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Retroactive Adjudication

ABSTRACT. This Article defends the retroactive nature of judicial lawmaking. Recent Supreme Court judgments have reignited debate on the retroactivity of novel precedent. When a court announces a new rule, does it apply only to future cases or also to disputes arising in the past? This Article shows that the doctrine of non-retroactive adjudication offers no adequate answer. In attempting to articulate a law of non-retroactivity, the Supreme Court has cycled through five flawed frameworks. It has variously characterized adjudicative non-retroactivity as (1) a problem of legal philosophy; (2) a discretionary exercise for balancing competing right and reliance interests; (3) a matter of choice of law; (4) a remedial issue; and (5) a contingency of last resort. This Article rejects these paradigms and instead offers an alternative framework grounded in conventional common-law reasoning: that judicial precedent is inherently retroactive. The "equitable considerations" animating this body of law can best be fulfilled by judicial abandonment of non-retroactivity doctrine. Instead, courts should respond to "new" law by turning to a long-held value in our legal system: that equity aids the vigilant, not those who sleep on their rights.

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INTRODUCTION

The temporal scope of judicial decisions has long been "among the most difficult of those [issues] which have engaged the attention of courts."[1] When a court announces a new rule, does the new rule apply only to future cases or also to disputes arising in the past?

Over the past half century, the Supreme Court has addressed this temporal puzzle primarily through the lens of non-retroactivity doctrine. This doctrine, also known as "prospective overruling" of the law, defies the conventional conception of common-law adjudication whereby judicial decisions both bear upon past events and lay down the law for future cases. Non-retroactive adjudication constrains the effects of judicial changes in the law from applying to the past. Only events postdating a new precedent are treated as governed by it. Litigants' rights to legal recourse under this doctrine are thus determined according to the timing and outcome of any relevant leading case.

Federal non-retroactivity doctrine peaked during the Warren Court era. It now seems destined for demise before the Roberts Court. While scholars continue to argue that non-retroactivity is a useful paradigm, this Article contends that it is not. To the contrary, non-retroactive adjudication is a defective and superfluous doctrine. It lacks a coherent and generally accepted rationale. There is no agreement within the judiciary or academe as to how the doctrine should be conceived. Non-retroactivity cannot even perform its basic job: to rationalize and contain the temporal scope of novel precedent.

This Article advances an alternative framework for understanding novel precedent, one that returns to conventional common-law reasoning. This framework orients judges' focus toward the claims that come immediately before their courts—those over which they have direct jurisdiction. It embraces the retroactivity of judicial precedent. Disputes over rights, adjudicated by courts, can only be resolved from the perspective of hindsight, and they cannot feasibly be insulated from developments in precedent. Precedent today necessarily informs our understanding of past rights. That does not mean, however, that new rights of action are unlimited in temporal scope. Rather, interests of justice and fairness are embodied in long-recognized temporal limits on plaintiffs' rights to obtain relief from a court.

Supreme Court jurisprudence on the temporal scope of novel precedent has effectively been dormant since the mid-1990s.[2] But recent judgments have reignited the retroactivity debate. After the Supreme Court in *Obergefell v. Hodges* declared that the Fourteenth Amendment guarantees same-sex couples a right

1. Chicot Cty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940).

2. *See infra* Section I.D.

to marry,[3] attention turned to the judgment's remedial implications. Many scholars encourage "backdating" same-sex marriage to vindicate the rights of those previously denied the constitutional protection.[4] They argue, for example, that where a same-sex spouse passed away before *Obergefell* was handed down, courts should uphold the partner's claims to surviving-spouse pension benefits or to the primary share of the deceased's estate by treating the couple as retroactively married in law.[5] Others counsel restraining the judgment's retroactive effects to protect prior reliance interests and the finality of past transactions.[6] These scholars are concerned that, among other things, retroactive expansion of spousal property rights and liabilities under *Obergefell* would likely not have been anticipated and accounted for by same-sex couples—nor, indeed, by their creditors (who may gain access to newly deemed community property) or by those with whom they entered (now potentially voidable) transactions. Both of the competing "right" and "reliance" arguments are compelling.

A similar dynamic has followed the Court's decision in *Janus v. AFSCME*, which held that the deduction of union agency fees from nonconsenting public-sector employees violated the First Amendment.[7] Immediately following the judgment, plaintiffs sought to vindicate their newly announced rights through lawsuits filed across the country demanding recovery of fees paid before *Janus* was decided. Some scholars believe such plaintiffs have good constitutional and private-law grounds, given that *Janus* held that these fees were unconstitutional.[8] Others do not, on the grounds that agency fees "were indisputably

3. 576 U.S. 644, 675 (2015).

4. *See, e.g.*, Peter Nicolas, *Backdating Marriage*, 105 CALIF. L. REV. 395, 395-96, 425-41 (2017); Charles W. "Rocky" Rhodes, *Loving Retroactivity*, 45 FLA. ST. U. L. REV. 383 *passim* (2018); Kate Shoemaker, *Post-Deportation Remedy and* Windsor*'s Promise*, 63 UCLA L. REV. 168 *passim* (2016); Lee-ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of* Obergefell, 2016 WIS. L. REV. 873 *passim*; *see also* Michael J. Higdon, *While They Waited: Pre-*Obergefell *Lives and the Law of Nonmarriage*, 129 YALE L.J.F. 1, 1 (2019) (discussing how the courts must "wrestle with the question whether any portion of a pre-*Obergefell* relationship should count toward the length of the ensuing marriage").

5. *See, e.g.*, Nicolas, *supra* note 4, at 398, 402; Tritt, *supra* note 4, at 922.

6. *See, e.g.*, Andrea B. Carroll & Christopher K. Odinet, *Gay Marriage and the Problem of Property*, 93 WASH. U. L. REV. 847, 851-54 (2016); *see also* Huiyi Chen, *Balancing Implied Fundamental Rights and Reliance Interests: A Framework for Limiting the Retroactive Effects of* Obergefell *in Property Cases*, 83 U. CHI. L. REV. 1417, 1420, 1435-49 (2016) (describing the potential for "significant disruption of settled property interests due to the retroactive application" of *Obergefell*).

7. Janus v. Am. Fed'n of State, Cty. & Mun. Emps., 138 S. Ct. 2448 (2018), *overruling* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

8. *E.g.*, William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 172, 203 (2018).

lawful" *at the time of collection*.[9] Since fee refunds could bankrupt unions, these scholars would limit the retroactive effect of *Janus* to protect union coffers based on the unions' reasonable reliance on the state of the law at the time agency fees were collected.[10]

This tension between newly declared rights and reliance on prior established rights arises whenever a court "changes" the law as previously understood. Claims for restitution of unlawful taxes are another prominent example. When a court strikes down a taxing statute or overrules prior precedent, its new precedent presents plaintiffs with a compelling claim to a remedy for their unlawfully impinged rights.[11] Prima facie, plaintiffs are entitled to restitution of taxes improperly paid.[12] There should, after all, be no taxation without (valid) legislation. But defendant states and municipalities have a compelling counterargument: that their treasuries should not be vulnerable to extensive money claims based on interpretations of law that were not known at the time of collection.[13] The stakes are high. In the leading Supreme Court case on recovery of unconstitutional taxes, $1.8 billion of tax revenue hinged on the retroactivity of the Supreme Court's new precedent.[14] In the United Kingdom, £55 billion of tax revenue was thought to be at stake after tax provisions were retrospectively found to be incompatible with European Union law.[15]

Similar concerns arise when the public- and private-party interests are inverted. Where private entities have benefited from a precedent that is later overruled, states may be able to seek backward-looking remedies under the new precedent. For example, for half a century, federal doctrine exempted businesses that

9. Aaron Tang & Fred O. Smith Jr., *Can Unions Be Sued for Following the Law?*, 132 HARV. L. REV. F. 24, 24 (2018); *see also* Erwin Chemerinsky & Catherine L. Fisk, *Exaggerating the Effects of* Janus*: A Reply to Professors Baude and Volokh*, 132 HARV. L. REV. F. 42, 43-54 (2018) (arguing that unions are not retroactively liable under *Janus*).

10. *See* Chemerinsky & Fisk, *supra* note 9, at 53-54; Tang & Smith, *supra* note 9, at 30-37.

11. *See, e.g.*, McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 31-33 (1990).

12. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 19(1) (AM. LAW INST. 2011).

13. *See* Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 183 (1990) (plurality opinion) ("[W]e think it unjust to impose this burden [of retroactive tax refunds] when the State relied on valid, existing precedent in enacting and implementing its tax.").

14. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 130 (1993) (O'Connor, J., dissenting) ("The States estimate that their total liability will exceed $1.8 billion.").

15. Charles Mitchell, *End of the Road for the Overpaid Tax Litigation?*, 9 U.K. SUP. CT. Y.B. 1, 1 (2018).

had no "physical presence" in a state from state sales tax.[16] When the Supreme Court was invited in *South Dakota v. Wayfair* to overrule the physical-presence rule,[17] the respondent businesses implored judicial restraint, warning that overruling the long-standing precedent would "expose all remote sellers that have relied on the rule to retroactive liability in dozens, if not hundreds, or even thousands of jurisdictions."[18] The temporal repercussions of adjudication are pervasive, and managing them may seem irresoluble.

The solution to this puzzle does not lie in denying the retroactive effects of novel precedent. A familiar flaw in theories of non-retroactivity is failure to appreciate adjudication as a dynamic experience.[19] Part I of this Article shows that novel judgments do not simply replace "old" law with "new" law. Rules and principles are constantly subject to elaboration, challenge, and revision. Judgments do not apparate. They proceed from a background of complaint and litigation. The stakes are set long before issues reach a courtroom. In this context, novel judgments may be considered surprising, but they are never wholly a surprise. The protest that novel precedent unpredictably "changes" past law on which parties may have "relied" is thus overwrought. Since interpretation of law is not divisible into static points in time, adjudicating courts can only coherently understand past rights in light of prevailing law. Judicial precedent is by nature retroactive: there is no prospectivity puzzle at all.

This Article advances two core contributions to non-retroactivity scholarship. First, Part II challenges the prevailing rationales for non-retroactivity

16. *See* South Dakota v. Wayfair, 138 S. Ct. 2080, 2091-92 (2018) (describing the physical-presence rule and tracing it to Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967)); *see also* Quill Corp. v. North Dakota, 504 U.S. 298, 301-02 (1992) (declining to overrule *Bellas Hess*).

17. 138 S. Ct. at 2087-88.

18. Respondents' Brief in Opposition to Petition for Writ of Certiorari at 35, *Wayfair*, 138 S. Ct. 2080 (No. 17-494); *see Wayfair*, 138 S. Ct. at 2104 (Roberts, C.J., joined by Breyer, Sotomayor & Kagan, JJ., dissenting) (criticizing the majority for overruling the Court's established precedent when instead Congress could legislate and "provide a nuanced answer to the troubling question whether any change will have retroactive effect"); Michael T. Fatale, Wayfair*, What's Fair, and Undue Burden*, 22 CHAP. L. REV. 19, 34-35, 42-43 (2019) (discussing the possible retroactive effects of *Wayfair*); *cf.* Richard D. Pomp, Wayfair*: Its Implications and Missed Opportunities*, 58 WASH. U. J.L. & POL'Y 1, 14 (2019) (noting that "the states seem not to be applying *Wayfair* retroactively").

19. *Cf.* HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 63-65 (2013) [hereinafter DAGAN, RECONSTRUCTING] (discussing "the intrinsic dynamism of law"); Hanoch Dagan, *The Real Legacy of American Legal Realism*, 38 OXFORD J. LEGAL STUD. 123, 144 (2018) [hereinafter Dagan, *American Legal Realism*] (discussing how "law is a dynamic institution"). *But see* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 *passim* (1997) (considering how the dynamic nature of lawmaking implicates conceptions of retroactivity).

doctrine in federal law. It identifies in the case law and commentary several distinct frameworks. Each framework misconceives the essence of the temporal problem and relies on distinctions that are arbitrary and manipulable. Non-retroactive adjudication simply has no principled foundation.

Second, Part III offers an alternative framework grounded in conventional common-law reasoning: that judicial precedent is inherently retroactive. Since adjudication is dynamic, the essential question is not when it is that *law* is changed, but rather when it is that plaintiffs can "timely challenge" the validity of legal rules affecting them.[20] This inquiry—the time at which "novel" rights of action become justiciable—asks when a plaintiff incurred the complained-of harm. As a general matter, when a court finds with hindsight that there has been a violation of a plaintiff's right, the violation should be remedied according to prevailing law at the time of judgment. In most cases, that will be the end of the matter. In exceptional cases, where the extent of such relief would be unduly prejudicial to defendants, courts can invoke the equitable doctrine of laches, among other possible tools, to constrain the scope of litigation. After *Janus*, for example, a court might well be justified in limiting those who sued in *Janus*'s wake to a recovery period much shorter than that provided by the statute of limitations. Judges need not deny claims entirely by resorting to the sledgehammer of non-retroactivity doctrine. The response to "new" law advanced in this Article reflects a long-held value in our legal system: that equity aids the vigilant, not those who sleep on their rights.[21]

I. THE PUZZLE OF NOVEL PRECEDENT

Whenever a court delivers a novel precedent[22]—a judgment that determines a new rule of law or overrules a prior rule—the decision carries implications for

20. Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018); *see* Elizabeth Earle Beske, *Backdoor Balancing and the Consequences of Legal Change*, 94 WASH. L. REV. 645, 645 (2019) (describing *Lucia* as heralding the Court's "next big retroactivity challenge").

21. JAMES W. EATON, HANDBOOK OF EQUITY JURISPRUDENCE 52 (1901) ("Vigilantibus non dormientibus æquitas subvenit.").

22. This Article addresses only *adjudicative* (non-)retroactivity, not *legislative* (non-)retroactivity, which involves quite different considerations. *See* BEN JURATOWITCH, RETROACTIVITY AND THE COMMON LAW 67-118 (2008); CHARLES SAMPFORD, RETROSPECTIVITY AND THE RULE OF LAW 103-64 (2006); Neil Duxbury, *Ex Post Facto Law*, 58 AM. J. JURIS. 135, 158-61 (2013); J. Lyn Entrikin, *The Death of Common Law*, 42 HARV. J.L. & PUB. POL'Y 351, 424 (2019). *But cf.* Jonathan S. Masur & Adam K. Mortara, *Patents, Property, and Prospectivity*, 71 STAN. L. REV. 963, 997 (2019) ("There is no reason to deprive patent policymakers of the tool of prospective lawmaking just because those policymakers happen to be judges, rather than legislators or executive officials.").

similarly situated parties.[23] Some will seem to gain and others to lose substantive rights in light of the newly determined rule. Without some mechanism to limit the repercussions of adjudicative change, people, institutions, and courts may face considerable challenges reconciling parties' conflicting claims to rights.

This Part introduces the problems with novel precedent that have caused courts to entertain the idea of limiting their retroactive reach. It begins by outlining the puzzle of adjudication's temporal implications. It then addresses the retroactive nature of adjudication and sets the scope of this Article, before turning to summarize the development and decline of non-retroactivity doctrine over the past century.[24]

A. The Temporal Puzzle

The doctrine of stare decisis guides lower courts to follow precedent when issues reappear before them.[25] This reinforces the rule-of-law principle that like cases should be treated alike.[26] It is conceptually easy for a judge to apply precedent to resolve a dispute that arose *after* that precedent was delivered because no temporal conflict arises. It is harder when parties have ordered their affairs and conducted transactions on the basis of the law as it stood (or was understood) *prior* to a new precedent being delivered. In these cases, to apply a new rule of law that the parties did not appreciate at the time of their transaction would seem to undercut the parties' reliance interests. It is not clear that justice is served by applying new law to such antecedent claims.[27]

Kermit Roosevelt poses the problem this way: consider two parties who transact at Time 1. A dispute arises that, under the settled law at the time of transacting, would be resolved in favor of Party *A*, so Party *A* files suit. At Time 2, the Supreme Court delivers a novel precedent in another case that changes the relevant legal rule. It might do so by striking down a statute or overruling a

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23. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 216 (3d ed. 2000).

24. This Article does not draw a sharp distinction between the quite problematic terms "retroactive" and "retrospective," although some scholars do. *See* SAMPFORD, *supra* note 22, at 21-23 (noting that "this distinction is made by many" who write on the temporal implications of novel precedent, but claiming that "it is not as important as ordinarily assumed").

25. *See* William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 314-29 (2020) (contending that the Roberts Court has introduced elements of arbitrary discretion into modern stare decisis doctrine).

26. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 86 (1985); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33-34 (1921); *cf.* Andrei Marmor, *Should Like Cases Be Treated Alike?*, 11 LEGAL THEORY 27, 27 (2005) (arguing that the principle "like cases should be treated alike" is often confused with two other ideas: "the rationale of analogical reasoning in adjudication" and "the value of coherence").

27. *See infra* Section II.B.

precedent that had supported the earlier rule. This new precedent favors Party *B*'s position. At Time 3, the parties' dispute reaches a court. Should the court resolve the dispute by applying the rule prevailing at the time of the parties' transaction (Time 1) or at the time the court delivers its decision (Time 3)?[28] In other words, should the new rule influence the outcome of cases that arose before the rule was explicitly articulated?

For clarity, we can designate the parties to the Supreme Court's novel decision as the "principal" parties. Our concern is with the precedent's impact on other, "successive" parties. Applying the transaction-time law (so that Party *A* prevails) would seem to vindicate successive parties' reliance interests, whereas applying the decision-time law (so that Party *B* prevails) would seem to vindicate the parties' rights as understood in the law's best light. This scenario illustrates the problem that drives judicial non-retroactivity jurisprudence. The problem is not simply that applying a novel precedent to antecedent disputes subordinates the expectations that parties may have had about their rights and duties at the time of their transaction. The problem is that handing down such a precedent itself changes parties' expectations. The novel precedent gives Party *B* reason to expect to prevail where they otherwise might not have. And it does so for everyone in society who acted on the basis of the "old" law—the law as it was understood before the Supreme Court determined the principal parties' case. Thus, the problem with novel precedent is its tendency to disrupt people's expectations and beliefs about their rights and duties across society. People and institutions who planned, acted, or transacted at a time when the law was understood to be X come to be alerted that the law is $\neg X$. This creates potential for great disruption to future expectations and past transactions.

Huiyi Chen shows that similar problems arise when, varying Roosevelt's scenario, the "events or facts giving rise to the [successive plaintiff's] legal claim occur" at Time 1, and only *after* the new rule is delivered in the principal case at Time 2 does the plaintiff file suit.[29] This too is a hard case because the relevant legal rule changes between the time of the alleged wrong and the time the wrong is litigated. There are many reasons why people might not litigate until after a relevant rule changes in their favor, not the least of which is that while precedent stood against them, such parties would have thought they had a losing case. Much of the post-*Obergefell* and post-*Janus* litigation exemplifies this problem: that novel precedent can have cascading effects by inspiring other materially similar parties to pursue their own rights of action.

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28. Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1080-81 (1999).

29. Chen, *supra* note 6, at 1422-23*; see* David Lehn, *Adjudicative Retroactivity as a Preclusion Problem:* Dow Chemical Co. v. Stephenson, 59 N.Y.U. ANN. SURV. AM. L. 563, 565 (2004).

Roosevelt's scenario concerns the effects of novel precedent on *pending* cases before a court, and Chen's scenario, the effects on *subsequent* cases filed in court. In both scenarios, unfairness seems inescapable regardless of whether the successive court applies the new rule or the old rule to the dispute before it. Since in both scenarios, the underlying dispute arose at a time when the old rule apparently governed, each side can stand on either right or reliance to argue that their preferred rule should determine their dispute.[30] Each side can invoke notions of fairness[31] and efficiency[32] to support their argument. How should courts sort between applying old law and new?

B. Adjudication's Inherent Retroactivity

This Article's thesis is that this is the wrong question. That is because the "old"-law versus "new"-law framing rests on a false dichotomy. As Paul Mishkin recognized over half a century ago, this paradigm oversimplifies the adjudicatory role.[33] Adjudication is an inherently backward-looking exercise: cases can only come to the courts via (past) disputes that judges must (now) resolve.[34] In this

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30. *See infra* Section II.B.

31. *See* Chen, *supra* note 6, at 1435; Fisch, *supra* note 19, at 1085-86; Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515, 1560-61 (1998).

32. *See* SAMPFORD, *supra* note 22, at 221, 236-38; Fisch, *supra* note 19, at 1088-91; Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 520-66, 598-602 (1986) (evaluating strategies for managing legal transitions and contending that non-retroactivity of new rules is inefficient because market actors already absorb risks of legal change); *cf.* Jonathan S. Masur & Jonathan Remy Nash, *The Institutional Dynamics of Transition Relief*, 85 N.Y.U. L. REV. 391, 394 (2010) ("Recent commentary . . . questions the scope of Kaplow's claim. Scholars have pointed out that considerations of efficiency, incentives for socially desirable investments, governmental legitimacy, and fairness might justify legal transition relief."); Anthony Niblett, *Delaying Declarations of Constitutional Invalidity*, *in* THE TIMING OF LAWMAKING 299, 319 (Frank Fagan & Saul Levmore eds., 2017) (arguing that prospective constitutional remedies can mitigate some of the costs of legal transitions, which "may be socially valuable in particular circumstances"). *See generally* Kyle D. Logue, *Legal Transitions, Rational Expectations, and Legal Progress*, 13 J. CONTEMP. LEGAL ISSUES 211 *passim* (2003) (assessing the consequentialist transition frameworks that can account for adjudicative retroactivity).

33. *See* Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 56-60 (1965).

34. *See id.* at 60-72 (1965) (discussing institutional, symbolic, and functional explanations for adjudicative retroactivity); *see also* Herman Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 720-23 (1966) (partially criticizing Mishkin for failing to embrace a fully retroactive conception of adjudication); Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 838-62 (2003) (discussing the retroactive nature of the adjudicative function); Harry H.

context, there can be no clean separation between "old" law and "new." Interpretation of the law is not a static inquiry. It is informed by legal authorities that—themselves a product of adjudication—build over time. Judges interpret "old" law with hindsight from their present-day perspective, and they determine "new" law by ruling today on past disputes. This process inevitably generates contests in interpretive perspectives. The same judgment can be seen both as a (mere) evolution from prior law and as a (radical) change in the law.[35] The Supreme Court's judgments in *Obergefell*, *Janus*, and *Wayfair* exemplify the point. There is a real sense in which these judgments were "new" law: they overturned prior authorities and upheld rights previously unrecognized by federal precedent. But there is also a real sense in which these judgments were not new: they rested on long-developed constitutional authority (interpreting the Fourteenth Amendment, the First Amendment, and the Commerce Clause, respectively) and affirmed rights internalized by claimants, the judicial recognition of which had long been publicly pursued. The judgments did not suddenly appear one day out of a blue sky. Owing to the process of dispute and public litigation by which these cases rose through the courts, it cannot be said that these novel precedents, on the day they were handed down, would have taken any prudent observer of the law wholly by surprise.

Jill E. Fisch has explored how the dynamic nature of adjudication implicates conceptions of judicial retroactivity, and her work presents a model for analyzing the stability of rules of law.[36] Some legal rules can be understood as long-standing, settled, predictable, and oft-relied upon (and so in a "stable equilibrium"), while other rules are unpredictable and in a state of flux such that it would be

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Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 254-58 (1973) (discussing "whether a court, when dealing with a rule justified by a principle, may overrule a prior decision prospectively, or whether, as at common law, a retroactive overruling is required," and concluding that "the answer is retroactive or not at all"); Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 CONN. L. REV. 737, 763-77 (2012) (acknowledging that "[a]djudication is inherently backward-looking" because "[i]t addresses past events, and it does so primarily in light of previously existing law," but discussing how "common law adjudication always has been less past-oriented than is widely thought, and it has become even less so in recent decades").

35. *See* Fisch, *supra* note 19, at 1071 (considering the difficulty of "determining whether adjudication has created a new legal rule at all"); Mishkin, *supra* note 33, at 60 (noting that "even when 'new law' must be made, it is often in fact a matter of the court articulating particular clear implications of values so generally shared in the society that the process might well be characterized as declaring a preexisting law" (footnote omitted)); *infra* Section II.A.2.

36. Fisch, *supra* note 19 *passim*; *see also* Dagan, *American Legal Realism*, *supra* note 19, at 134 (describing how "legal discourse tends to develop in a pattern of repeated shifts . . . between periods of fixity and periods of innovation and change"); Hanoch Dagan, *Doctrinal Categories, Legal Realism, and the Rule of Law*, 163 U. PA. L. REV. 1889, 1904 (2015) (same).

unreasonable to assume they will not change (an "unstable equilibrium").[37] Retroactive law may be justified to bring certainty to unstable rules.[38] The opposite generally holds for stable rules: retroactive change tends to be unjustifiably disruptive.[39] This captures an essential distinction between legislation and judge-made law.[40] Legislation typically affects or overrides stable rules, hence the rule of law's general prohibition on retroactive legislation. By contrast, "adjudication will rarely disturb a stable equilibrium."[41] This is due to the restrained nature of the adjudicative process:

> The lawmaking power of the courts is restrained by their inability to control their lawmaking agenda in a way that the legislative power is not. Courts can make law only as a by-product of deciding cases and, for the most part, have little role in determining which issues come before them for decision. Within the context of deciding a particular case, courts are further constrained by the requirement that their rules be tied to an explicit text or to common law precedents. In either case, the reasoned elaboration that provides legitimacy to judge-made rules demands that a court employ accepted interpretive principles rather than making naked policy judgments.[42]

This seems right: judicial lawmaking is a backward-looking and comparatively modest lawmaking process. Fisch postulates, however, that a novel judgment would be "revolutionary" when it disrupts stable legal rules.[43] Fisch gives as examples "[d]ecisions in which the Supreme Court overrules its own precedent or fashions a new principle of constitutional law."[44] Such judicial

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37. *See* Fisch, *supra* note 19, at 1100-11 (developing these ideas).

38. *Id.* at 1109 ("The likelihood of legal change in an unstable equilibrium makes reliance on the legal status quo unreasonable and thereby mitigates potential fairness problems arising out of retroactivity."); *id.* at 1123 (explaining that in an unstable equilibrium, "retroactive lawmaking is an appropriate and efficient means of clarifying, correcting, and incrementally adjusting the regulatory climate").

39. *Id.* at 1105 (arguing that "[t]he existence of a stable equilibrium justifies the protection of reliance-based interests" via non-retroactive application of new rules).

40. *See id.* at 1118 ("[A]s a descriptive matter, revolutionary legal change is most commonly associated with the legislative process and . . . adjudicative lawmaking is typically evolutionary."); *see also* Rivers v. Roadway Express, Inc., 511 U.S. 298, 311-12 (1994) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." (quoting United States v. Sec. Indus. Bank, 459 U.S. 70, 79 (1982))).

41. Fisch, *supra* note 19, at 1107.

42. *Id.*

43. *Id.* at 1102 ("[W]e can associate disturbance of a stable equilibrium with revolutionary change. In an unstable equilibrium, evolutionary change is sufficient to produce a new position.").

