doctrines are unified by purposes which have not previously been well understood"); Lee, *supra* note 21.

281. There are some notable exceptions. See, e.g., BICKEL, *supra* note 172, at 148–56; GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 17–30 (1982); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 67–68 (1997).

282. See *Powell v. McCormack*, 395 U.S. 486, 496 (1969) (internal quotation marks omitted).

283. See *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

284. See N.H. REV. STAT. ANN. § 207:48 (1973); W. VA. CODE § 61-1-6 ("It shall be unlawful for any person to have in his possession or to display any red or black flag . . .") (repealed 2010).

that is simultaneously too narrow and too wide.<sup>285</sup> Even more, the link between mootness and Article III has proven “arcane” and “pointless” in practice, erecting a screen of “legalistic nonsense” that excuses judicial “dissembling”<sup>286</sup> and masks true court motives. In practice and in theory, mootness and Article III are at best an awkward fit. Instead of attaching more to Article III, then, perhaps it would be wiser to attach less—to detach both mootness and desuetude altogether from this constitutional root.

I believe it would. Mootness should be untethered from Article III, and desuetude should remain that way. Both should be understood as purely prudential doctrines, judicial tools “plucked of [any] constitutional plumage”<sup>287</sup>—and then deployed and defended as such. Mootness should exchange its shaky case or controversy explanation for a sturdier pragmatic one. And desuetude should expand into more frequent usage—both criminal and civil—trading its current doctrinal anonymity for a more active and provocative role.

For mootness this change would mean three things at least: preserved judicial flexibility, revamped requirements of judicial argumentation, and increased possibilities of legislative reply.<sup>288</sup> Courts could still declare cases moot—because a business closed, say, or because a teacher retired—but they would need to express more clearly the pragmatic and prudential reasons why. They would need to explain why a mootness dismissal is appropriate, not because the Constitution mandates it, but because it conserves scarce judicial capital, for example, or because it advances the ideals of adversarial process. And even then Congress could assert its jurisdictional prerogatives in response. It could, if it wished, pass a statute and change mootness law.

For desuetude this change would mean three things too: expanded judicial engagement, increased legal predictability, and comparable levels of legislative control. Courts could invoke desuetude more frequently, if not quite regularly—because a law’s moral underpinnings had grown “hopelessly anachronistic,” or because a law lacked sufficient cultural support.<sup>289</sup> And they would need to make clear their reasons here too. They would need to explain that a law banning seaweed collection, say, had lost its social backing—and that judicial

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285. Professor Brilmayer surveys this incomplete understanding:

English practice at the time the Constitution was framed included resolution of some abstract disputes; in addition, the law of declaratory judgments has developed to permit adjudication of some disputes that would not then have been heard. The practice at the time the Constitution was written was therefore both more restrictive and more lenient than at present.

Brilmayer, *supra* note 280, at 300–01 (citations omitted); *see also* Lee, *supra* note 21, at 639 (“Like so much history, [the sources here] really say quite little about how present arrangements should be made.”).

286. *See* Brilmayer, *supra* note 280, at 299–301 (“The charge is that the doctrines are being used as a convenient opportunity to avoid both implementation of past decisions of the Warren Court and resolution of new and controversial social issues.”).

287. Lee, *supra* note 21, at 654.

288. *See id.* at 634.

289. Sunstein, *supra* note 101, at 31.

invalidation, not legislative intervention, was particularly appropriate. This shift would make the law more predictable—for parties could rely on clear patterns of nonenforcement and escape dead hand law problems, thereby getting “fair[er] notice”<sup>290</sup> of what laws actually apply. And still legislatures could participate too. If a court made a desuetude blunder, it could be reversed by statute.

