
DOCTRINAL SUNSETS

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Sunset provisions—timed expirations of an announced legal or policy rule—occupy a prominent place in the toolkit of legislative policymakers. In the judiciary, by contrast, their presence is far more obscure. This disjuncture is intriguing. The United States’ constitutional text contains several sunset provisions, and an apparent doctrinal sunset appeared in one of the most high-profile and hot-button Supreme Court decisions in recent memory—Grutter v. Bollinger. Grutter’s famous declaration that while affirmative action programs in pursuit of diversity ends were currently constitutional, “25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” Yet despite voluminous literature debating the merits of sunset clauses as a legislative practice, scholars have not systematically explored the utility of incorporating sunset clauses into judicial doctrine.

This Article provides the first comprehensive analysis of the place of sunset provisions in judicial doctrine. It defends the conceptual legitimacy of doctrinal sunsets as valid across all theories of legal interpretation, including textualist or originalist accounts which might seem incompatible with admitting any change in legal outcomes without formally amending the underlying text. In addition, it articulates the practical utility of doctrinal sunset clauses in scenarios where predictable changes in circumstances make it unlikely that an initial rule-decision will remain optimal over a long period of time. This can occur in mundane situations where a placeholder rule is necessary to govern until a more complex and tailored rule can be operationalized. It can also occur in sharply controversial scenarios where

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a decision is needed immediately under conditions that do not allow for optimal deliberation. Finally, sunsets can be beneficial as a means of prompting reassessment and tailored adjustment of prior decisions which—though perhaps products of the best judgment of their eras—are unlikely to continue tracking changing social circumstances.

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INTRODUCTION

Sunset provisions—timed expirations of an announced legal or policy rule—occupy a prominent place in the toolkit of legislative policymakers. In the judiciary, by contrast, their presence is far more obscure. This disjuncture is intriguing—the United States’ constitutional text contains several sunset

provisions, and an apparent doctrinal sunset appeared in one of the most high-profile and hot-button Supreme Court decisions in recent memory.¹ Yet scholars have not systematically explored the utility of incorporating sunset clauses into constitutional or judicial doctrine.

This Article provides the first comprehensive analysis of the place of sunset provisions in judicial doctrine. I argue that doctrinal sunset clauses can be useful in several scenarios where predictable changes in circumstances make it unlikely that an initial rule-decision will prove to be optimal over a long period of time. This can occur in mundane situations where a placeholder rule is necessary to govern until a more complex and tailored rule can be operationalized. It can also occur in sharply controversial scenarios where it is unlikely that contemporary political conditions will allow for optimal deliberation. Likewise, sunsets can be beneficial as a means of prompting reassessment of prior decisions which—though perhaps products of the best judgment of their eras—are unlikely to continue tracking changing social circumstances.

In terms of structure, this Article is primarily schematic and taxonomic, with only modest normative ambitions. The primary goal is first to explain how the factual underpinnings of certain doctrinal rules make sunsets at least a potentially useful tool in the judicial toolkit, and then to categorize the sorts of sunset provisions which might be helpful in crafting these various legal doctrines. Normatively, the objective is to defend the legitimacy of incorporating doctrinal sunsets in at least some cases as a valid exercise of judicial power. While I will provide doctrinal examples designed to illustrate scenarios where sunsets might be particularly useful or help further doctrinal goals, I do not attempt either a comprehensive argument that sunset clauses are necessary elements of doctrinal design or a systematic exploration of where sunsets should be included or excluded as part of any specific doctrine.

Part I begins by briefly charting the history of sunsets in American law and the vibrant literature debating their virtues and drawbacks. Proponents of sunsets contend that they offer greater flexibility to policymakers, allowing for experimentalism and timed feedback that enables more tailored and responsive decision-making over time. Critics argue that sunsets do not actually offer any power that decisionmakers do not already possess. Congress, after all, can always decide to amend or repeal a law it has passed

1. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (upholding the use of race-based affirmative action in law schools but suggesting that “25 years from now, the use of racial preferences will no longer be necessary”).

without needing prior authorization; thus, critics see sunsets as primarily a means of increasing transaction costs by forcing deliberators to retread old ground while offering greater opportunities for lobbyists and special interests to (re)insert themselves into the deliberative process. I will not provide a full accounting of these debates (the literature is voluminous), but what is striking about them is that virtually all discussion of sunsets considers them as something that *legislatures* do. Courts and legal precedents are almost entirely absent from the story.

Part II commences the process of rectifying that gap and articulating the conceptual case for including sunsets as a valid feature of judicial doctrine. It may be that sunset clauses have been overlooked as a tool of doctrinal design because they are thought to rest uneasily with a properly cabined understanding of the judicial interpretive process. Textualists (often, though not always, conservative), who emphasize values of stability, predictability, and consistency in crafting doctrine, may find unappealing the overt and intentional shifting of legal doctrine over time caused by a sunset. For their part, pragmatists (again, frequently though not universally liberal), who already see legal texts as evolving documents adaptable to changing circumstances, may find sunsets unnecessary or, worse, threatening to the extent that they imply evolutions in meaning can *only* occur when an explicit sunset has been implemented (or through the formal amendment process).

I will argue, however, that such concerns are unfounded. Indeed, sunsets are in fact wholly compatible with a variety of philosophical and ideological priors about law. Specifically, Part II seeks to establish three propositions that generate the conceptual and practical justification for using doctrinal sunsets:

- (1) Semantically identical legal questions can yield different “correct” answers at different time periods;
- (2) This property generalizes across all theories of statutory or constitutional interpretation—it is not a quality of “liberal” or “conservative” interpretive practices; and
- (3) This property is not adequately accounted for by the ability of judges to distinguish a precedent “on its facts.”

From this foundation, we can find both a conceptual warrant for the *legitimacy* of doctrinal sunsets as well as a roadmap pointing us towards the sorts of scenarios where sunsets are most likely to be *useful* in securing valid doctrinal aims.

While there are several different scenarios where doctrinal sunsets may

become appropriate, the clearest point of intersection is where legal doctrine must respond to changes in factual circumstances over time. Hence, Part III surveys the relationship of judicial doctrines to temporally variant facts. Some legal doctrines are, or claim to be, analytic statements regarding the meaning of a given text. They do not purport to depend on anything but proper understanding of statutory or constitutional meaning, and so are not particularly affected by alterations in the social universe. But other doctrines rely on particular facts about the world—facts that have varying degrees of permanence. Some facts are unlikely to change over relevant time periods—many facts about human biology or psychology fall into this category. Judicial doctrines which are justified by reference to those facts are *fact-reflective* doctrines. Other facts, however, are quite likely to change over time—think of social expectations over what counts as “private”—and doctrines which purport to depend on assessments regarding those sorts of facts are *fact-tracing*. Finally, in some cases a judicial doctrine is not just predicated on temporally variant facts—its purpose *is* to change those facts. A doctrine permitting race-conscious remediation programs in circumstances where there has been a fact of *de jure* racial segregation is by design supposed to alter that fact (that is, end the segregation). These doctrines I term *fact-modifying*.

Part IV draws on these insights to offer a taxonomy of sunset clauses as they could be used in crafting doctrine. There are several different iterations of sunsets, which each help resolve different problems a judge might encounter when deciding on a given case or controversy. Sunsets can serve as *stop-gaps*—a temporary rule designed to provisionally govern a given area of law until a more permanent solution can be implemented. This can be useful in cases where the ideal rule *is* known in advance but implementing it immediately is impossible, cost-prohibitive, or too jarring to settled expectations. Sunsets can also act as *decision-delaying* mechanisms—punting a difficult or controversial issue down the road in the hopes that a later court may be better positioned to give the question full and fair consideration. This feature of sunsets is attractive in circumstances where a court might be under severe time or political pressure. Judicial decisions on national security questions made in the heat of warfare may be an example. A judge could both recognize the importance of leveling an immediate decision while understanding that circumstances are unideal for crafting a permanent resolution to the doctrinal question.

Finally, while courts are always free to overturn their own precedents and so adapt to changing factual circumstances on their own initiative, sunsets can serve an *anti-inertial* function. Some issues may, for a variety of

reasons, demand periodic revisitation to maintain judicial legitimacy. Sunsets offer a formalized mechanism for ensuring such revisitation occurs. Other doctrines—particularly fact-tracing and fact-modifying rules—seemingly demand recalibration to ensure that the doctrinal outcomes continue to track the underlying purposes of the rule. Again, sunsets would provide an explicit structure enabling such adjustments to regularly occur.

The prior sections provide a normative justification for sunsets as a valid judicial tool, a schematic description of the different relationships between facts and various doctrinal rules, and a taxonomic account of the scenarios where a sunset might resolve certain regularly encountered doctrinal problems. Part V synthesizes these parts to describe what conditions must accrue in order for the sunsets described to actually represent an optimal solution to these problems. The critical questions that any judge considering a sunset must answer are (1) whether a relevant change in surrounding facts can be predicted in advance, (2) whether a hard rule like a sunset is necessary to ensure these changes are indeed taken into account, and (3) whether the future judge is better positioned to be the actor accounting for these factual changes compared to the present judge considering a sunset.

While, as I have stressed, my goal is not to present doctrinal sunsets as a panacea or to defend their adaption as a part of any particular doctrine, it will no doubt be helpful to track how they might be usefully incorporated into a concrete doctrine. Hence, I conclude by applying the above framework to explore the possibility of sunseting determinations of “suspect classifications” under the Fourteenth Amendment. This section is more provisional. In particular, it significantly relies upon several criticisms of suspect classification doctrine—namely, its seemingly perpetual character and its inconsistent utility at actually “protecting” the groups it purportedly shields—that I have largely developed in other work but which no doubt remain contentious.² Still, suspect classification doctrine serves well as an example of a fact-modifying rule, and moreover it is an arena where doctrinal inputs and outputs are increasingly drifting out of alignment. A recalibrating sunset would not only help ensure that suspect classification decisions are applied consistently and fairly across time, it would also likely prompt much needed clarification regarding the contours of suspect classification doctrine

2. For an overview of these criticisms of suspect class doctrine, see generally David Schraub, *Post-Racialism and the End of Strict Scrutiny*, 92 IND. L.J. 599 (2017) [hereinafter Schraub, *Post-Racialism*]; David Schraub, *Unsuspecting*, 96 B.U. L. REV. 361 (2016) [hereinafter Schraub, *Unsuspecting*]; David Schraub, *The Siren Song of Strict Scrutiny*, 84 UMKC L. REV. 859 (2016) [hereinafter Schraub, *Siren Song*].

going forward by forcing judges to give explicit *reasons* (beyond adherence to precedent) why their decisions in this field comport with the Fourteenth Amendment's text, history, and purpose.

I. THE SUNSET STORY (SO FAR)

Sunset clauses have a long pedigree in American (and before that, English) law.³ Perhaps the most famous articulation of the importance of sunset clauses came from Thomas Jefferson, who suggested that all constitutions should automatically expire after nineteen years.⁴ While this proposal clearly was not incorporated into the U.S. Constitution, the founders did embed several sunset provisions into our formative charter. These include a prohibition on legislation restricting the slave trade (which was set to expire in 1808)⁵ and a requirement that any appropriation of money for the armed forces be limited to no more than a two-year term.⁶

Modern attention to the utility and advisability of sunset clauses reignited in the mid-twentieth century, initially as a potential avenue for limiting interest group capture of increasingly powerful federal or state agencies.⁷ Since then, a robust literature has developed exploring the virtues and vices of sunset clauses. Proponents of the use of sunsets contend that they promote evaluation and reassessment of governmental programs, ensuring that they remain effective and operate within the public interest.⁸ A sunset clause, Adrian Vermeule observes, “pushes the question onto the legislative agenda a second time and thus encourages the legislature to take a second look at the policy.”⁹ This reappraisal is argued to promote both

3. See, e.g., Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 255–58 (2007); John Ip, *Sunset Clauses and Counterterrorism Legislation*, 2013 PUB. L. 74, 74–80; Chris Mooney, *A Short History of Sunsets*, LEGAL AFF. (Jan.–Feb. 2004), http://www.legalaffairs.org/issues/January-February-2004/story_mooney_janfeb04.msp [<https://perma.cc/6CWH-7T5Q>].

4. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), reprinted in 15 THE PAPERS OF THOMAS JEFFERSON, MARCH 1789 TO NOVEMBER 1789, 396 (Julian P. Boyd & William H. Gaines, eds., 1958). For discussion of the concept of sunset constitutions in their entirety, see generally Ozan O. Varol, *Temporary Constitutions*, 102 CALIF. L. REV. 409 (2014).

5. U.S. CONST. art. I, § 9, cl. 1.

6. U.S. CONST. art. I, § 8, cl. 12.

7. THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY 309–10 (1969); Dan R. Price, *Sunset Legislation in the United States*, 30 BAYLOR L. REV. 401, 417 (1978).

8. Lewis Anthony Davis, *Review Procedures and Public Accountability in Sunset Legislation: An Analysis and Proposal for Reform*, 33 ADMIN. L. REV. 393, 393 (1981).

9. Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1439 (2011).

governmental efficiency¹⁰ as well as democratic values.¹¹ Meanwhile, sunsets may offer more opportunities for compromise and bargaining by lowering the stakes of the dispute. Negotiators may be more willing to accede to a temporary provision that will expire after a given period than one which is slated to have an indefinitely lasting effect.¹²

Sunsets also are useful in enabling the acquisition of information by policymakers, which they can use to further tailor policies to better meet political goals.¹³ Sunsets are a means of facilitating experimentalism in policymaking, allowing “learning-by-doing” and thereby increasing both the effectiveness and legitimacy of laws.¹⁴ When a policy is enacted without an explicit end date, it often can persist via inertia alone. By contrast, because a sunsetted law needs to be renewed, it encourages policymakers to gather information and make assessments regarding what works and what does not in order to justify reauthorizing the provision (or to vindicate its abandonment).¹⁵

Critics of sunsets, naturally, suggest that many of these benefits are overstated. A sunset is not necessary in order for a policymaker to reassess whether a given decision continues to be wise, and it is unlikely that most decisionmakers conceive of their enactments as being permanent in character. After all, Congress revisits, rewrites, or repeals prior legislative decisions as a matter of course. As Rebecca Kysar observes, we do not enact permanent legislature but rather “lasting legislation”—laws which lack a defined end point and so are revised if and when the relevant policymaker

10. Davis, *supra* note 8, at 394 (arguing that, properly designed, sunsets give legislators “a powerful tool to cut wasteful spending and reduce ineffective programs”); Gersen, *supra* note 3, at 259 (observing that the wave of sunset legislation in the 1970s “sought to produce more effective and efficient regulation by terminating unneeded agencies and regulations after periodic review”).