44. *Id.* at 1107-08.

lawmaking, Fisch argues, more closely resembles legislating and warrants "the temporal flexibility of nonretroactivity."[45] Indeed, Fisch suggests that "constitutional change frequently disrupts a stable equilibrium," generating "substantial transition costs" that should not be compounded through retroactive application of novel precedent.[46]

On this point, this Article pushes back on Fisch's theory. Certainly, it is illuminating to consider the temporality of judge-made law in terms of stable and unstable equilibria. Some rules can be seen as more stable than others, and their stability may vary over time. But the move from stability to instability of judge-made law is more fluid than Fisch's theory suggests.[47] It is not obvious that "substantial force" is required for an apparently stable judicial rule to become unstable.[48] A rule progresses to instability when it becomes subject to question, good-faith disagreement, and ultimately litigation. Litigation itself can expose the façade of a stable equilibrium by publicly calling into question the current authoritative force of a rule. (This is not at all comparable to the legislative process. The process of proposing and debating a bill does not itself make current law more unstable, since it is clear that a bill is not law.) As dispute over a rule gains traction, and especially as the dispute works its way through and up the court system, the rule is surely in an unstable equilibrium.[49] Ultimately, an appellate court will be required to determine the state of the law to resolve the dispute. It will do so by employing accepted interpretive principles that are informed by legal authorities and assessing the dispute with retrospect to restore certainty over the issue and to reestablish stability.[50]

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45. *Id.* at 1108.

46. *Id.*

47. Equilibrium theory perhaps better explains legislative (non-)retroactivity than adjudicative (non-)retroactivity. Typically, when Congress enacts a statute to reform the law on some issue, it does so not because the superseded law was unclear or unstable, but because it was unpopular as compared to the newly enacted law. Such statutes should apply prospectively so as not to disturb the stable equilibrium of the prior law. By contrast, when a statute as enacted produces confused or unexpected interpretations, the law may be in an unstable equilibrium. The only way to restore stability may be for Congress to pass corrective or curative legislation with retroactive effect. *See id.* at 1105-18.

48. *See id.* at 1105 ("A stable equilibrium can be disrupted, but only through the application of substantial force."). Moreover, it may only be with the benefit of hindsight that we can assess the nature of the equilibrium at issue.

49. In adjudicating a novel claim, how can a court ever "conclude[] that the law is in a stable equilibrium" while the court's judgment is effecting "legal change . . . sufficient to disturb that equilibrium?" *Id.* at 1106. If the court is effecting "disruption" in the law, the law is surely in an unstable equilibrium.

50. Of course, ambiguity and uncertainty can never be fully expunged from the law, so expectations can never be completely stable. *See* Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303, 307-09.

The claim, in sum, is that due to the nature of adjudication, novel precedent is always the product of an unstable equilibrium. As such, it must operate under "a general rule of adjudicative retroactivity."[51]

C. Breadth of Non-Retroactivity Doctrine

There are four basic dimensions to adjudicative non-retroactivity doctrine in the United States:

- State/federal: U.S. Supreme Court precedent determines non-retroactivity doctrine for the federal courts only. Each state's final appeals court is competent to determine the temporal implications of its own jurisdiction's judgments.[52]

- Criminal/civil: Courts and commentators tend to distinguish between criminal and civil cases when assessing the retroactivity of a new rule. In the penal context, there is a further distinction between collateral review (e.g., habeas petitions) and cases brought on direct appellate review.[53]

- Relief sought: A distinction is drawn between whether a remedy sought is forward-looking (e.g., injunctive relief) or backward-looking (e.g., damages or restitution). Ceteris paribus, courts that express concern about the retroactivity of their decisions tend to view forward-looking relief more favorably than backward-looking relief.[54]

- Temporal era: The prominence of, and preference for, non-retroactivity doctrine has waxed and waned over the past century. Judicial enthusiasm for non-retroactive adjudication peaked during the Warren Court

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51. Fisch, *supra* note 19, at 1110.

52. Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932).

53. *See, e.g.*, Welch v. United States, 136 S. Ct. 1257, 1264 (2016); Johnson v. United States, 520 U.S. 461, 467 (1997); Teague v. Lane, 489 U.S. 288, 310 (1989); Griffith v. Kentucky, 479 U.S. 314, 328 (1987); Peter Bozzo, *What We Talk About when We Talk About Retroactivity*, 46 AM. J. CRIM. L. 13, 13 (2019) (discussing the doctrine concerning new rules of criminal law or procedure, noting that the Supreme Court's case law is a "mess," but peculiarly arguing that "[t]he theoretical incoherence of [non-]retroactivity doctrine is its greatest strength").

54. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 677 (1974) ("[A] federal court's remedial power [in a § 1983 action], consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury . . . ." (first citing *Ex parte* Young, 209 U.S. 123 (1908); and then citing Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459 (1945))). *But cf.* Wellington, *supra* note 34, at 254-58 (critiquing non-retroactivity doctrine's distinction between forward- and backward-looking relief).

era.[55] It has since been in decline and it seems likely to be disfavored by the current Roberts Court,[56] even while U.S. non-retroactivity doctrine is increasingly influencing foreign common-law appellate courts.[57]

Judicial non-retroactivity doctrine has particularly struggled to manage federal civil cases in which plaintiffs seek backward-looking monetary relief. Courts have strained to resolve such claims when brought in the light of a change in relevant law (subsequent cases) or in anticipation of a change (pending cases). It is these cases with which this Article is concerned.

This Article does not venture to resolve the full breadth of issues that arise from judicial non-retroactivity doctrine. It does not directly address temporal issues at the state level, issues in the criminal context, or issues concerning injunctive relief. That said, non-retroactivity doctrine in these contexts has often intersected with the doctrine regarding federal civil monetary claims. In this respect, the insights proffered in this Article may aid reassessments of non-retroactivity doctrine in other contexts. While those contexts warrant full consideration on their own merits, for the purposes of this Article, the relevant intersections can be briefly summarized.

First, state courts have tended to look to U.S. Supreme Court precedent in formulating and assessing their own comparable doctrines. The persuasive force of federal precedent in this area seems, however, to be waning. Today, non-retroactivity doctrine is on the whole more strongly maintained at the state level than it is at the federal level.[58]

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55. Roosevelt, *supra* note 28, at 1079, 1093.

56. The idea that judgments create "new" law controverts Chief Justice Roberts's (in)famous "balls and strikes" adjudicative philosophy. *See* Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991, 995, 1047 (2009). Prior to being elevated to the Supreme Court, then-Judge Gorsuch delivered an opinion for the Tenth Circuit Court of Appeals in which he opined that "the presumption of retroactivity attaching to judicial decisions was anticipated by the Constitution and inheres in its separation of powers" and noted that the Supreme Court "barely tolerate[s] the practice [of rendering purely prospective judicial decisions] in the civil arena." De Niz Robles v. Lynch, 803 F.3d 1165, 1170 (10th Cir. 2015); *see also* Barr v. Am. Ass'n of Political Consultants, Inc., 140 S. Ct. 2335, 2366 (2020) (Gorsuch, J., concurring in the judgment in part and dissenting in part) (criticizing Justice Kavanaugh's plurality opinion for entertaining non-retroactivity as an adjudicative option when "prospective decisionmaking has never been easy to square with the judicial power"). Justice Scalia, whose seat Justice Gorsuch filled, considered prospective overruling "impermissible simply because it is not allowed by the Constitution." James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 548 (1991) (Scalia, J., concurring in the judgment).

57. The influence has, though, been modest and incremental. *See infra* note 173.

58. *See* Richard S. Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 AM. J. COMP. L. SUPPLEMENT 37, 42, 50 (2014); Stephen J. Hammer, Note, *Retroactivity and Restraint: An Anglo-American Comparison*, 41 HARV. J.L. & PUB. POL'Y 409, 430 (2018).

Second, the Supreme Court developed its criminal non-retroactivity doctrine broadly in tandem with its civil counterpart. Section I.D outlines the doctrinal progression. This Article's thesis is that judge-made law is inherently retroactive, but judges may resort to tools other than non-retroactivity that limit plaintiffs' ability to reopen old cases under new law.[59] It complements Herman Schwartz's thesis that, in an early reply to Mishkin, criticized theories of adjudication that fail to embrace retroactivity fully.[60] This position is broadly consistent with the Supreme Court's modern trend toward affording new rules of criminal law retroactive application while maintaining procedural limits on collateral rehearing of concluded cases.[61]

Third, as to remedies, damages tend to operate retroactively (compensating for past loss), whereas injunctions tend to bear upon the defendant's prospective conduct.[62] Many suits in which non-retroactivity doctrine arises concern claims both for backward-looking monetary awards and for forward-looking injunctions. The cases concerning unconstitutional taxes, discussed further in Section II.B, are prime examples. In *American Trucking Ass'ns v. Smith*,[63] for example, the Supreme Court sanctioned an injunction against the defendant state from

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59. *See infra* Part III.

60. Schwartz, *supra* note 34, at 752 ("[N]ewly declared constitutional criminal procedure rights are not newly conceived or newly relevant. Rather, they reflect fundamental principles of our legal system—principles implicit in the concept of ordered liberty. Regardless, then, of when it took place, a trial conducted in a manner inconsistent with these principles should not be permitted to stand."); *cf. id.* at 746 (noting, as a constraint, that "cases in which a guilty plea was entered are generally immune from collateral attack").

61. *See, e.g.*, McKinney v. Arizona, 140 S. Ct. 702, 709 (2020) (holding that state courts can reweigh aggravating and mitigating sentencing circumstances in collateral-review proceedings in light of new law); Welch v. United States, 136 S. Ct. 1257, 1261-62, 1268 (2016) (applying a new substantive constitutional rule as to criminal sentencing retroactively on collateral review). The Supreme Court nevertheless continues to recognize "a separate non-retroactivity doctrine" under habeas corpus review, pursuant to which new constitutional rules are presumed not to apply retroactively unless they are "substantive" rules or "watershed" procedural rules. Ramos v. Louisiana, 140 S. Ct. 1390, 1419 (2020) (Kavanaugh, J., concurring in part) (discussing Teague v. Lane, 489 U.S. 288 (1989)); *see* Steven W. Allen, *Toward a Unified Theory of Retroactivity*, 54 N.Y.L. SCH. L. REV. 105, 110-12 (2009); *cf. Ramos*, 140 S. Ct. at 1437 (Alito, J., dissenting) (criticizing Justice Kavanaugh for opining on this subject in the case "without briefing or argument," and questioning the "new"-rule versus "old"-rule premise upon which the *Teague* test rests). The Supreme Court will revisit this exception to retroactivity in *Edwards v. Vannoy*, No. 19-5807 (Nov. 30, 2020) (hearing argument on the question "[w]hether this Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), applies retroactively to cases on federal collateral review").

62. *Cf.* Edelman v. Jordan, 415 U.S. 651, 677-78 (1974) (denying injunctive relief that would have had the effect of ordering retroactive payment of benefits from a state, where the state conceded that *prospective* injunctive relief was valid).

63. 496 U.S. 167 (1990) (plurality opinion).

continuing to collect an unconstitutional tax but denied claims for monetary relief for previously collected taxes. In the view of the Court's plurality, equitable considerations favored forward-looking relief but weighed against retroactive remedies.[64]

Finally, beyond the scope of this Article — yet of great importance — is the influence of U.S. non-retroactivity doctrine on foreign jurisdictions. In 2014, the Nineteenth Congress of the International Academy of Comparative Law gathered in Vienna to review the subject of judicial prospectivity. In her report following the Congress, General Reporter Eva Steiner summarized how "common and civil law jurisdictions have had to reflect in recent years on the possible introduction in their legal systems of the well-established [U.S.] practice of prospective overruling."[65] This Article shows that, far from "well-established," the doctrine of prospective-only overruling in the United States is in decline. Moreover, it argues that abandonment of the doctrine is justified. Foreign jurists inclined to look to U.S. practice in this area should adopt a more critical gaze.

D. The Rise and Fall of Federal Non-Retroactivity Doctrine

The development and decline of non-retroactivity doctrine over the past century are well documented.[66] A summary is sufficient to provide context.

It has become conventional to explain judicial non-retroactivity as having progressed through a distinctive arc. As Stephen Hammer summarizes, the practice of prospective-only overruling "found acceptance in the 1930s, escalated in the 1960s, fell into disfavor in the 1980s, and was strictly curtailed in the 1990s."[67] This arc emerged from "the old days of the common law," when jurists

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64. *Id.* at 198-200.

65. Eva Steiner, *Judicial Rulings with Prospective Effects: From Comparison to Systematisation*, *in* GENERAL REPORTS OF THE XIXTH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 15, 16 (Martin Schauer & Bea Verschraegen eds., 2017).

66. *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 54-55 (7th ed. 2015); Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. REV. 808, 826-43 (2018); Beske, *supra* note 20, at 651-73; Bozzo, *supra* note 53, at 28-59; Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1738-58 (1991); Hammer, *supra* note 58, at 413-26; Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 972-79 (2006); Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1348-67 (2010); Rhodes, *supra* note 4, at 390-403; Daniel B. Rice & John Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865, 894-97 (2019); Roosevelt, *supra* note 28, at 1081-1103; Shannon, *supra* note 34, at 816-833; Stephens, *supra* note 31, at 1517-58.

67. Hammer, *supra* note 58, at 413.

embraced the declaratory theory of adjudication.[68] Scholars have often attributed the declaratory theory to Lord Coke,[69] but it is most commonly associated with Sir William Blackstone, who asserted "that judges are 'not delegated to pronounce a new law, but to maintain and expound the old one,' and that when courts are called upon to overturn an existing precedent, they 'do not pretend to make a new law, but to vindicate the old one from misrepresentation.'"[70] In its strong form, the declaratory theory holds, in the words of Justice Story, that judicial decisions "are, at most, only evidence of what the laws are, and are not, of themselves, laws."[71] From this perspective, judges have no power to constrain the retroactive nature of their judgments because judging is an inherently backward-looking exercise. The judge's role is to resolve disputes that arose in the past, and in so doing, the judge cannot escape making determinations on what the law was (*past-tense*) that governed. Retroactivity is inherent in the judicial function. As Justice Holmes opined, "Judicial decisions have had retrospective operation for near a thousand years."[72]

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68. Roosevelt, *supra* note 28, at 1077.

69. This attribution appears to be predicated on a widespread belief that Lord Coke wrote, "It is the function of a judge not to make, but to declare the law, according to the golden metewand of the law and not by the crooked cord of discretion." *See, e.g.*, Anastasoff v. United States, 223 F.3d 898, 901 (8th Cir.), *vacated on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000); Kansas v. Farry, 23 Kan. 731, 733 (1880); LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION 106-07 & n.254 (2019); Allen, *supra* note 61, at 107 & n.13. Despite much investigation, however, I have been unable to locate this quotation within Lord Coke's corpus. Lord Coke did say, "A good caveat to Parliaments to leave all causes to be measured by the golden and streight metwand of the law, and not to the incertain and crooked cord of discretion." EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 41 (London, M. Flesher, for W. Lee, and D. Pakeman 1644). But this is no clear endorsement of the declaratory theory.

70. Allen, *supra* note 61, at 107 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69); *see* Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 907-08 (1962); *see also* MATTHEW HALE, HISTORY OF THE COMMON LAW 67 (Charles Runnington ed., London, W. Strahan & M. Woodfall, for T. Cadell 4th ed. 1779) ("[English courts cannot] make a law, properly so called, (for that only the king and parliament can do); yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times; and though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons, as such, whatsoever.").

71. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see* Kay, *supra* note 58, at 38 ("Joseph Story, a preeminent early American legal authority, embraced this idea with enthusiasm.").

72. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting); *cf.* Gerald J. Postema, *Philosophy of the Common Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 588, 589 (Jules L. Coleman, Kenneth Einar Himma & Scott J. Shapiro eds., 2004) (noting that "[l]egal historians widely agree that before the eighteenth century there was no firm doctrine of *stare decisis* in English common law").

Belief in the declaratory theory of adjudication was shaken with the rise of legal realism. Two famous judgments in the 1930s encapsulated a new era of adjudicative reconceptualization. In *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, the Supreme Court considered for the first time the constitutionality of a state court's decision to make its ruling non-retroactive.[73] Justice Cardozo held that a state was competent to determine the temporal reach of its judgments according to "the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature," and "the federal constitution," he held, "has no voice upon the subject."[74] State courts have, accordingly, since developed a spectrum of doctrines that guide whether state laws should be "*Sunburst*-ed" so that their novel precedents apply only prospectively.[75]

In *Erie Railroad Co. v. Tompkins*,[76] the Supreme Court repudiated the notion that judgments merely evince "an unchanging common law; instead, it recognized that the common law was nothing more than [judges'] decisions."[77] In disclaiming any power of federal courts to determine state-law issues according to a general federal common law, *Erie* threw into doubt the soundness of the federal courts' many prior judgments resolving issues in diversity jurisdiction unconstrained by state common law. *Erie* stood for the proposition that overruling created new law. This meant that "law could change; law could die"—insights that exposed "the false unity of the Blackstonian model."[78] A new problem thus became salient: What law was to be applied to events that took place before the date of a law-changing decision?

The federal courts found their voice on this problem in the 1960s, as judges grappled with the temporal implications of the Warren Court's landmark criminal-procedure judgments. After the Supreme Court determined in *Mapp v. Ohio* that evidence obtained in violation of a defendant's Fourth Amendment rights was inadmissible in state courts,[79] the problem arose as to whether this

73. 287 U.S. 358 (1932); *see* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 301-05 (1960).

74. 287 U.S. at 364-65; *cf.* Rowan v. Runnels, 46 U.S. (5 How.) 134, 139 (1847), *cited in* Kay, *supra* note 58, at 46.

75. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 604-08 (1994); Hammer, *supra* note 58, at 430; Kay, *supra* note 58, at 42, 50.

76. 304 U.S. 64 (1938); *see* HART & SACKS, *supra* note 75, at 608-09.

77. Roosevelt, *supra* note 28, at 1078; *see* Richard S. Kay, *Construction, Originalist Interpretation and the Complete Constitution*, 19 U. PA. J. CONST. L. ONLINE 1, 10 n.47 (2017) (referring to *Erie* as "the now prevalent positivist view").

78. Roosevelt, *supra* note 28, at 1088; *see* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 570-79 (2019) (discussing *Erie*).

79. 367 U.S. 643, 655 (1961).

exclusionary rule could aid persons already convicted. The Supreme Court in *Linkletter v. Walker* held by a majority that "in appropriate cases the Court may in the interest of justice make [a new] rule prospective."[80] Balancing factors of purpose, reliance, and effect of the new rule,[81] the Court determined that *collateral-review* proceedings were appropriately met by treating new rules as non-retroactive. In *Stovall v. Denno*,[82] the Court anointed the method of "selective" prospectivity by holding that new rules must apply to the cases in which they are announced, but that cases brought by *direct appellate review* in the wake of a new rule would be resolved according to *Linkletter*'s balancing inquiry. The Burger Court extended this non-retroactivity precedent to civil cases. In *Chevron Oil Co. v. Huson*, the Court articulated a three-factor test to guide courts in determining whether a new legal rule should apply retroactively.[83] This test—which has since been borrowed by many state courts—considers:

> (1) whether the decision to be applied non-retroactively establishes a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression;
>
> (2) if, in light of the new rule's purpose and effect, retrospective operation would further or retard its operation; and
>
> (3) the extent of the inequity imposed by retroactive application, namely the injustice or hardship that would be caused by retroactive application.[84]

Non-retroactivity doctrine has always divided courts[85] and commentators,[86] and it ultimately fell out of favor with the Rehnquist Court. The Court first returned to applying its precedent retroactively in criminal cases on direct review. In such cases, it had become too difficult for the Court to justify giving remedial relief to a successful criminal appellant through a selective prospective overruling

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80. 381 U.S. 618, 628 (1965).

81. *Id.* at 636; *see* Roosevelt, *supra* note 28, at 1090.

82. 388 U.S. 293, 300-01 (1967).

83. 404 U.S. 97, 106-07 (1971).

84. Kay, *supra* note 58, at 42.

85. Justice Harlan spearheaded judicial opposition in the Supreme Court. *See* Fallon & Meltzer, *supra* note 66, at 1743; Kay, *supra* note 58, at 57.

86. *See, e.g.*, Thomas E. Fairchild, *Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or "Sunbursting,"* 51 MARQ. L. REV. 254, 269 (1968) ("[I]t is not always possible nor wise to pull a rabbit out of the hat."); Roosevelt, *supra* note 28, at 1090 ("The *Linkletter* analysis is deeply unsatisfying.").

that would deny relief to other similarly situated parties.[87] Not long after, the Court also turned against non-retroactivity in civil cases. In a series of judgments concerning claims for restitutionary relief from unconstitutional state tax laws, a majority of the Court disclaimed an inherent power to adjudicate non-retroactively,[88] denounced selective prospectivity,[89] and endorsed a presumption that retroactivity is "overwhelmingly the norm."[90] The Court left room for "pure" prospective overruling—wherein the Court would deny retroactive relief even to the party who brings the novel claim—but the current Roberts Court majority does not seem inclined toward it.[91] The strong presumption now, articulated in *Harper v. Virginia Department of Taxation*, is that

> [w]hen [the Supreme] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule.[92]

We have reached a point where non-retroactivity doctrine has lost favor in U.S. federal courts,[93] although it remains popular with many legal scholars. It is employed to different degrees in state courts.[94] And it is gaining traction in

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87. Griffith v. Kentucky, 479 U.S. 314, 327-28 (1987). The Supreme Court continues, however, to recognize a separate non-retroactivity doctrine under habeas corpus review. *See supra* note 61.

88. Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 222 (1990) (Stevens, J., dissenting) ("When the federal courts have no equitable discretion, we have held a federal court has no authority to refuse to apply a law retroactively."); *id*. at 201 (Scalia, J., concurring).

89. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993).

90. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535 (1991) (opinion of Souter, J., joined by Stevens, J.); *see also* McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 32 (1990) (discussing "the scope of a State's obligation to provide retrospective relief" for unconstitutionally exacted taxes); Renée Burbank, *Illegal Exactions*, 87 TENN. L. REV. 315, 331 & n.81 (2020) (identifying *McKesson Corp.* as signaling the Supreme Court's abandonment of non-retroactivity doctrine in unlawful government-exaction cases).

91. *See supra* note 56 and accompanying text.

92. 509 U.S. at 97; *see* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 752 (1995) (affirming *Harper*); Landgraf v. USI Film Prods., 511 U.S. 244, 279 n.32 (1994) (characterizing *Harper* as "establish[ing] a firm rule of retroactivity").

93. Beske, *supra* note 20, at 647; *cf.* Masur & Mortara, *supra* note 22, at 1016 & n.263 (noting that some federal courts have interpreted *Harper* to permit courts to "issue purely prospective rulings, so long as they do not apply those rulings to the parties who brought the case"); Elliot Watson, *The Revival of Reliance and Prospectivity:* Chevron Oil *in the Immigration Context*, 36 SEATTLE U. L. REV. 245, 261-64 (2012) (describing a case in which the Ninth Circuit applied the *Chevron Oil* test but characterizing its approach as "an exception to the general rule").

94. *See* Hammer, *supra* note 58, at 430; Kay, *supra* note 58, at 42, 50.

foreign courts.[95] Following the arc of federal non-retroactivity doctrine, it would seem that "[t]he end of all the Court's explorings has been to arrive, more or less, where it started."[96]

II. NON-RETROACTIVITY FRAMEWORKS

The decline of federal non-retroactivity doctrine can be explained in part by widespread dissatisfaction with the prevailing frameworks that have sought to justify it.[97] There is no agreement within the judiciary or academy as to how the doctrine should be conceived. Jurists have grappled with firm rules, discretionary balancing tests, and strong presumptions, and no approach has won consensus.[98] Instead, from the case law and commentary we can distill five distinct frameworks for understanding the doctrine. These frameworks are not mutually incompatible but are instead different conceptual perspectives on the problem. This Part describes and critiques these frameworks by way of a prelude to Part III's rights-based understanding of law's temporal reach.

A. Legal-Philosophical Framework

Courts and commentators commonly frame the temporal implications of adjudication as reflecting "one of the great jurisprudential debates" about the nature of law.[99] Namely, do judges "find" or "make" law? The notion of finding law is said to hew to natural-law philosophy; and making law, to legal positivism and legal realism. The predominant view today is that judge-made law is law made by judges; that the declaratory theory of adjudication is dead; and so when judges create law there is no philosophical objection to applying their new law only to future events.

Such framing is open to several objections, as addressed below. In brief, first, despite contentions to the contrary, it is not absurd to suggest that legal norms — like social norms — can be "found" independent of formal sources.[100] Second, it

95. *See infra* notes 141-150.

96. Roosevelt, *supra* note 28, at 1103; *see* Allen, *supra* note 61, at 106 ("[T]he Supreme Court has completely remade [retroactivity doctrine] twice in the last fifty years, casting off the existing practice to replace it, all at once, with a completely new and comprehensive approach to the problem.").

97. Roosevelt, *supra* note 28, at 1104.

98. *See* Lehn, *supra* note 29, at 572-73.

99. *See, e.g.*, Beavers v. Johnson Controls World Servs., Inc., 881 P.2d 1376, 1377 (N.M. 1994); Hammer, *supra* note 58, at 430-32.

100. Sachs, *supra* note 78, at 527.

is not clear that resolving the jurisprudential debate bears on the question of retroactivity. Critics often fail to appreciate that the declaratory theory is not hostile to legal-positivist and realist outlooks: judges can be seen to *make* law through *declaring* the rules and principles that govern disputes before them. Conversely, natural-law philosophy is not necessarily incompatible with non-retroactivity. Indeed, principles of natural law seem to be just as readily invoked to support prospective adjudication. Thus, the legal-philosophical debate is largely orthogonal to the question of retroactivity. And third, the legal-philosophical framework invariably descends into intractable debate.[101] As the following discussion elucidates, it is not a feasible framework for settling the temporal implications of adjudication.

1. Description

The idea that common-law principles or right interpretations of statutes might preexist their articulation in judicial decisions is associated with Blackstone's natural-law tradition. Blackstone described judges as "the living oracles" of the common law who were "sworn to determine, not according to [their] own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound an old one."[102] John Austin's positivist theory challenged this idea by maintaining that judges do make law when they pronounce new rules or overturn past judgments. Austin considered it a "childish fiction employed by our judges . . . that . . . common law is not made by them, but is a miraculous something made by nobody, existing . . . from eternity, and merely declared from time to time by the judges."[103]

The Supreme Court has long employed this philosophical contest to frame the problem of judicial retroactivity. In *Sunburst Oil*, Justice Cardozo alluded to the Blackstonian theory when he said that a state court delivering novel precedent may "hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration," so that when overruling past precedent, "the discredited declaration will be viewed as if it had never been,

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101. *See* KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 361 (1962) ("Do the judges find the law *or* do they make it? If you pose this question in the world of correct—or incorrect—doctrine, you enter a never-ending battle."); Deryck Beyleveld & Roger Brownsword, *The Practical Difference Between Natural-Law Theory and Legal Positivism*, 5 OXFORD J. LEGAL STUD. 1, 22-23 (1985) (suggesting that the debate between positivism and natural-law theory is only conceptually, but not practically, significant); Tim Kaye, *Natural Law Theory and Legal Positivism: Two Sides of the Same Practical Coin?*, 14 J.L. & SOC'Y 303, 317-18 (1987) (suggesting that the debate may no longer even be conceptually significant).