I do not claim this proposal is perfect. Courts may apply these revamped mootness and desuetude doctrines oddly or unevenly, hiding their true motives as they do. They may also overstep institutional boundaries, encroaching on legislative power and undercutting majoritarian will. But my proposal, at its best, could even make a benefit out of these lurking costs. Consider desuetude first: an invigorated desuetude doctrine may seem to allow judicial overreaching, excusing if not inviting sustained court encroachment on the legislative role. But what may seem like a separation-of-powers imbalance could in fact be an interbranch solution. Far from enabling a judicial power-grab, my proposal could instead curtail an executive one, keeping executive actors from relegislating by way of selective and unexpected enforcement. Even more, my proposal could inspire healthy government (re)deliberation, encouraging legislatures to rethink rigid mandates and to revise archaic but unrepealed laws.<sup>291</sup> Legislatures may well be involved more here, not less.

Now consider desuetude and mootness both: a full turn to judicial prudence may seem to trade political accountability for judicial penchant, leaving key social decisions up to unelected courts. But what may seem like a democratic deficiency could in fact be a majoritarian boon. Far from inviting countermajoritarian activism, my proposal could instead promote democratic self-correction. It could (again) inspire useful dialogue, both within and among the branches. And it could recognize courts as agents, not of countermajoritarian resistance, but of promajoritarian change. Judges are not always counterdemocratic impediments. They can be, and often are, implements of majority preference.<sup>292</sup> This is true on hot-button social issues like school desegregation and same-sex rights.<sup>293</sup> And it is especially likely to be true here, where a case or a law is truly out-of-date. Courts would not buck popular preference here but advance it, perhaps more quickly and more carefully than any other branch.

Mootness and desuetude should thus be united and updated, released from all constitutional mooring and revamped as applied. They should be recognized and improved as real partners in *some time*.

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290. *Id.* at 27–28; *see id.* at 50 (noting that desuetude may help relieve the grip of dead hand problems).

291. *See* Shiffrin, *supra* note 182, at 1225–26.

292. *See, e.g.,* Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1750 (2001) (“On only a relative handful of occasions has the Court interpreted the Constitution in ways opposed by a clear majority of the nation.”); Thomas R. Marshall, *Public Opinion, Representation, and the Modern Supreme Court*, 16 AM. POL. Q. 296, 297–98 (1988).

293. *See, e.g.,* Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 117 (2012) (presenting *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), as an example of the Court abiding, not resisting, “majoritarian proclivities”).



### 3. Retroactivity

A third proposal brings new clarity to old clutter. It argues for retroactivity doctrine to adopt a single, simpler, “time of decision” rule. Courts should apply the law as it exists at the moment of judicial intervention—at the time of decision.<sup>294</sup> Selective retroactivity should give way to this “straightforward”<sup>295</sup> substitute—and the doctrine’s half-hearted commitment to *all time* should cede to *some time* in full.

The alternative is prolonged confusion. Current retroactivity doctrine seems almost designed to perplex. It applies judicial decisions forward almost always and backward on occasion, though seldom with clear reasons why.<sup>296</sup> It breaks “primary” from “secondary” retroactivity—the first concerning rules that “change what was the law in the past,” the second about “nominally prospective rules with retroactive effects”—but never explains the meaning of the split.<sup>297</sup> And it labors, even today, under a kind of Warren Court anxiety: an institutional unease with Court influence that mixes faith in judicial action with a fear of overextension and political backlash.<sup>298</sup> The result is not chronologically moderated courts or carefully calibrated case law. The result is a doctrine part right, part wrong, and befuddled the whole way through.

A time of decision rule would leave these right parts intact. It would preserve *Griffith v. Kentucky*, the case that makes judicial decisions retroactive in criminal cases still pending on direct review.<sup>299</sup> And it would uphold *Harper v. Virginia Department of Taxation*, the opinion that extends *Griffith* into the civil realm.<sup>300</sup> Both *Griffith* and *Harper* allow courts to apply the law as it exists at the time of court engagement. So both already conform to a time of decision rule.