11. Davis, *supra* note 8, at 394 (suggesting that sunsets empower legislatures as against executive branch bureaucracies).

12. Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT’L J. CONST. L. 636, 651 (2011) (providing a comparative example using a five-year sunset of a controversial clause in the Brazilian constitution as means of “reduc[ing] the stakes” for the clause’s opponents); Tom Ginsburg, Jonathan S. Masur & Richard H. McAdams, *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U. CHI. L. REV. 291, 337 (2014) (“Because the opponents of [a proposed policy] will understand that the status quo ante will return after the regulatory period ends, they may be less resistant to explicitly temporary rules.”).

13. Ginsburg, Masur & McAdams, *supra* note 12, at 326–28 (arguing that sunsets can reveal additional equilibria of citizen behavioral choices in circumstances where the choice of equilibrium is influenced by the immediately preceding policy rule).

14. SOFIA RANCHORDÁS, CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION: A COMPARATIVE PERSPECTIVE 57–58 (2014).

15. *Id.* at 51 (“Lawmakers can therefore use sunset clauses and experimental legislation to gather information, and given this informational advantage, proceed to the correction of errors.”).

decides they need reformation.¹⁶

Moreover, sunset clauses carry with them risks of their own. On the one hand, a sunset can help facilitate the passage of legislation that is generally unpopular but fervently desired by narrow special interests, and these interest groups will often be uniquely well-positioned to lobby for renewal of the supposedly “sunsetting” provision as the expiration date approaches.¹⁷ On the other hand, a sunset can also keep these interest groups beholden to their political patrons over the mid- to long-term as the need to renew the desired legislative program can perpetually be dangled overhead.¹⁸ This creates all the conditions for a “shake down” of constituents—an effect of sunsets which may not pass unnoticed by legislative drafters.¹⁹ A permanent tax cut may please benefited interest groups but offers them no reason beyond selfless gratitude to support the policy’s authors prospectively. But wealthy Americans who benefited from the Bush administration’s “sunsetting” tax cuts, for example, had “powerful motivation . . . to bankroll Republican reelection efforts in the future” in order to preserve their winnings.²⁰

I do not wish to offer a comprehensive exploration of the benefits or drawbacks of sunsets. This is a topic that has already been well-explored in the relevant literature; below I will offer a more tailored assessment of the potential uses of sunsets in the judicial context.²¹ For our purposes what matters is that, by and large, the legal literature on sunset clauses has had one major commonality: it focuses on their presence in statutory law.²² The idea that sunsets are inherently legislative is so entrenched that many authors simply assume a legislative actor when defining the term itself. Antonios Kouroutakis and Sofia Ranchordás tell us that “[s]unset clauses are legislative dispositions that provide that a specific piece of legislation shall

16. Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1010 n.5 (2011) (favoring the term “lasting legislation” over “permanent legislation” because even laws without a fixed expiry date “need not continue indefinitely and, indeed, the legislature is unlikely to conceive of” them as lasting in perpetuity).

17. Jacob S. Hacker & Paul Pierson, *Abandoning the Middle: The Bush Tax Cuts and the Limits of Democratic Control*, 3 PERSP. ON POL. 33, 46 (2005) (“Tax cutters reasonably predict that the pressure to extend the tax cuts will be intense, not least because well-off beneficiaries of the big tax provisions that take effect just before the sunsets kick in will be unusually well poised to make their voices heard.”).

18. Kysar, *supra* note 16, at 1051–52.

19. Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159, 1164–65 (2006).

20. Hacker & Pierson, *supra* note 17, at 46.

21. See *infra* Part IV.

22. See generally, e.g., John E. Finn, *Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation*, 48 COLUM. J. TRANSNAT’L L. 442 (2010); Gersen, *supra* note 3; Kysar, *supra* note 16; Sofia Ranchordás, *Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty?*, 36 STATUTE L. REV. 28 (2015).

expire automatically on a specific date.”²³ Melissa Mitchell describes a sunset provision as “a timing mechanism used by both federal and state legislatures to keep laws from becoming frozen on the statute books.”²⁴ Allison Orr Larsen defines a sunset provision as “a clause in the statute stating the law will cease to have effect after a certain date.”²⁵ Adrian Vermeule speaks of sunset clauses exclusively as a part of legislative action.²⁶ And so on.

The Supreme Court’s decision in *Grutter v. Bollinger*, however, opened the door for at least some consideration of sunset provisions as part of judicial doctrine. In *Grutter*, the Supreme Court upheld race-based affirmative action programs while simultaneously declaring that “25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”²⁷ *Grutter* inspired at least two articles, the first by Vikram Amar and Evan Caminker and the second by Neal Katyal, on the subject of using sunsets as part of judicial doctrine.²⁸ Both, however, were limited in scope. The former addressed only the importance of the temporal limitation to the affirmative action debate; the latter was a short symposium piece on the war on terror and likewise confined its analysis to the utility of including sunset provisions in judicial precedents addressing evolving counterterrorism initiatives.

What still has not emerged is a comprehensive account of the validity and typology of sunsets as a tool of judicial doctrine. Kysar’s observation about “lasting legislation” applies just as well to judicial decisions. Judicial

23. Antonios Kouroutakis & Sofia Ranchordás, *Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies*, 25 MINN. J. INT’L L. 29, 33 (2016).

24. Melissa J. Mitchell, Comment, *Cleaning Out the Closet: Using Sunset Provisions to Clean Up Cluttered Criminal Codes*, 54 EMORY L.J. 1671, 1696 (2005).

25. Allison Orr Larsen, *Do Laws Have a Constitutional Shelf Life?*, 94 TEX. L. REV. 59, 106 (2015).

26. Vermeule, *supra* note 9, at 1439 (“[U]nder sunset clauses the interim status quo is that the legislation goes into effect when initially enacted and is then subject to re-approval . . .”).

27. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). There is some debate over whether this passage is dicta or an integral part of *Grutter*’s holding. Compare Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1371 (2010) (noting that the twenty-five-year time frame “was not itself essential to the Court’s decision” and thus is likely dicta), with *Grutter*, 539 U.S. at 376 (Thomas, J., dissenting) (characterizing this durational limit as part of the *Grutter* holding). On at least two occasions, Justice Scalia suggested in oral argument that he viewed the *Grutter* sunset as controlling. Transcript of Oral Argument at 74, *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (No. 14-981); Transcript of Oral Argument at 50, *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013) (No. 11-345).

28. Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O’Connor’s Closing Comments in Grutter*, 30 HASTINGS CONST. L.Q. 541, 543 (2003); Neal Katyal, *Sunseting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237, 1252–56 (2004). To a lesser extent, Joel Goldstein discusses this issue as well. Joel K. Goldstein, *Justice O’Connor’s Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter*, 67 OHIO ST. L.J. 83, 85 (2006).

precedents are not “permanent,” they are merely “lasting”—they have binding effect unless and until they are overturned, and courts as much as legislatures always retain the freedom to overrule their own past decisions.²⁹ In the judicial context, a sunset would declare that the binding authority and precedential value of a given legal holding does not last indefinitely, but instead shall expire at a given date. On that date, the legal rule might simply revert back to the status quo (as if the instigating decision had never been binding); future cases on the topic would become matters of first impression.³⁰ Alternatively, a decision could announce a new legal rule that would come into force after the initial rule expires—the new rule becoming the binding precedent and authority going forward.³¹

This brief historical overview sets the stage for what remains missing in the literature on doctrinal sunsets: a comprehensive exploration of the validity and advisability of sunsets as a general feature of the judicial toolkit. Why does the concept of doctrinal sunsets strike lawyers, judges, and academics as being so very odd? And if sunsets are a valid part of the judicial toolkit when crafting doctrine, what, if any, are the scenarios wherein courts should consider utilizing them?

II. CHANGING LAW WITHOUT AMENDING LAW: A JUSTIFICATION FOR SUNSETS

There is an intuitive strangeness to the idea of incorporating sunsets into judicial doctrine. Sunsets do not seem to cohere with how we typically understand doctrine to work. In general, it would be at least unusual for a court to make a declaration “not about how today’s law would apply tomorrow, but rather about how today’s law may change tomorrow.”³² Precedent does not typically work that way. As Neal Katyal points out, “the standard conception of stare decisis is binary—either precedent should be

29. See Kysar, *supra* note 16, at 1010 n.5.

30. Of course, the reasoning of the initial case could still be cited as persuasive authority. But it would not hold precedential weight.

31. David Singh Grewal and Daniel Herz-Roiphe touch on a related difference in creating a distinction between what they call “sunrise” and “sunset” clauses. In a sunset clause, a new rule is implemented but is set to expire after a given period (at which point we return to the status quo). In a sunrise clause, a new rule is announced but delayed for a given period, following which it is implemented as a new status quo. Daniel E. Herz-Roiphe & David Singh Grewal, *Make Me Democratic, but Not Yet: Sunrise Lawmaking and Democratic Constitutionalism*, 90 N.Y.U. L. REV. 1975, 1982–83 (2015). While I agree that this distinction can be more than just formalistic given the prevalence of status quo bias, *id.* at 1283–84, for our purposes a “doctrinal sunset” encompasses any situation where a court announces that the rule it is implementing immediately going forward will expire at some defined point.

32. Amar & Caminker, *supra* note 28, at 551 (emphasis omitted).

given weight or it should not.”³³ The oddity of doctrinal sunsets in concept is matched by their apparent rarity: Frederic Bloom, for example, puts forward *Grutter* as the “single illustration” (or at least the only prominent illustration) of a doctrinal sunset.³⁴

This suggests a more philosophical objection to doctrinal sunsets: that they are simply not a legalistic move. A judge, as Justice Scalia put it, is properly tasked with “discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be.”³⁵ And so, from a “declaratory” perspective of the judicial role wherein judges are thought only to discover rather than create law,³⁶ sunsets feel inappropriate because they seemingly contemplate the same legal provision—a statute or a constitutional clause—yielding different legal rules at different times. Even from a positivist perspective which considers a new judicial rule to have changed the law (rather than simply correcting an old mistake),³⁷ it is difficult to rationalize the gap between a declaration of what the law is now and what it will be in twenty-five years.³⁸

Nonetheless, sunsets can be fitted into our more established practices of crafting judicial doctrine. The purpose of this Part is to provide a conceptual analysis and justification of sunsets by establishing three propositions:

- (1) Semantically identical legal questions can yield different “correct” answers at different time periods;
- (2) This property generalizes across all theories of statutory or constitutional interpretation—it is not a quality of “liberal” or “conservative” interpretive practices; and
- (3) This property is not adequately accounted for by the ability of judges to distinguish a precedent “on its facts.”

Establishing these propositions does not itself justify the use of sunsets in any particular doctrinal case. What it does do is establish the *general validity* of sunsets as one tool in the doctrinal toolkit, and one whose usage is not restricted to any particular legal-ideological camp.

33. Katyal, *supra* note 28, at 1244

34. Frederic Bloom, *The Law's Clock*, 104 GEO. L.J. 1, 17 n.116 (2015). As will be explored below, I do believe there have been other examples of doctrinal sunsets, though perhaps none as self-conscious as the one in *Grutter*. See *infra* Part IV.

35. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment) (emphasis omitted).

36. See LaCroix, *supra* note 27, at 1349 (citing *Linkletter v. Walker*, 381 U.S. 618, 623 (1965)).

37. See *id.* at 1350 (citing *James B. Beam*, 501 U.S. at 550 (O'Connor, J., dissenting)).

38. See *id.* at 1369–70.

A. SEMANTICALLY IDENTICAL QUESTIONS AND DIVERGENT LEGAL ANSWERS

At root, the hesitancy towards doctrinal sunsets seems to stem from the assumption that absent a formal amendment law should not differ from one time period to another. Judges might be *mistaken* about the law at one time or another; judges might even *uncover reasons* which alter the legal calculus and reveal why a decision that seemed correct at the time was in fact erroneous. But if the text does not change, then the right legal outcome is static.³⁹

This view accounts for many precedential reversals which occur because the Court announces that a prior decision was simply wrong at the time it was decided. *Lawrence v. Texas*, for example, declared that *Bowers v. Hardwick*⁴⁰ “was not correct when it was decided, and it is not correct today.”⁴¹ *Trump v. Hawaii* said the same about *Korematsu v. United States*.⁴² In these cases, the right doctrinal outcome is asserted to have been the same over time—the Court is merely correcting its own errors.

But other reversals are different. Jack Balkin discusses the category of “outmoded” precedents: those which were correct at the time they were decided but have been rendered obsolete by changing legal or social developments.⁴³ In those cases, the correct doctrinal outcome changes even as the underlying law stays constant. Searches which once were permissible become illicit; punishments which were reasonable are now deemed cruel; statutes which previously were constitutional transform into unlawful excesses—all without any concession that the prior legal rules were at all mistaken.

Such legal evolutions are considerably more controversial than the sorts of reversals at issue in *Lawrence* or *Trump*. Justice Scalia, dissenting in

39. Christopher Green articulates this view via the following syllogism:

- (1) Constitutional outcomes properly change only if constitutional meaning properly changes;
- (2) Constitutional meaning cannot properly change; therefore
- (3) Constitutional outcomes cannot properly change.

Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 558 (2006). He goes on to critique the first premise as false, thus allowing for the possibility that constitutional meaning is fixed *and* that constitutional outcomes can properly change across time. *See id.* at 558–59.

40. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

41. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

42. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in law under the Constitution.’” (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting))).

43. *See* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 185 (2011).