102. 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

103. 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 634 (Robert Campbell ed., London, John Murray 5th ed. 1885).

and the reconsidered declaration as law from the beginning."[104] In other words, a state court could apply its new rules retroactively on the premise that they expound what was always the correct view of the law. But if a state court's "juristic philosophy" aligned with Austin's theory, it could choose to adopt non-retroactivity and "say that decisions of its highest court, though later overruled, are law [nonetheless] for intermediate transactions."[105]

The Court in *Linkletter* explicitly framed the problem as a contest between Blackstone and Austin. Justice Clark for the Court cited Blackstone's *Commentaries* as grounding the declaratory theory of adjudication, and with it the idea that an overruled decision "was thought to be only a failure at true discovery and was consequently never the law."[106] By contrast, Justice Clark noted, "Austin maintained that judges do in fact do something more than discover law; they make it interstitially by filling in with judicial interpretation the vague, indefinite, or generic statutory or common law terms that alone are but the empty crevices of the law."[107] Past precedent thus remains "an existing juridical fact until overruled" and so "intermediate cases finally decided under it are not to be disturbed."[108] Rather, new judge-made rules can be applied prospectively. Justice Clark characterized Austin's theory as ascending in acceptance among courts and commentators, and Blackstone's philosophy as a theory in decline. He concluded that "there seem[ed] to be no impediment—constitutional or philosophical—to the use of" prospective overruling of past precedent.[109] The Court was "neither required to apply, nor prohibited from applying, a decision retrospectively."[110]

Those who invoke legal philosophy to frame the temporal scope of novel precedent tend to assume three propositions. The first is that the declaratory theory rests on the implausible notion that judges only "find" law.[111] The theory, it is said, presupposes that "law is objective and constant. It exists 'out there,'

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104. Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 365 (1932) (citations omitted).

105. *Id*. at 364.

106. Linkletter v. Walker, 381 U.S. 618, 623 (1965) (citation omitted).

107. *Id*. at 623-24.

108. *Id*. at 624.

109. *Id*. at 628.

110. *Id*. at 629.

111. John Martinez, *Taking Time Seriously: The Federal Constitutional Right to Be Free from "Startling" State Court Overrulings*, 11 HARV. J.L. & PUB. POL'Y 297, 301 (1988) ("According to the now-outdated 'declaratory' or 'Blackstonian' theory, courts merely 'found' the law rather than 'made' it. . . . The modern theory of judicial decision-making, often attributed to Professor Austin, acknowledges that courts make law; they do not simply find it.").

waiting to be 'found' by a court."[112] Consider a typical characterization of what it means for judges to declare the law:

> The declaratory theory of the common law is the hypothesis that judges who decide cases (when they are not following precedents, obeying rigid rules of evidence, or interpreting and applying statutes) do not make but instead find law. In other words, the declaratory theory is that what is now commonly called "judge-made law" is actually preexisting law that judges discover and not something that they create.[113]

It follows that in novel cases, judges do not wield discretion to legislate new rules. Rather, they draw on principles ascertainable generally in the body of law to elucidate that which is not clearly posited in the legal sources. Retroactive adjudication hangs on the assumption that every rule of law preexists its articulation by a court. But Austin blew up this assumption and with it the rationale for adjudicative retroactivity.

A second common proposition is that the declaratory theory of adjudication is rooted in natural-law philosophy and subsists in conflict with legal positivism. That law may be found through the "ethical intuitionism" of the judges aligns the theory with natural law.[114] That law may be found outside of the legal sources chides against the central tenet of legal positivism. The "counterpart" to the declaratory theory, then, "is the positivist theory, which acknowledges that courts do indeed make law."[115] Judge-made law under this theory can be "new." And as such, it need not govern "old" disputes, but can be applied only prospectively. Thus, it is said that Blackstone and Austin represent "two opposing jurisprudential theories of retroactivity."[116]

A third proposition is that the legal system has outgrown the declaratory theory. The debate is over: judges make law. The adjudicatory function must, then, be conceived through a positivist or realist lens. It is often said that "[i]f the declaratory theory of the common law was ever truly believed in, it is no

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112. Lehn, *supra* note 29, at 574.

113. Brian Zamulinski, *Rehabilitating the Declaratory Theory of the Common Law*, 2 J.L. & CTS. 171, 171 (2014).

114. *Id*.

115. Lehn, *supra* note 29, at 576.

116. Chen, *supra* note 6, at 1421; *see* Andrew J. Bowen, *Fairy Tales and the Declaratory Theory of Judicial Decisions*, 1999 SCOTS L. TIMES 327, 328 (referring to "two competing theories of judicial decision making, the declaratory theory and the change theory"); LaCroix, *supra* note 66, at 1349 ("[T]he majority of the Supreme Court's cases dealing with adjudicative retroactivity view the choice of retroactivity as implicating the dichotomy between what the Court has termed the Blackstonian or 'declaratory' model of law and the Austinian or 'positive law' model."); Martinez, *supra* note 111, at 301.

longer."[117] Criticisms of the declaratory theory—and of jurists who lend it credence—have become frequent and blunt to the point of condescension. The predominant view is that the declaratory theory is a "myth,"[118] a "fiction,"[119] a "fairy tale,"[120] a "nightmare,"[121] and an "ancient dogma"[122] that is "inherently circular," excessively "formalist," and "antiquated."[123] The idea that "judges do no more than discover the law that marvelously has always existed, awaiting only the judicial pen that would find the right words for all to heed" is "moonspinning."[124] It also "lacks the virtue of being true."[125] The claim that courts find law is said to be "routinely contravened" by judges and is "less and less useful each day."[126] The theory has been "ridiculed,"[127] "discredited," "abandon[ed],"[128] and "irretrievably lost."[129] Therefore, its proponents are either "naive"[130] formalists who are easily "fool[ed]," [131] or they are disingenuous and probably concealing

117. Hammer, *supra* note 58, at 410; *see* Fallon & Meltzer, *supra* note 66, at 1759 (suggesting that "[i]t would be only a slight exaggeration to say that there are no more Blackstonians"); Liron Shmilovits, *The Declaratory Fiction*, 31 KING'S L.J. 59, 73-74 (2020) ("[T]wo centuries after Bentham's rebellion against the orthodoxy of the declaratory theory, there is probably no legal theory more often repudiated than it; so much so, that deriding it is a mark of sophistication.").

118. Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533, 535 (1977); *cf.* Mishkin, *supra* note 34, at 63 ("If the view be in part myth, it is a myth by which we live and which can be sacrificed only at substantial cost.").

119. Munroe Smith, *State Statute and Common Law*, 2 POL. SCI. Q. 105, 121 (1887); *see* Griffin v. Illinois, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring in the judgment); Kleinwort Benson Ltd. v. Lincoln City Council [1999] 2 AC 349 (HL) 378 (Lord Goff of Chieveley) (appeal taken from Eng.).

120. Lord Reid, *The Judge as Lawmaker*, 12 J. SOC'Y PUB. TEACHERS L. 22, 22 (1972).

121. Richard McManus, *Predicting the Past: The Declaratory Theory of the Common Law—From Fairytale to Nightmare*, 12 JUD. REV. 228, 245 (2007).

122. Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 365 (1932); *see also* 5 JEREMY BENTHAM, *Truth Versus Ashhurst; Or, Law as It Is, Contrasted with What It Is Said to Be*, *in* THE WORKS OF JEREMY BENTHAM 233, 235 (John Bowring ed., London, Simpkin, Marshall & Co. 1823) (calling it "dog-law").

123. Fisch, *supra* note 19, at 1080, 1082.

124. Traynor, *supra* note 118, at 535.

125. Masur & Mortara, *supra* note 22, at 1019.

126. *Id.*

127. Kay, *supra* note 58, at 64.

128. Hammer, *supra* note 58, at 409, 411.

129. Kay, *supra* note 58, at 66.

130. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 546 (1991) (White, J., concurring in the judgment); *see also id.* at 549 (Scalia, J., concurring in the judgment) ("I am not so naive . . . as to be unaware that judges in a real sense 'make' law.").

131. Masur & Mortara, *supra* note 22, at 1019.

devious agendas.[132] Judges who employ the theory perhaps only "pretend[] to hold" it[133] for "politically expedient" purposes.[134] Blackstone himself, apparently, "presented the 'declaratory theory' with a wink and a nod."[135]

Thus, we reach a purported solution: to turn our backs on the theory. To recognize that "we do not believe in fairy tales any more."[136] For ostensibly "[e]ver since the legal realists, sophisticated legal observers have understood that the courts make law, just as legislatures and agencies do."[137] So enlightened courts face a simple inquiry: they need only determine whether a novel precedent establishes "a new principle of law"[138] or constitutes "a clear break with the past."[139] If so, non-retroactivity will be justifiable. As Jonathan Masur and Adam Mortara explain, "If the rule is not new, it will apply in every case; if the rule is new, the court must decide whether it should be applied retroactively or purely prospectively, following . . . considerations related to reliance interests and social costs . . . ."[140]

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132. *See* Allan Beever, *The Declaratory Theory of Law*, 33 OXFORD J. LEGAL STUD. 421, 422 (2013).

133. Beavers v. Johnson Controls World Servs., Inc., 881 P.2d 1376, 1380 (N.M. 1994) (discussing Harper v. Va. Dep't of Taxation, 509 U.S. 86, 107 (1993) (Scalia, J., concurring)).

134. Masur & Mortara, *supra* note 22, at 1019.

135. Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 37 (1996).

136. Reid, *supra* note 120, at 22.

137. Masur & Mortara, *supra* note 22, at 1019; *cf.* sources cited *supra* note 22 (distinguishing legislative from judicial lawmaking).

138. Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971).

139. Desist v. United States, 394 U.S. 244, 248 (1969).

140. Masur & Mortara, *supra* note 22, at 1010. For a discussion of reliance interests and social costs, see *id.* at 1002-03.

This framework has gained traction in other jurisdictions too.[141] Judges of the highest courts of India,[142] Ireland,[143] the United Kingdom,[144] Israel,[145] New

141. Steiner, *supra* note 65, at 15-16. South Africa's Constitution specifically empowers courts to limit the retrospective effect of judgments striking down unconstitutional laws. S. AFR. CONST., 1996, § 172(1)(b)(i); *see Masiya v. Dir. of Pub. Prosecutions* 2007 (5) SA 30 (CC) at 53, [51] (S. Afr.).

142. Golak Nath v. State of Punjab, (1967) 2 SCR 762, 808 (India) (discussing the relevance of "two doctrines familiar to American Jurisprudence, one . . . described as Blackstonian theory and the other as 'prospective over-ruling,'" and endorsing the latter in the case); *see* A.R. Blackshield, *"Fundamental Rights" and the Economic Viability of the Indian Nation: Part Three: Prospective Overruling*, 10 J. INDIAN L. INST. 183 (1968).

143. Murphy v. Att'y Gen. [1982] 1 IR 241, 293-94 (Ir.) (treating as persuasive the practice of "[t]he American Supreme Court . . . of deciding . . . whether a ruling which upsets what was regarded as the law should operate retrospectively or merely prospectively"); *see* A. v. Governor of Arbour Hill Prison [2006] 4 IR 88, 116-17 (Ir.) ("In modern constitutional systems we have moved on from [Blackstone's] perception of the law, at least in its purest form, but even when viewed through Blackstone's prism the common law did not envisage absolute retroactivity of judicial decisions and did not permit previous cases, even though finally determined on principles that were 'never law' to be reopened."); *cf.* P.C. v. Minister for Soc. Prot. [2018] IESC 57, [39] (Ir.) (noting that only a minority of Supreme Court judges have approved of prospective-only overruling).

144. Nat'l Westminster Bank plc v. Spectrum Plus Ltd. [2005] 2 AC 680 (HL), [34] (appeal taken from Eng.) ("[Blackstone's declaratory] theory is still valid when applied to cases where a previous decision is overruled as wrong when given. Most overruling occurs on this basis. These cases are to be contrasted with those where the later decision represents a response to changes in social conditions and expectations. Then, on any view, the declaratory approach is inapt."); *see* Mary Arden, *Prospective Overruling*, 120 LAW Q. REV. 7 *passim* (2004).

145. LCA 8925/04 Solel Boneh Bldg. & Infrastructure Ltd. v. Estate of Alhamid [2006] (1) IsrLR 201, 216 (Isr.) ("The declaratory theory of law has not acquired great strength in Israel; there is no constitutional obstacle that prevents recognizing th[e] possibility [of giving precedents merely prospective force]."); *id.* at 225-26, 243 (contending that retrospectivity should be the exception, not the rule, for judicial lawmaking); *see* Ittai Bar-Siman-Tov, *Time and Judicial Review in Israel: Tempering the Temporal Effects of Judicial Review*, *in* THE EFFECTS OF JUDICIAL DECISIONS IN TIME 207, 223-26 (P. Popelier, S. Verstraelen, D. Vanheule & B. Vanlerberghe eds., 2014).

Zealand,[146] Bangladesh,[147] Singapore,[148] Ghana,[149] and Canada have indicated that when courts venture to change the law, they are not shackled by the declaratory theory's demand for retroactivity. For example, Canada's apex court has said:

> When the Court is declaring the law as it has existed, then the Blackstonian approach is appropriate and retroactive relief should be granted. On the other hand, when a court is developing new law within the broad

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146. Chamberlains v. Lai [2007] 2 NZLR 7, [136] (N.Z.) ("We are changing the law in the present case. . . . We are not declaring [the law]; nor are we simply correcting a mistaken view of the law. Blackstone might have put it that way but we cannot. We are changing the law because of a change in perceptions over time of what public and legal policy require."); *see* Jesse Wall, *Prospective Overruling—It's About Time*, 12 OTAGO L. REV. 131, 133-34 (2009). *But cf. Ha v New South Wales* (1997) 189 CLR 465, 504 (Austl.) ("The adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from non-judicial power. Prospective overruling is thus inconsistent with judicial power on the simple ground that the new regime that would be ushered in when the overruling took effect would alter existing rights and obligations. If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law." (citations omitted)); *see* James Edelman, *Chief Justice French, Judicial Power and Chapter III of the Commonwealth Constitution*, *in* ESSAYS IN HONOUR OF CHIEF JUSTICE FRENCH 81, 101-04 (Henry Jackson ed., 2019).

147. Khan v. Bangladesh, ADC Vol IX (A), 10 (2012) (Bangl.) (citing Golak Nath v. State of Punjab, (1967) 2 SCR 762 (India), Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932), and Linkletter v. Walker, 381 U.S. 618 (1965), and concluding that "[o]ur Constitution does not expressly or by necessary implication speak against the doctrine of prospective overruling"); *see* M. Jashim Ali Chowdhury, *Bangladesh's Inconsistency with the Doctrine of Prospective Invalidation*, *in* CONSTITUTIONAL REMEDIES IN ASIA 33, 34 (Po Jen Yap ed., 2019).

148. Public Prosecutor v. Hue An Li, [2014] SGHC 171, [124] (Sing.) ("Our *appellate* courts (that is, our High Court sitting in its appellate capacity and our Court of Appeal) . . . have the discretion, in exceptional circumstances, to restrict the retroactive effect of their pronouncements. This discretion is to be guided by [four] factors . . . ."); *see* WenXiong Zhuang, *Prospective Judicial Pronouncements and Limits to Judicial Law-Making*, 28 SING. ACAD. L.J. 611, 612 (2016). *But cf.* Hong Kong v. Wa, [2006] 9 H.K.C.F.A.R. 614, [18] (H.K.) (considering that "[o]n any view, the power to engage in prospective overruling, if it exists, is an extraordinary power," and finding it not necessary to decide whether Hong Kong courts can exercise the power); *see* Andrew Li, *Reflections on the Retrospective and Prospective Effect of Constitutional Judgments*, *in* THE COMMON LAW LECTURE SERIES 2010, at 21, 24-32 (Jessica Young & Rebecca Lee eds., 2011).

149. Kpebu v Attorney General, [2016] GHASC 15, [36] (Ghana) ("Under the doctrine of prospective overruling, which has its origin in American jurisprudence, and which has been adopted, developed and applied in deserving cases in other jurisdictions, including India, Malaysia, Singapore, United Kingdom, Uganda and other Commonwealth countries, this court has power to decide whether to limit the retroactive effect of the declaration of invalidity."); *see* Stephen Kwaku Asare, *Inconsequential Declarations of Unconstitutionality and Unconstitutional Consequential Orders: The Case of* Professor Stephen Kwaku Asare v Attorney General and General Legal Council, 63 J. AFRICAN L. 463, 473-77 (2019).

> confines of the Constitution, it may be appropriate to limit the retroactive effect of its judgment.[150]

The legal-philosophical framework thus concerns the problem of whether a novel precedent in issue is "new" law.

2. Critique

The problem so stated begs the question. Even putting legal philosophies aside, there can often be genuine disagreement as to whether some novel precedent is really "new" law. Take, as examples, *Obergefell* and *Janus*. If these cases announced "new" precedent and overrode past law, then perhaps their holdings should apply only to disputes occurring after the Supreme Court delivered its judgments. But if these cases articulated principles that were always discernable in the Constitution, then the judgments merely corrected aberrant precedent and their holdings ought to govern past cases. The new-law inquiry predominantly turns on perspective and thus is easily manipulable based on how it is framed.[151] That, of course, was the reason the Court in *Sunburst Oil* left the determination to "the wisdom" of individual state courts' "philosophies"[152]: it thought there was no right answer to the problem.

A deeper criticism can be leveled against the legal-philosophical approach to retroactivity: that it misconceives the declaratory theory of adjudication and unfairly caricatures its proponents. It attacks a straw man.[153] John Finnis charges "the declaratory theory's despisers" with failing to confront "its essential, normative claim"—that as a theory of adjudication it encapsulates "an important element in judicial duty . . . of judges to differentiate their authority and responsibility, and thus their practical reasoning, from that of legislatures."[154] It is the judge's *adjudicatory* role that compels this duty:

> [A]djudication is not the telling of some story which if accurate might be called history—or prescient prediction—and if inaccurate a myth or fairy tale. Adjudication is the effort to identify the rights of the contending parties *now* by identifying what were, in law, the rights and wrongs, or

150. Canada (Attorney General) v. Hislop, [2007] 1 S.C.R. 429, [93] (Can.); *see* Daniel Guttman, Hislop v. Canada*: A Retroactive Look*, 42 SUP. CT. L. REV. (2d) 547, 552-53 (2008).

151. *See supra* Section I.B.

152. Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 365 (1932).

153. Beever, *supra* note 132, at 425-30; *see* Shmilovits, *supra* note 117, at 69-79.

154. J.M. Finnis, *The Fairy Tale's Moral*, 115 LAW Q. REV. 170, 173 (1999).

validity or invalidity, of their actions and transactions *when entered upon and done*.[155]

Contrary to popular belief, the declaratory theory is far from dead.[156] Its essence is simply that judges determine the law by looking to the past.[157] Judges do not legislate. Rather, they *recognize*[158] or *elucidate*[159] the law within the constraints of adjudication. The apparent inadequacies of Blackstone's descriptive account of judicial decisionmaking do not erode the principles that it embodies,[160] including, and especially, the retroactive nature of judicial decisions.

The three propositions outlined in the preceding Section miss the mark. First, the idea that judging involves "finding" law cannot be dismissed out of hand. Stephen Sachs disputes the critics' charge that as a matter of theory "law has to come from somewhere" and "judges can't discover norms that no one ever made."[161] If social norms can be "found," why not law? Copy editors and dictionary authors routinely and uncontroversially "declare" standard English, for instance, though the rules of language derive from no formal source. Language norms also change and diverge, yet they have determinate content independent

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155. *Id.* at 172; *see* Paul Troop, *Why Legal Formalism Is Not a Stupid Thing*, 31 RATIO JURIS. 428, 432-33 (2018).

156. *See* Beever, *supra* note 132, at 423 ("Despite contemporary condemnation of the declaratory theory, the modern law remains committed to it."); Jason Iuliano, *The Supreme Court's Noble Lie*, 51 U.C. DAVIS L. REV. 911, 924-25 (2018) (discussing the American judiciary's commitment to the declaratory theory); Shmilovits, *supra* note 117, at 81 ("Whether we like it or not, the declaratory theory is still alive and well. It is widely condemned and widely applied."); *see also* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535-36 (1991) (opinion of Souter, J., joined by Stevens, J.) ("[T]he declaratory theory of law, according to which the courts are understood only to find the law, not to make it . . . comports with our received notions of the judicial role . . . ." (citations omitted)).

157. *See supra* note 34 and accompanying text.

158. LLEWELLYN, *supra* note 101, at 361-62 (explaining that the debate over whether judges find *or* make law is meaningless, because judges simultaneously do both — "their decision is . . . quite literally *found* and *recognized*, as well as *made*" — and they do so constrained and guided by legal materials and context); *see* DAGAN, RECONSTRUCTING, *supra* note 19, at 61-63 (discussing Llewellyn's theory of adjudication); Dagan, *American Legal Realism*, *supra* note 19, at 131-36 (same).

159. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 19, 239-40, 244, 254-55, 363-64 (2020) (describing judicial decisionmaking as "elucidative" — a process of recognizing rights and duties); *see* CARDOZO, *supra* note 26, at 124-41 (discussing the judicial power to declare law).

160. Jessie Allen, *Blackstone, Expositor and Censor of Law Both Made and Found*, *in* BLACKSTONE AND HIS CRITICS 41, 44-49 (Anthony Page & Wilfrid Prest eds., 2018) (defending Blackstone and discussing how the declaratory theory submits judges' individual will to the direction of law).

161. Sachs, *supra* note 78, at 527; *see also* Zamulinski, *supra* note 113, at 171 (discussing, from a natural-law perspective, judges' "ability to apprehend moral truths").

of the sources in which words are expressed.[162] Finding law, Sachs contends, is "a real and plausible option for a modern legal system."[163] Such a contention does not hinge on a defense of Blackstone. Modern jurisprudence may have outgrown Blackstone, but it need not abandon a declaratory view of adjudication. Mishkin notes that "while the Blackstonian conception is not entirely valid, neither is it wholly wrong."[164] Most cases can readily be taken to be resolved on the basis of foregoing law—whether by statute or stare decisis—and most judicial decisions explicitly have retroactive effect.

Second, it is wrong to assume that the declaratory theory is inconsistent with the positivist or realist view of judges as lawmakers.[165] Staunch positivists and realists comprise some of the declaratory theory's keenest defenders.[166] Justice Scalia's opinions on judicial retroactivity, for instance, reflect the normative account that Finnis outlines—though the two jurists are philosophically unaligned. Scalia was unapologetically hostile to the idea of judges employing natural-law principles that might "render judgments that contradict positive law."[167] And he accepted that "courts have the capacity to 'make' law."[168] But, he insisted, they do so within the constraints of adjudication. Unlike legislatures,

162. Sachs, *supra* note 78, at 531.

163. *Id.* at 527.

164. Mishkin, *supra* note 33, at 60; *see* LaCroix, *supra* note 66, at 1350; 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, 1682 (2007).

165. Beever, *supra* note 132, at 426; Sachs, *supra* note 78, at 530-32.

166. Even those who maintain that the law is "what the judge says," Reid, *supra* note 120, at 22, or "does," BENJAMIN NATHAN CARDOZO, *Jurisprudence*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 7, 12 (photo. reprint 1980) (Margaret E. Hall ed., 1947) (describing the view of the "neo-realists"), must recognize that judges speak and act from a perspective of hindsight.

167. ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 248 (2017).

168. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989) [hereinafter Scalia, *The Rule of Law*]; *see* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment) ("I am not so naive . . . as to be unaware that judges in a real sense 'make' law."); ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 9-14 (Amy Gutmann ed., 1997) (acknowledging that judges make law and explaining that the retroactivity of judicial lawmaking compels a modest judicial mindset); *cf.* Hammer, *supra* note 58, at 431-32 (considering the New Mexico Supreme Court's insinuation that Scalia's conception of adjudication was disingenuous); Lehn, *supra* note 29, at 575 (dubiously attributing to Scalia the intuition "that because the law does not actually change, the 'new' law was in fact always also the 'old' law").

judges do not make new rules "out of whole cloth."[169] They must ground their decisions in the preceding legal materials: "in the text that Congress or the Constitution has provided."[170] For Scalia, the declaratory theory simply reflects the modest judicial attitude that judges must hold. Recognizing that their lawmaking power is constrained, they should commit to making law only "*as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be."[171] To cast off that constraint, he contended, would be "to alter in a fundamental way the assigned balance of responsibility and power among the three branches."[172]

A constraining, "more realistic" account of the declaratory theory also appeared across the pond in a seminal decision of the House of Lords.[173] In his swansong judgment, Lord Goff of Chieveley—whose juridical philosophy maintained that "[p]ragmatism must be the watchword"[174]—accepted as "inevitable" that "in reality . . . the law is the subject of development by the judges."[175] Since judicial lawmaking "is what actually happens," Lord Goff sought to "look at the declaratory theory of judicial decision with open eyes."[176] He dismissed the "historical" notion of "an ideal system of the common law, which the judges from time to time reveal in their decisions."[177] But he did not regard the declaratory theory "as an aberration of the common law;" he described it, instead, as "an inevitable attribute of judicial decision-making."[178] Lord Goff considered the

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169. Scalia, *The Rule of Law*, *supra* note 168, at 1183; *see* GOLDBERG & ZIPURSKY, *supra* note 159, at 252.

170. Scalia, *The Rule of Law*, *supra* note 168, at 1183.

171. *James B. Beam*, 501 U.S. at 549 (Scalia, J., concurring in the judgment).

172. *Id.*; *see* Peter Cane, *The Common Law, the High Court of Australia, and the United States Supreme Court*, *in* APEX COURTS AND THE COMMON LAW 66, 77 (Paul Daley ed., 2019).

173. Kleinwort Benson Ltd. v. Lincoln City Council [1999] 2 AC 349 (HL) 377 (Lord Goff of Chieveley) (appeal taken from Eng.); *see* Bowen, *supra* note 116, at 331 ("The decision in [*Kleinwort*] is thus extremely important insofar as it held that the victor in the clash was the declaratory theory."); Jane Convery, *Lord Goff's Swansong: Restitution, Mistake of Law, and the Retrospective Effect of Judicial Decisions*, 3 EDINBURGH L. REV. 202, 216 (1999) (criticizing the majority Law Lords' "acceptance of the declaratory theory"); Peter Mirfield, *A Challenge to the Declaratory Theory of Law*, 124 LAW Q. REV. 190, 190 (2008) (observing that "[t]he English judiciary continues to maintain its institutional commitment to the declaratory theory of law"); *cf.* Hammer, *supra* note 58, at 412 (supposing that "English judges, like their American counterparts, reject the declaratory theory").

174. Robert Goff, *The Search for Principle*, 69 PROC. BRIT. ACAD. 169, 186 (1984).

175. *Kleinwort Benson*, [1999] 2 AC at 377.

176. *Id.*

177. *Id.* at 378.

178. *Id.* at 379.

essential elements of the declaratory theory to be "the doctrine of precedent" and the practice of "development, usually . . . very modest development, of existing principle."[179] So characterized, Lord Goff thought that even "radical" departures from previously established principle "must nevertheless be seen as a development of the law, and treated as such."[180] And what it meant to treat it as such was that "when the judges state what the law is, their decisions do . . . have a retrospective effect."[181]

To a similar end, the eminent British judge Lord Reid "debunked the notion that judges declare but do not make law"[182] and ridiculed the theory that one could find the common law "in some Aladdin's cave" through "knowledge of the magic words Open Sesame."[183] But even he did not escape the constraints of the declaratory theory by venturing to disavow its central tenet: that "judge-made law is always retrospective."[184] It is not a contentious proposition that judges determine the law in the context of past disputes. One does not need to be a "natural lawyer" to recognize retroactivity as a basic feature of adjudication.