But three other things would change. First, a time of decision rule would streamline the basic question, turning an elliptical inquiry about “conflict of laws in time”<sup>301</sup> into a targeted study of contemporary doctrine: What is the law now? Here courts need not worry about selective retroactivity, new-but-inapplicable case law, or modified (Neo-Blackstonian) incarnations of *all time*. They simply need to apply the law as it then exists—the “best current understanding of the law.”<sup>302</sup> Put in the language of the figure below, that is, courts need not attempt to recover the state of the law at Time<sub>1</sub> or to root out the retroactive

294. Roosevelt, *supra* note 94, at 1117.

295. *Id.* at 1118.

296. See Fisch, *supra* note 160, at 1058. If legislative retroactivity is better explained, it is not better explained by much. That doctrine, too, is confused, and the root of that confusion may reach back to the same spot. As Professor Eule puts it pithily: “Blame it all on *Calder*.” Eule, *supra* note 111, at 427.

297. Fisch, *supra* note 160, at 1068 (internal quotation marks omitted).

298. See, e.g., Roosevelt, *supra* note 94, at 1091.

299. 479 U.S. 314, 328 (1987).

300. 509 U.S. 86, 90 (1993).

301. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 616 (1994).

302. Roosevelt, *supra* note 94, at 1117.

effects of the legal change at Time<sub>2</sub>. They simply need to apply the law as it exists at Time<sub>3</sub>.

**Figure 1: Three Times**

Time <sub>1</sub>	Time <sub>2</sub>	Time <sub>3</sub>
Time of Event/Transaction	Time of Change in Law	Time of Decision
Example: Arrest for Owning Pornographic Film	Example: Court Deems Pornography Protected by the First Amendment	Example: Direct Appeal of Criminal Conviction

Second, a time of decision rule would reorient modern limits on collateral review. These limits matter very little in the civil context, where *res judicata* tends to preclude relitigation without more.<sup>303</sup> But these limits may matter significantly in the criminal context, where petitions for writ of habeas corpus permit a second strand of judicial review. In this criminal setting, a time of decision rule might appear to invite a flood of habeas petitions and to encourage an expansion of habeas relief. A person in custody need only wait for a favorable change in law (Time<sub>2</sub>), file a petition, and then remind the habeas court to apply the law at the time of this new suit. Quick habeas relief would seem likely, even obligatory—required by the terms of a time of decision rule.

But this fear-of-floodgates logic forgets habeas's central question. It asks not is the original decision legitimate by today's standards, but was the original decision legitimate at the time it was rendered—that is, at the time of its own decision. It asks not whether the original decision would be right today, but whether it was right then, in its own time. Rather than rejecting this question, a time of decision rule would reiterate it. It would refocus the judicial eye in habeas on the original court decision, clearing away unnecessary complications of retroactivity too. It would do nothing to expand current habeas review.

Nor would it reject the two longstanding exceptions of *Teague v. Lane*.<sup>304</sup> *Teague's* core rule is by now familiar. It holds that new rules of criminal procedure do not apply on habeas review. A 2002 decision that revamps jury sentencing, for example, does not apply to a conviction entered and last appealed in 1989. But there are also two exceptions. The first concentrates on substance: it permits use of a new rule during collateral review when that new rule places “certain kinds of primary, private individual conduct beyond the

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303. *See, e.g.*, *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466 n.6 (1982) (“[T]his Court has consistently emphasized the importance of the related doctrines of *res judicata* and collateral estoppel in fulfilling the purpose for which civil courts had been established, the conclusive resolution of disputes . . .”).

304. 489 U.S. 288 (1989).

power of the criminal law-making authority to proscribe<sup>305</sup>—when, say, the Court extends First Amendment protection to the possession of pornography. The second exception looks at process: it allows use of a new rule in habeas when that new rule “alter[s] our understanding of [] bedrock procedural elements,” enhancing the accuracy as well as the fairness of criminal litigation<sup>306</sup>—when, say, the Court requires defense counsel in criminal trials. Neither *Teague* exception applies often, if at all.<sup>307</sup> But both still send important signals about the role of justice in collateral jurisdiction, even in today’s cramped habeas universe. They suggest, obliquely, that some convictions should not stand, no matter when they were won.