Roper v. Simmons, proclaimed it a “mockery” of the founders’ vision to declare “that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court’s decision 15 years ago was *wrong*, but that the Constitution *has changed*.”⁴⁴ *Roper* concerned the constitutionality of imposing the death penalty on juveniles; it overturned the Court’s prior decision in *Stanford v. Kentucky* which had permitted such executions.⁴⁵ And descriptively, Justice Scalia did not mischaracterize the decision, for the *Roper* majority indeed did not say that *Stanford* was wrong. Rather, it suggested that changes in social facts about the juvenile death penalty—namely, the increasing rarity of its usage—altered the proper legal calculus such that it now was inconsistent with the Eighth Amendment’s prohibition on “cruel and unusual punishments.”⁴⁶

And *Roper* does not stand alone. Examples of its ilk are ubiquitous and occupy no particular place on the spectrum of legal ideology. There are in fact many examples where identical textual mandates yield different “correct” results across time. Indeed, courts have endorsed radical revisions of governing doctrinal rules over a very short period of time based on a judicial assessment that the relevant facts had sufficiently changed.

Consider the desegregation remedies at issue in *Parents Involved in Community Schools v. Seattle School District No. 1*.⁴⁷ In *Parents Involved*, much of the challenged Louisville school integration policy was simply an extension of the plan that had been in place under a mandatory consent decree imposed to remedy *de jure* school segregation in Jefferson County.⁴⁸ Indeed, Louisville presciently argued *against* lifting the consent decree on the grounds that its successful racial integration plan would not be permitted once the district was declared unitary.⁴⁹ Yet the Court was entirely unsympathetic to Jefferson County’s observation that a hostile ruling would render what had been legal (in fact, constitutionally required) one day illegal the next.⁵⁰ Intervening facts had changed things—specifically, once Louisville had eliminated the “vestiges” of its prior *de jure* segregation, the

44. *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

45. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

46. *See Roper*, 543 U.S. at 574–75 (“To the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989, it suffices to note that those indicia have changed.” (citation omitted)); *infra* notes 171–77 and accompanying text.

47. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 710–14 (2007).

48. *See id.* at 715–16; *see also id.* at 844 (Breyer, J., dissenting).

49. *See* David Schraub, *Sticky Slopes*, 101 CALIF. L. REV. 1249, 1261 (2013).

50. *See Parents Involved*, 551 U.S. at 725 n.12 (plurality opinion) (rejecting Louisville’s argument “that it would be incongruous to hold that what was constitutionally required of it one day—race-based assignments pursuant to the desegregation decree—can be constitutionally prohibited the next”); *id.* at 755 n.8 (Thomas, J., concurring).

race-conscious school assignment policies that had been lawful now (under the same precedents) were forbidden to it.⁵¹

The Supreme Court's decision in *Shelby County v. Holder* likewise radically altered the state of the Voting Rights Act ("VRA") not on the grounds that it was always unconstitutional, but because in the Court's view, circumstances had sufficiently changed such that the Act's current formula could no longer be justified.⁵² Like in *Parents Involved*, the logic of *Shelby County* depended on the notion that an identical set of legal texts could yield different legal mandates across time. While there had been no amendment to the relevant constitutional provisions governing the legality of the VRA, "history," Chief Justice Roberts portentously declared, "did not end in 1965."⁵³ The VRA "imposes current burdens and must be justified by current needs."⁵⁴

To be clear, the Court never said that prior cases upholding the VRA against constitutional challenges (such as *South Carolina v. Katzenbach*)⁵⁵ were incorrect. Unlike *Bowers* or *Korematsu*, *Shelby County* at no point suggested that its prior decisions addressing the VRA's constitutionality were "not correct when [they were] decided, and . . . [are] not correct today."⁵⁶ But it did characterize the VRA as an "extraordinary departure from the traditional course of relations between the States and the Federal Government."⁵⁷ This "departure" was—at least at one point—justified because of the similarly extraordinary nature and prevalence of racial discrimination in the voting context, the existence of which compelled a "decisive" congressional response.⁵⁸ The Court (at least in the telling of *Shelby County*) permitted an "uncommon" and "not otherwise appropriate"

51. *Id.* at 725 n.12 (plurality opinion).

52. *Shelby County v. Holder*, 570 U.S. 529, 546–47 (2013) (arguing that "[a]t the time, the [VRA's] coverage formula . . . made sense" but that "[n]early 50 years later, things have changed dramatically").

Reading the tea leaves after *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), Enbar Toledano had suggested incorporating an automatic "periodic bailout review" into the VRA as a means of ensuring that it is responsive to changing conditions in the covered jurisdictions. Enbar Toledano, Comment, *Section 5 of the Voting Rights Act and Its Place in "Post-Racial" America*, 61 EMORY L.J. 389, 429 (2011).

53. *Shelby County*, 570 U.S. at 552.

54. *Nw. Austin*, 557 U.S. at 203.

55. *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966).

56. *See* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

57. *Shelby County*, 570 U.S. at 545 (quoting *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 500–01 (1992)).

58. *Katzenbach*, 383 U.S. at 335 ("Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.").

statute to be enforced because of racial barriers to the franchise, as a means of eliminating those barriers.⁵⁹ Citing the “significant progress” that has occurred since 1965,⁶⁰ the Court in essence found that these barriers had been sufficiently overcome and that therefore the “preclearance” portions of VRA could no longer be constitutionally enforced.

Each of these cases—*Roper*, *Parents Involved*, and *Shelby County*—entailed an assertion that semantically identical legal texts (the Eighth Amendment, the Fourteenth Amendment, and the Fifteenth Amendment, respectively), when properly interpreted, yield divergent legal outcomes across time. The Eighth Amendment, for example, was under *Roper*’s logic *correctly* read to permit juvenile executions in 1989 and *correctly* read to prohibit them in 2005. And while none of these doctrinal shifts came by way of a sunset clause, a moment’s reflection suggests that their logics each would have been wholly compatible with one. All three cases, to varying degrees, declared that what had been correctly deemed legal in one time period was now unlawful going forward. Had the prior decisions—affirming the juvenile death penalty in *Stanford*, upholding the VRA in *Katzenbach*, imposing race-conscious remedies in Louisville—stated at the time they were decided that their precedential value would expire after a term of years, the net effect would only have been to have given advanced warning of the coming doctrinal shift.

B. THE (IR)RELEVANCE OF INTERPRETIVE THEORY

One might suspect, at this point, that the question of doctrinal sunsets would consequently map neatly onto a larger liberal versus conservative debate regarding the proper role of the judiciary. Conservatives believe that judges interpret but do not make the law; statutes and (especially) constitutional provisions have a “fixed-meaning” that is set when the clause was adopted and can only be changed by a valid *legislative* amendment.⁶¹ Sunsets, which imply that proper legal interpretations can change without any intervening legislative modification, would be anathema under this view.

Liberals by contrast, are thought to be more comfortable with a “living

59. *Shelby County*, 570 U.S. at 545 (quoting *Katzenbach*, 383 U.S. at 334).

60. *Id.* at 565.

61. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 78–82 (2012); see also Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011) (“What defines originalism as a method of constitutional interpretation is the belief that (a) the semantic meaning of the written Constitution was fixed at the time of its enactment, and that (b) this meaning should be followed by constitutional actors until it is properly changed by a written amendment.”).

Constitution” and a more adaptive method of statutory interpretation.⁶² But while liberals might not, under this view, have a philosophical objection to judicial sunsets, they could have a pragmatic aversion. Precisely because liberals are comfortable with extra-textual forms of legal change, they might see little need for a sunset. If law or precedent needs to be changed, then it should be changed—there’s no added benefit to announcing the sunset of a doctrinal rule *ex ante*.

So we might have a simple, integrated explanation for why doctrinal sunsets are rarely considered: conservatives think they are illegitimate, and liberals think they are unnecessary.⁶³ But this account is less explanatory than it first appears, and it does not suffice to make a normative case for dismissing doctrinal sunsets. To begin, several of the more high-profile legal developments which most closely approximate a doctrinal sunset have come from conservative, not liberal, legal actors.⁶⁴ But my argument is not one of hypocrisy. In fact, I contend that incorporating sunset provisions into legal doctrine is compatible with any theory of constitutional or statutory interpretation. Whether one is liberal or conservative, pragmatic or textualist, sunsets are a legitimate and viable doctrinal tool.

1. The Textualist Case

A doctrinal sunset strongly implies (if not outright depends upon) the possibility that the correct legal outcome in the future may differ from the correct legal conclusion made at the time a case is decided, even absent any formal amendment of the underlying legal texts. The examples in the previous section—*Roper*, *Parents Involved*, and *Shelby County*—all concern just such a scenario: they are cases where semantically-identical legal texts were thought to give different “correct” legal answers across time.

Immediately, this possibility might appear to be incompatible with textualist or originalist theories of legal interpretation, where the meaning of

62. See, e.g., T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23–24 (1988); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891 (1996).

63. Cf. Schraub, *Unsuspecting*, *supra* note 2, at 393 (suggesting that one reason there has never been a doctrine developed to remove classifications from equal protection “suspect status” is that both conservatives and liberals, for separate reasons, lack any incentive to create one).

64. The sunset in *Grutter* was a sop to conservative critics of affirmative action, who have long complained of anti-racism remedies “that are ageless in their reach into the past, and timeless in their ability to affect the future.” *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986). The treatment of the VRA—warning Congress that its constitutional days were numbered and then ultimately striking it down based on its alleged failure to remain congruent with contemporary facts regarding race and voting—likewise was a doctrinal push emanating from the right. See *supra* notes 52–54 and accompanying text.

a given legal text is “fixed” at the time of its enactment.⁶⁵ Certainly, some sentiment of this sort seemed to motivate Justice Scalia’s incredulous broadside against the *Roper* decision.⁶⁶ Of course, a skeptic might retort that Justice Scalia and his fellow originalists/textualists felt no similar hesitation in their *Parents Involved* and *Shelby County* votes. But a claim of hypocrisy, even if established, proves little—it might as easily show that the latter two cases were without legal foundation as it does that the former is justifiable.

That said, proponents of the view that constitutional or statutory meaning is fixed have long affirmed that this standpoint is wholly compatible with evolutions in doctrine. As early as 1900, Arthur W. Machen Jr. wrote that while “the Constitution and its construction must remain unchanged . . . the validity *vel non* of a legislative act often depends partly upon questions of fact.”⁶⁷ By 1926, the Supreme Court, via Justice Sutherland, expressed a similar view in *Village of Euclid v. Ambler Realty*: “[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.”⁶⁸ He continued to note that “a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances.”⁶⁹ And just in the 2018 term, Justice Gorsuch made the same observation: “While every statute’s *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world.”⁷⁰

What, precisely, marks the difference between “meaning” and “application”? Christopher Green suggests that it lies in the “sense-reference” distinction associated with influential philosopher of language

65. See, e.g., Michael C. Dorf, *The Supreme Court, 1997 Term – Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 21–22 (1998) (“[F]or the textualist-cum-originalist, the meaning of the statute is fixed at the time of its adoption.”); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 754 (2009) (“Originalist interpretive theories argue that the meaning of the Constitution is fixed as of the time of its enactment.”).

66. See *Roper v. Simmons*, 543 U.S. 551, 608 (Scalia, J., dissenting).

67. Arthur W. Machen Jr., *The Elasticity of the Constitution*, 14 HARV. L. REV. 200, 273 (1900) (“The law of the Constitution remains forever unchanging; the facts . . . are infinitely various.”).

68. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); see also *Mo. Pac. R.R. Co. v. United States*, 271 U.S. 603, 607 (1926) (“[W]ords do not change their meaning; but the application of words grows and expands . . .”); *South Carolina v. United States*, 199 U.S. 437, 448 (1905) (“The Constitution is a written instrument. As such its meaning does not alter. . . . [But] as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred.”).

69. *Village of Euclid*, 272 U.S. at 387.

70. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018).

Gottlob Frege.⁷¹ Simplified, the “sense” of a statement refers to the property it connotes, whereas the “referent” is any object in the world that satisfies the criteria of that property.⁷² So, for example, the sense of the phrase “the largest fork on the table” relates to the abstract properties of being “largest,” a “fork,” and “on the table,” whereas the referent is the particular object that satisfies those criteria and possesses that property (the fork that in fact is the largest fork on the table). And importantly, even as the sense of the statement remains constant, the reference can change: if more silverware is added, a new fork might be the “largest fork on the table”.

Jack Balkin offers a helpful legal example via the Constitution’s requirement that the United States protect each state from “domestic violence.”⁷³ While today that term typically is used to denote spousal or intimate partner assaults, at the time of the Constitution’s enactment “domestic violence” instead meant “riots” or “insurrections,” and that is the usage through which we interpret Article IV.⁷⁴ In this extremely narrow respect—fidelity to original *semantic* meaning—it might be fair to say we are indeed all originalists.⁷⁵ For our purposes, however, the point is that even if the *sense* of “domestic violence” remains unchanged from the time of the Constitution’s enactment, its *referents*—what actions qualify as “riots” or “insurrections”—are quite likely to depend on changing social facts.⁷⁶ Just as *that* fork may or may not be the “largest fork on the table” at any point in time, *that* sort of social disruption may or may not be “domestic violence” depending on a much wider array of social considerations. In either case, the admission that the legal outcome might vary in different circumstances is not in conflict with the belief that the textual meaning of the phrase is fixed.

“[A] smart originalist,” Ilan Wurman writes, “will normally understand that the provisions of the Constitution enshrine a *sense* that does not change with time. But the facts and conditions to which the sense applies—the

71. See Green, *supra* note 39, at 560.

72. See *id.* at 563.

73. U.S. CONST. art. IV, § 4 (“The United States . . . shall protect each [state] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).

74. Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 552 (2009).

75. It is equally fair to say that, defined so expansively, “originalism” isn’t that useful of a concept. James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785, 1788 (2013) (“But if we define originalism so inclusively—and we are all now in this big tent—it may not be very useful to say that we are all originalists now.”).