The converse position is equally tenuous: that the natural-law perspective rejects the notion of law changing, and that it necessarily rejects non-retroactivity. This is the claim that when judges overrule precedent they simply correct errors of past judges, so natural law demands retroactivity in adjudication. This proposition flounders, however, under the assessment of Lon Fuller, the preeminent theorist of the law's internal morality. Fuller acknowledged that judges develop the law. He also recognized the paradox "that courts, in order to avoid the appearance of legislating, cast their legislative enactments in the harshest possible form, making them ex post facto."[185] While accepting the presumption that "a retroactive law is truly a monstrosity,"[186] Fuller showed that in most cases judicial retroactivity can be justified, both as a matter of legal morality and pragmatic adjudication.[187] Nevertheless, for Fuller, adjudication did not demand retroactivity in all cases: "Theoretically, a court might distinguish between [obviously retroactive] decisions and those which announce a rule or standard

179. *Id.* at 378.

180. *Id.*

181. *Id.*; *see* Cane, *supra* note 172, at 90.

182. Anthony Mason, *The Judge as Law-Maker*, 3 JAMES COOK UNIV. L. REV. 1, 1 (1996).

183. Reid, *supra* note 120, at 22.

184. *Id.* at 23; *see* Beever, *supra* note 132, at 432-33.

185. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 391 (1978).

186. LON L. FULLER, THE MORALITY OF LAW 53 (rev. ed. 1969).

187. *Id.* at 53-57, 92, 240-41.

that seems 'new,' even though it may represent a reasoned conclusion from familiar premises."[188]

In exceptional cases of "new" law, some judgments could be "prospective only."[189] Such cases would, however, have to be the exception to the norm of retroactive adjudication in order to maintain the stability of the legal system.[190]

Moreover, it is clear that principles of natural right and natural justice underlie many claims for *non*-retroactivity. Arguments for prospective overruling are often grounded in basic rule-of-law notions of fundamental fairness,[191] reliance on settled law,[192] predictability of law,[193] fair notice of legal change,[194] and closure and finality of legal liability.[195] Retroactive adjudication, it seems, is not an essential condition of natural-law jurisprudence.

And so, at the third proposition—to abandon the declaratory model on legal-philosophical grounds—we reach an impasse. The declaratory theory of adjudication does not hew only to one side of the legal-philosophical debate. Nor does the notion of judicial retroactivity. Arguments from natural law, legal positivism, and legal realism can be, and have been, corralled both for and against retroactive adjudication. Even if the debate were resolved, then, determining whether in a given case a law is "new"—and how its temporality should be understood—would remain a puzzle.

3. Summary

The idea that the (non-)retroactivity puzzle can be solved by taking sides in the Blackstone/Austin debate is fundamentally misconceived. A clear answer to

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188. Fuller, *supra* note 185, at 392.

189. *Id.*

190. *Id.*

191. *See, e.g.*, James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 536 (1991) (opinion of Souter, J., joined by Stevens, J.) ("[T]o apply the new rule to parties who relied on the old would offend basic notions of justice and fairness."); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 371 (1991) (O'Connor, J., dissenting) (basing non-retroactivity doctrine on the principle of fairness and "fundamental notions of justified reliance and due process"); Fisch, *supra* note 19, at 1084; Daniel E. Troy, *Toward a Definition and Critique of Retroactivity*, 51 ALA. L. REV. 1329, 1330-31 (2000).

192. *See infra* Section II.B.

193. *E.g.*, Fallon & Meltzer, *supra* note 66, at 1763-67.

194. *E.g.*, Guido Calabresi, *Retroactivity: Paramount Powers and Contractual Changes*, 71 YALE L.J. 1191, 1191 n.2 (1962); Troy, *supra* note 191, at 1342.

195. *E.g.*, Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 212 (1990) (Stevens, J., dissenting); Linkletter v. Walker, 381 U.S. 618, 627 (1965); Thyssenkrupp Steel N. Am., Inc. v. United States, 886 F.3d 1215, 1223 n.3 (Fed. Cir. 2018); Kay, *supra* note 58, at 52.

law's temporal implications does not lie within an intractable philosophical debate. Attempts to find it there will inevitably be "misguided, inconclusive, and unproductive."[196]

B. Right-Reliance Balancing Framework

Might the solution lie not in philosophy but in functionalism? Pamela Stephens suggests that the inquiry into whether a novel precedent is "new" law is "merely code language for the reliance interests involved."[197] The function of non-retroactivity doctrine should be to resolve parties' competing interests. Many commentators favor the idea that the temporal fallout of new law should be tempered by balancing recognition of new rights with others' expectations and reliance on the state of the law at the time they acted. Justice O'Connor's judicial opinions also endorsed this view. Yet accounts of a right-reliance balancing framework are frequently too simplistic and fail to address basic questions regarding *whose* reliance is relevant, as well as *when* reliance interests are material. The lack of a coherent answer to these questions dooms the framework.

1. Description

The crux of the problem with judicial retroactivity lies in the unfairness of applying new rules to events that preceded a court's novel precedent. People who fail to anticipate a legal change will have interacted and transacted against the backdrop of the "old" rule. Parties may have acted in *reliance* on some clear statutory or common-law rule that affirms principle of law X, or in the reasonable *expectation* that the relevant principle of law was X. These interests will be upset if a court later overrules the "clear past precedent" or delivers a ruling on a point that "was not clearly foreshadowed."[198] A subsequent ruling that the relevant principle of law is $\neg X$ may undercut the reasonable bases on which parties previously interacted and transacted.

Incentive distortions might then follow. The potential for new decisions to change past law creates pervasive uncertainty. Fear of disruptive legal change may deter people from transacting on the basis of current settled law and lead to

196. Roosevelt, *supra* note 28, at 1084 n.42; *see also* Fallon & Meltzer, *supra* note 66, at 1764 n.187 (endorsing "a philosophically unambitious account" of non-retroactivity doctrine).

197. Stephens, *supra* note 31, at 1573.

198. Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971).

underinvestment.[199] Judges may also become "hesitant to discard an outmoded rule due to the transition's impact on settled expectations"[200] and the administrative costs of effecting change.[201] If overall the new rule is superior to the old, judicial reluctance to apply it may stymie "efficient legal reform."[202]

Non-retroactivity doctrine functions to preserve prior expectation and reliance interests while facilitating implementation of superior new rules of law for the future. A note in this *Journal* once opined that the doctrine "allows a court to have its cake and eat it too—to overrule an outmoded precedent without having to disappoint the justified expectations of anyone."[203] Applying the doctrine, past events remain governed by the past law, and new events by the new law. As Masur and Mortara aver, prospective overruling "decouple[s] a judicial decision's prospective effect—which is presumptively positive—from the backward-looking harm it might do to investment-backed expectations and reliance interests."[204] It "enables courts to . . . chang[e] bad law without upsetting the reasonable expectations of those who relied on it."[205]

How is this achieved? Through judicial cost-benefit analysis.[206] The Court in *Chevron Oil* explicitly directed judges to "weigh the merits and demerits" of retroactively applying new rules in each case and to "weigh[] the inequity imposed by retroactive application."[207] Justice O'Connor, who authored several significant opinions favoring non-retroactivity doctrine, invoked the "balanc[ing]"

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199. Masur & Mortara, *supra* note 22, at 974 ("[L]egal instability can upset reliance interests and create problems of inadequate investment regardless of whether the change in the law is generally helpful or harmful.").

200. Rhodes, *supra* note 4, at 403.

201. Fisch, *supra* note 19, at 1119.

202. Rhodes, *supra* note 4, at 408; *see also* Gil J. Ghatan, *The Incentive Problem with Prospective Overruling: A Critique of the Practice*, 45 REAL PROP. TR. & EST. L.J. 179, 192-99 (2010) (arguing that non-retroactivity doctrine suppresses plaintiffs' incentives to argue for efficient changes in the law); *see* Masur & Mortara, *supra* note 22, at 982 (suggesting that the costs of upsetting reliance-based interests may "lead courts to refrain from changing the law, even when they believe that the law is not optimally calibrated").

203. Note, *supra* note 70, at 912.

204. Masur & Mortara, *supra* note 22, at 968.

205. Traynor, *supra* note 118, at 542.

206. William W. Berry III, *Normative Retroactivity*, 19 U. PA. J. CONST. L. 485, 506 (2016) (framing "the retroactivity inquiry in terms of the normative impact of the new constitutional rule at issue"); Lehn, *supra* note 29, at 566 (suggesting that "the only viable solution to the retroactivity problem is a cost-benefit test" and "that the reliance interest is at the heart of this test").

207. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971) (quoting Linkletter v. Walker, 381 U.S. 618, 629 (1965)).

of competing interests.[208] Reliance is a major interest that has informed the Supreme Court's landmark judgments.[209] The merits of upholding private rights as articulated by the courts (which counsel in favor of retroactivity) are balanced against parties' "good-faith" expectations and reliance on the state of the law at the time they acted (which "counsel in favor of nonretroactivity" of new rules).[210] Despite its seeming demise before the Rehnquist Court, *Chevron Oil*-style balancing continues implicitly to inform judicial reasoning today.[211] Stephens suggests that the justifiability of a party's reliance on a prior rule can be determined by "how well established the prior rule of law was, how clear it was, [and] perhaps whether there was reason (in the form of evolving, eroding caselaw) to predict a change."[212] This framework sets up a neat dichotomy between the interests of those who relied on the old rule and those seeking to benefit from the new rule: the new rule's temporal reach depends on whose interests are ultimately more compelling.

2. *Critique*

This is, however, an overly simplistic précis. In order to understand how reliance interests affect the scope of a new rule of law, we must first understand *whose* reliance is relevant, as well as *when* reliance interests are material in the process of interaction and litigation. The jurisprudence is opaque and inconsistent on both of these points.

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208. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 558 (1991) (O'Connor, J., dissenting); *see also* Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 181-86 (1990) (plurality opinion) (applying the balancing approach to non-retroactivity doctrine).

209. John Bernard Corr, *Retroactivity: A Study in Supreme Court Doctrine as Applied*, 61 N.C. L. REV. 745, 773 (1983) (observing that among the factors the Court considers in its retroactivity analyses, reliance "perhaps stirs the greatest empathy"); Shannon, *supra* note 34, at 813 ("The problem usually takes the form of reliance; because one or more parties . . . relied on the 'old' law, it would be unfair to apply the 'new' law to those parties."); Stephens, *supra* note 31, at 1560 ("The fairness which formed the rationale for pure or modified prospectivity, was of a type which focused on reliance."); Jason Tzu-cheng Kuo, Note, *Retroactivity of Refund Claims for Unconstitutional State Taxes: How Helpful Is the* Chevron Oil *Test?*, 45 TAX LAW. 889, 893 (1992) ("Constitutional violations should be classified into at least two types, one in which there is no reliance . . . , and another in which there is demonstrated reliance.").

210. Chen, *supra* note 6, at 1435; *see* Traynor, *supra* note 124, at 542 (contending that retroactivity of novel precedent would "upset[] the reasonable expectations of those who relied" on prior law).

211. *See* Beske, *supra* note 20 *passim*.

212. Stephens, *supra* note 31, at 1573.

a. Who?

There is no satisfactory answer as to whose reliance interests should be taken into account. A narrow focus (that considers the *litigants'* interests) means the law will be one thing for people who can prove reliance and another thing for people who cannot. A broad focus (that considers *anyone's* interests) is nebulous and may well subvert litigants' own interests.

Consider first the narrow focus. One might expect the argument for non-retroactivity to hinge on the mutual reliance on the old rule by *all* of the "litigants" to the case.[213] If parties were operating in the shadow of the prior rule, intuitively it seems unfair to revise the basis of their interaction after the fact in a way that neither party would have expected. Commentary on non-retroactivity doctrine frequently refers to protecting "the parties'" reliance interests.[214] But case law shows that mutual reliance of litigants is not pertinent. Indeed, parties' interests are often at odds. One party may litigate seeking to challenge the status quo, while others plead reliance on the status quo to constrain the scope of any subsequent legal change.[215] Reliance arguments are considered particularly persuasive when the party pleading reliance is a public body for which the fallout of legal change would be disruptive.[216] Where, for instance, a court strikes down an unconstitutional tax, a state's "good faith reliance on a presumptively valid statute"[217] and its "exceedingly strong interest in financial stability"[218] will tend to weigh in favor of restricting backward-looking relief.

More broadly, relevant interests may extend beyond litigants. The reliance interests of nonparties who stand to be adversely affected by a change in the law seem to weigh against retroactive implementation of a new rule. Indeed, it is far from clear that actual reliance is pertinent at all.[219] Supreme Court precedent indicates that the impact on general categories of people might be the more

213. Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971). *But see* Fisch, *supra* note 19, at 1086 ("Looking to the litigants' interests . . . provides little guidance.").

214. *See* Stephens, *supra* note 31, at 1569.

215. *See* Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 218-19 (1990) (Stevens, J., dissenting).

216. *See* Stephens, *supra* note 31, at 1574.

217. McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 44 (1990).

218. *Id.* at 37.

219. *See* Note, *supra* note 70, at 945 (suggesting that "in a great many cases . . . the parties will have acted without any knowledge at all of what the governing law was" and so they cannot realistically claim to be surprised by a change in the law; "whatever law is finally held to govern their conduct, whether it be the old rule or the new rule, will be a new rule to them").

significant consideration than the impact on the parties to the case.[220] Justice O'Connor favored an expansive view of relevant reliance interests. Her judgments invoked non-retroactivity to protect the reliance interests not just of immediate parties,[221] but also of nonparty state or government entities,[222] government officers tasked with enforcing an overruled law,[223] and even the legislatures that enacted the law[224] and the judges who interpreted it.[225] In *American Trucking Ass'ns v. Smith*, Justice O'Connor emphasized the importance of giving "great weight to the reliance interests of *all parties* affected by changes in the law."[226] In her dissent in *James B. Beam Distilling Co. v. Georgia*, she characterized prospective overruling as necessary to protect the interests of "every jurisdiction in the Nation that reasonably relied on" the previous rule of law.[227] It would seem that so long as *someone*—whether or not a party to proceedings—relied on a previous rule of law, their interest will tilt the scales toward non-retroactivity of novel precedent. Such appeal to general reliance may well subvert, rather than protect, litigants' own reliance interests.

b. When?

As to the temporal question, is it reliance on the old rule at the time of transaction, at the time of litigation, or at the time of judicial resolution that is relevant? And how should courts take account of shifts in a party's reliance? The jurisprudence on these points is also unclear. It is useful in this regard to revisit the two scenarios that implicate retroactivity discussed in Section I.A. *Pending* cases are those brought at a time when the old rule was seen to be in force. In these cases, it is tempting to assume that at the time the parties interacted, their

220. *See* Kay, *supra* note 58, at 42 ("[C]ourts almost always consider *categories* of cases[,] not the presence or absence of reliance by the particular parties before the court."). *But see* Stephens, *supra* note 31, at 1574 ("[I]t should be actual reliance in the usual case, which will be necessary to overcome the presumption of retroactivity.").

221. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 370 (1991) (O'Connor, J., dissenting) (emphasizing "respondents' entirely proper reliance" on the prior rule).

222. Teague v. Lane, 489 U.S. 288, 310 (1989).

223. Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 185 (1990) (plurality opinion).

224. *Id.* at 182.

225. Fallon & Meltzer, *supra* note 66, at 1791 n.318 (noting the Supreme Court's seeming concern for "protecting the reliance interests or sensibilities of state court judges rather than those of state and local officials"). *But see* Schwartz, *supra* note 34, at 756 ("Nor is it clear who would be harmed by complete retroactivity. State judges might be offended, but they certainly would not be harmed.").

226. 496 U.S. at 185 (plurality opinion) (emphasis added).

227. 501 U.S. 529, 551 (1991) (O'Connor, J., dissenting).

reliance interests were aligned with the "old" rule. This may be true of plaintiffs who sue seeking to take advantage of the old rule without anticipating it being overruled. But what of pioneering plaintiffs—such as the *Obergefell* plaintiffs—who believed the old rule was wrong and sought to challenge it by reference to some other, better rule?[228] Their reliance was never on the old rule, but instead on a competing rule or constitutional principle. Should non-retroactivity doctrine draw a distinction between cases according to differences in the parties' respective accounts of reliance?

And what of those *subsequent* cases—like those that followed in *Obergefell*'s wake—where a plaintiff, whose interaction was apparently governed by the old rule, seeks (without violating other procedural constraints)[229] to rely on a new rule announced by a court? It is not necessarily the case that plaintiffs simply shift their reliance interests from the old rule to the new rule when it suits them. Successive plaintiffs might always have viewed the old rule as unjust or unconstitutional yet not had the means or fortitude to challenge their treatment under it until some favorable, novel precedent was handed down. Should such circumstances negate the inference that they "relied" on the old rule at all? Or should such cases raise the specter of opening the floodgates, so as to warrant non-retroactivity? It is difficult to ascertain *when* reliance interests are material in these cases.

i. Pending Cases

The reliance interest is premised on the unfairness of rules "changing" between the time a party acts and the time its actions are adjudicated.[230] This unfairness seems particularly stark when a plaintiff has brought suit seeking to invoke rule X, but rule X is replaced with rule $\neg X$ before the plaintiff's suit is resolved. That is what happened in *Chevron Oil Co. v. Huson*,[231] a case that became the high watermark of the Supreme Court's civil non-retroactivity doctrine. Huson had filed a personal-injury action two years after he was injured on Chevron Oil's offshore drilling rig. Federal precedent at that time held that maritime law governed offshore injuries, and Chevron Oil did not challenge the timeliness of Huson's claim under the admiralty laches doctrine. However, while the claim was pending, the Supreme Court handed down *Rodrigue v. Aetna*

228. The old rule in this case being state laws that "define marriage as a union between one man and one woman." Obergefell v. Hodges, 576 U.S. 644, 653-54 (2015). The new rule being an interpretation of the Fourteenth Amendment that protects the petitioners' "right to marry or to have their marriages, lawfully performed in another State, given full recognition." *Id.* at 655.

229. Such as res judicata or limitations periods. *See infra* Section III.B.

230. *See* Lehn, *supra* note 29, at 565.

231. 404 U.S. 97 (1971).

Casualty & Surety Co., holding that injuries occurring on fixed offshore platforms were governed not by maritime law but by the law of the adjacent state.[232] One of the implications of *Rodrigue*, though it was not the subject of that litigation, was that such claims would be subject to state statutes of limitations. Chevron Oil sought to invoke *Rodrigue* to dismiss Huson's claim because he had filed it outside of the adjacent state of Louisiana's more restrictive one-year limitations statute.

It is easy to see how reliance interests tilted the Court in favor of restraining the retroactive effect of *Rodrigue* in Huson's case. Chevron Oil had not initially questioned the applicability of maritime law to the suit. Huson had not anticipated that the governing precedent would change. Both parties, it seems, "relied" on maritime law governing their dispute, at least until it served the defendant's interests to argue otherwise. The Court considered it "inequitable" to hold Huson to the one-year limitations period when at the time "he could not have known the time limitation that the law imposed upon him."[233] The inference is that if Huson's case had been resolved before *Rodrigue*, it would have succeeded, and that Huson should not be penalized by the happenstance of when his case was heard. But this inference only holds because Chevron Oil did not challenge maritime law's jurisdiction at the outset. Had Chevron Oil always pleaded state limitations law in response to Huson's claim,[234] thereby setting up the sort of argument that ultimately succeeded in *Rodrigue*, it is not obvious that the balance of competing reliance interests would necessarily have favored Huson.

Novel precedent does not inevitably disrupt *mutual* reliance interests in pending cases.[235] The more recent case of *Reynoldsville Casket Co. v. Hyde*[236] provides a stark counter-illustration to *Chevron Oil*. Hyde, too, suffered an injury attributable to the defendant. She filed suit three-and-a-half years after her accident. Ohio's limitations period for personal injury was two years, but Hyde sought to rely on a statutory exception that tolled limitations while a defendant was not "present" in the state.[237] In reply, the Pennsylvania-based defendant argued that Hyde's claim was barred by the two-year limitations period, and that the tolling provision was unconstitutional and so did not apply. Thus, from the outset of the litigation, the parties "relied" on different rules of law. Before the

232. 395 U.S. 352, 355 (1969).

233. *Chevron Oil*, 404 U.S. at 108 (quoting Cipriano v. City of Houma, 395 U.S. 701, 706 (1969)).

234. It is far from definitive that "[t]he most [Huson] could do was to rely on the law as it then was." *Id.* at 107; *see infra* Section III.C.

235. Fisch, *supra* note 19, at 1086 ("[T]he actual degree to which a new rule affects justified reliance interests varies considerably from case to case.").

236. 514 U.S. 749 (1995).

237. *Id.* at 751 (citing OHIO REV. CODE ANN. § 2305.15(A) (1991)).

case reached trial, the U.S. Supreme Court delivered judgment in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, holding that the Ohio limitations-tolling provision for out-of-state defendants violated the Commerce Clause.[238] In this context, it is not so easy to conceive of *Bendix* as disrupting *the parties'* reliance interests, as it simply reflected Reynoldsville Casket's position from the outset. Hyde was not caught off guard in the way Huson was caught off guard. Reynoldsville Casket did not need to rely on *Bendix* to advance its limitations argument. It invoked the arguments that informed the reasoning in *Bendix* from the outset. The Supreme Court then unanimously rejected the argument that Hyde's reliance on the pre-*Bendix* understanding of the law should trump the presumptive retroactivity of the holding in *Bendix*.[239] Reynoldsville Casket prevailed under the "new" law.

Chevron Oil and *Reynoldsville Casket* were cases concerning *plaintiffs'* reliance on an old rule. More commonly, it is *defendants* who invoke non-retroactivity to curb the impact of a change in the status quo. The argument seems compelling that defendants should not be penalized for relying on some unchallenged legal rule that is impugned only at a future date.[240] But once a legal rule *is* challenged, pleas of reliance seem more dubious. Why should a defendant on notice of a challenge to the validity of a legal rule nevertheless continue to benefit from pleading reliance on that rule?

In this regard, the Supreme Court's decision in *American Trucking Ass'ns v. Smith* is problematic.[241] *Smith* arose out of a constitutional challenge brought by out-of-state truckers to Arkansas' Highway Use Equalization Tax Act (HUE Tax Act), a tax statute enacted in March 1983 with effect from July 1983.[242] The plaintiffs filed suit in May 1983, contending that the HUE Tax Act violated clauses of both the state and federal constitutions. Thus, the HUE Tax Act was subject to judicial review from the outset. While the case was being litigated, Arkansas continued to levy the tax without escrow. After failing in the state courts,[243] the plaintiffs sought certiorari from the U.S. Supreme Court, but the Court held their appeal pending decision on a materially similar case, *American Trucking*

238. 486 U.S. 888, 891 (1988).

239. *Reynoldsville Casket*, 514 U.S. at 758-59; *see also* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 (1991) (retroactively applying a new statute-of-limitations interpretation).

240. *See* discussion of subsequent cases *infra* Section II.B.2.b.ii.

241. 496 U.S. 167 (1990).

242. *See id.* at 206 (Stevens, J., dissenting) (describing the HUE Tax Act).

243. *See* Am. Trucking Ass'n v. Gray, 707 S.W.2d 759, 761-63 (Ark. 1986) (relying on the Supreme Court's prior decisions upholding flat taxes).

Ass'ns v. Scheiner.[244] The Supreme Court delivered *Scheiner* in June 1987, holding that Pennsylvania's unapportioned flat highway-use tax violated the Commerce Clause, and remanded the Arkansas case back to the Arkansas Supreme Court.[245] In light of the new precedent, the Arkansas Supreme Court ruled the HUE tax unconstitutional, but it declined to order restitution of taxes back to 1983, holding that *Scheiner* did not apply retroactively.[246] On further appeal to the U.S. Supreme Court, a four-Justice plurality[247] in *Smith* held that *Scheiner* did not apply to taxation of highway use prior to the date it was decided (namely, June 23, 1987). That was because *Scheiner* had established "a new principle of law," and its retroactive application was neither necessary nor appropriate.[248] The State of Arkansas, the plurality held, had "relied on valid, existing precedent in enacting and implementing its tax."[249] They considered that the "inequity of unsettling actions taken in reliance on those precedents [was] apparent," as refunds of previous taxes paid "could deplete the state treasury, thus threatening the State's current operations and future plans."[250]

This is an unsatisfying presentation of the respective reliance interests in *Smith*. The four plurality Justices characterized the State of Arkansas as having relied in "good faith" on "presumptively valid" law.[251] True, the HUE Tax Act was not clearly invalid when enacted.[252] But even before the HUE Tax Act came into effect, its lawfulness and constitutionality were challenged in court. The state was on notice from the outset that its reliance might not be well placed. The plaintiffs, meanwhile, placed their reliance in the U.S. Constitution and the State of Arkansas Constitution, clauses of which they contended invalidated the HUE

244. 483 U.S. 266 (1987).

245. Am. Trucking Ass'ns v. Gray, 483 U.S. 1014 (1987).

246. Am. Trucking Ass'ns v. Gray, 746 S.W.2d 377, 379 (Ark. 1988) (ordering restitution only back to the date of Justice Blackmun's escrow order on August 14, 1987).

247. Justice Scalia joined as a fifth vote concurring with the plurality's judgment, writing separately because he thought that *Scheiner* was wrongly decided and it was necessary to curb its consequential impact. *See* Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 202 (1990) (Scalia, J., concurring in the judgment). For further discussion, see *infra* Section II.E.1.

248. *Smith*, 496 U.S. at 187 (plurality opinion).

249. *Id.* at 183.

250. *Id.* at 182; *see also* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 558 (1991) (O'Connor, J., dissenting) (emphasizing states' reliance interests "at a time when most States are struggling to fund even the most basic services").

251. *Smith*, 496 U.S. at 186 (plurality opinion) (quoting Lemon v. Kurtzman, 411 U.S. 192, 209 (1973)). This argument has also been used to justify the non-retroactivity of *Obergefell*, 576 U.S. 644 (2015), and *Janus*, 138 S. Ct. 2448 (2018). *See supra* notes 6, 9.

252. *Cf.* McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 46 (1990) (noting that the state could "hardly claim surprise" at the invalidation of the tax scheme at issue, given that it was "virtually identical" to a scheme previously invalidated by the Court).

Tax Act. The plaintiffs ultimately succeeded on their primary argument—their reliance was shown to be well placed. Why should the unsuccessful defendant state's reliance trump the long-held reliance interests of the successful plaintiffs?[253]

ii. Subsequent Cases

The reliance assumption—that retroactive application of new rules to past transactions is unfair because at the time of transaction, the parties would have "relied" on the old rule—fails in pending cases, and it is similarly difficult to defend in subsequently filed cases. These are cases where a plaintiff files a claim only *after* the new rule is delivered. For several reasons, we cannot assume that plaintiffs' reliance shifts from the old rule to the new rule in such cases, or that filing suit gives rise to unfairness that favors defendants' reliance on the old rule.