And both exceptions also find solid, even better, footing in a time of decision rule. As they now stand, *Teague*’s exceptions perpetuate the fiction that a decision in August can change the law in May—that a shift at Time<sub>2</sub> may rework the law at Time<sub>1</sub>. They proceed, that is, on a kind of *all time* ground. But they need not, and they should not. *Teague*’s exceptions should instead admit that some criminal detention is impermissible, not because of faint-hearted commitments to *all time*’s brooding omnipresence, but because of the law’s evolution and justice’s most basic terms. Sometimes the law changes. And sometimes those legal changes prove fundamental enough to merit immediate reaction—an acknowledgement that some criminal detention is inappropriate now. *Teague*’s exceptions can and should stand on this *some time* logic alone.

Third, and finally, a time of decision rule would require a doctrinal correction. It would force the belated retirement of *Linkletter v. Walker*<sup>308</sup>—an opinion Professor Roosevelt has called a “serious mistake.”<sup>309</sup>

*Linkletter* was a case about evidence. It concerned a Louisiana burglary conviction secured, at least in part, by way of improperly seized items: Linkletter’s home and office were searched without a warrant.<sup>310</sup> But the real question in *Linkletter* was largely one of scope: How far back would a new constitutional rule go? Four years before, in 1961, the Court announced a new rule in *Mapp v. Ohio*, holding that the Fourth Amendment prohibits the use of unconstitutionally seized evidence in state court.<sup>311</sup> In 1963, the Court held that *Mapp* would apply to cases still pending on direct review.<sup>312</sup> But *Linkletter*’s direct appeals were already finished, so his case presented a question about the one thing that was left: How should courts treat convictions already final by the date of

305. *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part, dissenting in part).

306. *Id.* at 693–94.

307. *See, e.g., Beard v. Banks*, 542 U.S. 406, 417 (2004) (“We have repeatedly emphasized the limited scope of the second *Teague* exception . . .”).

308. 381 U.S. 618 (1965).

309. Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What It Might*, 95 CALIF. L. REV. 1677, 1677 (2007).

310. 381 U.S. at 621.

311. 367 U.S. 643, 655 (1961).

312. *Ker v. California*, 374 U.S. 23, 25 (1963).

*Mapp*'s decision but still inconsistent with *Mapp*'s constitutional rule? How, that is, should courts handle *Mapp* on habeas review?

The Court's answer was to draw a line. It declared *Mapp* only partly retroactive—retroactive on direct but not on collateral review.<sup>313</sup> Defendants whose cases were still pending on direct appeal could advance *Mapp* arguments. But defendants, like *Linkletter*, whose cases had already gone final could not. It did not matter if the evidence was seized unconstitutionally. It did not matter if the case was final because of bad timing, bad luck, or bad lawyering. And it did not matter if a direct and a collateral defendant were convicted in the same jurisdiction, by the same prosecutor, using the same evidence, for the exact same crime.<sup>314</sup> This was a rule about timing. *Linkletter*'s line was firm.

And it was not drawn at random. It was, for one, a self-conscious attempt to be pragmatic, to limit the wave of habeas petitions filed in *Mapp*'s wake—and thus to control the effects of the Warren Court's criminal procedure revolution.<sup>315</sup> It was also a nod toward Austinian positivism—a belief, again, that the courts do not declare law but actually make it.<sup>316</sup> In *Linkletter*, in fact, the Court tried to do two things simultaneously: it hoped to exercise power and to restrain it—to change the law substantially and to tailor the consequences of that bold change.