76. See Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 678 (1966) (arguing that judicial reliance on facts may sometimes be “indispensable to sound constitutional adjudication”).

referents of the constitutional provisions—can change.”⁷⁷ Consequently, it is entirely consistent with originalism—and in certain circumstances demanded by originalism—that the application of even fixed legal texts might change due to the input of new factual information.⁷⁸ It is not, to be clear, the case that every legal or doctrinal provision is equally vulnerable to such changes. But, as will be discussed in Part III, some legal rules can be predicted with a fair degree of certainty to require evolution over time. In such circumstances, there is nothing latent in originalism or textualism which forbids acknowledging these evolutions—and thus no reason in principle why a sunset could not be one mechanism to account for them.⁷⁹

77. ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 39–40 (2017).

78. See Brief of Amici Curiae Cato Inst. et al. in Support of Petitioners at 4, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, -562, -571, -574) (citing Ilya Somin, *William Eskridge on Originalism and Same-Sex Marriage*, VOLOKH CONSPIRACY, WASH. POST, (Jan. 23, 2015, 12:55 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/23/william-eskridge-on-originalism-and-same-sex-marriage> [<https://perma.cc/KEY5-BPKF>]); WURMAN, *supra* note 77, at 8 (“Originalists recognize that original meaning often *requires* that the application of the text evolve as modern circumstances evolve . . .”); Somin, *supra* (“As nearly all originalists recognize, that methodology is entirely consistent with updating the application of its fixed principles in light of new factual information. Indeed, such updating is often not only permitted, but actually required by the theory.”).

79. This defense of sunsets suggests that sunsets are validated under textualism insofar as they help ensure that doctrinal outcomes track the proper understandings of a legal text as it shifts across time. That is to say, sunsets are legitimate textualist tools insofar as they promote proper textualist outcomes. However, it is possible that some originalists might raise a procedural objection to the use of sunsets—namely, that under the original understanding of the judicial role, sunsets were not viewed as a valid legal tool existing in the judicial toolkit.

I do not have the space to pursue this argument here in detail; presumably such a claim would require an independent exploration of the compatibility of sunsets with the judicial power as Article III was originally understood. It is worth noting, however, that for the most part originalists and textualists have not been particularly interested in the mechanisms of doctrinal design decisions beyond whether the doctrines themselves are substantively correct as a matter of textual interpretation. So long as the results ultimately arrived at are consistent with proper textualist interpretation, the implementation processes judges use to translate those results into legal realities seem beyond the scope of the theory.

Where originalists and textualists have sought to inject themselves into this domain, it’s generally been part of an effort to salvage a working theory of *precedent*—a stalwart feature of judicial *methodology* which nonetheless seems to make the embarrassing demand that courts should (at least sometimes) adhere to past decisions even when they are inconsistent with proper original meaning. Compare Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 25–33 (1994) (contending that the Constitution forbids following precedent in circumstances where the precedent is incompatible with constitutional meaning), with John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 824 (2009) (defending precedent on originalist grounds as being part of a common law tradition governing proper judicial conduct that existed and was incorporated at the founding). It seems unlikely that this debate would extend to criticizing judicial implementation processes where they were compatible with—and indeed, a means of facilitating—the substantive legal outcomes demanded by originalism.

2. The Pragmatic Case

If the prior subsection dispensed with a conceptual objection to sunsets—that they imply that correct legal outcomes can change across time even in absence of formal legal amendments—it did not itself provide a positive case for sunsets as a jurisprudential tool. There are many judicial maneuvers that might be acceptable philosophically but which are pointless or unappealing. While a liberal or pragmatic jurist might not share the instinctive aversion of, say, a Justice Scalia to the prospect of correct legal outcomes changing over time, they still might not perceive sunsets as filling any particular niche in their jurisprudential toolkit. If sunsets are to earn a place in judicial practice, they must not only be acceptable as a matter of judicial theory, but also fill a useful need in judicial practice.

So what is the use of a sunset if courts can simply adapt new interpretations in response to any change in factual circumstances? Judges, after all, always remain free to respond to factual changes simply by overruling prior precedents.⁸⁰ If anything, this question is even more pressing for liberal or pragmatic jurists who do *not* feel particularly bound to the idea of fixed textual meaning and thus presumably have even greater flexibility to adapt their decisions to changing social conditions. Under this view, a sunset is simply extraneous and does not offer judges anything they do not already possess. For example, while *Grutter v. Bollinger* upheld affirmative action programs on the grounds of promoting diversity but declared its expectation that “25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today,”⁸¹ one could fairly rejoin that the 2028 Supreme Court does not require an invitation from Justice O’Connor to readdress the constitutionality of affirmative action, and if it does elect to do so it would not be bound to adhere to Justice O’Connor’s conclusion. Instead of being forced to “start from scratch” at the end of a sunset period, courts can maintain the status quo unless and until they perceive changes in facts which compel a different outcome.⁸²

One answer is that even under more adaptive theories of legal interpretation, courts are still constrained by the *verticality* of precedent—

80. See *Smith v. Allwright*, 321 U.S. 649, 665 (1944) (“[W]e are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent.” (footnote omitted)); Katyal, *supra* note 28, at 1246.

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

82. See Louis Lusk, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1103 (1982) (noting that the existence of precedent means litigants need not “start from scratch, approaching the elusive issue of fundamental injustice as an original proposition in each case”).

that is, lower courts remain bound by superior court opinions.⁸³ Particularly with Supreme Court decisions, the relative infrequency with which the Court hears cases may limit the opportunities for reversing outmoded precedents, even when they no longer are justified by current factual affairs. A decision that may have been correct in one historical moment may nonetheless “lie[] about like a loaded weapon”⁸⁴—never overturned, but still binding onward into the future.⁸⁵ This is especially troublesome in doctrinal areas where courts might expect new salient developments to occur quickly and the need for lower court flexibility is at its apex.

Moreover, even when it is the same court revisiting a given issue (“horizontal” precedent), the abstract capacity for judges to overturn precedent founders against the reality of doctrinal inertia. Aside from all the general bars to significant judicial change, rules of precedent dictate that prior rules should be left undisturbed unless compelling grounds justify an alteration.⁸⁶ When left to their own devices, courts do not respond to factual changes in a consistent or even coherent way. Relying on courts to overturn their own precedents as a means of responding to updated factual circumstances means relying on a system that is notoriously *ad hoc*, ill-defined, and designed to have high barriers to action.

Whether in its “vertical” or “horizontal” guise, precedent is by design intended to stick. In circumstances where we intend for a legal doctrine to last over time, this may not be a problem—the stickiness of precedent is a virtue rather than a vice. But the examples of “cruel and unusual punishment” or “reasonable expectation of privacy” or “suspect classifications” point to legal doctrines which cannot function as intended unless they are allowed to evolve over time. In these circumstances the *ad hoc* decision to overturn a prior precedent is a cumbersome and unreliable

83. See John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 513 n.25 (2000) (“Vertical stare decisis refers to the rule that courts must follow the precedents of courts above them in the appellate hierarchy. Horizontal stare decisis refers to the rule that a court must follow its own precedents.”).

84. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

85. In *Baker v. Nelson*, 409 U.S. 810 (1972), for example, the Supreme Court’s one-sentence dismissal of a challenge to same-sex marriage bans in 1972 wreaked havoc on the legal prospects of gay marriage litigants for decades. See also Schraub, *Siren Song*, *supra* note 2, at 859.

86. See *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (observing that “any departure from [precedent] demands special justification”); Amy L. Padden, Note, *Overruling Decisions in the Supreme Court: The Role of a Decision’s Vote, Age, and Subject Matter in the Application of Stare Decisis After Payne v. Tennessee*, 82 GEO. L.J. 1689, 1696 (1994) (“[W]hen there is an intervening development in the law, when a precedent has proved unworkable, or when the underlying reasoning of a precedent has become outdated, it is entirely legitimate and sometimes even necessary for the Court to overrule a prior decision. However, such a measure should be taken only in these limited circumstances, so that the goals of stare decisis—certainty, equality, efficiency and the appearance of justice—may be attained.”).

mechanism.⁸⁷ The result, as the Court conceded in *Trammel v. United States*, is the “reality that the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggests the need for change.”⁸⁸

Even where judicial doctrines are explicitly and admittedly fact-bound, the fact of a decision exerts an independent gravitational pull on future cases. There is little that compels a court to reverse itself even when it itself initially admitted the challenged doctrine rests upon contested facts.⁸⁹ For example, in deciding *Miranda v. Arizona*, the Supreme Court recognized that the factual impact of its decision was unclear and thus invited continued legislative exploration as to “effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.”⁹⁰ Congress obliged by forwarding an alternative doctrine that confessions were admissible so long as they were voluntarily made, and supported the validity of this approach with extensive factual findings.⁹¹ The Supreme Court entirely ignored this factual riposte when it reaffirmed *Miranda* in *Dickerson v. United States*.⁹²

Another practical consideration in favor of sunsets is that, at least in certain cases, the public declaration of a sunset may better actualize the

87. In the statutory context, Eric Posner and Adrian Vermeule note that [t]he “default”—that statutes persist until repealed—creates a compromise between stability and flexibility, but this balance is more appropriate for some policy areas than others. . . . Congress recognizes as much when it provides certain statutes with sunset provisions, reflecting the view that greater flexibility than the norm is needed in that policy area.

Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1672 (2002).

88. *Trammel v. United States*, 445 U.S. 40, 48 (1980).

89. See David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 589 (1991) (“Even if, however, research clearly demonstrated an error in the Court’s empirical assumption, there is little reason to be sanguine that the Court would pay much attention. If the Court wished to reaffirm . . . , it might simply sweep the research aside as invalid or shift to an alternative basis for its holding, thereby rendering the research irrelevant.”).

90. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (“It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. . . . However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.”).

91. See John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 78–79 (2008).

92. *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000); see also Faigman, *supra* note 89, at 589 (noting that the Supreme Court easily could ignore any subsequent empirical evidence which undermined its decision in *Leon*).

reliance value of the precedent.⁹³ At first blush, this may seem counter intuitive. A sunset, after all, renders legal one day what was illegal the day before. Placing an expiration date on a given judicial doctrine does allow the judiciary more flexibility in adapting to changing circumstances but at the seeming expense of reduced legal stability.⁹⁴ Legislators, of course, can decide that this trade-off is worthwhile. But judges, tasked with interpreting the law, not making it, may seem to be ill-suited to make such determinations themselves.

Yet on closer examination, it is apparent that sunsets can often better instantiate reliance values. To be sure, a sunset provision offers up greater opportunity for doctrinal change, and thus, in that way, can promote doctrinal instability as compared to the status quo where doctrinal rules are presumed to exist in perpetuity. Yet it is hard to argue that a sunset would not have been more predictable than the largely ad hoc processes of doctrinal change seen in cases like *Parents Involved* or *Shelby County*. The desegregation program at issue in *Parents Involved*, for example, was negated because of the conclusion that Louisville had successfully eliminated the “vestiges” of its prior segregationist practices.⁹⁵ But eliminating “the vestiges of past discrimination . . . to the extent practicable”⁹⁶ is hardly the model of a bright-line rule for actors to depend upon for guiding their behavior.

Shelby County provides an even better example. Four years before *Shelby County*, the Supreme Court warned in *Northwest Austin* that it was growing more skeptical of the VRA.⁹⁷ The VRA, the Court wrote, “imposes current burdens and must be justified by current needs.”⁹⁸ But its language was hedged. In the sentence immediately prior, the Court conceded that “[i]t may be that . . . conditions continue to warrant preclearance under the [Voting Rights] Act.”⁹⁹ Unclear signals yielded congressional inaction. Congress did not make new factual findings or adjust the VRA in any way following *Northwest Austin*. And in *Shelby County*, what had been a probe suggesting concerns over the continued vitality of the VRA turned into a cudgel striking down the law outright, with the majority citing *Northwest*

93. See, e.g., Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1460 (2013); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 414–16 (2010).

94. See Posner & Vermeule, *supra* note 87, at 1672 (noting that the decision on if and when legislation is set to expire represents a balancing of the need for stability with flexibility).

95. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725 n.12 (2007) (plurality opinion).

96. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 250 (1991).

97. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202–04 (2009).

98. *Id.* at 203.

99. *Id.*

Austin's "current burdens" language four times to contend that the VRA no longer passed constitutional muster.¹⁰⁰

Imagine if the Court in *Northwest Austin* had made explicit what it had apparently intended to say *sub rosa*: that the VRA was "on the clock," and that its continued constitutional validity depended on Congress providing new and updated evidence of racial discrimination in voting rights within (say) the next five years. Of course, this would not have guaranteed a congressional response, but the explicit announcement of a sunset would have made clear the stakes and likely motivated a stronger push for action. One benefit of sunset clauses, after all, is that they are "useful ways of providing automatic, timed feedback" and counter "the propensity to let unsatisfactory arrangements harden into accepted habits and routines."¹⁰¹ This seems to track at least the stated objections of *Northwest Austin* and *Shelby County* to the VRA—that the law was based on outdated evidence and needed to be modified to fit current needs.¹⁰² The murky signal of *Northwest Austin* would have been replaced by a clarion demand to update the VRA or see it fall.

In other words, by affirming the constitutionality of the VRA but putting that decision on an explicit sunset, the *Northwest Austin* Court would have explicitly announced its rule and allowed all parties to plan their response accordingly. In general, a sunset allows political and social actors time to plan in advance how to adjust to the change and model their behavior to be consistent with the announcement—either by preparing for the new state of affairs or by gathering updated data and arguments that can support the continuation of the current doctrine under new circumstances.¹⁰³ This stands in significant contrast to a world where prior decisions are overturned in a largely arbitrary or ad hoc manner—what often feels akin to a bolt of judicial lightning. In this way, sunset provisions can actually further the reliance interests that precedent is designed to defend.¹⁰⁴

100. *Shelby County v. Holder*, 570 U.S. 529, 536, 542, 550, 556 (2013).

101. DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 291 (1977).

102. *Shelby County*, 570 U.S. at 556 ("It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story.").

103. See Amar & Caminker, *supra* note 28, at 549–50.

104. Ranchordás, *supra* note 22, at 39 ("Sunset clauses, if correctly implemented, can provide a greater continuity guarantee and time framework on which citizens can rely. In this light, the principle of legal certainty is not endangered but rather furthered by sunset clauses, since the latter can function as an impediment for abrupt and unjustified changes before the sunset occurs." (footnote omitted)).