First, the line between pending and subsequent cases is procedural, not substantive. A plaintiff who files suit challenging a rule of law *before* an appellate court hands down a novel precedent that overturns that rule may have pleaded the exact same arguments as the principal plaintiff whose case became the vehicle for change.[254] They might also be materially the same arguments that subsequent plaintiffs bring when they seek to take advantage of the new rule. The difference is one of timing, not substantive pleading.

Second, there are any number of reasons why plaintiffs might not file suit to vindicate a rights violation before a novel precedent is handed down. They may lack the resources, the competence, or the confidence to pioneer proceedings. Such plaintiffs might even comprise those with particularly sympathetic circumstances but who are only in a position to pursue their rights via class-action proceedings led by others. This does not mean we can presume that such plaintiffs viewed the old rule as valid and constitutional at the time they labored under it, such that their suit under the new rule should be subject to dismissal.

Third, the inquiry into parties' actual reliance is unhelpful. Changes in precedent invariably affect countless parties and nonparties to litigation—many of whom will, and perhaps many more of whom will not, have "relied" on the old rule.[255] The non-retroactivity analysis attempts an impossibly ambitious balancing exercise between manifold competing interests. But, as Justice Souter

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253. *See infra* Section III.B.

254. *See* Walter V. Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631, 645 (1967) (arguing that "[t]oo many irrelevant considerations, including the common cold, bear upon the rate of progress of a case through the judicial system" for it to be a salient basis for distinguishing rights).

255. *See* Fairchild, *supra* note 86, at 260.

insisted in *James B. Beam*, the substantive law cannot "shift and spring" according to "the particular equities" of individual parties' claims, like "whether they actually relied on the old rule and how they would suffer from retroactive application of the new."[256] For "reliance on cases subsequently abandoned" is "a fact of life if not always one of jurisprudential recognition."[257]

Recognizing these problems in a series of tax-restitution cases, a majority of the Supreme Court post-*Smith* shrank from treating reliance interests as persuasive when advanced by defendants in cases brought following a novel precedent. In *James B. Beam*, the plaintiffs had sought a refund of Georgia state excise taxes on imported liquor paid between 1982 and 1984, after the Supreme Court in June 1984 struck down a materially similar tax statute in Hawaii.[258] Writing an opinion in support of the Court's judgment,[259] Justice Souter applied this "new" rule retroactively, though he acknowledged the suspicion that such plaintiffs "only exploit others' efforts by litigating in the new rule's wake."[260] Countering that charge, Justice Souter maintained that these "putative hangers-on . . . are merely asserting a right that the Court has told them is theirs in law."[261] Such plaintiffs "cannot be characterized as freeloaders any more than those who seek vindication under a new rule on facts arising after the rule's announcement. Those in each class rely on the labors of the first successful litigant."[262]

Moreover, Justice Souter continued, using non-retroactivity doctrine to distinguish between pending and subsequent cases would only exacerbate administrative burdens, because "distinguishing between those [plaintiffs] with cases pending and those without would only serve to encourage the filing of replicative suits when this or any other appellate court created the possibility of a new rule by taking a case for review."[263]

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256. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 543 (1991) (opinion of Souter, J., joined by Stevens, J.), *cited with approval in* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993); *see* Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 406 n.6 (2006).

257. *James B. Beam*, 501 U.S. at 536 (opinion of Souter, J., joined by Stevens, J.).

258. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

259. Justice Souter's opinion was joined only by Justice Stevens. The opinion was supplemented by three others that concurred in the judgment and by one dissent authored by Justice O'Connor for herself, Chief Justice Rehnquist, and Justice Kennedy.

260. *James B. Beam*, 501 U.S. at 542 (opinion of Souter, J., joined by Stevens, J.) (adding that "Beam had yet to enter the waters at the time of our decision in *Bacchus*, and yet we give it *Bacchus*' benefit").

261. *Id.* Justice Souter continued, "The applicability of rules of law is not to be switched on and off according to individual hardship." *Id.* at 543.

262. *Id.* at 542.

263. *Id.* at 542–43.

A similar approach was taken in *Harper v. Virginia Department of Taxation*.[264] The *Harper* plaintiffs had sought a refund of Virginia state taxes discriminatorily imposed on their federal retirement benefits after the Supreme Court struck down as unconstitutional a materially similar tax scheme in Michigan.[265] While Michigan had conceded that restitution was the appropriate remedy, Virginia did not. The Virginia Supreme Court declined to apply the U.S. Supreme Court's new precedent retroactively,[266] even after it reevaluated the plaintiffs' suit in light of *James B. Beam*.[267] The U.S. Supreme Court reversed. Applying *James B. Beam*, Justice Thomas held that when the Court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect" in both pending and subsequent cases.[268] The Court majority rejected Justice O'Connor's position that defendants' reliance interests should take precedence *unless* the defendant acted in a manner akin to bad faith.[269] The majority did not do so for "fairness" reasons, although, patently, unfairness can ensue from applying disparate rules to principal and successive parties.[270] Instead, the Court invoked "basic norms of constitutional adjudication" to prioritize applying precedent—including new rules—equally to all.[271] In so doing, the Court majority repudiated the technique of selective prospective overruling altogether.

3. Summary

The right-reliance balancing framework calls on courts to weigh the costs and benefits to parties of applying new rules retroactively. This framework is malleable to the point of being manipulable. Notions of reliance can readily be

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264. 509 U.S. 86 (1993).

265. Davis v. Mich. Dep't of the Treasury, 489 U.S. 803 (1989).

266. Harper v. Va. Dep't of Taxation, 401 S.E.2d 868 (Va. 1991).

267. Harper v. Va. Dep't of Taxation, 410 S.E.2d 629 (Va. 1991).

268. *Harper*, 509 U.S. at 97.

269. *Id.* at 135 (O'Connor, J., dissenting).

270. *See, e.g.*, Molitor v. Kaneland Cmty. Unit Dist. No. 302, 163 N.E.2d 89, 96-97 (Ill. 1959) (initially using selective prospectivity to grant relief to one student who brought a personal-injury suit as a test case against his school following a serious bus crash, while denying relief to other victims of the same crash (including the test plaintiff's siblings) whose cases were pending—a disparity in treatment that was only rectified in subsequent proceedings), *revisited in* 182 N.E.2d 145 (Ill. 1962); *see also* Fairchild, *supra* note 86, at 268-69 (discussing *Molitor*); Hammer, *supra* note 58, at 423-24 (noting the unfairness of the initial *Molitor* holding).

271. *Harper*, 509 U.S. at 87 (quoting Griffith v. Kentucky, 479 U.S. 314, 322 (1987)); *see also* Reich v. Collins, 513 U.S. 106, 114 (1994) ("[T]axpayers need not have taken any steps to learn of the possible unconstitutionality of their taxes at the time they paid them. Accordingly, they may not now be put in any worse position for having failed to take such steps.").

tamed to meet decisionmakers' desired ends. It remains unclear *whose* reliance is pertinent to the assessment, and whether the inquiry is a subjective or objective one. Nor is it clear *when* in the process of interaction and litigation reliance interests become material. The upshot of this framework, it would seem, is that so long as someone, somewhere, at some time might have relied on the "old" rule, their interest will weigh against retroactive application of the "new" rule. This is not a stable foundation on which to rest the doctrine.

C. Choice-of-Law Framework

Perhaps the problem with the right-reliance balancing framework is that it emphasizes the wrong dichotomy. *Sunburst Oil* suggested that novel precedent presents courts with a "choice" between applying old law and applying new law.[272] In the 1950s, Henry Hart and Albert Sacks characterized *Sunburst Oil*-type cases as raising a "problem of the conflict of laws in time."[273] This characterization has endeared itself to some judges at the highest level. Under scrutiny, however, it does not fare well. The choice-of-law framework bears the same flaws as the legal-philosophical and right-reliance balancing frameworks. Though intuitively appealing, it is not a workable method for determining the temporal reach of novel precedent.

1. Description

According to Hart and Sacks's "conflict of laws in time" theory, the problem with new law arising from the judicial branch is that

> the substantive content of its laws is constantly changing. . . . Again and again, in many varied types of situations, the question[] presents itself: Should this matter be settled in accordance with the law as it was or appeared to be at one or another past point of time or in accordance with the law as it appears to be now?[274]

This question, which sets up a dichotomy between old law and new law from which an adjudicating court must choose, was first articulated in earnest at the

272. Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932); *see* Richard H.S. Tur, *Time and Law*, 22 OXFORD J. LEGAL STUD. 463, 473 (2002).

273. HART & SACKS, *supra* note 75, at 606.

274. *Id.* at 616.

federal level in *Smith*.[275] Justice O'Connor contended that when reliance interests weigh in favor of non-retroactivity, lower courts considering subsequent cases should apply the law that governed at the time of the transaction in issue. This meant that

> [i]f the operative conduct or events occurred before the law-changing decision, a court should apply the law prevailing at the time of the conduct. If the operative conduct or events occurred after the decision, so that any reliance on old precedent would be unjustified, a court should apply the new law.[276]

The choice-of-law framework proposes that a legal issue may be subject to different laws that correspond to two different temporal periods. That is because "when the Court changes its mind, the law changes with it."[277] The judge's task is to apply the law that governed at the time the issue in dispute arose.[278]

Justice Souter built upon this framework in *James B. Beam*. He explained that whether a new rule applies retroactively "is properly seen in the first instance as a matter of choice of law,"[279] which leaves a court with three options: (1) to apply the new rule "fully retroactive[ly]" (a practice Justice Souter described as "overwhelmingly the norm");[280] (2) to overrule "purely prospective[ly];"[281] or (3) to apply "modified, or selective, prospectivity" by "apply[ing] a new rule in the case in which it is pronounced, then return[ing] to the old one with respect to all others arising on facts predating the pronouncement."[282] Justice Souter rejected this third option of selective prospectivity as contrary to "principles of equality

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275. Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 191 (1990) (plurality opinion); *see* Fallon & Meltzer, *supra* note 66, at 1757 (noting that "[t]he four Justices in the [*Smith*] plurality adopted a starkly positivist outlook").

276. *Smith*, 496 U.S. at 191 (plurality opinion). *But see id.* at 218-19 (Stevens, J., dissenting).

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

278. Justice O'Connor in *Smith* rejected the dissent's framing of this problem as involving not a choice of law but a choice of *remedy*. Non-retroactivity doctrine, Justice O'Connor maintained, is "better understood as part of the doctrine of *stare decisis*, rather than as part of the law of remedies." *Smith*, 496 U.S. at 196 (plurality opinion); *see* Stephens, *supra* note 31, at 1535; Kuo, *supra* note 209, at 892-93; *infra* Section II.D.

279. *James B. Beam*, 501 U.S. at 534-35 (opinion of Souter, J., joined by Stevens, J.), *endorsed by* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 131-32 (1993) (O'Connor, J., dissenting); *see* Hans W. Baade, *Time and Meaning: Notes on the Intertemporal Law of Statutory Construction and Constitutional Interpretation*, 43 AM. J. COMP. L. 319, 326 (1995); Kuo, *supra* note 209, at 899.

280. *James B. Beam*, 501 U.S. at 535 (opinion of Souter, J., joined by Stevens, J.).

281. *Id.* at 536.

282. *Id.* at 537.

and *stare decisis*,"[283] a rejection that the *Harper* majority later affirmed.[284] And though Justice Souter and Justice O'Connor were in agreement that judicial retroactivity was a choice-of-law problem, they parted ways in its application. For Justice Souter, once it was found that a new rule had been applied to the parties in the principal case in which it was articulated, the rejection of selective prospectivity left the Court only one option: to apply the new rule retroactively "for all others."[285] Such was the case in *James B. Beam*. In contrast, Justice O'Connor in dissent contended that the Court's failure to deal with retroactivity when striking down the unconstitutional state tax at issue was an oversight that ought not to be perpetuated when reliance interests weighed on the side of prospective overruling.[286] Her view would suggest that the Court should explicitly pronounce the temporal scope of its judgments in future landmark cases.[287] The Supreme Court has not, however, adopted such an approach.[288]

2. Critique

The choice-of-law framework hinges on the premise "that parties should be judged by the law in effect at the time of their actions" and so the judicial inquiry should focus on "what the transaction-time law [was]."[289] There are several problems with the framework.

First, despite impressions, the choice-of-law framework "bears no obvious resemblance" to conflict-of-laws analysis.[290] In the field of conflict of laws, choice of law is a preliminary procedural inquiry that determines which jurisdiction's laws govern a substantive dispute.[291] It is employed, for instance, in

283. *Id.* at 540. *But see id.* at 550 (O'Connor, J., dissenting).

284. 509 U.S. at 97.

285. *James B. Beam*, 501 U.S. at 543 (opinion of Souter, J., joined by Stevens, J.).

286. *See id.* at 550-51 (O'Connor, J., dissenting); Kuo, *supra* note 209, at 891.

287. *James B. Beam*, 501 U.S. at 550 (O'Connor, J. dissenting). *But see* Note, *supra* note 70, at 951 ("When a federal court overrules a prior decision and announces a new rule of law by applying it to the litigants in the case or controversy before it, it should withhold any statement as to the retroactive effect of the new rule. The question of whether the new rule should be applied retroactively should not be decided until it is presented to a court as an actual case and controversy.").

288. Far from it. Since the mid-1990s, the Court has largely avoided the subject of judicial nonretroactivity. *See infra* note 318.

289. Roosevelt, *supra* note 28, at 1080.

290. *Id.*

291. HERMA KAY, LARRY KRAMER, KERMIT ROOSEVELT & DAVID L. FRANKLIN, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 415 (10th ed. 2018).

determining whether federal law or state law governs a case.[292] The choice-of-law inquiry relevant to retroactivity, by contrast, is neither preliminary, nor procedural, nor jurisdictional. It is a substantive inquiry into the rights of the parties that directly determines how a dispute should be resolved. It is unhelpful to conflate these two concepts.

Second, the choice-of-law framework is not actually about *choosing* between two laws. It is about *finding* what the law was during a specific temporal period.[293] The pertinent question, as Justice O'Connor characterized it in *Smith*, is whether a transaction was governed by the "old" law or the "new" law.[294] This inquiry reintroduces the conundrum of the legal-philosophical framework. The judge's decision on which law prevailed at the time of the parties' transaction will invariably be informed by their personal perspective and their philosophy of law and adjudication. As already addressed, such inquiry is "unworkable in principle and in practice."[295]

Third, to the extent that the choice-of-law framework does give judges a meaningful choice between (temporal) laws, that choice, at least according to Justice O'Connor, is guided by the right-reliance balancing framework.[296] It is therefore subject to the same criticisms as that framework.[297]

Finally, it is not clear whether, or why, the choice-of-law framework should focus on the time of the parties' *transaction* rather than the time of their *dispute*. Roosevelt's critique is premised on an example of "a transaction between two parties" where a lawsuit is "filed immediately thereafter."[298] But transactions are not necessarily reducible to discrete moments, nor is there necessarily immediacy between when parties first interact and when a dispute arises between them. A party has no right of action until it has suffered a wrong or experienced a rights violation. Is rights violation (i.e., the event that causes the plaintiff to sue) not "the operative conduct or event[]" on which the choice-of-law inquiry should focus?[299] This supposition suggests a further complexity: the relevant rule might change between the time of the transaction and the time of the dispute,

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292. Kuo, *supra* note 209, at 899.

293. A variant of the choice-of-law framework is Jill E. Fisch's equilibrium theory of (non-)retroactivity doctrine. *See supra* Section I.B.

294. Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 191 (1990) (plurality opinion).

295. Roosevelt, *supra* note 28, at 1081; *see, e.g.*, *Smith*, 496 U.S. at 212 (Stevens, J., dissenting) (contending that the impugned Arkansas flat tax "violated the Constitution before our decision in *Scheiner*").

296. *See Smith*, 496 U.S. at 183 (plurality opinion).

297. *See supra* Section II.B.2.

298. Roosevelt, *supra* note 28, at 1080.

299. *Smith*, 496 U.S. at 218-19 (Stevens, J., dissenting); *see id.* at 191 (plurality opinion).

and change again between the time of dispute and the time of judgment. In such circumstances, how should the judge choose?

3. *Summary*

The choice-of-law framework asks courts to identify what the law was at the time of the transaction in issue. This framework bears the same flaws as the legal-philosophical and right-reliance balancing frameworks, while injecting further complexity of its own. The characterization of a legal rule as either "old" or "new" may vary based on decisionmakers' individual perspectives and legal philosophies, how they choose to factor in reliance interests, and when they consider operative conduct or events to be material. Such scope for variation in judicial approach can offer little certainty or stability to parties assessing their rights and duties in a dynamic legal order.

D. Remedial Framework

Instead of asking what law governed at the time of transaction, many scholars favor asking what law governs at the time of judgment. That is, "[c]ourts should apply their current best understanding of the law to all cases before them, regardless of whether the best understanding at the time of the transaction would produce a different result."[300] Under this approach, judgments will always operate retroactively for the purpose of determining what the law was, but courts may employ equitable considerations to curb the *remedial* impact of unexpected judicial changes in the law. Alas, the central inquiry of the remedial framework—whether legal change was anticipatable—cannot produce principled distinctions between cases warranting retroactive relief and those not.

1. *Description*

The idea that the impact of new law should be addressed through the law of remedies was urged by Justice Harlan II in a series of minority opinions delivered in the twilight of his tenure on the Supreme Court.[301] In *United States v. Estate of*

300. Roosevelt, *supra* note 28, at 1117; *see* Frederic Bloom, *The Law's Clock*, 104 GEO. L.J. 1, 51 n.321 (2015) ("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.").

301. Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part); United States v. Estate of Donnelly, 397 U.S. 286, 295 (1970) (Harlan, J., concurring); Desist v. United States, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting); *see also* Griffith v. Kentucky, 479 U.S. 314, 322 (1987) (noting that the Court had since "embraced to a

Donnelly, a case concerning civil non-retroactivity doctrine, Justice Harlan expressed "fear" that endeavors to distinguish new law from old risked "ensnar[ing]" the Court in "a retroactivity quagmire."[302] Instead, he endorsed applying novel precedent retroactively to all cases until doctrines of limitation or res judicata placed them "beyond challenge."[303] "Any uncertainty engendered by this approach should," he thought, "be deemed part of the risks of life."[304] Relevant "equitable considerations," such as "reliance," could then be addressed "in the determination of what relief is appropriate in any given case."[305] On this approach, new law presents a problem for remedies, not substantive rights.

Justice Harlan's contention that "'[r]etroactivity' must be rethought" has prevailed.[306] Current Supreme Court precedent characterizes the issue as a question for remedies.[307] Justice Stevens for the dissenting justices in *Smith*, for example, adopted Justice Harlan's framework.[308] He contended that *Chevron Oil* and its progeny could be shown, on "[c]lose examination," to concern "a remedial principle for the exercise of equitable discretion by federal courts" rather than "a choice-of-law principle."[309] This was a revisionist reading of the Court's precedent that Justice O'Connor sharply criticized in her plurality opinion.[310]

Justice O'Connor's aversion to the remedial framework was short lived, however, as the Court's majority increasingly soured on non-retroactivity doctrine. In *Harper*, the Court's majority implicitly accepted the remedial framework, though it declined to limit the remedial impact of its novel precedent in the

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significant extent the comprehensive analysis presented by Justice Harlan in [the *Mackey* and *Desist*] opinions").

302. *Estate of Donnelly*, 397 U.S. at 295.

303. *Id.* at 296.

304. *Id.*

305. *Id.*

306. United States v. Johnson, 457 U.S. 537, 548 (1982) (citing *Desist*, 394 U.S. at 258 (Harlan, J., dissenting)).

307. Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 761 (1995) (Kennedy, J., concurring in the judgment); Reich v. Collins, 513 U.S. 106, 114 (1994); Harper v. Va. Dep't of Taxation, 509 U.S. 86, 98 (1993); *see Harper*, 509 U.S. at 112 (Kennedy, J., concurring in part and concurring in the judgment).

308. Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 210 (1990) (Stevens, J., dissenting); *see* Fallon & Meltzer, *supra* note 66, at 1757.

309. *Smith*, 496 U.S. at 219-20 (Stevens, J., dissenting); *see also* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535 (opinion of Souter, J., joined by Stevens, J.) ("Once a rule is found to apply 'backward,' there may then be a further issue of remedies, *i.e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one.").

310. *Smith*, 496 U.S. at 195-96 (plurality opinion).

case.[311] Justice O'Connor, now in dissent, maintained that "[t]he questions of retroactivity and remedy are analytically distinct."[312] However, concerned about "the Court's revisions to the law of retroactivity," which were restricting its "authority to temper hardship," Justice O'Connor herself invoked the remedial approach.[313] She objected to retroactive remedies being "*unanticipated* windfall[s]" to plaintiffs, imposing on defendant states "*unanticipated* financial burdens" that are ultimately borne by "blameless and *unexpecting* taxpayers" of those states.[314] Her priority was to preserve the Court's ability "to avoid injustice by taking equity into account when formulating the remedy for violations of novel constitutional rules."[315]

Justice Kennedy gave the last substantive Supreme Court judgment on this matter. Writing for himself and Justice O'Connor in *Reynoldsville Casket Co. v. Hyde*, he reiterated the remedial framework[316] but "postpon[ed] extended discussion of reliance interests as they bear upon remedies" for a suitable future case.[317] Surprisingly, the Supreme Court has not since found such a case.[318] This has not dampened academic interest in non-retroactivity doctrine, however.

Richard Fallon and Daniel Meltzer were the first to theorize the remedial framework in earnest in an influential article in the *Harvard Law Review*.[319] Many scholars have embraced their perspective since.[320] Fallon and Meltzer

311. *Harper*, 509 U.S. at 98 (1993); *see id.* at 112 (Kennedy, J., concurring in part and concurring in the judgment).

312. *Id.* at 131 (O'Connor, J., dissenting).

313. *Id.* at 133, 136.

314. *Id.* at 129-31 (emphasis added).

315. *Id.* at 136.

316. 514 U.S. 749, 761 (1995) (Kennedy, J., concurring in the judgment).

317. *Id.* at 764.

318. At least not in the civil context. *See also* Davis v. United States, 564 U.S. 229, 243 (2011) (seemingly endorsing Justice Harlan's approach to the retroactive effect of new rules of criminal procedure, while citing the since-abandoned plurality opinion in *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990), for the proposition that "[r]emedy is a separate, analytically distinct issue [from retroactivity]"); *cf. id.* at 254 (Breyer, J., dissenting) ("What we are actually determining when we assess the 'retroactivity' of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought." (quoting Danforth v. Minnesota, 552 U.S. 264, 271 (2008))); cases cited *supra* note 61 (citing recent criminal-law cases).

319. Fallon & Meltzer, *supra* note 66, *cited in* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 103 (1993) (Scalia, J., concurring), *and id.* at 133, 136 (O'Connor, J., dissenting).

320. *See, e.g.*, John M. Greabe, *Remedial Discretion in Constitutional Adjudication*, 62 BUFF. L. REV. 881, 927-28 (2014) ("[T]he Court should use a purely remedial framework—and not selective

contended that "the concept of 'new' law" reflects a practical issue about the "relative unpredictability" of legal change, an issue "best understood as addressing a question within the law of remedies."[321] They outlined a theory of constitutional remedies that seeks to accommodate the sometimes-competing interests in providing "effective redress to individual victims of constitutional violations" and in adequately "keep[ing] government within the bounds of law."[322] Satisfaction of these two interests, they suggested, sometimes warrants substitutionary remedies and sometimes even the withholding of remedies. The barometer for restricting remedies should depend on the novelty and unpredictability of the legal change at issue. For Fallon and Meltzer, "legal rules and principles are new to the extent that, ex ante, their recognition as authoritative would have been viewed as relatively unlikely by competent lawyers."[323] When a defendant violates foreseeable or "established law," withholding remedies on the basis of cost or administrative disruption will offend interests in rights protection, fairness, and sound incentive structures.[324] By contrast, when a defendant "might have thought their conduct constitutionally valid, there is less need to impose a 'penalty' to deter future misconduct" — especially, Fallon and Meltzer contended, when the defendant is a government official.[325] In such cases, when rights are relatively unpredictable ex ante, "the moral strength of a plaintiff's claim to relief" may not be compelling.[326] The "interest in individual redress" in such cases

prospectivity or any other non-retroactivity doctrine — to protect the public interest from the costs of constitutional innovation."); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999) (explaining that remedial limits "facilitate[] constitutional change by reducing the costs of innovation"); Roosevelt, *supra* note 28, at 1107 ("[R]emedial analysis is the only acceptable route to prospective results . . . ."); Kuo, *supra* note 209, at 901 ("[F]ocusing on remedies . . . avoids *Chevron Oil*'s obsession with the existence of new or old laws.") *see also* Rhodes, *supra* note 4, at 411 ("[R]emedial relief may be manipulated to mitigate society's reliance costs from legal change"); Shannon, *supra* note 34, at 842-43 (suggesting that "[t]he most sophisticated version" of the prospective approach that separates "the issue of the 'applicable' rule of law . . . from the issue of the appropriate remedy" is "that advanced by Richard H. Fallon, Jr., and Daniel J. Meltzer").

321. Fallon & Meltzer, *supra* note 66, at 1736; *see also* United States v. Estate of Donnelly, 397 U.S. 286, 295 (1970) (Harlan, J., concurring) (considering the impulse "to avoid jolting the expectations of parties to a transaction").

322. Fallon & Meltzer, *supra* note 66, at 1736.

323. *Id.* at 1763.

324. *Id.* at 1793.

325. *Id.*; *see id.* at 1795-96 ("[A]djustment of remedies when a constitutional violation is quite unpredictable exacts little toll on the aspiration to keep government generally within constitutional bounds.").

326. *See id.* at 1797.

may have to "yield" to other interests, which could warrant the withholding of remedies.[327]

2. *Critique*

The remedial framework invokes the language of equity, but its conceptualization of equity is sui generis. The remedial framework is not grounded in traditional equitable considerations of prejudice or hardship to a defendant.[328] It is grounded in speculative considerations regarding the foreseeability or predictability of legal change. This is its flaw.

The line Fallon and Meltzer strive to draw—between whether or not a novel precedent was "relatively unpredictable"—remains highly indeterminate. Their task is similar to the inquiry concerning whether a judgment represents "a clear break with the past."[329] It is not clear how this should be decided.[330] Fallon and Meltzer would define new law "narrowly" so that "rules and decisions that are clearly foreshadowed, . . . reflect ordinary legal evolution, . . . or are dictated by precedent" could not be a basis for withholding remedies.[331] Curiously, this position suggests that the Supreme Court's decision in *Janus* was not "new" law, since public-sector unions had "been on notice for years" that the tide of constitutional precedent was turning against them.[332] *Janus* should, accordingly, have retroactive effect. Yet "any effort to define the requisite degree of novelty will necessarily be spongy and highly manipulable. The signals sent by the Supreme Court in application will be at least as important as the precise verbal formulation."[333]

One upshot of the inquiry into the predictability of legal change would seem to be to drive a wedge between pending and subsequent cases on any issue. That is because those who file suit pleading novel claims, challenging unfavorable precedent, reveal by their actions an anticipation that their complaint is recognizable in law. Under the remedial framework, the opposite inference could be drawn against those who sit back until after unfavorable precedent is overturned. For instance, when the Supreme Court delivers a landmark judgment that is followed by a flood of lawsuits that seek to invoke the right that the judgment

327. *Id.* at 1791.

328. *See infra* Section III.B.