But *Linkletter*'s line still broke. It strayed from relevant precedent.<sup>317</sup> And it charted a path lacking in foundation or coherence. The problem was not just that *Linkletter* was wrong on its chronological facts, because the pertinent Fourth Amendment violation—the unlawful search of *Linkletter*'s property—occurred after the events in *Mapp*, events to which *Mapp* certainly applied.<sup>318</sup> The problem was that *Linkletter* pulled the Court unnecessarily into the murky realm of selective retroactivity—of deciding for itself whether “the interest[s] of justice” made one of its new rules retroactive or not.<sup>319</sup> *Linkletter* may have believed those interests sufficiently apparent. And the Court may have hoped to cabin its own influence. But in the end *Linkletter* simply shifted Court power

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313. See *Linkletter*, 381 U.S. at 639–40 (“[T]hrough the error complained of might be fundamental it is not of the nature requiring us to overturn all final convictions based upon it.”).

314. See Roosevelt, *supra* note 94, at 1091.

315. See Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 71 (1965) (“To whatever extent . . . that the Court is influenced by possible professional and public reaction, it must anticipate heightened reactions because its actions are retroactive. This, in turn, is likely to have some effect in the direction of greater restraint.”).

316. See Roosevelt, *supra* note 94, at 1680–81.

317. See Roosevelt, *supra* note 94, at 1090.

318. See *Linkletter*, 381 U.S. at 641–42 (Black, J., dissenting).

319. *Id.* at 628.

from one place to another—from its authority to interpret the Fourth Amendment to its authority to keep legal time.

*Linkletter*'s line should thus be redrawn. Its interests-of-justice approach may be the wise doctrinal hook elsewhere, as I attempt to show below. But here it adds costs without true benefit. It turns pragmatic aspiration into doctrinal confusion—a swirl of “distinction[s] without a difference” (say, between direct and collateral review) and “differences without distinctions”<sup>320</sup> (say, between judicial and legislative retroactivity). And it asks a question that need not be answered, posing a riddle about selective retroactivity where a simpler approach would do. *Linkletter* was wrong in 1965, and it is wrong today. Selective retroactivity should be abandoned. It should be replaced, in practice and in theory, with a time of decision rule.<sup>321</sup>

#### 4. Rule 60(b)

A fourth (and final) proposal cuts very differently. It argues not to eliminate an interests-of-justice-type standard but to highlight one—to erase all but the final, catch-all basis for reopening judgments under Federal Rule of Civil Procedure 60(b). Rule 60(b)'s first five entries should be excised from the text, reframed as illustrations, and eliminated as independent categories.<sup>322</sup> Section (6) should stand on its own—and courts should focus the doctrine's development there.

Rule 60(b) now recognizes six “grounds for [r]elief from a [f]inal [j]udgment, [o]rder, or [p]roceeding . . . :

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial . . . ;
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.”<sup>323</sup>

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320. Roosevelt, *supra* note 94, at 1092.

321. This rule might resolve some transitional moment difficulties too. A time of decision rule would help close the transition window, making it clearer what law applies in any particular instance—even if the law changed during litigation.

322. Cf. Gideon Parchomovsky & Alex Stein, Essay, *Catalogs*, 115 COLUM. L. REV. 165, 168–69 (2015) (defining legal catalogs as legal commands comprising specific enumerations of behaviors or prohibitions that share a common denominator and a residual category that allows courts to add unenumerated instances). Rule 60's structure does not quite fit this definition perfectly, though in makeup and operation it appears rather close.

323. FED. R. CIV. P. 60(b).

All of these grounds permit a court, and only a court, to do something unusual: to reopen a final decision and consider a case anew.