C. ADDRESSING ADJUDICATIVE VERSUS LEGISLATIVE FACTUAL CHANGES

Even if persons of diverse ideological orientations might agree that legal outcomes can change depending on factual evolutions, they might nonetheless suggest that courts can adequately account for this prospect through a simple and uncontroversial mechanism: the practice of distinguishing a case on its facts.¹⁰⁵ Where there are material factual differences between the original precedent and the case at bar, the former routinely is not held out as binding on the latter.

This is true. But there is an important difference in two *types* of factual distinctions, which plays an essential role in determining when courts are willing to distinguish a prior precedent on basis of divergent facts. These types are sometimes termed “adjudicative” versus “legislative” facts.¹⁰⁶

“Adjudicative facts” are those relating to the particular dispute before the court—for example, whether Tom was driving negligently when he struck Jane or whether Anne genuinely believed her life was in danger when she shot Mike—and are left in the hands of juries.¹⁰⁷ By contrast, “legislative facts” are those which “transcend the particular dispute” and relate to broader policy considerations which would support the crafting of one legal rule over another.¹⁰⁸ In determining whether sexual orientation ought to be considered a suspect classification, for example, a court would need to decide whether or not gays and lesbians are a “discrete and insular minority,”¹⁰⁹ as well as whether they are “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”¹¹⁰ These are factual determinations, but of a very different kind than the “was Tom driving negligently” variety, and they are typically decided upon by judges. The judicial determination of legislative facts has long been a part of American constitutional jurisprudence.¹¹¹

105. Harry W. Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443, 456 (1975) (“A past judicial decision is generally binding in future cases involving the same *material facts*, and in such cases only. If a later controversy involves what the court considers materially different facts . . . the new case . . . is ‘distinguishable on its facts.’”).

106. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942).

107. *See id.*

108. Faigman, *supra* note 89, at 552 (citing Davis, *supra* note 106, at 402–03).

109. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

110. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

111. *See* Faigman, *supra* note 89, at 556–65 (surveying judicial determinations of factual question across a variety of hallmark constitutional cases).

In terms of their binding and precedential effect, legislative facts are quite different from their adjudicative peers—particularly in the arena of a lower court seeking to evade an otherwise controlling precedent by distinguishing the case on its facts. A distinction in legislative facts can certainly undermine a previously announced decision; where the facts have shifted enough, we might even expect that a lower court would write an opinion suggesting that the Supreme Court do just that.¹¹² But lower courts do not typically view themselves free to “distinguish on its facts” a superior-court precedent when the factual distinctions are legislative rather than adjudicative. They view themselves as precedentially bound even though—or perhaps because—the doctrinal rule in question depends on factual predicates which may have changed since the initial ruling.

The Montana Supreme Court found this out the hard way following the Supreme Court’s *Citizens United* decision.¹¹³ Rejecting limits on corporate campaign contributions, *Citizens United* concluded in that case that there was no evidence such expenditures corrupted the political process.¹¹⁴ One year later, the state of Montana compiled extensive documentation of exactly this sort of corrupting influence (at least in that state), and the Montana Supreme Court used that record to uphold its own state’s campaign finance law.¹¹⁵ The state court even stated explicitly that this record meant that the Montana case had different facts than those posed in *Citizens United*.¹¹⁶ The Supreme Court did not just reverse, it reversed in a breezy two paragraph per curiam opinion where it concluded that there could “be no serious doubt” that “the holding of *Citizens United* applie[d].”¹¹⁷

The distinction between legislative and adjudicative facts also helps tackle another potential objection to the use of sunsets—the claim that they can never be part of a judicial *holding* and thus cannot precedentially bind lower courts. As any legal theorist knows, “not every opinion expressed by a judge forms a [j]udicial [p]recedent.”¹¹⁸ Some portions of a judicial opinion

112. See *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 775 (8th Cir. 2015) (suggesting that the Supreme Court revisit its abortion precedents in part because “the facts underlying *Roe* and *Casey* may have changed”); Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 147 (observing that “some doctrinal shifts are caused by disruptions internal to the doctrine, that is, by changes in foundational assumptions”); *infra* notes 148–50 (discussing *Dassey v. Dittmann*, 877 F.3d 297 (7th Cir. 2017) (en banc), and the suggestion that doctrine governing permissibility of police deception in eliciting confessions needs reassessment).

113. *Citizens United v. FEC*, 558 U.S. 310, 372 (2010).

114. *Id.* at 360–62.

115. *W. Tradition P’ship v. Att’y Gen.*, 271 P.3d 1, 13 (Mont. 2011).

116. *Id.* at 6.

117. *Am. Tradition P’ship v. Bullock*, 567 U.S. 516, 516 (2012) (per curiam).

118. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 261 (2d. ed. 1921).

are mere *dicta* and lack precedential force. Formalist theories of precedent suggest that the holding of a case is limited to those legally salient facts necessary to reach the court's ultimate legal conclusion.¹¹⁹ But the declaration of a sunset is not, at first glance, necessary to the resolution of the actual case and controversy before the court. It speaks to the disposition of future cases but is not directly germane to the present dispute. Hence, it is arguably *dicta* and not binding on future courts.

Yet applying this line of reasoning to judicial sunsets would be highly anomalous. First, if the reason for the division between *dicta* and holding is to "limit[] the rate at which new law can be created," then a sunset, which effectively shrinks the scope of a holding (by announcing its eventual expiry), represents among the least dangerous expansions of the judicial power.¹²⁰ Perhaps more strikingly, if a declared sunset is deemed to be non-binding *dicta*, a lower court might (in the period following the sunset) feel constrained by a legal precedent even though the superior court, which handed down the decision, expressly stated that it is not so bound.

The true nexus of the dilemma, however, is simple. In the cases described above, legislative facts are clearly salient to the announced legal rule, yet changes in those salient facts are not perceived as sufficiently distinguishing the precedent.¹²¹ What's needed is a way to signal lower courts that changes in these legislative factual patterns will render the direct holding of the case inapposite, ideally while maintaining some of the benefits precedent provides in terms of stability, reliability, and legal coherency.

Allison Orr Larsen discusses this problem in a compelling article on "factual precedents."¹²² Factual precedents are rulings by the Supreme Court on factual questions which are viewed by lower courts as binding with regard to the factual question they address.¹²³ Larsen argues persuasively that

119. See Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 179 (1930). Less formalist theories give greater deference to judiciary's power to simply declare what is and is not part of a case's holding, at which point the only question would be whether the sunset is so announced. See Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 188–89 (2006).

120. Eric Rasmusen, *Judicial Legitimacy as a Repeated Game*, 10 J.L. ECON. & ORG. 63, 75 (1994) ("If *dicta* were binding, a judge could create an unlimited amount of new law. His 600-page decision on a bankruptcy case could also control the law on abortion, copyright, and criminal evidence.").

121. See Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1053 (2005); Goodhart, *supra* note 119, at 177 (suggesting the authority of courts to declare which facts are and are not salient to its decision, and thus are contained in the holding).

122. See Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 108–11 (2013) (discussing, among other examples, *Citizens United* and Montana's attempted reply).

123. *Id.* at 73 ("[A] factual precedent is a lower court's reliance on the Supreme Court's assertion of legislative fact—a general factual claim—as authority to prove that the observation is indeed true.").

treating the Supreme Court's factual declarations as binding in the same way a legal conclusion binds can have deeply destructive, even destabilizing, effects. But sometimes these precedents seem unavoidable, because the doctrines themselves encode certain factual predicates upon which the legal decision relies. A court which decided that sexual orientation was a suspect classification would, assuming they were following the prevailing doctrine, necessarily be registering some conclusions about gays and lesbians being politically powerless, saddled with disabilities, or being a discrete and insular minority.¹²⁴

Larsen addresses this problem as one of “premise facts”: ones “where the Supreme Court’s legal pronouncement depends quite explicitly on a factual claim.”¹²⁵ Recognizing these particular sorts of facts present especially knotty precedential dilemmas, she ultimately suggests viewing judicial determinations along these lines not as “factual” conclusions per se but rather as the announcement of bright-line rules (whose factual underpinnings may, in particular cases, turn out to be over- or under-inclusive).¹²⁶ For lower courts struggling to determine whether a precedent’s discussion of facts ought to be viewed as precedentially-binding, she suggests a “clear statement” rule: “If the Supreme Court is clear that its factual statements are part of a legal rule, then the statements are authoritative due to their legal component. Absent such a clear label, a lower court should assume that the factual dispute is open for debate.”¹²⁷

Larsen’s proposal works quite well as a means of salvaging a working theory of precedent, explaining when and why doctrinal rulings can remain binding on lower courts even when they seem to rely on factual conclusions that are either weakly established or proven inapposite in future cases. But it does little to ensure that facts and doctrine will remain in harmony in those cases where the doctrine does seem to explicitly encode factual assumptions into the rule. It is these doctrines—when the Court has clearly hooked a doctrinal rule to a given factual account about the world—where it seems most important to ensure that the facts and the doctrine do not drift out of alignment. Yet paradoxically, it is also these doctrines where the binding effect of precedent makes it most difficult for future courts to prevent such a drift. As between two unappealing options—either allowing lower courts near-infinite latitude to reassess legislative factual determinations made by

124. See *supra* text accompanying notes 109–10.

125. Larsen, *supra* note 122, at 108.

126. *Id.* at 109 (“I submit that with premise facts . . . the Court is not really finding facts but is rather building bright line rules.”).

127. *Id.* at 111–12.

superior courts (with all the attendant instability and uncertainty that would result), or binding lower courts to precedents which depend on factual determinations even after those determinations are clearly obsolete—a sunset may provide a sensible middle road.

III. FACTUAL CHANGES AND LEGAL RULES: FOUR RELATIONSHIPS

The utility of sunset clauses is, in large part, based on the potentially dynamic relationship of a given legal rule to the factual world. Law relies on certain facts, and when those facts change, it often will be necessary, or at least advisable, for law to change with it. Nonetheless, that broad generalization admits of considerable variance as one moves across legal doctrines. Depending on how they are drawn, legal rules can exist almost entirely independent of social facts or be inextricably intertwined with them. Understanding when and why doctrinal sunsets may be appropriate depends on understanding the different sorts of relationships a legal doctrine might have with the factual world.

One can categorize legal rules into four distinct relationships that they might have with surrounding factual predicates. None of these categories necessarily demand a sunset nor are they incompatible with one, but they are presented in roughly ascending order of their likelihood of fruitfully incorporating a doctrinal sunset.

First, there are *non-fact-dependent* rules: The legal rule does not substantially depend on any facts about the world.

Second come *fact-reflective rules*: The legal rule is supposed to track certain facts about the world, but these facts are not necessarily supposed to change over time.

Third, there are *fact-tracing rules*: Here, the legal rule is supposed to track certain facts about the world, and these facts are expected to change over time. But these changes are not necessarily due to the legal doctrine itself, and the purpose of the doctrine is not to effectuate any particular change in these predicate facts.

Fourth and finally, there are *fact-modifying rules*: The legal rule is supposed to track certain facts about the world, and these facts are expected to change over time due to the effects of the doctrine. That is to say, the purpose of the doctrinal rule is to (hopefully) modify a particular set of facts about the world.

In keeping with the above arguments that sunsets are viable doctrinal

tools regardless of one's interpretive ideology,¹²⁸ it is important to stress that as a taxonomy none of these rule-categories are in and of themselves more likely to be the outcropping of liberal versus conservative forms of constitutional or statutory interpretation. Consider the "evolving standards of decency" test used to determine what practices violate the Eighth Amendment's bar on "cruel and unusual punishments."¹²⁹ This is an example of a fact-tracing rule: it is presumed that our "standards of decency" will "evolve" over time, and when they do the proper doctrinal results should change with them. Whether or not this rule actually is, for example, the proper "originalist" Eighth Amendment standard is beyond the scope of this Article. But surely there is nothing latent in originalism that would make it impossible for a polity, when considering the enactment of an Eighth Amendment-like constitutional provision, to originally understand the words "cruel and unusual punishment" to mean that which does not reflect the standards of a decent society as that community progressively comes to understand them over time.¹³⁰ In other words, there is no *conceptual* reason why we should not expect to find any or all of these forms of doctrinal rules as part of the ideal interpretative practice of a wide range of interpretive theories. The taxonomy hence is one whose utility generalizes regardless of whether one is a textualist or a purposivist in statutory interpretation, or an originalist versus a living constitutionalist for constitutional construction.

A. NON-FACT-DEPENDENT RULES

Some legal doctrines do not seem to significantly depend on any significant factual assessments. More or less, they present themselves as analytic statements—their validity is simply a matter of possessing the proper understanding of the underlying texts they purport to interpret.¹³¹ So,

128. See *supra* Section II.B.

129. U.S. CONST. amend. VIII. I discuss this example at length below. See *infra* notes 166–77 and accompanying text.

130. See Green, *supra* note 39, at 626 (acknowledging that "if the Constitution contains moral terminology, then moral theorizing would be needed in order to figure out the Constitutional referent"); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 610 (2004) ("It is entirely possible for a text to embody principles or general rules, and much of the constitutional text does exactly that.").

131. An "analytic" statement is one in which the predicate concept is contained in the subject concept, such that the statement can be validated simply by knowing the meaning of the relevant terms. A common example is the phrase "all bachelors are unmarried men"—that statement can be confirmed as true solely by knowing what "bachelor" and "unmarried man" mean. A "synthetic" statement, by contrast, cannot be validated this way: if one asserted that "all animals with hearts have kidneys," that statement may or may not be true, but its truth cannot be deduced simply by knowing the semantic meaning of "animals with hearts" and "kidneys." See IMMANUEL KANT, *THE CRITIQUE OF PURE REASON* 7 (J.M.D. Meiklejohn trans., 2010) (1781).

for example, some doctrines which purport to interpret the First Amendment's prohibition on laws "abridging the freedom of speech" claim to simply be derivations of what "freedom of speech" means as a concept.¹³² Other than getting that semantic meaning correct, these doctrines do not depend on any particular fact about the world being true.