329. Fallon & Meltzer, *supra* note 66, at 1831 (citing McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990)).

330. *See* Kuo, *supra* note 209, at 901.

331. Fallon & Meltzer, *supra* note 66, at 1817.

332. Janus v. Am. Fed'n of State, Cty. & Mun. Emps., 138 S. Ct. 2448, 2484 (2018).

333. Fallon & Meltzer, *supra* note 66, at 1796.

upheld, there may be compelling fairness and reliance reasons to frame the Supreme Court's judgment as novel precedent and to restrict backward-looking relief.[334] *Janus* could be understood as such an example. It could be inferred that public-sector workers who "litigat[e] in the new rule's wake"[335] do so only because they did not foresee the Supreme Court overturning its precedent (concerning the compulsory deduction of union agency fees), and so their claim (for restitution of past-collected fees) should yield to the defendants' reliance and administrability interests. But the same cannot be said of all those plaintiffs who already had cases pending in federal courts on the day *Janus* was handed down.[336] Nor could it be said of the principal plaintiffs in the *Janus* case itself. For those plaintiffs, legal change was clearly foreseeable and predictable because it was the very thing their lawsuits sought. There could be no basis for withholding relief from such plaintiffs according to the remedial framework. Indeed, Fallon and Meltzer favored the method of selective prospectivity precisely because it *would* vindicate the expectation interests at least of principal plaintiffs who successfully litigate their rights.[337]

This critique can be taken further. Novelty and unpredictability of legal change are characterized as objective inquiries. Fallon and Meltzer define these inquiries according to the expectations of "competent lawyers"[338] or what government officials "reasonably might have thought."[339] That being so, it seems irrelevant that subsequent plaintiffs might not have anticipated legal change when there are principal plaintiffs and plaintiffs with cases pending who did. Since novel precedent is invariably preceded (and caused) by at least one party who fights for it, legal change will invariably be (nontrivially) anticipatable before the date a court hands down a landmark judgment. This insight shakes a core assumption of the remedial framework. If the principal plaintiffs to a novel case are able to foresee or predict legal change when filing suit, then others—be they potential plaintiffs or defendants—ought to be able to do so as well.

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334. *Cf.* Fisch, *supra* note 19, at 1083 ("Viewing retroactivity purely in remedial terms, although appealing in theory, is unsatisfying. From the perspective of the litigant, winning the application of a particular rule of law has little value unless the litigant is entitled to the relief justified by that rule.").

335. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 542 (1991) (opinion of Souter, J., joined by Stevens, J.).

336. *See, e.g.*, Lee v. Ohio Educ. Ass'n, 951 F.3d 386 (6th Cir. 2020); Danielson v. Inslee, 945 F.3d 1096 (9th Cir. 2019); *see also* Chemerinsky & Fisk, *supra* note 9, at 43 n.9 (citing pending agency-fee-refund cases).

337. This preserves litigant incentives to raise novel claims. Fallon & Meltzer, *supra* note 66, at 1806-07; *cf.* Roosevelt, *supra* note 28, at 1108 ("Formalism may be a vice, but incoherence is no virtue, and incoherence is what selective prospectivity brings.").

338. Fallon & Meltzer, *supra* note 66, at 1763.

339. *Id.* at 1793.

Subsequent claims for past grievances should therefore be viable so long as they are filed within the requisite limitations period. And if that premise is accepted, then the distinction that the remedial framework utilizes to grant remedies in some cases and withhold them in others collapses. The framework provides no principled basis for withholding remedies at all.

3. Summary

The remedial framework seeks to delineate retroactive remedies by reference to the foreseeability or predictability of legal change. Even its proponents concede that this inquiry is necessarily "spongy and highly manipulable,"[340] weakening its interpretive force. Further, where legal change is found to be foreseeable or predictable for some parties, it seems doubtful that the remedial framework can justify any limits on retroactive remedies for others. The very process of litigation renders legal change anticipatable. As such, the framework is unable rationally to contain the temporal scope of novel precedent.

E. Exceptionality Framework

The final framework can be addressed briefly, for it is not a theory of non-retroactivity so much as a contingency of last resort.

1. Description

It should not be controversial to state that judicial retroactivity is "overwhelmingly the norm."[341] During the Warren Court's foray into non-retroactive adjudication, Thomas Fairchild observed that "the technique of prospective overruling" was employed "as an exceptional expedient when the traditional retroactivity would wreak more havoc in society than society's interest in stability will tolerate."[342] He endorsed maintaining this cautious approach.[343] Similarly, in *Reynoldsville Casket*, Justices Kennedy and O'Connor sought to preserve non-

340. *Id.* at 1796.

341. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535 (1991) (opinion of Souter, J., joined by Stevens, J.); *cf.* Masur & Mortara, *supra* note 22, at 1016 (suggesting that "courts remain free to issue purely prospective rulings, so long as they do not apply those rulings to the parties who brought the case").

342. Fairchild, *supra* note 86, at 254.

343. *Id.* at 269.

retroactivity at least in "exceptional cases" where important fairness and reliance interests demanded it.[344]

A curious example of non-retroactivity being implicitly endorsed as a last resort was Justice Scalia's concurring opinion in *Smith*. Justice Scalia was no fan of non-retroactivity doctrine. He rejected all of the aforementioned frameworks.[345] He was labeled a "neo-Blackstonian,"[346] which in his case can only mean he assented to the function of the declaratory theory of adjudication, albeit not to Blackstone's formal account of it.[347] Nevertheless, in *Smith*, Justice Scalia added the fifth vote to Justice O'Connor's judgment for the Court, which refused plaintiffs' claims for retroactive relief brought in light of the Court's decision in *Scheiner*, because in his view, expressed in his *Scheiner* dissent, that case was wrongly decided.[348] Justice Scalia said that while ordinarily stare decisis would cause him to uphold a decision of the Supreme Court as precedent for successive cases, he could not cast a vote that would impose liability upon a litigant when he had already declared that no such liability should lie.[349] Employing the language of non-retroactivity, Justice Scalia refused to "upset th[e] litigant's settled expectations" by applying against them a decision that had "overruled prior law."[350]

2. Critique

There is little substance to an exceptionality approach to non-retroactivity. Lacking a conceptual framework, there are no firm principles to guide judges as to when a case warrants "exceptional" treatment. This gives rise to concerns that non-retroactivity will be too often, too rarely, or too arbitrarily employed.

A series of tax-restitution cases in England presents a cautionary tale to this effect. In England, prospective overruling is "a wholly exceptional" resort.[351] It

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344. Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 761 (1995) (Kennedy, J., concurring in the judgment).

345. *Id.* at 759-61 (Scalia, J., concurring); *James B. Beam*, 501 U.S. at 548-49 (Scalia, J., concurring in the judgment).

346. Fallon & Meltzer, *supra* note 66, at 1757.

347. *See supra* Section II.A.2.

348. *See* Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 202-05 (1990) (Scalia, J., concurring in the judgment) (citing Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266, 303-06 (1987) (Scalia, J., dissenting)).

349. *See Smith*, 496 U.S. at 204-05 (Scalia, J., concurring in the judgment).

350. *Id.* at 205 (emphasis omitted).

351. Nat'l Westminster Bank plc v. Spectrum Plus Ltd. [2005] 2 AC 680 (HL), [74] (appeal taken from Eng.); *see also* Ramdeen v. State [2015] AC 562 (PC), [90] (appeal taken from Trin. &

was not employed when, around the turn of the millennium, corporate groups that operated within the European Union sued the U.K. Government for discriminatory tax treatment under the U.K. corporation and value-added-tax statutes.[352] After the corporate groups' substantive claims were upheld in landmark appellate judgments, further plaintiffs filed suit seeking restitution of their past paid taxes, in some cases dating back to 1973 (when the U.K. joined the European Economic Community).[353] The plaintiffs claimed that they could not have "discovered" their mistakes of law[354] in paying the taxes until the corporate groups' novel claims had been upheld by the courts, thereby (retroactively) clarifying the legal landscape. England, like most U.S. states, applies a discovery rule to determine when the statute of limitations begins to run in cases of "mistake."[355] Applying this rule, limitation was thought not to run against any of the plaintiffs' claims until the date the novel precedent on which their arguments relied was handed down.[356] This led the English courts to uphold as timely claims for restitution in respect of three decades of tax payments. This understanding of the retroactivity of novel precedent threatened to neuter the statute of limitations in cases of "mistake of law" in England, exposing billions of pounds of past-collected revenue to litigation.[357] Yet, even these circumstances did not tempt any English judge to adopt the exceptional method of prospective

Tobago) ("[I]n very exceptional cases, European and common law courts do have power to declare the law with prospective effect only[.]"); Canada (Attorney Gen.) v. Hislop, [2007] 1 S.C.R. 429, [140] (Can.) (Bastarache, J., concurring) ("[R]etroactivity of a constitutional remedy . . . is the norm in our constitutional jurisprudence, not the exception.").

352. Mitchell, *supra* note 15, at 1.

353. *See* Prudential Assurance Co. Ltd. v. Comm'rs for Her Majesty's Revenue & Customs [2018] STC 1657 (UKSC); Test Claimants in the Franked Inv. Income Grp. Litig. v. Comm'rs of Her Majesty's Revenue & Customs [2017] STC 696 (EWCA).

354. Mistake of law was the basis of their cause of action. ANDREW BURROWS, A RESTATEMENT OF THE ENGLISH LAW OF UNJUST ENRICHMENT § 10(1) (2012); *see* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 cmt. g (AM. LAW INST. 2011).

355. Limitation Act 1980, c. 58, § 32(1) (Eng.); *see* 2 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 8.3 (1991); *infra* note 381.

356. Deutsche Morgan Grenfell Grp. Plc v. Her Majesty's Comm'rs of Inland Revenue [2007] 1 AC 558 (HL), [31], [71], [144], *applied in FII Test Claimants*, [2017] STC 696, [372] ("[I]n the case of a point of law which is being actively disputed in current litigation the true position is only discoverable . . . when the point has been authoritatively resolved by a final court."); *cf.* Samuel Beswick, *Discoverability Principles and the Law's Mistakes*, 136 LAW Q. REV. 139, 140 (2020) (arguing that this *ratio decidendi* contravenes the text, principles, and policies of limitations law). The Supreme Court abandoned this interpretation and overruled *Deutsche Morgan Grenfell* in *Test Claimants in the Franked Inv. Income Grp. Litig. v. Comm'rs for Her Majesty's Revenue & Customs*, [2020] UKSC 47, [253].

357. McManus, *supra* note 121, at 236; Mitchell, *supra* note 15, at 1.

overruling.[358] Lacking any clear standards, the doctrine cannot be employed in a consistent and principled manner.

3. Summary

Non-retroactivity doctrine is widely accepted to be an exception to the ordinary course of retroactive adjudication. But being an exception cannot be its only feature. Otherwise, its implementation can only be arbitrary.

III. RIGHT-OF-ACTION FRAMEWORK

The five preceding frameworks each seek to explain how novel precedent affects parties' rights. What these frameworks have in common is that they focus primarily on the rights of principal plaintiffs — those who pioneer novel proceedings. The content of those plaintiffs' judicially determined rights is then treated as governing successive parties' claims. In other words, each of the frameworks presupposes that successive litigants' rights to legal recourse depend upon the timing and outcome of principal plaintiffs' cases. This is not, however, how rights of action are conventionally conceived. And this is why non-retroactivity doctrine has found no satisfactory framework.

This Part outlines an alternative framework grounded in conventional common-law reasoning. This framework reorients judges' focus onto the claims that are currently before them — those over which they have direct jurisdiction. It embraces the retroactivity of judicial precedent: disputes over rights can only be resolved from a perspective of hindsight and cannot, it is contended, feasibly be insulated from developments in precedent. While rejecting the premises of (non-)retroactivity jurisprudence, the right-of-action framework nevertheless shares with that jurisprudence three core features:

358. *See* Edelman, *supra* note 146, at 103-04 (suggesting that the doctrine of prospective overruling should not govern claims in mistake of law); *cf.* Stephens, *supra* note 31, at 1568 (commenting that in U.S. law, "should the [C]ourt announce a new rule of law that provides a cause of action where one did not exist before, a litigant may not take advantage of that to bring a case barred by the relevant statute of limitations").

(1) A focus on the rights of action of the parties before an adjudicating court. This focus influenced the judicial opinions of Justice Stevens,[359] Justice Souter,[360] and Justice Scalia,[361] in particular.[362]

(2) A view that rights should be construed through the court's "current best understanding of the law."[363] In other words, judges should apply decision-time law, rather than seek to identify some different transaction-time law. This was the view adopted by Justice Harlan[364] and endorsed by Roosevelt.[365]

(3) A concern to avoid remedies that do injustice to either party. This concern underlaid the judicial opinions of Justice O'Connor[366] and informed the remedial framework developed by Fallon and Meltzer.[367]

The right-of-action framework outlined in this Part takes no position in the legal-philosophical debate,[368] and it does not turn on whether one adopts a formalist or a functionalist understanding of rights of action. Further, the right-of-action framework eschews the assumptions of the right-reliance balancing framework. Reliance, clearly, is a proxy for hardship. But it is a superfluous proxy. We already have a body of doctrine designed to relieve defendants from the hardship of the ordinary course of the law: equity. Equitable principles—not

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359. Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 214 (1990) (Stevens, J., dissenting) ("[O]nce a determination has been made that a party is properly before the Court and a new decisional rule properly states the law, interests of repose should play no role in determining the substantive legal rights of parties."); *see* Shannon, *supra* note 34, at 874 ("The focus must remain on the parties and the issues before the court, and the law announced must be the law that is applied to those parties in resolution of those issues.").

360. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 542 (1991) (opinion of Souter, J., joined by Stevens, J.) ("[T]he putative hangers-on . . . are merely asserting a right that the Court has told them is theirs in law.").

361. *Smith*, 496 U.S. at 201 (Scalia, J., concurring in the judgment) ("Either enforcement of the statute at issue . . . was unconstitutional, or it was not; if it was, then so is enforcement of all identical statutes in other States, whether occurring before or after our decision . . . .").

362. *See also* Note, *supra* note 70, at 937 (emphasizing that decisions of retroactive application should be made "in the context of actual cases and upon actual facts").

363. Roosevelt, *supra* note 28, at 1117.

364. United States v. Estate of Donnelly, 397 U.S. 286, 297 (1970) (Harlan, J., concurring) ("[C]ourts should apply the prevailing decisional rule to the cases before them.").

365. Roosevelt, *supra* note 28, at 1117.

366. *See supra* Sections II.B-C.

367. *See* Fallon & Meltzer, *supra* note 66, at 1833.

368. In this respect it is "a philosophically unambitious account" of law's temporal implications. *Id.* at 1764 n.187. *See supra* Section II.A.

amorphous appeals to fairness, efficiency, or reliance—should be employed when the ordinary adjudication of rights in light of novel precedent would lead to injustice.

The right-of-action framework makes no use of the choice-of-law framework, either, for as Section II.C showed, that framework involves no meaningful choice between laws and distracts from the core problem. In contrast, it is accepted that the remedial and the exceptionality frameworks embody some important principles—especially that withholding remedies for rights violations should be the exception, not the rule. Yet, they fall short of facilitating consistent and principled reasoning. There is a better way to rationalize the temporal scope of novel precedent.

This Part proceeds as follows. Section III.A reframes the core problem. It contends that the salient temporal period is not when an appellate court hands down novel precedent, but when novel rights of action become justiciable. In other words, it is when a plaintiff comes to have a valid legal complaint to plead to a court. This inquiry—whether a novel claim is properly before a court—is informed by two complementary temporal[369] inquiries: ripeness doctrine and limitation law's accrual inquiry. Understanding these principles of law is key to understanding the temporal nature of rights of action.

Section III.B considers the limits on rights of action recognized in law. The Supreme Court's jurisprudence has long acknowledged important temporal limits and defenses, including res judicata, collateral estoppel, limitations, laches and acquiescence, and stays of judgment. Section III.B argues that these doctrines can properly constrain injustices that might arise from construing past rights through decision-time law.

Section III.C summarizes the implications of this framework. It argues that the framework avoids the flawed assumptions of the contemporary non-retroactivity frameworks and provides the soundest rationalization of the temporal scope of novel precedent.

A. Justiciability of Rights of Action

The problem of novel precedent concerns whether "new" rules apply to past transactions and disputes. Does the interpretation of law upheld in a principal case inform the content of successive plaintiffs' rights? The answer ultimately depends on whether successive plaintiffs can obtain a judgment requiring

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369. Justiciability encompasses a number of nontemporal doctrines as well, such as standing. *See* Russell W. Galloway, *Basic Justiciability Analysis*, 30 SANTA CLARA L. REV. 911, 921-32 (1990); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 129-38 (2007). This Article employs the term justiciability in its narrower, temporally oriented sense.

defendants to provide redress in their case. This response may seem circular, but it is not.[370] It relies on a principled and pragmatic demarcation between persons with timely legal claims and those without. The key is to understand when it is that plaintiffs gain the power to sue in a case: in other words, when they gain a right of action.

A right of action is a legal power. When the law grants persons who have suffered a substantive rights violation a right of action, it enables them—if they comply with applicable procedures—to obtain a court order compelling another person to take actions to remedy the violation. John Goldberg and Benjamin Zipursky define a right of action as a plaintiff's legal "power to obtain a remedy" from the defendant.[371] As such, it is more than simply the right to file a claim or to have one's day in court. It is a "right to prosecute an action *with effect*."[372]

Whereas substantive rights have an air of timelessness—I always have a right not to be assaulted by you—a right of action is a time-bounded power. It empowers a plaintiff to hold a defendant accountable for a specific rights violation occurring at an identifiable point in time. It has a lifespan: it can be pursued only once there are valid grounds for alleging a deprivation of a substantive legal right,[373] and it can expire if the plaintiff takes no action.[374]

Before we can understand how novel precedent affects successive plaintiffs' rights, we must first understand when it is that a plaintiff is able to assert a right of action. That moment occurs when the plaintiff's grievance becomes justiciable before a court. Justiciability concerns whether a court is able to hear and adjudicate on a plaintiff's grievance. Nonjusticiable claims include those that are not

370. GOLDBERG & ZIPURSKY, *supra* note 159, at 98-99.

371. John C.P. Goldberg & Benjamin C. Zipursky, *Rights and Responsibility in the Law of Torts*, *in* RIGHTS AND PRIVATE LAW 251, 268 (Donal Nolan & Andrew Robertson eds., 2011) [hereinafter Goldberg & Zipursky, *Rights and Responsibility*]; *see also* John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1567 (2006) (defining a right of action as "a power to seek recourse through law that belongs to the right holder whose rights have been violated by the doing of the wrong").

372. GOLDBERG & ZIPURSKY, *supra* note 159, at 98 (quoting Patterson v. Patterson, 59 N.Y. 574, 578-79 (1875) (emphasis added)).

373. As discussed later in this Section, this is ultimately determined by a court assessing the complaint with hindsight, "deciding whether the fabric of law that already exists is such that plaintiff is entitled to relief from the court." Benjamin C. Zipursky, *Philosophy of Private Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 72.

374. Rights of action expire according to the governing laws of limitation and other time-sensitive doctrines and defenses. *See infra* Section III.B.

"ripe"[375] or that have not "accrued."[376] The "ripeness" inquiry is generally concerned with whether a claim is premature (i.e., has been filed too early), and the "accrual" inquiry with when the limitations clock begins to run against a claim. Both inform the temporal lifespan of rights of action—the "when" of adjudication.[377] Though taxonomically distinct, these doctrines concern the same thing: the point in time at which a plaintiff may file and begin to litigate her claim for a court-ordered remedy.[378] This point is ultimately determined by the particular circumstances of each plaintiff's case.

Ordinarily, rights of action ripen and accrue (the terms are interchangeable) when the relevant rights violation occurs—when, for example, a physical interaction that appears to meet the definition of a battery happens. But what of those would-be plaintiffs who do not know that they have a viable right of action? Perhaps their injuries are concealed, or they do not understand their options for civil recourse, or the state of the law is unstable. Does the right of action stay dormant while it remains unfound?

Courts have long grappled with this problem in the limitations context. The traditional view was that rights of action accrue when the material facts on which they are based occur, so the limitations period would run whether or not a potential plaintiff had actual knowledge of those material facts.[379] The contemporary prevailing view is that an action accrues "when the claimant discovers, or in

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375. In constitutional law, a claim is ripe when the issue pleaded is either "purely legal" or needs no "further factual development," and the challenged conduct has a "sufficiently direct and immediate" impact on the plaintiff. Michael Aaron DelGaudio, *From Ripe to Rotten: An Examination of the Continued Utility of the Ripeness Doctrine in Light of the Modern Standing Doctrine*, 50 GA. L. REV. 625, 641 (2016).

376. *See* Bloom, *supra* note 300, at 27. In limitation law, generally "a cause of action does not accrue until a party has a right to enforce the claim." Schulz v. Milne, No. 95-15703, 1996 WL 570498, at *2 (9th Cir. Oct. 3, 1996) (quoting Norco Constr., Inc. v. King Cty., 801 F.2d 1143, 1146 (9th Cir. 1986)); *see* 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 6.1 & n.12 (1991).

377. *See* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 *passim* (1973).

378. *See* Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 696 (1990) ("[T]he ripeness test [is] used to assess whether the plaintiff is legally entitled to relief."); Daniel Zacks, *Claims, Not Causes of Action: The Misapprehension of Limitations Principles*, 48 ADVOCS.' Q. 165, 169 n.12 (2018) (suggesting that whether a cause of action "completes, accrues, arises, or ripens . . . all means the same thing: the date on which the cause of action first becomes viable"); *see also, e.g.*, Bayou Des Familles Dev. Corp. v. United States, 130 F.3d 1034, 1038 (Fed. Cir. 1997) (considering when plaintiff's claim became "ripe for adjudication, starting the statute of limitations clock"); Boerger v. Levin, 812 F. Supp. 564, 566 n.4 (E.D. Pa. 1993) ("Since the claim is not yet ripe, the limitations period cannot have begun.").

379. Stephen V. O'Neil, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule*, 68 CALIF. L. REV. 106, 106 (1980) ("The basic principle governing the accrual of limitation periods states that they run from the date of injury.").

the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation."[380] This "discoverability"[381] inquiry is an objective one, which defers time until a plaintiff is reasonably in a position to pursue a right of action. When someone fraudulently conceals a harm they have caused to a would-be plaintiff, for instance, that plaintiff's right of action will accrue only once they have the ability to discover the concealed harm.[382] Non-retroactivity doctrine would seem to cast novel principles of law in a similar way—as having been concealed from would-be plaintiffs until "the date of the decision announcing the principle."[383] The date of judicial announcement is typically taken to be the point at which something "new" happens that creates and disrupts others' legal rights and duties. It is seemingly the date that plaintiffs discover (or reasonably should discover) the "new" law. This date is taken to be the fulcrum for determining whether the new law governs past rights retroactively or applies only prospectively.

Yet, even if novel principles of law are subject to a discoverability analysis,[384] it would be an error to hold that novel rights cannot be discovered until they are

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380. Winnett v. Caterpillar, Inc., 609 F.3d 404, 408 (6th Cir. 2010) (quoting Noble v. Chrysler Motors Corp., 32 F.3d 997, 1000 (6th Cir. 1994)); *see* Fleishman v. Eli Lilly & Co., 465 N.Y.S.2d 735, 737 (1983) (Gibbons, J., concurring in part and dissenting in part) (explaining that declaring a limitations period expired before it can be discovered seeks "to declare the bread stale before it is baked"); *see also* Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 553 (2004) (tracing the discovery rule of accrual for federal limitations statutes to *Urie v. Thompson*, 337 U.S. 163, 169-71 (1949)); *cf.* TRW Inc. v. Andrews, 534 U.S. 19, 37 (2001) (Scalia, J., concurring) (calling the discovery rule "bad wine of recent vintage").

381. This concept is more commonly known in the United States as "the discovery rule." Lonny Hoffman & Bret Wells, *The Exceptions Prove the Rule: Recalibrating the Discovery Rule and Equitable Fraud Exceptions to the Legal Injury Rule*, 71 BAYLOR L. REV. 63, 83 (2019). This Article prefers "discoverability" to "discovery" for three reasons: to distinguish the limitation doctrine from the procedural practice of document discovery; to reinforce that discover*ability* incorporates an objective inquiry; and to align the analysis with other common-law jurisdictions that recognize this limitation doctrine. *See* ANDREW MCGEE, LIMITATION PERIODS 137 para. 8.002 (8th ed. 2018).

382. 2 CORMAN, *supra* note 355, §§ 9.9, 11.5.

383. Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 187 (1990) (plurality opinion).

384. *Cf.* United States v. Kubrick, 444 U.S. 111, 122 (1979) ("We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment."); Marrero Morales v. Bull S.S. Co., 279 F.2d 299, 301 (1st Cir. 1960) ("[I]gnorance of one's legal rights does not excuse a failure to institute suit . . . . This principle is applicable not only to ignorance of substantive legal rights but also to ignorance of the procedures of law by which a more favorable doctrine of substantive law can be sought." (citations omitted)); Jolly v. Eli Lilly & Co., 751 P.2d 923, 929 (Cal. 1988) ("[I]t is the discovery of facts, not their legal significance, that starts the

first articulated by an appellate court. Rights of action may ripen and accrue even while a plaintiff is ignorant of the law or while binding precedent stands against the plaintiff's case.[385] That is because justiciability doctrines are not concerned with the plaintiff's certainty of litigation success. They are concerned with the plaintiff's *ability to plead* an action before a court. The law on any point may be unclear, but it is presumptively discoverable by virtue of plaintiffs' right to access the courts, whose function it is to rule upon and elucidate the law. A right of action accrues when, as a matter of fact and law, one has a reasonable basis for claiming to have suffered a substantive rights violation. When the suit rests on a novel theory of liability, or on an argument for a change in substantive law, this feature of rights of action gives rise to a paradox: one does not know whether one "really" has a right of action—as opposed to a claimed or putative right of action—until there is a ruling on the merits. But if the plaintiff prevails on the merits, the plaintiff's claim (asserted from the outset of litigation) to be entitled to enlist the courts to obtain a remedy from the defendant is vindicated. In this sense, the accrual of rights of action precedes courts' determinations of novel principles of law. This is inevitable from the sequential nature of litigation: judgment can only *follow* the filing of a (novel) claim. After all, it takes a challenge to the status quo for new rules to develop.[386]

When a new rule is announced, it may spur litigation by others, but its issuance does not affect the justiciability of others' rights of action. Same-sex couples in America had a right of action each time they were denied marriage certificates even before June 26, 2015,[387] as did public-sector employees before June 27, 2018 each time agency fees were deducted without their consent.[388] On each occasion, affected persons gained a right to object, to plead to a court that they had been wronged, to litigate their substantive rights, and to seek recourse for the violations they faced. That is how *Obergefell* and *Janus* reached the Supreme Court in the first place. The numerous plaintiffs who had similar pending cases when the

statute."); Passmore v. Watson, 337 P.3d 84, 87 (Mont. 2014) ("A statute of limitations begins to run when all facts relevant to a claim are known or through reasonable diligence could be known. The rule does not apply to legal theories." (emphasis omitted)).

385. 54 C.J.S. *Limitations of Actions* § 136 (2020).