There are good reasons for this too. Rule 60(b) aims in part to protect parties from the harsh consequences of understandable blunders—for missing an early deadline, say, because of a “transition in [office] staffing.”<sup>324</sup> It attempts too to keep adversaries from profiting from their own misconduct—from winning a judgment, for example, by way of doctored documents.<sup>325</sup> And it hopes to prevent courts from basing their decisions on inappropriate things—reversed judgments, incomplete evidence, or litigant fraud.<sup>326</sup> At the heart of Rule 60(b), then, is a kind of *broken time* compromise: it empowers courts to break time—treating past as present, then as now—but only rarely. And it sets broad concerns about fairness and integrity against a strong interest in finality.<sup>327</sup>

There is nothing wrong with this idea. Rule 60(b) commands respect for court decisions, even incorrect court decisions, while carving out useful space for judicious reassessment. But the rule itself might actually do more with less. It might function better with a single basis for reopening—a flexible,<sup>328</sup> reworded Rule 60(b)(6) left standing alone. Rule 60(b) should permit courts to offer relief from a final judgment, order, or proceeding when extraordinary circumstances and the interests of justice so require. And it should say just that.

The change would be small but important. It would bring together dispersed-but-related doctrines, connecting Rule 60(b) to analogous extraordinary circumstances devices discussed above—the writ of *coram nobis*, for example, and the doctrine of equitable tolling.<sup>329</sup> These rare but powerful tools also allow courts to break time—to ignore missed deadlines, to treat then as now. And they already have plain extraordinary circumstances thresholds for granting relief. It makes sense to join Rule 60(b) directly to them in style and form.

It also makes sense to reorganize this disorganized rule. Rule 60(b) was not promulgated all as one. The first version, adopted in 1938, included much of today’s edition—but not section (6). That piece was added later, in the late 1940s, in the hope of increasing judicial flexibility and reducing haphazard prior practice.<sup>330</sup> Then as now, (b)(6) was meant to be separate—“mutually exclusive” of sections (1)–(5) in both timing and coverage.<sup>331</sup> But it makes little

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324. *J & J Sports Prods., Inc. v. Looney*, No. C 11–2093 CW, 2011 WL 6306660, at \*1 (N.D. Cal. Dec. 16, 2011).

325. *MMAR Grp., Inc. v. Dow Jones & Co.*, 187 F.R.D. 282, 292 (S.D. Tex. 1999).

326. *See* FED. R. CIV. P. 60(b). In a way, section (5) operates as a time of decision rule in an individual case. The idea in section (5) is to apply the best law at the time of judicial intervention—with an eye toward justice overall. This echoes much of the time of decision rule I outline here, and I hope the spirit of section (5) persists, even as I argue that its text should be subsumed in a revamped rule.

327. *See* James Wm. Moore & Elizabeth B. A. Rogers, *Federal Relief from Civil Judgments*, 55 *YALE L.J.* 623, 623 (1946).

328. *See Klapprott v. United States*, 335 U.S. 601, 614–15 (1949).

329. *See supra* Part II.

330. *See* FED. R. CIV. P. 60 advisory committee’s note.

331. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 n.11 (1988).

sense to treat it that way. Rule 60(b)(6) does more than fill the gaps left by the grounds that come before it. It makes those grounds unnecessary.<sup>332</sup> By itself Rule 60(b)(6) invests courts with ample discretion to reopen judgments when necessary—too much discretion for some, perhaps,<sup>333</sup> but more than enough to make sections (1)–(5) superfluous. By itself, for example, Rule 60(b)(6) allows courts to reopen judgments procured by fraud—and not need section (1) or (3) to do it.<sup>334</sup> It should stand alone. At the very least this would simplify future case law.

And it would improve judicial practice. Rewriting Rule 60(b) would focus the courts' attention on a single reopening source, not on an array of prudent-but-redundant entries. It would also promote greater deliberative engagement, not in spite of Rule 60(b)'s open-textured standard, but because of it. This single extraordinary circumstances approach would stir a healthy public discourse, a richer judicial conversation about when and why to reopen final judgments overall.<sup>335</sup> Even more, it could help channel and air that discourse, inducing courts to “render decisions that make the adjudicator accountable and transparently responsible.”<sup>336</sup> Courts could still break time under Rule 60(b), reopening judgments when an attorney betrays his client, say, or when spoliated evidence emerges after the fact.<sup>337</sup> But judges would need to be clear and candid about what these *broken time* decisions actually are: assertions of institutional influence, manipulations of legal chronology, and modern expressions of a power courts have claimed so many times before.