Consider the First Amendment's bar on prior restraint announced in *Near v. Minnesota*.¹³³ One could imagine a universe in which this rule was imposed because of some factual assessment about the world: for example, a measurement of societal attitudes regarding when speech ought to be protected versus regulated. But this is not the rationale given by the Court; instead, the ban on prior restraints was taken to be an inherent part of the very concept of a free press.¹³⁴ The doctrine forbidding prior restraint is a non-fact-dependent rule.

Of course, it is possible to recode virtually any doctrinal rule into a set of factual assessments.¹³⁵ For example, *Near* relied on a historical canvassing of the general treatment of prior restraint in English and early American law to determine that it was generally incompatible with freedom of the press.¹³⁶ If future historical research demonstrated that this account of prior restraint was incorrect, then one might suggest *Near* should be overturned. But this amounts to little more than saying judges can be wrong in their legal analysis. As Larsen observes, while the distinction between law and fact is, philosophically speaking, surprisingly fraught, this difficulty plays little role in the ability of legal professionals to recognize the distinction between categories on a day-to-day basis.¹³⁷

I will not belabor this point here; the difference between a legal rule against prior restraint as articulated in *Near* and the sorts of factually dependent legal rules discussed below is clear enough to stand on its own.

132. As Jeremy Waldron observes, the "essential contestability" of many key legal terms means that even legal claims that are on-face analytic will often be quite controversial in ways that "[a] bachelor is an unmarried man" is not. We do not in fact agree on what "free speech" simply "means" in the way that we agree what "bachelor" means. See Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 152 n.38 (2002). But this does not mean the statements are not holding themselves out as analytic, it just means they might not be true analytic statements.

133. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716, 722–23 (1931).

134. *Id.* at 716. ("The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.")

135. See Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 185–87 (2003) (arguing that, increasingly, the Court treats doctrinal questions like empirically-verifiable factual questions).

136. *Near*, 283 U.S. at 713–19.

137. Larsen, *supra* note 122, at 67–73.

And where a legal rule does not depend on factual assessments about the world in any capacity, it is least likely to benefit from a sunset¹³⁸ and so least interesting from the vantage of this Article. What is true is that rules of this sort are perhaps the paradigm of what lay people often envision when they think of judges interpreting legal texts—ascertaining textual meaning of a given statute or clause and then deriving from that process the answer to a legal question. But, as shown below, many legal doctrines are not so straightforward. They are by necessity dependent on factual assessments about the world that cannot be contained in a purely semantic analysis of the relevant legal texts.

B. FACT-REFLECTIVE RULES

Often, legal doctrines do depend on at least some factual account of the surrounding world. But just because doctrine depends on facts does not mean that the doctrine cannot be stable. A factually dependent doctrinal rule can nonetheless be perfectly steady if the facts in question are not expected to vary over time. Where a doctrine is promulgated based on such an unchanging fact, it is a *fact-reflective* rule.

Nguyen v. INS, for example, addressed the legality of having different requirements for attaining citizenship for children born out of wedlock and abroad to one U.S. citizen parent, depending on whether the citizen was the mother or the father.¹³⁹ In rejecting a sex-discrimination challenge, the Court relied on several facts about biology and reproduction which rendered fathers and mothers constitutionally dissimilar. The Court observed, for instance, that a child's biological relationship to his or her mother is verifiable at birth whereas the "validity of the father's parental claims must be gauged by other measures."¹⁴⁰ The Court also noted that whereas a U.S. citizen mother living abroad has the right to control where she gives birth to her child (that is, she is entitled to return to the United States to give birth if she so desires), a U.S. citizen father generally cannot determine where his child will be born.¹⁴¹

One could—and many have—contested whether these factual

138. The exception could be a decision-delaying sunset. It is plausible to imagine scenarios where the relevant controversy is purely a question of law, but the surrounding social environment is such that judges are not confident about their ability to reason optimally or dispassionately. *See* discussion *infra* Section IV.B.

139. *Nguyen v. INS*, 533 U.S. 53, 56–57 (2001).

140. *Id.* at 62 (quoting *Lehr v. Robertson*, 463 U.S. 248, 260 n.16 (1983)).

141. *Id.* at 61 (“[A] citizen mother expecting a child and living abroad has the right to re-enter the United States so the child can be born here and be a 14th Amendment citizen. . . . [U]nlike the unmarried mother, the unmarried father as a general rule cannot control where the child will be born.”).

predicates actually suffice to justify the outcome in *Nguyen*.¹⁴² For our purposes, however, what is important about these facts is that they are unlikely to vary over time. In general, biological motherhood will continue to be verifiable at the time of birth.¹⁴³ In general, U.S. citizen mothers residing abroad will retain considerably more legal and practical authority to decide whether they wish for their child to be born in America than will U.S. citizen fathers. So even though the *Nguyen* majority did rely on certain factual predicates in determining its ruling, it did not have to worry about the doctrinal rule becoming outmoded because of changes in the factual groundwork.

Fact-reflective rules are those in which the doctrine is supposed to track a relatively stable and unchanging fact (as in the facts surrounding human reproduction). Hence, like non-fact-dependent rules, the doctrine is unlikely to require alteration based on changes in the underlying factual predicates. But there may be exceptions—most notably scenarios where the underlying *fact* does not change but our knowledge *about* it does.

Recently, in *Dassey v. Dittmann*, the Seventh Circuit was asked to address whether a videotaped confession of a juvenile murder suspect whose account of the slaying was riddled with inconsistencies and featured facts “injected” into the discussion by the police was given voluntarily.¹⁴⁴ Considerable precedent permits the police to engage in substantial manipulation, deception, trickery, or even outright lying in order to elicit a confession—none of which renders the confession non-voluntary unless they reach “the point where rational decision becomes impossible.”¹⁴⁵ These

142. See, e.g., Mary-Christine Sungaila, *Nguyen v. INS and Sex Stereotyping in Citizenship Laws: Building on the Equal Protection Legacy of Ruth Bader Ginsburg*, 10 S. CAL. REV. L. & WOMEN'S STUD. 293, 303–05 (2001); Erin Chlopak, Comment, *Mandatory Motherhood and Frustrated Fatherhood: The Supreme Court's Preservation of Gender Discrimination in American Citizenship Law*, 51 AM. U. L. REV. 967, 971 (2002); Caroline Rogus, Comment, *Conflating Women's Biological and Sociological Roles: The Ideal of Motherhood, Equal Protection, and the Implications of the Nguyen v. INS Opinion*, 5 U. PA. J. CONST. L. 803, 805–09 (2003).

143. Surrogacy represents a potential exception. But precisely because it stands outside the general, predictable norm, surrogacy requires considerable additional steps and technical legal maneuvering to establish legal parenthood.

144. *Dassey v. Dittmann*, 877 F.3d 297, 317 (7th Cir. 2017) (en banc). More precisely, they were asked to rule whether the Wisconsin state courts' determination that the confession was voluntary was contrary to, or an unreasonable application of, clearly established federal law. *Id.* at 301–02; see also 28 U.S.C. § 2254(d) (2018). The *Dassey* case is famous for being featured in the documentary series “Making a Murderer.” Tom Kertscher, *Judges Speak to Both Sides of Brendan Dassey's Confession in 'Making A Murderer' Case*, MILWAUKEE J. SENTINEL (Sept. 26, 2017, 9:03 AM), <https://www.jsonline.com/story/news/crime/2017/09/26/u-s-appeals-court-today-weigh-brendan-dassey-conviction-making-murderer-case/702392001> [<https://perma.cc/HJ6M-Y7XB>].

145. *United States v. Rutledge*, 900 F.2d 1127, 1130 (7th Cir. 1990). See also, e.g., *Procnier v. Atchley*, 400 U.S. 446, 454 (1971); *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *United States v.*

precedents, in turn, relied heavily on “the human intuition that told us that ‘innocent people do not confess to crimes.’”¹⁴⁶ Given this doctrine, as well as the strict standard of review mandated by the AEDPA in Habeas actions, the *en banc* court refused to find the confession involuntary.¹⁴⁷

The “intuition” that “innocent people do not confess to crimes” is a proposed fact (about human psychology) that in turn warrants a particular doctrine giving police considerable flexibility to use lies and manipulation to elicit confessions.¹⁴⁸ Writing in dissent, Judge Rovner contended that new social scientific research had undermined this intuition. As it turns out, under the right circumstances, innocent people are surprisingly prone to confessing to crimes they did not commit.¹⁴⁹ The problem, in Judge Rovner’s view, is that “the facts that supported our ‘modern constitutional standards’ come from a fifty-year-old understanding of human behavior, and . . . what we once thought we knew about the psychology of confessions we now know not to be true.”¹⁵⁰ Consequently, Judge Rovner suggested that these older precedents—meant to reflect facts about human psychology—should be revisited.¹⁵¹

Note that Judge Rovner was *not* arguing that something about human psychology had shifted in the past fifty years. In all likelihood, the propensity of innocent persons to falsely confess to crimes did not change between 2017 and 1967, or 1917, or 1817. If the peer-reviewed evidence Judge Rovner mustered is to be believed, what has changed is not the fact itself but our knowledge of it—just as the abandonment of a geocentric model of the solar system was not due to any *factual* changes in the movement of the earth through the cosmos.

Assuming Judge Rovner’s dissent is credited, it could provide the basis

Villalpando, 588 F.3d 1124, 1128 (7th Cir. 2009).

146. *Dassey*, 877 F.3d at 332 (Rovner, J., dissenting); see also *United States v. Redlightning*, 624 F.3d 1090, 1123 (9th Cir. 2010) (“Arguing that a person would not confess to a crime unless that person committed the crime is a fair inference to be drawn from common sense, and the argument is not misconduct because it is generally true, particularly where the person faces prosecution and extended imprisonment.”).

147. *Dassey*, 877 F.3d at 318 (majority opinion).

148. See *id.* at 332 (Rovner, J., dissenting) (“[O]ur case law developed in a factual framework in which we presumed that the trickery and deceit used by police officers would have little effect on the innocent.”).

149. *Id.* at 334–36 (collecting and summarizing research).

150. *Id.* at 333.

151. *Id.* at 331 (explaining that she “hope[d] to convince my colleagues throughout the courts that reform of our understanding of coercion is long overdue”). Judge Rovner also joined a separate dissent by Chief Judge Wood which more explicitly argued that the confession should not have been deemed “voluntary” even under current Supreme Court precedent. *Id.* at 319 (Wood, C.J., dissenting).

for reassessing or even overturning important swaths of doctrine relating to the admissibility of confessions. To the extent that many of the precedents enabling police deception or trickery depend on the assumption that innocent people do not confess to crimes they did not commit, they may represent prime candidates for narrowing or even abandonment.

Yet even here, there is no obvious case for implementing a sunset. *Dassey* may justify *revisiting* older precedents based on new information, but in order to justify a sunset, there must have been *ex ante* evidence that the then-current factual assessment was unreliable or likely subject to change.¹⁵² Of course, it is always possible that we will learn new information and so unsettle beliefs about the world that past generations had not thought to question.¹⁵³ But absent any particularized reason to assume that we will develop new understandings about a specific fact, a sunset would simply reflect an unadorned judgment that a given precedent should have only temporary binding force. There may be reasons to do that—several candidates will be laid out below¹⁵⁴—but they are not particularly related to changes in facts.

The best case for imposing a sunset on a fact-reflective doctrine is in a situation where the relevant empirical research is known to be nascent and developing. In *Lofton v. Secretary of the Department of Children and Family Services*, the Eleventh Circuit faced a challenge to a Florida law prohibiting homosexual couples from adopting children.¹⁵⁵ Declining to find the law “irrational” under Fourteenth Amendment review, the court (writing in 2004) noted that:

Openly homosexual households represent a very recent phenomenon, and sufficient time has not yet passed to permit any scientific study of how children raised in those households fare as adults. Scientific attempts to study homosexual parenting in general are still in their nascent stages and so far have yielded inconclusive and conflicting results.¹⁵⁶

152. See Kysar, *supra* note 16, at 1042–43 (noting that in order to “use sunset provisions optimally, the [decisionmaker] must foresee whether faulty information underlies the [decision] or whether intervening events will occur that would necessitate revised policy—perhaps an unlikely scenario”).

153. See RANCHORDÁS, *supra* note 14, at 50 (“Even if the enactment of a law is preceded by *ex ante* studies, there is still uncertainty as to its effects Only after the law has been in place for a reasonable period can lawmakers observe and evaluate these effects”).

154. See *infra* Section IV.B (noting cases where judges might be aware that their ability to render an ideal decision in the current climate is compromised and it might be better to delay a permanent ruling into the future); *infra* Section IV.C.1 (suggesting certain circumstances where it might be superior to formally encode periodic revisitation of a given legal controversy).

155. *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 806–09 (11th Cir. 2004).

156. *Id.* at 826.

Consequently, the court held that it “has not yet been conclusively demonstrated” that gay couples are equally capable of raising children as compared to straight couples.¹⁵⁷ Whether or not that conclusion was justified in 2004, its logic openly suggests that the court’s ruling is valid only so long as the relevant empirical evidence remains inconclusive. Yet because the decision has no durational limit, it remains effective indefinitely into the future.¹⁵⁸

The Supreme Court encountered a similar situation in *United States v. Leon* when considering how allowing a “good faith” exception to the Fourth Amendment’s exclusionary rule would impact police behavior.¹⁵⁹ How a given constitutional rule affects police actions is an empirical determination, one that relies primarily on how police officers respond to a given set of legal incentives. In *Leon*, the Court found that the evidence regarding whether excluding illegally obtained evidence gathered in good faith would deter police misconduct was inconclusive.¹⁶⁰ The Court concluded that without a strong empirical basis, it would not extend the exclusionary rule to cases where the police reasonably believed their actions were lawful.¹⁶¹

In his concurrence, Justice Blackmun observed that the majority’s decision rested on an empirical appraisal which could be falsified.¹⁶² He joined the majority because he believed its decision was supported by the best evidence available to the Court while simultaneously observing that there was a dearth of viable data on the subject.¹⁶³ Consequently, he suggested that the Court’s decision could only be seen as “provisional,” subject to reconsideration if new data confounded the Court’s expectations.¹⁶⁴

In other words, *Leon* offers a case where at least some members of the Court *did* have good reason to believe that their initial factual appraisal regarding the impact of a “good faith” exception might not be reliable—not because the impact would change over time, but simply because the relevant data had not been collected. The precedent in *Leon* could be justified as a stop-gap measure, a placeholder until a more robust factual picture could be

157. *Id.*

158. Notably, while the Florida state judiciary ruled in 2010 that the gay adoption ban was unconstitutional, Fla. Dep’t of Children & Families v. X.X.G., 45 So. 3d 79, 90–92 (Fla. Dist. Ct. App. 2010), *Lofton* has never been revisited in federal court.