386. Where parties have access to the courts, it is therefore wrong to suggest that "it is unfair to parties to judge them by law about which they had no way of knowing." Roosevelt, *supra* note 28, at 1105.

387. Obergefell v. Hodges, 576 U.S. 644, 680-81 (2015). Similarly, employees who were fired for being homosexual or transgender had rights of action under Title VII of the Civil Rights Act of 1964 even before June 15, 2020, when the Supreme Court held that such employer conduct amounts to sex discrimination. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1754 (2020).

388. Janus v. Am. Fed'n of State, Cty. & Mun. Emps., 138 S. Ct. 2448, 2486 (2018).

Supreme Court handed down judgment in *Obergefell*[389] and *Janus*[390] had already been advancing viable rights of action. Moreover, the fact that others might have awaited the Court's landmark decisions before litigating their own past grievances does not mean that their rights of action were not already justiciable. The opportunity to litigate *objectively* subsisted regardless of whether individuals *subjectively* appreciated their legal position.

As noted, there is an element of conditionality built into the idea of rights of action. A complaint, when filed, is merely an allegation, or a *claimed* right of action. That claim is not vindicated (or perfected) until the plaintiff establishes that the law entitles her to entry of judgment in her favor.[391] This is where legal argumentation and precedent comes in. The plaintiff must (be able to) prove that the defendant violated a substantive legal duty owed to the plaintiff, which conferred on the plaintiff a substantive legal right as against the defendant. In determining whether the parties are governed by a substantive right-duty relation, the successive court must interpret the relevant facts and law. In interpreting the law, the court should heed all relevant—including novel—precedent. That is because the considerations that persuaded an appellate court to (re)interpret the law in a novel case—whether driven by discrepancies in doctrine, principle, or policy—are considerations that also could have been employed by (successive) plaintiffs before the (successive) court when pleading their own case. As the Supreme Court insisted in *Danforth v. Minnesota*, "the underlying right necessarily pre-exists [the Court's] articulation of the new rule."[392] Timely legal claims ought therefore to be assessed by courts "apply[ing] their current best understanding of the law to all cases before them."[393]

The temporal question, then, is not whether new law applies backwards to create new rights. It is whether, back when the plaintiff suffered the violation they complain of (i.e., when their right of action ripened or accrued), "the fabric of law that already exist[ed] [was] such that plaintiff is entitled to relief from the court."[394] The "fabric of law" is the authority that the court draws upon in coming to its (novel) judgment. Though jurists disagree as to what counts as

389. *See* Nicolas, *supra* note 4, at 397-400.

390. *See supra* note 336 and accompanying text.

391. GOLDBERG & ZIPURSKY, *supra* note 159, at 98-99; Goldberg & Zipursky, *Rights and Responsibility*, *supra* note 371, at 265-66; *see* Baade, *supra* note 279, at 340 (noting that those who seek change bear the burden of argument).

392. 552 U.S. 264, 271 (2008).

393. Roosevelt, *supra* note 28, at 1117.

394. Zipursky, *supra* note 373, at 627. This inquiry does not require us to answer whether the new rule was *always* the law, or to determine precisely *when* in time the law changed. We only have to answer whether it is the law for *these plaintiffs' grievances* that are justiciable before the court today. *See infra* note 419.

legitimate authority—as to the place of positive sources, morality, and social conditions in judicial reasoning—there is significant common ground on the idea that legal authority constrains adjudication.[395] Legal authority in *Obergefell* encompassed Federal Due Process doctrine. In *Janus* it encompassed First Amendment doctrine. This notion must be understood to be flexible enough to envelop all those novel arguments that are open to plaintiffs to invoke on the facts, and to recognize that principles and interpretations of law can develop and change in a manner that may bear upon claims being adjudicated.[396] Within this rubric, when a pleaded action encounters an unfavorable rule, the pertinent question is not *when has the rule changed* but *when could the plaintiff have made the case for change*. It is from then that the plaintiff's right of action can be considered justiciable. And it is from then that the plaintiff can, in making their case, invoke the same principles and reasoning to persuade the immediate court as may have persuaded an appellate court in another case to hand down a novel precedent.

In sum, trial courts should "apply the prevailing decisional rule to the cases before them," as Justice Harlan implored.[397] This framework aligns with the dissent's view of adjudication that Justice O'Connor criticized in *Smith*: that a court should simply "determine whether a case was properly before it and, if so, apply current law," allowing the "retroactivity question" to pass by altogether.[398] This view would seem to comport with the prevailing position of the Court following *Harper*.[399] The temporal scope of novel precedent should be understood not in terms of a rule's retroactivity, but in terms of its justiciability.

B. Limits on Rights of Action

Non-retroactivity doctrine presumes that novel precedent creates novel rights for the future, not the past. But when a past transaction or dispute is litigated in light of a new rule, proponents of this doctrine do not take the date of

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395. This is the essence of "the judicial craft." Scalia, *The Rule of Law*, *supra* note 168, at 1183; *see* DAGAN, RECONSTRUCTING, *supra* note 19, at 50-59; GOLDBERG & ZIPURSKY, *supra* note 159, at 252-53; Dagan, *American Legal Realism*, *supra* note 19, at 140-43.

396. *See* Dagan, *American Legal Realism*, *supra* note 19, at 130, 135 n.57, 136 (considering legal-realist, legal-positivist, and legal-interpretivist views on the reforming, refining, and evolving of law).

397. United States v. Estate of Donnelly, 397 U.S. 286, 297 (1970) (Harlan, J., concurring).

398. Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 191 (1990) (plurality opinion) (disapproving of Justice Stevens's dissent); *see* Roosevelt, *supra* note 28, at 1117.

399. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993); *see supra* note 92 and accompanying text.

the novel judgment as the point from which limitation begins to run.[400] They assume limitation begins as it ordinarily does: upon accrual or discoverability of the action.[401] This steers the puzzle into "topsy-turvy land"[402]: if novel rights did not "exist" in the past then they could not begin to accrue until the novel precedent was handed down. But if the limitations statute was already running at that time, then viable rights have already accrued. It is surely axiomatic that "a statute of limitations does not begin to run against a cause of action before that cause of action exists."[403] Limitations statutes ensure timely litigation by penalizing plaintiffs who sleep on their rights. Yet, how can "a man . . . sleep on a right he does not have"?[404]

The solution is to recognize that the judicial function is inherently retroactive.[405] Precedent today necessarily informs how we should understand past rights. That does not mean new rights of action are unlimited in scope. They are subject to defenses. Interests of justice and fairness are embodied in long-recognized temporal limits on rights of action.[406] This Section describes these doctrines, and seeks to explain why one in particular, laches, has untapped potential as a tool to ensure justice in the face of novel precedent.

1. *Res Judicata and Collateral Estoppel*

The doctrine of res judicata bars plaintiffs from relitigating claims that have already been finally adjudicated.[407] Collateral estoppel precludes the relitigation of judicially determined issues.[408] Parties who have had their day in court do not get a second bite at the apple even when the weight of precedent has

400. And it would not be prudent to do so, as the English experience shows. *See supra* Section II.E.2.

401. Stephens, *supra* note 31, at 1568.

402. Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting) ("Except in topsy-turvy land you can't die before you are conceived . . . or miss a train running on a non-existent railroad."); *see also* Susan D. Glimcher, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?*, 43 U. PITT. L. REV. 501, 501 (1982) (citing *Dincher*).

403. *Dincher*, 198 F.2d at 823.

404. *Id.*

405. *See supra* Section I.B.

406. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2481 (2020).

407. *See* Lehn, *supra* note 29, at 590-92.

408. *Id.* at 585-87.

subsequently shifted in their favor.[409] If that seems unfair,[410] it is, as Justice Harlan maintained, "part of the risks of life."[411] The rule of law requires that a plaintiff has *an* opportunity to put forward their case and argue it as best they can before the courts. It does not require that a plaintiff is able to keep returning to the courts, filing successive suits in respect of the same event, until they finally win. It is more important that litigation have a determinate end so that rights can be fixed.[412]

2. Limitation

Once a right of action has ripened and accrued (i.e., once the rights violation complained of has occurred or become discoverable), a corresponding limitations period will begin to run.[413] The period is fixed by statute.[414] The limitations clock ticks regardless of the perceived stability or instability of the relevant law at issue.[415] The clock is paused by filing suit. A plaintiff who fails to file a complaint that asserts their right of action before expiry of the limitations period will usually be barred from doing so at a later date.[416] After a specified period,

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409. *See* Stephens, *supra* note 31, at 1568; *see also* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 541 (1991) (opinion of Souter, J., joined by Stevens, J.) (discussing res judicata and procedural barriers such as statutes of limitations as constraints on one's ability to press a claim based on new law). In the criminal context (which is beyond the scope of this Article), defendants have a (constrained) right to have their case revisited on collateral review. *See supra* note 61.

410. *See* Fairchild, *supra* note 86, at 267.

411. United States v. Estate of Donnelly, 397 U.S. 286, 296 (1970) (Harlan, J., concurring).

412. *See* Kay, *supra* note 58, at 52 ("At some point adjudication comes to an end and unsuccessful civil litigants are denied the solace of newer and friendlier law."); Arthur Ripstein, *The Rule of Law and Time's Arrow*, *in* PRIVATE LAW AND THE RULE OF LAW 306, 307 (Lisa M. Austin & Dennis Klimchuk eds., 2014) (providing a formal account of limitations periods as essential to the rule of law); Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 15-16 (1992) (giving reasons to think that rights fade and change with time such that historic injustices can be superseded by contemporary circumstances).

413. *See supra* note 378.

414. 1 CORMAN, *supra* note 376, § 1.5, at 75.

415. 54 C.J.S. *Limitations of Actions* § 135 (2020) ("The discovery rule . . . is not applicable to a situation where a plaintiff waits to file suit or a claim until he or she has some assurance of success on the merits of his or her claim. . . . The operation of the statute of limitations is not postponed where plaintiffs are in possession of all the facts necessary to determine whether they have a cause of action but are ignorant of the law on which their claim is based.").

416. *Id.* § 313. This applies unless the defendant waives the limitations defense or, exceptionally, a court applies a statutory or equitable discretion to waive or extend the ordinary limitations period. *Id.* § 133.

the law treats the would-be defendant's actions as "beyond challenge" in the interests of finality and closure.[417]

The effects of retroactive adjudication should not, then, be overstated. When judicial precedent "changes" the law, it is not *necessarily* pronouncing on the law for all time in the past.[418] It is determining the law affecting those claims still justiciable within the limitations period. Unless a court somehow retains jurisdiction to adjudicate disputes from centuries ago, it will have no occasion to rule authoritatively on what the law was that governed such centuries-old disputes.[419] Statutes of limitations serve a crucial function in curbing the fallout of judicial change.

3. Laches and Acquiescence

Non-retroactivity doctrine was developed to counter the hardship borne by parties who acted and transacted on the basis of an understanding of law that is subsequently upended by novel precedent. Non-retroactivity proponents cast this hardship as a problem of new law retroactively changing past rights and threatening reliance interests. The core problem, though, is not ex post recalibration of rights and duties. It is having to wait to find out what one's rights and duties really are. The core problem, in other words, is delay.

If parties to a transaction knew on day one that their transaction was legally defective, it would hardly be unfair or inefficient for their transaction to be recalibrated to fit the law. But parties typically have no such knowledge in non-retroactivity cases. To the contrary, parties may endure significant delay between a transaction and when it is challenged in court, as well as significant delay between suit and when the law is finally determined by judicial decision. Most of the time this delay is simply accepted as the inevitable cost of practical justice. If a novel judgment takes a party by surprise, at least its effects are constrained only to events falling within the statute of limitations and outside the doctrines of res judicata and collateral estoppel.

In exceptional cases, though, even such constrained disruption may be thought by a court to be too much. It is in such cases that courts have tended to

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417. United States v. Estate of Donnelly, 397 U.S. 286, 296 (1970) (Harlan, J., concurring); *see supra* note 412.

418. This is the stuff of (intractable) jurisprudential debate. *See supra* Section II.A.

419. Courts are not in the habit of adjudicating grievances occurring a hundred years ago because those rights of action expired long ago. It is therefore not necessary to answer whether, for example, a court would adjudicate a suit brought today against D_1 for invading P_1's privacy in 1919 in the same way as it would adjudicate a suit brought today against D_2 for invading P_2's privacy in 2019, because any right of action P_1 had in 1919 is no longer justiciable today. The only pertinent question is whether in 2019 D_2 breached a duty owed to P_2.

turn to non-retroactivity doctrine. This Section suggests that courts can better mitigate the fallout of legal change by employing established equitable principles than by seeking to resuscitate non-retroactivity doctrine. The Supreme Court has long cast its non-retroactivity judgments in terms of "equitable considerations,"[420] but it has not imbued that notion with substantive content.[421] This Section proposes to do just that: to put forward an alternative way that judges can limit "new" rights in exceptional cases. Given the essential problem is delay, courts should turn away from non-retroactivity doctrine and toward the equitable doctrines of laches and acquiescence, guided by the maxim that "equity aids the vigilant, not the indolent."[422]

a. Description

Laches and acquiescence are closely related doctrines.[423] Laches arises when a claimant's delay is unreasonable and causes prejudice to the defendant.[424] It

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420. *Estate of Donnelly*, 397 U.S. at 296 (Harlan, J., concurring), *cited in* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 133 (1993) (O'Connor, J., dissenting), Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 190 (1990) (plurality opinion), *and Smith*, 496 U.S. at 215 (Stevens, J., dissenting); *see* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 543-44 (1991) (opinion of Souter, J., joined by Stevens, J.) ("[N]othing we say here precludes consideration of individual equities when deciding remedial issues in particular cases."); *id*. at 547 (Blackmun, J., concurring in the judgment) (characterizing the argument against "selective application of new rules" as "a question of equity"); *id*. at 551, 557-58 (O'Connor, J., dissenting) (discussing "the equities of retroactive application"); Chevron Oil Co. v. Huson, 404 U.S. 97, 108 (1971) (noting that retroactive application of a statute of limitations might produce "substantial inequitable results").

421. *Cf.* Kuo, *supra* note 209, at 895-96 ("Equity considerations have included: (1) the length of time during which the taxes have been paid, (2) the availability of other remedies, (3) the administrability of refunding retroactively, and (4) the policy implications of retroactive refunds." (footnotes omitted)).

422. EATON, *supra* note 21, at 52.

423. So much so that some courts and commentators subsume acquiescence into laches. *See, e.g.*, 30A C.J.S. *Equity* § 142 (2020); J.D. HEYDON, M.J. LEEMING & P.G. TURNER, MEAGHER, GUMMOW AND LEHANE'S EQUITY: DOCTRINES AND REMEDIES § 38-015, at 1086 (5th ed. 2015); SARAH WORTHINGTON, EQUITY 36 (2d ed. 2006).

424. Samuel L. Bray, *A Little Bit of Laches Goes a Long Way: Notes on* Petrella v. Metro-Goldwyn-Mayer, Inc., 67 VAND. L. REV. EN BANC 1, 2 (2014) ("[L]aches is not concerned merely with the fact of delay. It matters why the plaintiff delayed bringing the claim and what effect that delay had on the defendant. In doctrinal terms, the delay must be 'unreasonable' and cause 'prejudice.'"); *see* 2 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 419, at 171-72 (S.F., Spencer W. Symons ed., 5th ed. 1941) (1882) (defining laches as "such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity" (quoting Cahill v. Superior Court, 78 P. 467, 469 (Cal. 1904))).

concerns the claimant's inaction "after an act is done."[425] Acquiescence arises when a claimant knows or has the means of knowing her rights but unreasonably delays in asserting them.[426] It concerns "inaction during performance of an act" that amounts to tacit assent to the act later complained of.[427] For both doctrines, the relevant inaction is failure to bring timely suit.[428]

The foundations of these doctrines, fundamental to equity jurisdiction, were long ago encapsulated by the Lord Chancellor, Lord Camden, as follows:

> A court of equity which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction, there was always a limitation to suits in this court.[429]

Laches and acquiescence are exceptions to the ordinary rule that violations of justiciable rights warrant a remedy. They give courts discretion to cut off litigation of rights of action even when initiated within a normal statutory limitations period. Their criterion of *unreasonableness*, combined with *prejudice* to the defendant (in respect of laches) or *tacit assent* of the claimant (in respect of acquiescence), sets a high threshold. Where defendants can overcome this threshold, however, these doctrines can be powerful and pragmatic tools for constraining the fallout of lawsuits brought in the light of new law.

Laches and acquiescence concern whether claimants failed to pursue legal rights with reasonable diligence. This equitable inquiry mirrors (and indeed

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425. 30A C.J.S. *Equity* § 142 (2020).

426. 27A Am. Jur. 2d *Equity* § 113 (2020); 30A C.J.S. *Equity* § 151 (2020); Heydon, Leeming & Turner, *supra* note 423, § 38-070, at 1094; Worthington, *supra* note 423, at 36.

427. Bay Newfoundland Co. v. Wilson & Co., 4 A.2d 668, 671 (Del. Ch. 1939); 30A C.J.S. *Equity* § 142 (2020); *see* Dock & Terminal Eng'g Co. v. Pa. R.R. Co., 82 F.2d 19, 20 (3d Cir. 1936) (finding plaintiff's inaction to be "tacit consent or acquiescence"); J. George N. Darby & Frederick Albert Bosanquet, A Practical Treatise on the Statutes of Limitations in England and Ireland 351-52 (London, William Maxwell & Son 1867) ("A person . . . [acquiesces] if he lie[s] by with full knowledge of his rights, and tacitly allows conduct which is inconsistent with them . . . ."); 3 John Norton Pomeroy, *supra* note 424, § 817, at 245-46 (Spencer W. Symons ed., 5th ed. 1941) (1883) (outlining a narrow definition of acquiescence).

428. 30A C.J.S. *Equity* § 151 (2020).

429. Smith v. Clay (1767) 29 Eng. Rep. 743, 744, *cited with approval in* Hayward v. Nat'l Bank, 96 U.S. 611, 617-18 (1877), *and* Bowman v. Wathen, 42 U.S. (1. How.) 189, 193 (1843).

informed)[430] the "discoverability" inquiry in the limitations context. The pertinent period of delay begins when the claimant "discovered or by the exercise of reasonable diligence should have discovered the wrong of which he or she complains."[431] This will typically coincide with the point at which a claim becomes "ripe such that a court could entertain it."[432] This point can be understood in several ways—as the point when the material elements of the alleged rights violation have all occurred, when the claimant is reasonably in a position to pursue a right of action, or when the claimant has the ability to plead an action before a court.[433]

Like the limitation inquiry, the equitable inquiry is concerned with when rights of action become justiciable. As Section III.A showed, this may be well before an appellate court hands down a novel judgment. Reflecting on the equitable doctrine of laches, Andrew Kull and Ward Farnsworth suggest: "Certain restitution plaintiffs—such as parties who lie low and wait to see how prices develop, before deciding whether to ratify or rescind a voidable transaction—offer textbook examples of the conduct that laches is designed to frustrate."[434] The same could, by analogy, be said of claimants who lie low and wait to see how legal precedent develops.

What amounts to *unreasonable* delay will "depend on the peculiar equitable circumstances" of each case.[435] Unreasonableness is not governed by any fixed rule or period of time. Courts will consider whether a claimant's delay had a significant impact on the litigation and the parties' positions and whether it could be adequately explained. There can often be significant delay between the accrual of a novel right of action and when suit is filed—particularly in those cases where claims are only brought after some landmark Supreme Court judgment is delivered. Delay can be significant without necessarily being extensive. It may be significant if, during the period of delay, the defendant takes actions and changes their position in reliance on their presumed rights because the would-be plaintiff has not formally challenged their actions by filing suit.[436] In such cases,

430. *See* Hoffman & Wells, *supra* note 381, at 76-86.

431. 30A C.J.S. *Equity* § 151 (2020).

432. *Id*.

433. *See supra* Section III.A.

434. Andrew Kull & Ward Farnsworth, Restitution and Unjust Enrichment: Cases and Notes 504 (2018).

435. The Key City, 81 U.S. (14 Wall.) 653, 660 (1871), *cited in* Czaplicki v. Hoegh Silvercloud, 351 U.S. 525, 533 (1956).

436. *E.g.*, Perry v. Judd, 471 F. App'x 219, 222 (4th Cir. 2012) (holding that laches barred relief sought by Republican-primary presidential candidates who had "displayed an unreasonable and inexcusable lack of diligence," which "significantly harmed the defendants" in delaying by several months their constitutional challenge to Virginia's ballot requirements).

particularly where reliance could be expected, a court might quite appropriately characterize certain delay as "unreasonable."

A finding of laches depends—in addition to unreasonable delay—upon prejudice to the defendant. Prejudice may be evidentiary in nature: it may stem from a loss of evidence or witnesses. Or it may be expectations based: it may stem from the defendant having taken "actions or suffered consequences that it would not have, had the plaintiff brought suit promptly."[437] Defendants might, for instance, change their position in reliance on a claimant's inaction by spending money received prior to learning the money is the subject of a restitutionary claim. Laches is a useful safety valve within the right-of-action framework.[438] It is a more principled mechanism for alleviating prejudice to parties than is nonretroactivity doctrine. Consider, for example, how it could apply following *Janus*. Given that public-sector unions had for many years relied on statute and precedent to validate the collection of compulsory agency fees,[439] a court might well be justified in invoking laches to stem the "flood of class action lawsuits" brought in *Janus*'s wake, which have "threaten[ed] to bankrupt unions around the nation."[440] That is because litigants' delay may have prejudiced unions by not alerting them that the money collected was subject to challenge. Unions could be understood to have changed their position when they spent and distributed incoming revenue, rather than holding it in escrow pending the outcome of litigation. Arguably, these cases could meet the doctrine's exceptional threshold. A court could in its discretion use laches to limit the scope of any valid restitutionary claims to, say, the fees collected in the *X* months prior to plaintiffs filing suit—rather than the full period of collection covered by the limitations statute.

A finding of acquiescence depends—in addition to unreasonable delay—upon a claimant's constructive knowledge and tacit assent to the alleged rights violation. A claimant may acquiesce by failing to object to a transaction by filing suit in respect of it within a reasonable time. What must be (able to be) known are the relevant facts (in other words, the material elements) that make up the right of action. This doctrine can play a particularly significant role in curbing

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437. Danjaq LLC v. Sony Corp., 263 F.3d 942, 955 (9th Cir. 2001); *see* Roger Young & Stephen Spitz, *SUEM—Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S.C. L. REV. 175, 188 (2003) ("[Equity] would not easily reward someone who caused undue prejudice to another by sleeping on his rights.").

438. *See* Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. (forthcoming 2021) (manuscript at 65-67) (on file with author) (considering how equity's moralizing maxims operate as a safety valve); Kenneth Ayotte, Ezra Friedman & Henry E. Smith, A Safety Valve Model of Equity as Anti-Opportunism 11-12 (Mar. 30, 2013) (unpublished manuscript), https://ssrn.com/abstract=2245098 [https://perma.cc/T6C3-3MQM].

439. The most significant precedent, of course, was *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

440. Tang & Smith, *supra* note 9, at 24.

"opportunistic" tax-restitution suits.[441] The doctrine is said to have "frequently been applied in taxpayers' actions" where claimants unreasonably delay filing suit after having had "express or implied knowledge or notice of the matter complained of."[442] Generally, tax exactions can be challenged and reviewed once paid. It is submitted that once a claimant is in a position to challenge the legality of a tax exaction, they ought to do so in a timely manner. It is not an exercise of reasonable diligence to await first the outcome of some other taxpayer's litigation and, in the event of their success, to sue only in their wake.[443]

What distinguishes the approach here from the non-retroactivity frameworks is that the defense will only prevail where defendants can demonstrate prejudice or tacit assent sufficient to justify the court's intervention. They must point to evidence. Otherwise, plaintiffs are entitled to retroactive relief to vindicate their rights violations. Unlike under the non-retroactivity frameworks, claims of general reliance on "old" law will not suffice.

It is worth highlighting how the laches and acquiescence defenses under the right-of-action framework differ, in particular, from the "equitable considerations" employed under the remedial framework.[444] The remedial framework seeks to delineate retroactive remedies based on the foreseeability or predictability of legal change. Unpredictable changes in the law provide a basis for denying retroactive relief under that framework. Yet, since unpredictability is an objective inquiry, the remedial framework can only ever capture too much or too little. Either a legal change is considered unpredictable, in which case everyone—including those with pending cases seeking the legal change—must be denied

441. *See* Kuo, *supra* note 209, at 896 ("Often, unconstitutional taxes are a substantial source of revenue for many states.").

442. L.S. Tellier, Annotation, *What Constitutes Laches Barring Right to Relief in Taxpayers' Action*, 71 A.L.R.2d 529 (1960). Laches and acquiescence typically do not, however, apply *against* the government, and so the doctrine may not provide protection to taxpayer defendants in cases such as *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). *See* 30A C.J.S. *Equity* § 144 (2020).

443. *See* Beswick, *supra* note 356, at 150-54, 158-60 (critiquing how a rule to this effect has distorted doctrine and parties' incentives to a dramatic extent in England); *see also* Gonzalez v. Crosby, 545 U.S. 524, 536-37 (2005) (noting that a change in the law of limitation does not in and of itself constitute extraordinary circumstances to justify vacating order denying habeas corpus petition, and that the petitioner had shown a "lack of diligence in pursuing review of the statute-of-limitations issue" in his case); Cabarga-Cruz v. Fundacion Educativa Ana G. Mendez, Inc., 609 F. Supp. 1207, 1210 n.2 (D.P.R. 1985) ("The foresight on the development of the law required of litigants in the retroactivity analysis is equally applicable to those who would justify a late amendment to pleadings on the need to incorporate a recent legal development or change. They should at least be diligent in detecting the possibility of change in the law so as to minimize the hardship and prejudice on the other parties that a late amendment will cause."), *aff'd*, 822 F.2d 188 (1st Cir. 1987).

444. *Supra* Section II.D.

retroactive relief, or the fact that there is novel litigation seeking legal change renders such change foreseeable and predicable, in which case (if successful) all claimants ought to be entitled to retroactive relief—regardless of how proactive they have been in pursuing their rights. The remedial framework produces a one-size-fits-all outcome. So even if this framework could coherently identify legal issues warranting a non-retroactive response (which, for the reasons discussed in Section II.D, is doubtful), it cannot differentiate between parties deserving of (non-)retroactive relief. The doctrines of laches and acquiescence, by contrast, do not depend on the predictability of legal change or the date an appellate court happens to hand down a novel judgment. They depend on the extent of claimants' delays between the event(s) complained of and the date(s) of filing suit. Those who file suit promptly have a more compelling claim for retroactive relief than do those who sit on their rights.