#### B. TIME'S POWER RETOLD

Very few of those expressions have been loud or conspicuous. From *Calder* until now they have tended to be guarded and discreet—overshadowed by other matters, understated by an otherwise-divided Court.<sup>338</sup> Only rarely has the Court placed legal time at the analytical center—in *Linkletter*, say, and in *Plaut*—yet even there it has treated the issue as abnormal, segmented, and narrow. Far more often the Court has spoken about time quietly, treating its expressions of chronological power as unremarkable and incidental.

But these expressions were not accidental. The Court's earliest considerations of legal time were deeply sensitive to historical context, part of a careful but

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332. It would also obviate the need for separate rules regarding the time parties have to file. See FED. R. CIV. P. 60(c) (requiring that all Rule 60 motions be made “within a reasonable time,” but excluding all motions “for reasons (1), (2), and (3)” if filed “more than a year after the entry of the judgment”).

333. See 12 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 60.48[1] (3d ed. 2014) (deeming (b)(6) “a grand reservoir of equitable power” (internal quotation mark omitted)).

334. Cf., e.g., *Oparaji v. N.Y. Dep't of Educ.*, No. 1:00CV05953 ENVVVP, 1:02CV03900 ENVVVP, 2006 WL 2220836, at \*2 (E.D.N.Y. July 20, 2006) (“Plainly, as plaintiff's arguments go toward ‘excusable neglect’ under [Rule] 60(b)(1), he cannot seek relief under [Rule] 60(b)(6).”).

335. See Shiffirin, *supra* note 182, at 1217.

336. *Id.*

337. See Bloom, *supra* note 25, at 644.

338. See *supra* Part I.B.

deliberate attempt to “legitimize [a] new [national] regime.”<sup>339</sup> They were also cleverly imperial, veiled but unambiguous claims to unparalleled chronological authority.<sup>340</sup> This imperialist impulse did not dissipate in the days and decades that came later. Instead the impulse endured, galvanized, spread—weaving its way through new Justices and new doctrines; through *all time, some time, and broken time*; through *Hicks*, mootness and desuetude, retroactivity, and Rule 60(b); and through *Miranda*, *Grutter*, *Richard*, and *Willis* too. To be sure, these modern faces appear to capture something other than the courts’ chronological supremacy, at least at first. They concern pornography and affirmative action, the death penalty and discovery abuse.<sup>341</sup> But like *Calder* and *Ogden* before them, they also reveal an image in the background—a picture of the courts as the keepers of the law’s clock.

A fuller version of that picture is sketched out in the pages above. Those pages show the court’s chronological power as it runs through the full lifespan of a lawsuit: at the beginning of litigation, in ripeness and equitable tolling; at the end of litigation, in Rule 60 and judicial sunsets; and during and between litigation too, in mootness and transitional moments. Even more, those pages capture a kind of powerful push-pull. They capture courts advancing their own *time* authority in *Hicks* and *Linkletter*, and courts restricting the ability of others (like Congress) to intervene in *Plaut*. They witness courts treating time as strict and inflexible for Michael *Richard* and Rhonda *Willis*, and courts treating time as pliable and indulgent for the prosecutors charging Vincent *Miranda*.

Through it all, the judges in these settings have tended to rest their decisions on particular (and particularly plausible) foundations. They rely on finality in *Plaut* and Rule 60, on maxims of equity and our federalism in *Hicks* and *Younger*, on changed circumstances in mootness and desuetude, and on docket worries in *Linkletter*. They rest on tardy process in *Richard* and *Willis*, on respect for state courts in *Miranda*, and on social context in *Grutter*. And these judges, here as elsewhere, likely mean what they say.<sup>342</sup>

But there is more to this picture than these surface accounts. There is also a strong undercurrent of power and time, a slightly subterranean thread of institutional authority and the law’s clock. That thread parallels a more vivid and more prominent strand of “creeping judicial imperialism,” a tale at the very heart of “American constitutional history.”<sup>343</sup> In that tale, iconic cases like *Marbury*, *Lochner*, and *Brown* confirm the Court’s “imperialist impulses” and ensure our abiding interest.<sup>344</sup> And in that tale, the shape of judicial power takes center stage.