159. *United States v. Leon*, 468 U.S. 897, 922 (1984).

160. *Id.* at 918–19.

161. *See id.* at 907 n.6, 926.

162. *Id.* at 928 (Blackmun, J., concurring).

163. *Id.* at 927.

164. *Id.* at 928.

developed.¹⁶⁵ In these circumstances, it might have made sense for the Court, given the knowledge available to it *at the time*, to announce that the *Leon* precedent was temporary in nature, signaling that the rule at issue should be judged afresh at some future date when (presumably) the legal community had a clearer factual picture regarding the impact of the doctrine.

C. FACT-TRACING RULES

While some facts express timeless truths (about physics, the universe, human psychology, or what have you), others are far more temporal in nature. Compare the fact “the Earth revolves around the sun” with “Columbus is the largest city in Ohio.” The former is not expected to change (at least within any meaningful human time period). The latter fact, by contrast, could very easily change—at some other point in history Cleveland or Cincinnati might be Ohio’s most populous metropolis. Hence, if there was a doctrine that depended on the factual question “what is the largest city in Ohio” (imagine if there was a rule that a state capital either must or must not be located in a state’s largest city), the practical demand of that rule would change if the underlying fact changed. Such a rule is *fact-tracing*—by design, it is supposed to track any shifts in certain facts about the world.

Several prominent legal doctrines are fact-tracing in character. The Eighth Amendment’s “evolving standards of decency” test is a well-known example.¹⁶⁶ Importantly, the Court has resisted the conclusion that this test boils down to imposing the mere “subjective views” of this or that judge.¹⁶⁷ The evolving standards of decency are rather “informed by objective factors to the maximum possible extent.”¹⁶⁸ “For example, when the question was whether capital punishment for certain crimes violated contemporary values, the Court looked for ‘objective indicia’ derived from history, the action of state legislatures, and the sentencing by juries.”¹⁶⁹ All of these are ways of potentially demonstrating that a punishment, which at one point was publicly acceptable, now is “repugnant to the conscience of mankind.”¹⁷⁰

165. See *infra* Section IV.A; see also RANCHORDÁS, *supra* note 14, at 51–52 (discussing the “precautionary” use of sunset clauses where “a novelty representing potential (but scientifically unproven) harms for the environment or society could be temporarily authorized and during this period the alleged risks could be further examined”).

166. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”).

167. *Rummel v. Estelle*, 445 U.S. 263, 275 (1980).

168. *Id.* at 274 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

169. *Rhodes v. Chapman*, 452 U.S. 337, 346–47 (1981).

170. *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976) (quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947)).

The precedents governing the use of capital punishment against minor offenders offer a good example of how this plays out in practice. In *Stanford v. Kentucky*, decided in 1989, the Supreme Court upheld the imposition of the death penalty on minor, teenaged offenders against an Eighth Amendment challenge.¹⁷¹ At that time, a majority of states that utilized capital punishment permitted it to be used in cases with minor defendants.¹⁷² Sixteen years later, in *Roper v. Simmons*,¹⁷³ five states that had previously permitted juvenile death sentences had reversed course, bringing the total number of states which barred the juvenile death penalty to thirty.¹⁷⁴ Moreover, even when formally authorized, juvenile death sentences were becoming increasingly infrequent: only three states had actually executed a juvenile offender in the preceding ten years,¹⁷⁵ and no state which had previously barred the practice had moved to reinstate it.¹⁷⁶ In the majority's view, this established that standards of decency had indeed evolved and that the juvenile death penalty was no longer constitutional. As the Court put it: "[t]o the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989, it suffices to note that those indicia have changed."¹⁷⁷

The "reasonable expectation of privacy" doctrine, which governs what qualifies as a "search" for Fourth Amendment purposes,¹⁷⁸ is another clear example of a fact-tracing doctrine. One way of characterizing the point of this doctrine is to reflect extant attitudes: what the people reasonably believe will be kept private, will be kept private.¹⁷⁹ If that is indeed the purpose of the doctrine, then the substantive content of the rule—what searches are and are not covered—should evolve over time so as to match popular understandings of what is reasonably private. If no such evolution occurs,

171. *Stanford v. Kentucky*, 492 U.S. 361, 379–80 (1989).

172. *Id.* at 371.

173. *Roper v. Simmons*, 543 U.S. 551 (2005).

174. *Id.* at 564–65.

175. *Id.* at 565.

176. *Id.* at 566 (suggesting that "it is not so much the number of these States that is significant, but the consistency of the direction of change" (quoting *Atkins v. Virginia*, 536 U.S. 304, 315–16 (2002))).

177. *Id.* at 574 (citations omitted). *But cf. id.* at 588 (O'Connor, J., dissenting) (arguing that too "little has changed since our recent decision in *Stanford*" to justify the majority's finding).

178. See *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (concluding that "the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action" (citations omitted)).

179. See Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 508–09 (2007) (discussing the "probabilistic model" of Fourth Amendment protection); Matthew B. Kugler & Lior Jacob Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 U. CHI. L. REV. 1747, 1749, 1755–56 (2017).

then there is a sizeable risk that popular expectations of privacy may drift away from those which prevailed at the time a particular precedent was laid down, resulting in a mismatch between doctrinal holdings and their supposed factual predicates until such time as the Court revisits these precedents.

Courts have recognized situations where the rule they are laying down is meant to trace a particular factual context and explicitly declared that changes to those facts should prompt reassessment of the rule. In *Hamdi v. Rumsfeld*, for example, the Supreme Court considered the military detention of a U.S. citizen who was deemed an “enemy combatant” for the Taliban.¹⁸⁰ Responding to Hamdi’s fear that he could be detained indefinitely or perpetually, Justice O’Connor’s plurality opinion concluded that the Authorization for Use of Military Force allowed for such detention “for the duration of the relevant conflict,” relying on “longstanding law-of-war principles.”¹⁸¹ However, Justice O’Connor continued, “If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”¹⁸² If, unlike World War I or World War II, the “War on Terror” cannot conceptually have an end date or a peace treaty, it would be inappropriate to rely on law-of-war rules developed under factual understandings about warfare that bear little relation to the conflict which triggered Hamdi’s detention.

In 2004, Justice O’Connor assessed that the state of the conflict in Afghanistan was sufficiently similar to a classic war scenario such that applying historical law-of-war principles, including those permitting detention of combatants “for the duration” of the conflict, were permissible.¹⁸³ But her opinion simultaneously recognized that these law-of-war principles were tied to a particular factual account of how wars proceeded which might soon be archaic, or at least inapposite to the War on Terror. Since a relevant factual change was at least on the horizon when *Hamdi* was decided, Justice O’Connor was well-positioned to declare in advance that the legal rule her opinion laid down might need reassessment if its factual predicates materially shifted. The law of military detention must trace certain facts about how military conflicts proceed in practice.

180. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509–11 (2004).

181. *Id.* at 521.

182. *Id.*

183. *Id.*

D. FACT-MODIFYING RULES

Fact-tracing rules are not designed to themselves change the underlying facts. When the Supreme Court decides that there is no “reasonable expectation of privacy” in a given social circumstance, it is trying to express a social consensus, not shift it. For a subset of judicial doctrines, by contrast, the purpose of the rule is in fact precisely to effectuate some sort of change in social facts. These doctrines are *fact-modifying* rules.

The Supreme Court has most commonly alluded to fact-modifying rules in its race jurisprudence. In *Northwest Austin v. Holder*, for example, the Court took note of significant improvements in voter registration and turnout parity in the South, improvements it attributed to the Voting Rights Act.¹⁸⁴ But these alterations, the Court went on to suggest, potentially undermined the ongoing constitutionality of the VRA, because the law “imposes current burdens and must be justified by current needs.”¹⁸⁵ In other words, the doctrinal validity of the VRA was predicated on its ties to the fact of racially discriminatory voting access—a fact which the VRA was intended to change. The Supreme Court returned to this observation when it struck down portions of the VRA four years later.¹⁸⁶

Perhaps the clearest example of a fact-modifying rule, then, is the Fourteenth Amendment doctrine of “suspect classifications.” Such classifications—most prominently race—are entitled to “strict scrutiny” when they are used as the basis for legislative action.¹⁸⁷ The criteria for becoming a suspect classification are charitably described as “opaque.”¹⁸⁸ The most comprehensive delineation of the doctrine came in *San Antonio Independent School District v. Rodriguez*, where the Court identified “the traditional indicia of suspectness” as whether “the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”¹⁸⁹ *Rodriguez* augmented the ur-precedent establishing suspect classification, the famous “footnote four” of *Carolene Products*, which spoke of certain “discrete and insular minorities” burdened by “prejudice”

184. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

185. *Id.*

186. *Shelby County v. Holder*, 570 U.S. 529, 536, 557 (2013).

187. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”).

188. Schraub, *Unsuspecting*, *supra* note 2, at 367 (“Unfortunately, the process by which a group joins the suspect ranks is among the most opaque and inconsistent in constitutional law.”).

189. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

as potentially in need of additional judicial solicitude.¹⁹⁰

These predicate facts are, by and large, not permanent. They are likely to change over time. “A group that might be a discrete and insular minority facing bias today may be a well-integrated, popular, and influential group tomorrow.”¹⁹¹ But more to the point, we might say that effectuating such changes is the *purpose* of suspect classification doctrine. Suspect classification, and the accompanying strict judicial oversight of democratic decision-making, are warranted when ingrained bias or discrimination leads to a breakdown in normal democratic processes.¹⁹² Heightened judicial protection can help purge these poisons from the polity, at which point ideally the group can return to “the normal rough-and-tumble of democratic politics.”¹⁹³ At least as currently expressed, suspect classification doctrine does not assert that, for example, race always and ever will be a site of political prejudice and hostility.¹⁹⁴ It is an exceptional, if not extraordinary, deviation from normal rules of democratic self-governance,¹⁹⁵ with the hope that constitutional law can successfully bend political and social players back to the norm.

Suspect classification doctrine is fact-modifying insofar as (1) the doctrine relies on the existence of certain facts (for example, about the degree of prejudice facing the suspect class) and (2) the purpose of the doctrine is to effectuate a change in those facts (to remove or at least significantly ameliorate that prejudice, so as to enable a return to ordinary democratic politics). The logic of the doctrine strongly suggests that if and when it succeeds in this ambition (removing the prejudice, dissipating the political powerlessness, and so on), then the suspect status should accordingly expire.¹⁹⁶

Still, the Court has nonetheless not indicated that suspect classifications ought to be sunsetted or revisited in any manner. This is an interesting

190. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

191. Schraub, *Unsuspecting*, *supra* note 2, at 372.

192. See JOHN HART ELY, DEMOCRACY AND DISTRUST 103 (1980).

193. Schraub, *Unsuspecting*, *supra* note 2, at 413.

194. For an account of suspect classification and strict scrutiny which does rely on such an assessment, see Schraub, *Post-Racialism*, *supra* note 2, at 639 (discussing perpetual strict scrutiny for race as a “[s]econd-[b]est [s]olution” in a world where we cannot envision racial tensions ever disappearing).

195. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (characterizing suspect classification status as providing “*extraordinary* protection from the majoritarian political process” (emphasis added)); see also *supra* note 57 and accompanying text (noting precedents which described the VRA as an “*extraordinary* departure” from the standard relationship between the states and the federal government).

196. See Schraub, *Unsuspecting*, *supra* note 2, at 362–66.

omission, especially since in other cases, the civil rights context is where the Court has been most willing to demand a strict and *ongoing* connection between a set of transient facts and a given legal regime. *Grutter*, of course, is the clearest example: the Court making explicit its belief that America's racial state will have changed by 2028 and that once that point is reached affirmative action will cease to be constitutionally permissible. But *Parents Involved* and *Shelby County* are also illuminative on this score.

Indeed, in terms of its amenability to a doctrinal sunset, the suspect classification inquiry is distinguishable even from an explicitly empirical inquiry such as the one in *Leon* discussed above.¹⁹⁷ Much of the debate over sunset rules starts from the proposition that they are most advantageous when the decisionmaker has reason to believe that their initial decision is incorrect.¹⁹⁸ This rationale seemingly requires the decisionmaker be cognizant at the outset that their decision is likely to be faulty.¹⁹⁹ While there was significant uncertainty in *Leon* as to the empirical impact that would result from allowing a good faith exception to the exclusionary rule, the problem was only a lack of knowledge: while the facts were *obscured*, they were not expected to *change*.²⁰⁰ And while to be sure various social shifts could alter the impact of the legal rule proposed in *Leon*,²⁰¹ there is no reason to believe the Court would be able to predict their occurrence *ex ante*. If further empirical evidence contradicts the conclusions in *Leon*, then a reassessment might be necessary, but it is at least as likely that the factual background will remain constant and thus the case's conclusions could remain intact.²⁰² Consequently, there is less reason to disturb *Leon*'s rule

197. See *supra* text accompanying notes 159–165.

198. See Gersen, *supra* note 3, at 267 (“The first and clearest informational effect of temporary legislation is the reduction of error costs when initial policy decisions have a significant probability of being incorrect.”); Kysar, *supra* note 16, at 1041–42 (addressing scholars who “have argued that . . . sunset provisions are advantageous when the initial policy is likely to be incorrect”).

199. See Kysar, *supra* note 16, at 1041–43; Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 CONN. L. REV. 737, 823 (2012) (“[S]ince we cannot reliably foresee the future, we cannot determine *ex ante* whether sun-setting would be good or bad.”).