While the right-of-action framework is attuned to the rights and interests of parties before adjudicating courts, that does not mean it is unreceptive to bright-line interpretations of what amounts to laches or acquiescence in complex litigation. Where defendants face suit on multiple fronts in respect of similar events or complaints (as is the case, for example, in litigation concerning the compulsory deduction of union agency fees), it may well be appropriate, and indeed inevitable, that precedents emerge as to what is unreasonable delay in respect of the defendants' conduct. Such precedents would not do so by reference to a specific *date*, as the non-retroactivity frameworks are wont to do. They would establish, instead, a *time period* within which delay in filing suit would be considered reasonable (e.g., within *X* months from when a plaintiff's right of action accrued or ripened), and beyond which claims would be treated as time-barred. This would enable successive claimants to identify the scope of their legally enforceable claims without having to litigate each afresh.

b. Objections and Responses

Some of the cases in which courts have employed non-retroactive adjudication likely fall beyond the traditional scope of the doctrines of laches and acquiescence. But that does not mean the doctrines are irrelevant. Even leaving their doctrinal bounds intact, laches and acquiescence could usefully be employed *by analogy* in appropriate cases. That is to say, the law could take the lead from equity.[445] In cases where courts previously might have turned to non-retroactivity doctrine, they could instead turn to the principle that underlies these equitable doctrines, namely, that remedying promptly prosecuted harms should be prioritized over remedying those that are brought after significant delay. Claimants

445. W.M.C. Gummow, Change and Continuity: Statute, Equity, and Federalism 38 (1999).

ought to pursue their rights vigilantly. If (successive) claimants prefer to hold back and wait to see whether the law develops favorably in other (principal) parties' cases, they ought to bear the risk of delay—just as principal parties bear risk when litigating novel rights. Courts have not resiled from fashioning non-retroactivity doctrine along largely amorphous "equitable considerations." These considerations might be more normatively persuasive were they aligned with established equitable principles.[446]

Alternatively, the formal doctrines of laches and acquiescence[447] could be developed to meet this context.[448] Admittedly, doing so would face a number of objections. But each, as the remainder of this Section shows, can be overcome.

The first objection is that, if laches were more liberally employed, claimants would never know ex ante whether a court was going to deem them out of time. Claims might be rejected for delay though they are brought within the prescribed limitations period. The answer, although cold comfort to claimants, is that courts will balance the respective prejudices to parties when weighing whether to invoke the equitable defense. Fortunately, courts have centuries of doctrine and principle to call upon to guide their discretion and moderate arbitrariness. That is more than what they have had to navigate the discretionary quagmire of non-retroactivity doctrine (a doctrine that is vulnerable to the same objection).

The second objection targets the idea that a suit filed within a statutory limitations period could nevertheless be dismissed for "unreasonable" delay. This issue has long divided courts. Some contend that laches can never bar relief for a claim filed within the limitations period.[449] But the better view is that it can.[450]

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446. This is not to suggest that analogizing to the doctrines of laches and acquiescence to constrain rights of action would be without objection. Flexibility begets uncertainty. In particular, the first and fifth objections that follow would also apply if courts reasoned by analogy to laches and acquiescence.

447. The remainder of this Section discusses laches, but the discussion should be assumed to encompass acquiescence also. *See supra* note 423 (noting that acquiescence is often subsumed into laches).

448. *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 587-89 (2016) (postulating that the system of equitable remedies could be reformed to make rules such as laches explicitly functional).

449. Thomas G. Robinson, *Laches in Federal Substantive Law: Relation to Statutes of Limitations*, 56 B.U. L. REV. 970, 973-74 (1976) ("[T]he federally developed laches doctrine applies only to those claims based upon federal equitable or maritime rights for which Congress has neglected to establish a limitations period.").

450. STEPHEN A. SMITH, RIGHTS, WRONGS, AND INJUSTICES: THE STRUCTURE OF REMEDIAL LAW 312-14 (2020) (suggesting that resort to laches may be justified, even within a limitations period, in cases where the burden of complying with a court order increases over time); Bray,

Laches would be a toothless instrument for guarding against unreasonable prejudice if it could not bar relief within the limitations period.

The Supreme Court considered the relationship between laches and limitations in *Petrella v. Metro-Goldwyn-Mayer, Inc.* and held that laches can be invoked notwithstanding a limitations statute.[451] Admittedly, the majority opinion was circumspect on this point. Justice Ginsburg for the Court thought there was "little place" for laches in a regime of statutory limitations periods,[452] and she confined her holding to claims for "equitable relief, in extraordinary circumstances."[453] Justice Breyer's dissenting opinion, however, more expansively rejoined that Congress enacts limitations statutes against the background of common law and equity,[454] and that the place for laches remains "an important one": "In those few and unusual cases where a plaintiff unreasonably delays in bringing suit and consequently causes inequitable harm to the defendant, the doctrine permits a court to bring about a fair result."[455] Prima facie, then, it is no sufficient retort that a limitations statute is extant.

A third and formidable objection is that, according to the Supreme Court in *Petrella* and *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, laches, being "a defense developed by courts of equity," "cannot be invoked to bar legal relief."[456] In other words, laches is only a defense "to claims of an equitable cast."[457]

supra note 424, at 17 (arguing that for equitable claims, "absent a clear statutory abrogation, laches should be allowed even where there is a statute of limitations since Congress is presumed to legislate against the backdrop of traditional equitable principles").

451. 572 U.S. 663, 667-68 (2014); *see* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1035 (2015); Bray, *supra* note 448, at 585.

452. *Petrella*, 572 U.S. at 685.

453. *Id.* at 667.

454. *Id.* at 694 (Breyer, J., dissenting).

455. *Id.* at 700.

456. *Petrella*, 572 U.S. at 678, *applied in* SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 960 (2017) (noting that laches is not a defense against damages for patent infringement); *see* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 70 cmt. g (AM. LAW INST. 2011) ("[Laches] applies only to a suit for equitable relief."); Bray, *supra* note 448, at 535, 548 (noting—without commenting on whether equitable constraints such as laches "would never be useful for legal remedies"—that "it is the blackletter law of the vast majority of jurisdictions that laches is an equitable defense good against equitable claims, but not against legal claims").

457. *Petrella*, 572 U.S. at 678.

Whether equitable defenses can bar legal claims has long been a matter of contest within courts.[458] Equitable remedies (such as injunctions) are historically, formally, and functionally distinct from legal remedies (such as damages).[459] The Court's holding in *Petrella* presents a barrier for cases in which legal remedies (like damages) are sought in the wake of new law. There are, however, four ways courts might overcome this barrier to preserve the use of laches in such cases:

(1) Often the monetary remedies sought in this context are restitutionary rather than compensatory.[460] Federal and state courts have long blurred the distinction between legal restitution and equitable restitution.[461] The *Restatement (Third)* largely dismisses the distinction as "ambiguous."[462] Thus, while taxonomically inelegant, it is open to courts to cast restitutionary claims as equitable in nature and therefore subject to the equitable doctrine of laches.

(2) Claims brought in the wake of new federal law are typically constitutional in nature. They arise from statutes being struck down, new constitutional rights being articulated, or old constitutional principles being reinterpreted. Constitutional remedies characteristically fall short of

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458. *See* T. Leigh Anenson, *Equitable Defenses in the Age of Statutes*, 36 REV. LITIG. 659, 698 (2018) ("A modern issue for equitable defenses, particularly those like laches and unclean hands that operated exclusively against equitable relief, is whether they may be extended to bar actions seeking damages."); T. Leigh Anenson, *Statutory Interpretation, Judicial Discretion, and Equitable Defenses*, 79 U. PITT. L. REV. 1, 5 n.9 (2017) [hereinafter Anenson, *Statutory Interpretation*] (noting "the Federal Circuit divided over the scope of laches" in *SCA Hygiene Products*, 137 S. Ct. 954); Bray, *supra* note 448, at 546(noting some states "allow[] one or more of the equitable defenses to be applied to all claims for legal relief").

459. *See* IRIT SAMET, EQUITY: CONSCIENCE GOES TO MARKET 28-42 (2018); *cf.* SMITH, *supra* note 450, at 31, 312 (arguing "that it is possible to describe and explain both (so-called) Legal remedies and (so-called) Equitable remedies on the basis of the same principles," and yet defending the distinction in the laches context on the basis that "delays in seeking specific relief [e.g., injunctions] typically prejudice defendants more significantly than delays in seeking non-specific relief [e.g., damages]").

460. *See* Burbank, *supra* note 90, at 351 (conceiving of illegal exaction cases as giving rise to "a restitution remedy . . . when the government unlawfully requires or demands money or property, regardless of the basis for that illegality").

461. *See* Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063, 1063 (2003) ("Equitable restitution is unrecognizable in recent Supreme Court decisions."); Note, *The Intellectual History of Unjust Enrichment*, 133 HARV. L. REV. 2077, 2094-95 (2020) (discussing American courts' confusion about unjust enrichment's place in equity and law).

462. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. a (AM. LAW INST. 2011); *see also* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 3-36, 82-84 (1991) (approving courts' willingness and tendency to skirt antiquated divisions between law and equity).

making victims of rights violations whole. This right-remedy gap is well acknowledged and is accepted by many scholars as a feature of courts' inherent equitable discretion to grant, withhold, or tailor backward-looking relief in constitutional cases.[463] Recourse to equitable defenses, including laches, in such cases would therefore seem acceptable.

(3) Even in cases where the monetary relief requested is clearly legal in nature, the Supreme Court's holdings in *Petrella* and *SCA Hygiene*—that equitable defenses cannot bar legal claims—need not necessarily apply across the board. *Petrella* was a copyright-infringement case, and *SCA Hygiene* a patent-infringement case. Copyright and patent infringement each typically concern ongoing harms. A case-specific court order may be the only way to prevent a defendant's ongoing infringement. These cases could be distinguished from new-law cases, in which continuing unlawful conduct typically ends once an authoritative judgment determining the law is handed down. The primary concern in new-law cases is how to respond to past conduct, not to ongoing conduct. There remains a useful role for laches to play in such cases.

(4) More boldly, the Court could venture to revise its "new equity" jurisprudence[464] and endorse the minority opinion in *Petrella*: that there is no "general rule" barring "laches in actions for legal relief," and in

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463. Jeffries, *supra* note 320, at 91; *see* Anenson, *Statutory Interpretation*, *supra* note 458, at 38 ("[A]n equitable analysis subordinates private law to public right."); Michael Coenen, *Right-Remedy Equilibration and the Asymmetric Entrenchment of Legal Entitlements*, 61 B.C. L. REV. 129, 132-38 (2020) (cautioning that the right-remedy gap will tend to expand over time, since it is easier for judges to limit legal entitlements than it is to promote them, and identifying strategies for overcoming the asymmetry); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 683-89 (2006) (arguing that courts equilibrate their doctrines of justiciability, substantive rights, and remedies so as to achieve overall desirable outcomes); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1166 (1996) (arguing that courts should determine claims of constitutional violation but defer the remedial response to the states, the executive branch, and the Congress); *see also* Hanoch Dagan & Avihay Dorfman, *Substantive Remedies*, 96 NOTRE DAME L. REV. (forthcoming 2020) (manuscript at 36-39) (on file with author) (discussing a tort doctrine of "crushing liability" that can operate ex post to excuse defendants from the disproportionate burden of full remedial relief).

464. *See* Bray, *supra* note 451; *see also* Anenson, *Statutory Interpretation*, *supra* note 458, at 4 ("Equitable defenses . . . have been resurrected. The Supreme Court is raising the dead in recent decisions."); James Fullmer, *The Outer Limits of Equity: A Proposal for Cautious Expansion*, 39 HARV. J. L. & PUB. POL'Y 557, 568 (2016) ("After hundreds of years of judicial evolution, equitable remedies are hardly experimental or dangerous such that they should be tools of last resort.").

> appropriate cases—whether legal or equitable—it ought to be available as a defense.[465]

Accordingly, the objection based on the law/equity distinction is not insurmountable.

Fourth, there is authority for the proposition that delay may be excused until the state of the law clearly favors a claimant's case. The Equity chapter of the *Corpus Juris Secundum* states that "[d]elay for the purpose of awaiting a change of previously unfavorable law is a reasonable delay for the purposes of laches, and does not constitute a lack of diligence."[466] Moreover, "[t]he pendency of legal proceedings may excuse a delay in instituting a subsequent suit involving the same subject matter."[467] This is bad law and bad policy. As a matter of law, it is inconsistent with two principles also recorded in the *Corpus Juris Secundum*. First, that "[i]gnorance of one's legal rights is not a reasonable excuse in a laches case."[468] Second, that delay is determined from when the right of action accrued, became ripe, or was discoverable. Delay is calculated from "the earliest time at which plaintiffs were able to bring their claims."[469] It is incontrovertible that claims may reasonably be brought despite an unfavorable state of the law. It is only through bringing novel claims that novel law can develop.[470] As a matter of policy, excusing such delay encourages claimants to sit back on their rights in the hopes of benefitting from others who pursue theirs. It discourages claimants from pursuing their rights vigilantly.[471] This contravenes the very essence of the equitable doctrine. The authority on this point thus warrants skeptical review.

A fifth objection is that in many cases the defendant's complaint will stem not from delay as such, but from the mounting and seemingly disproportionate claims brought against it in light of new law. Is delay not being used as a proxy

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465. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S 663, 697 (2014) (Breyer, J., dissenting) ("[T]he Court has said more than once that a defendant could invoke laches in an action for damages . . . despite a fixed statute of limitations.").

466. 30A C.J.S. *Equity* § 150 (2020) (citing *In re* Beaty, 306 F.3d 914, 927 (9th Cir. 2002)).

467. *Id.* § 166 ("[P]ending litigation excuses delay only where such litigation actually prevented assertion of the plaintiff's claim in a court of competent jurisdiction. . . . [D]elay pending the decision of a test case is not excusable in the absence of an agreement to abide by the event.").

468. *Id.* § 171.

469. *Id.* § 151.

470. *Supra* Section III.A. Where plaintiffs file suit in the shadow of some ongoing principal litigation, a court may find it appropriate to stay their proceedings pending the outcome of the principal case. This is, for example, what the Supreme Court did in the *American Trucking* litigation. *See* Am. Trucking Ass'ns v. Gray, 483 U.S. 1014 (1987). In such circumstances, delay is in the court's hands. It is not the plaintiffs who are responsible for delay.

471. *Cf. supra* note 443 (collecting sources that criticize plaintiffs who waited for legal doctrine to develop before pursuing their claims).

for hardship in the same way reliance is used in non-retroactivity doctrine? The short answer is that it is. But that does not sweep away the value of this construct. Where prejudice to a defendant stems from mounting claims,[472] vigilance/indolence is the fairest metric for distinguishing meritorious and unmeritorious claims.[473] Prima facie, the more prompt plaintiffs are to file suit, the more vigilant they are in pursuing their rights, and—relative to indolent plaintiffs—the more deserving their claim for relief.[474]

Sixth, what should be done in cases, such as *American Trucking Ass'ns v. Smith*, in which plaintiffs file suit without delay? Recall that in *Smith*, the impugned HUE tax was enacted in March 1983, plaintiffs filed suit in May 1983, and the HUE Tax Act took effect from July 1983.[475] While their appeal was pending, the Supreme Court in June 1987 delivered the favorable *Scheiner* judgment on which the *Smith* plaintiffs then sought to rely.[476] In July 1990, the *Smith* plaintiffs' substantive claim succeeded before the U.S. Supreme Court. Yet, the Supreme Court plurality denied the plaintiffs full retroactive relief on the basis that the HUE Tax Act's enactors had acted in "good faith" and that "equitable considerations tilt[ed] the balance toward nonretroactive application" of *Scheiner*.[477] It is not clear why *Scheiner* should bear upon the *Smith* plaintiffs' case at all: the *Smith* plaintiffs had mounted their arguments in court against the HUE tax well before *Scheiner* was decided. Their right of action had accrued in

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472. *See* SMITH, *supra* note 450, at 312-14 (describing laches as an appropriate response when the burden of complying with a court order increases over time, although also assuming that the burden of complying with monetary orders remains relatively constant over time).

473. One might object that this metric favors sophisticated and well-resourced claimants over those uninformed of their legal rights and those unable to pursue them. This objection is a more fundamental critique of the civil-litigation system generally. As a matter of doctrine and policy, impecuniosity does not normally excuse delay. *See* Leggett v. Standard Oil Co., 149 U.S. 287, 294 (1893) ("[A] party's poverty or pecuniary embarrassment [is] not a sufficient excuse for postponing the assertion of his rights."); Danjaq LLC v. Sony Corp., 263 F.3d 942, 954-55 (9th Cir. 2001) (holding, as part of laches determination, that a party's delay was unreasonable despite his claims that he could not afford to bring suit); 30A C.J.S. *Equity* § 165 (2020). This rule, however, operates less harshly in our era of class-action lawsuits and litigation funding. Plaintiffs in high-stakes litigation are often backed by well-resourced interested organizations. For example, the American Civil Liberties Union brought suit on behalf of the named claimants in *Obergefell v. Hodges*, 576 U.S 644 (2015), and the National Right to Work Legal Defense Foundation and the Liberty Justice Center on behalf of the named claimants in *Janus v. Am. Fed'n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448 (2018).

474. The Court in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S 663, 668 (2014), averred that a plaintiff's delay can "be brought to bear at the remedial stage."

475. Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 206-07 (1990) (Stevens, J., dissenting).

476. Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987); *see Smith*, 496 U.S. at 190 (plurality opinion).

477. *Smith*, 496 U.S. at 181, 186 (plurality opinion).

1983 and was immediately pursued. (Indeed it is happenstance that the Supreme Court held their appeal, rather than deciding it at the same time as, or instead of, *Scheiner*.[478]) In any event, *Smith* is hardly an exemplar for invoking equitable defenses. The *Smith* plaintiffs, by immediately filing suit, did everything they could to protect themselves from what was ultimately held to be an unconstitutionally discriminatory tax. The burden of delay was not caused by the plaintiffs, but by the drawn-out process of litigation. The defendants were on notice from the outset that the constitutionality of the HUE Tax Act was under challenge. In such circumstances, it hardly seems equitable that the plaintiffs should bear the burden of paying the unconstitutional tax. Thus, according to this Article's right-of-action framework, *Smith* was wrongly decided (the dissenting opinion was right),[479] and it is not a case in which the equitable defense of laches could apply. Defendants in such a case could, however, still grasp for the other temporal and nontemporal limits on rights of action outlined in this Section.

Finally, might *Smith* not stay the exception but become the norm under the right-of-action framework? After all, once plaintiffs are alerted to the risk that laches might bar their claims, they will have an incentive to challenge legal rules promptly to ensure that the opportunity to do so does not expire. This might perpetuate opportunistic litigation of rights. A threefold response can be given to this objection. First, parties are unlikely to challenge the validity of legal rules (and of actions taken under those rules) where they have no plausible grounds to believe that the rules are in some way legally invalid. Unsuccessful plaintiffs would bear the cost and, without an arguable case, would face dismissal for failure to state a claim. Second, since parties already have an incentive to challenge potentially invalid rules, making way for a laches defense would only marginally affect timing incentives. Third, it would be a good thing if the consequence is to encourage early litigation over potentially invalid legal rules. It is better for all parties, and particularly for states and governmental authorities, to know earlier rather than later whether their rules are good law. It is best that ultra vires laws are identified as soon as possible so that those responsible may redress and correct them. The drastic circumstances of the English tax-restitution cases, which

478. *See supra* note 244 and accompanying text; *see also* Schaefer, *supra* note 254, at 645 (arguing that the application of "new" law should not hinge on what stage a case happens to have reached in the judicial system).

479. *Smith*, 496 U.S. at 212 (Stevens, J., dissenting) ("[T]he Arkansas HUE tax also violated the Constitution before our decision in *Scheiner* and petitioners are entitled to a decision to that effect. . . . Petitioners would have prevailed if the Pennsylvania tax invalidated in the *Scheiner* case had never been enacted, or if that litigation had not reached our Court until after their litigation did. They should not lose simply because we decided *Scheiner* first.").

exposed three decades of past-paid taxes to protracted litigation, should be avoided.[480]

4. Stay of Judgment

A final temporal limit that courts can impose is staying entry of judgment.[481] This defers a successful plaintiff's opportunity to obtain a remedy until a future date, which can provide time for a legislature to recalibrate relevant rights and obligations (within constitutional bounds) in the interim period in a way that may bear upon the plaintiff's ultimate position. Critique of the judiciousness and constitutionality of stays of judgment is beyond the scope of this Article.

5. Nontemporal Defenses

In addition to time-oriented limits, a number of "pre-existing, separate, independent rule[s]" may also limit rights of action.[482] These include doctrines of sovereign immunity,[483] qualified immunity,[484] a good-faith defense to

480. *See supra* Section II.E.2.

481. *E.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 970 (Mass. 2003) (staying entry of a judgment recognizing a state constitutional right of same-sex marriage for 180 days); *see* Rhodes, *supra* note 4, at 415-16.

482. Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 756 (1995); *see* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018).

483. *See* Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 983-84 (2000); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 569-72 (2003); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 83-84 (1988); Roosevelt, *supra* note 28, at 1136.

484. *See Reynoldsville Casket*, 514 U.S. at 757-59. Although this doctrine, too, is highly problematic. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); *see* Baxter v. Bracey, 140 S. Ct. 1862, 1862-65 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari) (criticizing the Court's denial of certiorari on the question of whether the doctrine of qualified immunity should be narrowed or abolished); Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1941-51 (2018).

constitutional torts,[485] forfeiture,[486] estoppel,[487] procedural default,[488] change of position,[489] and passing on,[490] as well as the other justiciability doctrines such as standing.[491] Again, analysis of these various limits is beyond this Article's scope.

C. Summary

The right-of-action framework requires timely complaints to be resolved according to the adjudicating court's best understanding of the law. This encompasses relevant novel precedent. But whether a complaint remains timely must be understood in the context of established defenses and limits on rights of action. The right-of-action framework maintains the burden on plaintiffs to investigate and pursue their rights vigilantly. It incentivizes prompt litigation of novel rights by empowering courts, in exceptional cases where equity demands, to protect defendants from the prejudicial consequences of undue delay. Unlike non-retroactivity doctrine, it does not excuse parties who are caught off guard by novel precedent. For instance, the right-of-action framework rejects Justice Stevens's characterization of *Chevron Oil Co. v. Huson* as a "special" case in which "[i]t would have been most inequitable to have held that the plaintiff had 'slept

485. *See supra* note 336. Although, for the same reasons the *Smith* plurality judgment can be criticized, invoking "good faith" to bar relief in pending suits is dubious. *See* Petition for Writ of Certiorari at i, Janus v. Am. Fed'n of State, Cty & Mun. Emps., No. 19-1104 (Mar. 10, 2020) (presenting the question of whether there is a "good faith defense" to 42 U.S.C. § 1983 in cases of new law); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55-62 (2018); Schwartz, *supra* note 484, 1801-03, 1814. See also, in the context of criminal-procedure violations by government, *Davis v. United States*, 564 U.S. 229, 254 (2011) (Breyer, J., dissenting), which states that "[a] new 'good faith' exception and this Court's retroactivity decisions are incompatible." *Cf.* Beske, *supra* note 20, at 679-81 (discussing the relevance of retroactivity doctrine to the Fourth Amendment exclusionary rule's "good-faith" exception).

486. *See* Beske, *supra* note 20, at 681-87.

487. *See* Andrew Robertson, *Reliance and Expectation in Estoppel Remedies*, 18 LEGAL STUD. 360, 361-62 (1998).

488. *See* Kermit Roosevelt III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888, 1889 (2003).

489. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 65 (AM. LAW INST. 2011).

490. *See id.* § 64.

491. *See* Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 16-28 (2016).

on his rights' during a period in which neither he nor the defendant could have known the time limitation that applied to the case."[492]

It is not correct that the parties could not have known their respective rights and obligations under law prior to the day the Supreme Court handed down its novel decision in *Rodrigue*, or that "[t]he most [Huson] could do was to rely on the law as it then was."[493] Huson gained a right of action the day he was injured on Chevron Oil's drilling rig. He had reason to seek legal advice from that date. That he did not anticipate that state limitations law governed his claim, and that Chevron Oil did not think to argue it, does not take away from the reality that had Huson filed his claim within one year of his injury, there would have been no question as to its timeliness. *Rodrigue* did not abolish Huson's right of action. It may be that Huson's claim could have been saved by some other independent doctrine.[494] But that doctrine should not have been non-retroactivity.

Invoking established equitable principles such as laches — either directly or by analogy — is a preferable response to new law than the amorphous "equitable considerations" that underlie judicial non-retroactivity doctrine. Even radical shifts in precedent, as evinced in *Obergefell* and *Janus*, bear on past rights. The timing of such *judgments* does not determine which same-sex couples suffered rights violations when they were denied the benefits of marriage, or which public-sector employees suffered rights violations when they were compulsorily charged agency fees. Rather, the timing of those *rights violations* determines whether such plaintiffs can still have their day in court. This is the key point that distinguishes the right-of-action framework from the alternatives.

The right-of-action framework outlined in this Article eschews the non-retroactivity paradigm. It distinguishes cases according to when rights of action accrued and prioritizes remedying the most recent-in-time harms over those that are brought after delay. It does not divorce rights from remedies by reference to

492. Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 220 (1990) (Stevens, J., dissenting) (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 108 (1971)); *see also* Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilbertson, 501 U.S. 350, 370-74 (1991) (O'Connor, J., dissenting) (endorsing the Court's previous practice of applying new judicially determined limitations periods nonretroactively as a matter of fairness, justified reliance, and due process); *id.* at 377 (Kennedy, J., dissenting) (criticizing the majority for adopting an approach to limitations that the plaintiffs could not have anticipated and with which they could not have complied); David N. Mark, *Retroactivity of Statute of Limitations Rulings Under the Influence of* Jim Beam, 29 IDAHO L. REV. 361, 365 (1992) (arguing that "retroactivity of statute of limitations rulings should still be decided under the *Chevron Oil* three-factor equitable test").

493. *Chevron Oil*, 404 U.S. at 107; *see supra* Section II.B.2; *cf.* Beske, *supra* note 20, at 690-92.

494. The Court could, for instance, have held Chevron Oil was estopped from introducing a late limitations defense. *See* Rhodes, *supra* note 4, at 420-23.

an arbitrary date that a significant novel precedent is handed down.[495] It does not hinge on courts distinguishing between pending and subsequent cases. And it embodies an important value in our legal system: that equity aids the vigilant.

CONCLUSION

Non-retroactive adjudication fails to construe rights and remedies in a manner that does justice to parties. Its assumptions are flawed.[496] Its foundations — fairness, reliance, efficiency, and finality — are manipulable.[497] And perhaps most concerningly, it risks collapsing into a crude policy tool, whereby from case to case either retroactivity or prospectivity is favored merely to achieve the decisionmaker's preferred outcome.[498] Non-retroactivity doctrine does not satisfactorily rationalize the temporal scope of novel precedent.

The Supreme Court's current jurisprudence, which recognizes a strong presumption of adjudicative retroactivity, is but one step removed from the right-of-action framework. The Court should take the final step by collapsing the presumption into acceptance. The right-of-action framework is coherent and compelling because it recognizes that novel precedent, like all precedent, is inherently retroactive. Whether "new" law applies to a given case depends on the justiciability of the plaintiff's right of action. Only if justice demands it should equitable doctrines, such as laches, interfere to curtail plaintiffs from vindicating their judicially recognized rights. By reconceptualizing the puzzle of novel precedent in these terms, we solve it.

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495. *Cf.* Fallon & Meltzer, *supra* note 66, at 1794-97 (arguing that retroactive remedies can be withheld when new rules would have been unpredictable).

496. *See supra* Part II.

497. *See* Chen, *supra* note 6, at 1435; Stephens, *supra* note 31, at 1560-61.

498. *See* Chen, *supra* note 6, at 1450-51. Similar concerns permeate the temporality of new rules of criminal law and procedure. *See supra* note 61. They are also salient in so-called "judicial takings" cases. *See* Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305, 331-33 (2012).