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339. LaCroix, *supra* note 4, at 1343.

340. *Id.* at 1348.

341. *See supra* Introduction.

342. *Cf.* Bloom, *supra* note 275.

343. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 544, 550 (1997).

344. *Id.* at 551.



The story of legal time—this story—has no iconic cases. And so, perhaps, it has claimed no enduring interest. But this subtler story is just as much about institutional power. And with its esoteric case law and far-flung applications, it merits sustained attention too. Like the more familiar (*Marbury*-based) court-power narrative, the story of legal time reaches back to the nation's beginning. It influences doctrines of all stripes and substance. And it sketches a vital line of structural authority, of institutional self-assurance, and, at its core, of judicial power. This is the line that this Article aims to bring to the surface. This is the story of the law's clock.

#### CONCLUSION

Some fifteen-hundred years ago, in his *Confessions in Thirteen Books*, Saint Augustine gave voice to a stubborn paradox of time. “If no one asks me, I know what [time] is,” he reflected, but if “I wish to explain it to him who asks me, I do not know [how].”<sup>345</sup>

Since Augustine's day, we have only kept trying to explain it. Our fascination with chronology has only intensified; our horological studies have only burgeoned in complexity and scope. What once concerned clever artisans and Cistercian monks now connects nineteenth-century philosophers<sup>346</sup> to twenty-first-century polymaths,<sup>347</sup> groundbreaking social historians<sup>348</sup> to insightful cultural anthropologists.<sup>349</sup> And yet, as our clocks get even sharper<sup>350</sup> and our lives get quicker still,<sup>351</sup> Augustine's core question remains unsettled: How do we make sense of time?

This Article offers one part of a legal answer. It studies legal time as a doctrinal feature, a varied concept, a unifying theme, and a tool of institutional power in and around the law. My claim is not that time explains the law fully or absolutely—as if, within our far-flung doctrine, we can root out some singular court commitment or some supreme legal design. My claim is instead more prudent and provable: I argue that time is an overlooked but essential element in modern law—a tool of power, punishment, and progress—and so we must take a more time-sensitive point of view.

This Article aims to anchor that new perspective. It surveys a wide swath of doctrinal territory, crafts a novel *time* typology, and offers some early suggestions for doctrinal reform. Here we see litigants like Michael Richard and Vincent Miranda, categories like *all time* and *some time*, proposals like rethinking desuetude and rewriting Rule 60(b). Here too we see courts at once attentive

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345. KERN, *supra* note 125, at 33 (internal quotation marks omitted).

346. *See id.*

347. *See, e.g.,* Eco, *supra* note 124, at 11 (“The fact is that we can measure time, but this gives us no guarantee that we understand what time is . . .”).

348. *See, e.g.,* Thompson, *supra* note 35.

349. *See, e.g.,* Greenhouse, *supra* note 104.

350. *See* LANDES, *supra* note 5.

351. *See* JAMES GLEICK, *FASTER: THE ACCELERATION OF JUST ABOUT EVERYTHING* (2000).

and inattentive to legal chronology, courts both creating and alleviating time pressure, aware and unaware of their immense chronological power. These points of study are meaningful, even essential—if still sadly underappreciated. But they are not the only ones. The aim of this Article is thus much broader and more hopeful than creative examination. The aim is to map new legal terrain, to open new lines of legal dialogue, and to recognize courts as our most powerful and persistent legal timekeepers. It is to call attention, at long last, to the vital phases and changing faces of the law's clock.