200. See Wendy M. Rogovin, *The Politics of Facts: “The Illusion of Certainty”*, 46 HASTINGS L.J. 1723, 1768 (1995) (distinguishing between facts which “never have been true” and facts which “might have once been true but are no longer accurate”).

201. For example, substantial changes in the composition of American police forces could result in different ideological preferences which would change how they respond to a particular legal regime. Cf. Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME L. & SOC. CHANGE 35, 51–54 (1992). Alternatively, the good faith exception could interact with other, seemingly unrelated, judicial rules to form different doctrinal “cocktails” leading to different effects. Cf. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395–97 (1978) (defining and discussing the concept of “polycentricity”).

202. Kysar, *supra* note 16, at 1042 (“[I]f the initial policy is correct, then lasting legislation will be the appropriate course of action. Otherwise, Congress will incur unnecessary transaction costs in an effort

unless and until compelling contradictory evidence emerges.²⁰³

By contrast, a decisionmaker needs far less self-awareness or clairvoyance to predict that a rule tailored toward factual predicates that they knew are likely to shift—as in the case of fact-tracing or fact-modifying rules—may become unnecessary or even harmful when that change occurs. Sunsetting suspect classifications is not advisable because courts are poor initial judges of which groups qualify for heightened judicial protection;²⁰⁴ it is advisable because the groups which so qualify are highly likely to vary over time. Even if we possess some degree of confidence that our initial assessment of suspectness is accurate, we can be equally sure that the considerations which input into that analysis will change and may well do so to make even a correct decision legally invalid in the future.²⁰⁵

IV. A TAXONOMY OF DOCTRINAL SUNSET CLAUSES

The preceding sections have given a general defense of sunset clauses as a valid judicial tool and articulated some of the features of the relationship between facts and doctrine that might make sunsets more or less useful. But just because sunsets are legitimate does not mean that they should be used in precisely the same way as they are deployed in the legislative context. We can develop a taxonomy of doctrinal sunset clauses centered around the different purposes they might serve.

Some sunsets are procedural in nature, establishing a temporary governing doctrine in order to allow other social or legal actors to “catch up” and provide the prerequisites necessary to effectuate a more permanent rule. Others are deliberative in character, delaying a permanent determination on a contested legal question in circumstances where—for whatever reason—it is unlikely that the relevant decisionmakers are optimally positioned to reach the best legal answer. And still other sunset doctrines are explicitly substantive—seeking to maintain a correspondence between legislative facts and formal doctrine in doctrines (most commonly fact-tracing or fact-modifying doctrines) where a legal rule is by design meant to track shifting factual predicates.

simply to maintain the status quo by reenacting the legislation at sunset.”).

203. One reason why sunsetting may be appropriate even in this situation is the problem of doctrinal inertia. Even where clear and convincing new evidence emerges, courts may still be reluctant to disturb prior decisions. *See supra* notes 89–91 and accompanying text.

204. *See* McGinnis & Mulaney, *supra* note 91, at 94–109 (arguing that judges are superior to legislators in accurately determining social facts).

205. Katyal, *supra* note 28, at 1245 (observing that “a decision might be appropriate when announced, but later events might collude to make the ruling ineffective or even wrong”).

A. STOP-GAP SUNSETS

A stop-gap sunset is a one-time rule established to govern a particular case or fact-pattern pending a more permanent arrangement. Often times, a new legal regime will require along with it new data or new institutional arrangements. Where this data is not yet available, or the institutions not yet formed or functional, a stop-gap sunset can provisionally regulate the field until the predicates for the permanent rule are established.

Article I, Section 2, Clause 3 of the Constitution is illustrative. That provision requires that seats in the House of Representatives be allocated to states “according to their respective Numbers.”²⁰⁶ In order to properly enforce that rule, we need to know what the population of each state is. But that raises an immediate problem: how does one allocate House seats before the first census is completed? In other words, at the time of the Constitution’s ratification there was a missing factual predicate necessary for the proper implementation of the permanent rule for apportioning House seats. The Constitution resolves this dilemma by a stop-gap sunset: it simply fiats the initial allocation of House seats, with the admonition that a census providing for the actual population count of each state must be completed “within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years.”²⁰⁷

Stop-gap sunsets provide a provisional rule of governance that can regulate a given case or fact pattern prior to the development of the factual or democratic predicates that are supposed to undergird the permanent rule. The census example shows one circumstance where this is particularly likely to be of use: the creation of a new legal rule. Another case is when there is a shift from one rule to another. Stop-gap sunsets can smooth the transition from an old legal regime to a new one, allowing time for parties to prepare and adjust or giving space for actors to implement any newly necessary institutions.

For example, in *Northern Pipeline v. Marathon* the Supreme Court struck down important jurisdictional elements of the Bankruptcy Act of 1978.²⁰⁸ Recognizing that this decision held the potential to throw existing bankruptcy adjudication into chaos, the Court not only granted relief only prospectively but also stayed its decision for three months after the date the opinion was handed down. It stated that a “limited stay will afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid

206. U.S. CONST. art. I, § 2, cl. 3.

207. *Id.*

208. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87–88 (1982).

means of adjudication, without impairing the interim administration of the bankruptcy laws.”²⁰⁹ Instead of striking down the laws immediately, the Court allowed the previous (but now unconstitutional) rules to sunset as a means of allowing Congress to reestablish a functional replacement with minimal disruption, hardship, or injustice to bankruptcy stakeholders.

Indeed, framed this way we can understand a stay as perhaps the most prominent form of sunseting regularly practiced in the federal judiciary. *Northern Pipeline* stands out because it explicitly permitted an *unconstitutional* legal arrangement to persist temporarily in order to allow Congress sufficient time to reorganize the bankruptcy courts while minimizing disruption. But in other contexts—particularly patent law—courts have explicitly tied together “sunset” and “stays” as a means of cushioning the impact of legal decisions which on their face might radically disrupt economic, medical, or other important social sectors.²¹⁰ Implementing a finding of patent infringement immediately might threaten not just billions of dollars in sales but also the availability of entire product lines. Allowing sales to continue temporarily, typically with royalty payments to the patent-holder and subject to a sunset, “may help mitigate this situation by granting the infringer a limited time period to implement a non-infringing design around with similar functionality, while continuing to offer the infringing product or service [in the interim].”²¹¹

Larry Alexander also suggests something akin to a stop-gap sunset when addressing the possibility of overturning the *Legal Tender Cases*,²¹² the 1871 precedents which affirmed the constitutionality of paper money.²¹³ While the constitutional reasoning in the *Legal Tender Cases* has come under sharp criticism,²¹⁴ the precedent itself seems almost immune from reversal

209. *Id.* at 88.

210. *See, e.g.*, *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 704 (Fed. Cir. 2008); *Broadcom Corp. v. Qualcomm Inc.*, 585 F. Supp. 2d 1187, 1188 (C.D. Cal. 2008); Ryan T. Holte & Christopher B. Seaman, *Patent Injunctions on Appeal: An Empirical Study of the Federal Circuit’s Application of eBay*, 92 WASH. L. REV. 145, 202 n.288 (2017) (collecting cases).

211. Holte & Seaman, *supra* note 210, at 181; *see also* James Boyle, *Open Source Innovation, Patent Injunctions, and The Public Interest*, 11 DUKE L. & TECH. REV. 30, 58 (2012); Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2038 (2007).

212. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871).

213. *Id.* at 553–54; Larry Alexander, *Did Casey Strike Out? Following and Overruling Constitutional Precedents in the Supreme Court*, in 33 PRECEDENT IN THE UNITED STATES SUPREME COURT 47, 50–51 (Christopher J. Peters ed., 2013). Alexander assumes for sake of argument that the *Legal Tender Cases* were erroneously decided, but I do not take him as intending to signal he necessarily shares that view.

214. *See* Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 389 (concluding that “it is difficult to escape the conclusion that the Framers intended to prohibit [the use of legal tender paper money]”); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 668–69 (2009) (“A committed historicist

for the simple reason that overturning the decision would have instant, disastrous effects on the American economy. Alexander suggests, however, that a constitutional “purist” could overturn the precedent while “delaying” its implementation—giving Congress time to either set up alternate economic arrangements or, perhaps, propose and ratify a constitutional amendment.²¹⁵ He further indicates that *Brown II*’s famous “all deliberate speed” formulation can be read in this light: setting up an interim rule in order to enable the orderly transition to a new, more permanent constitutional regime.²¹⁶ In this way, a stop-gap sunset can create the necessary practical breathing room to reverse an erroneous but entrenched (and deeply relied-upon) prior precedent.

Importantly, in a stop-gap sunset the expectation is that the sunset will expire and a *new* rule will replace it. There is no reason to expect that Congress would ever desire to use its original (fiated) apportionment scheme once the Census has been conducted and accurate population figures for each state have been ascertained. Likewise, in *Northern Pipeline* the sunset existed only to smooth the transition to a new bankruptcy law structure. Contrast that to, for example, a stay of a district court order pending appeal, where presumably at least one party wants the stay to “persist” indefinitely (because they want the ruling reversed). Stop-gap sunsets are not simply delaying mechanisms—they are deployed in cases where it is already envisioned that another rule will be the permanent doctrine but certain facts or institutions necessary to the application of that rule are not yet sufficiently developed.

B. DECISION-DELAYING SUNSETS

That said, sometimes the primary purpose behind a sunset *is* to delay a substantive decision until a later date.²¹⁷ The Constitution’s decision to forbid any legislation (or constitutional amendment) addressing the slave trade until 1808 would be an example. The slave trade sunset is a decision to punt on a particularly difficult political question, saving it for future generations. While the 1808 Congress could continue to kick the issue

could easily conclude that . . . the use of paper money as legal tender . . . [is] unconstitutional.”). Michael Stokes Paulsen defends the constitutional validity of paper tender while conceding that the *Legal Tender Cases* themselves rely “on reasoning sufficiently convoluted and unsound as to make the conclusion seem dubious and the overruling [of prior precedent striking down legal paper tender] feel result-oriented.” Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for its Own Interpretation?*, 103 NW. U. L. REV. 857, 907 (2009).

215. Alexander, *supra* note 213, at 51.

216. *Id.*; see also *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

217. See Dixon & Ginsburg, *supra* note 12, at 652, 658.

further and further down the road, presumably the founders hoped that by that time the slave trade issue would become sufficiently manageable to be decided through normal political channels.

Of course, the hope that today's politically explosive controversies will be more amenable to resolution in the future is not always realized (as the progression of the conflict over slavery makes evident). Sunsets "require the next generation to revisit a myriad of issues, some of which proved to be intractable the first time around,"²¹⁸ and so they may well prove equally intractable the second time around. But there may also be reasons why a decisionmaker could have greater faith in the ability to level an optimal decision at a future date even if at the present moment he or she feels more constrained. In these circumstances, a decision-delaying sunset may be advisable.

To be sure, courts have many mechanisms for avoiding deciding thorny legal questions when they do not find the issue suitable for consideration. Ripeness can serve this role,²¹⁹ as can standing (both prudential and Article III). Alexander Bickel's famous article *The Passive Virtues* is an ode to the utility and validity of these sorts of tactics.²²⁰ But sometimes courts will feel compelled to issue a decision resolving a pressing case while nonetheless understanding that it is not well-positioned to establish a permanent legal rule. As Oliver Wendell Holmes famously observed, "Great cases . . . make bad law."²²¹ Certain types of high-profile controversies may be resistant to being deflected aside via the passive virtues yet may also be decidedly unideal for establishing permanent legal precedents.

Consider *Bush v. Gore* in this light.²²² *Bush v. Gore* is perhaps the epitome of a "great case," and the unique circumstances—an election whose outcome remained uncertain as the date of inauguration approached and an unprecedented set of equal protection and voting rights problems that were both legally and factually novel and complicated—may well have made it practically impossible for the Court to "duck" the case via normal means. And indeed, the Court did end up hearing and deciding the case, putting a decisive end to the controversy over the 2000 Presidential election. Still, the

218. Wistrich, *supra* note 199, at 821–23.

219. Bloom, *supra* note 34, at 27 ("Ripeness . . . assures that federal cases and controversies do not arrive too early—that federal courts do not entangle themselves in disputes too 'abstract' and 'remote' for judicial intervention.").

220. See Alexander M. Bickel, *The Supreme Court, 1960 Term – Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40–47 (1961).

221. *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

222. *Bush v. Gore*, 531 U.S. 98 (2000).

per curiam opinion in *Bush v. Gore* famously disclaimed that “[o]ur consideration is limited to the present circumstances.”²²³ Many took this to mean that the Court was implicitly devaluing the precedential value of its own opinion—a sunset of a single day, perhaps.²²⁴ Was this a closet admission of lawlessness, a concession that the Court was indulging its political preferences in service of principles it was unwilling to consistently defend as the governing legal rule?²²⁵

Maybe. But maybe it was a more modest admission: that the unique, high-profile, and incredibly high-stakes nature of *Bush v. Gore* rendered it peculiarly ill-suited to developing a good legal rule covering election law disputes going forward. High-profile, important cases possess “immediate overwhelming interest which appeals to the feelings and distorts the judgment.”²²⁶ If the Court believed that it had to issue a decisive resolution (one way or the other) but lacked the normal confidence in the accuracy or neutrality of its legal reasoning processes, a (functional) sunset could have been a wise nod to its own limitations—resolving the present controversy while leaving the door open to more efficacious development of binding precedent in future cases. If, as seems likely, the next set of cases touching on these matters had stakes lower than deciding who the next Leader of the Free World will be, the precedential rules developed there would be far more likely to be reliable than any rule derived from *Bush v. Gore* itself.

Similar concerns motivate Neal Katyal’s proposal for using sunsets in the national security context.²²⁷ Katyal targets the reliance on *Ex Parte Quirin*,²²⁸ a World War II-era case where the Supreme Court permitted military tribunals to try (and sentence to execution) Nazi saboteurs captured on American soil, as the key precedent determining the legal status of military commissions today.²²⁹ But what makes *Quirin* less reliable than other precedents?

223. *Id.* at 100–04, 109.

224. *See, e.g.*, Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 3 (2007) (“Indeed, no Court opinion—majority, concurrence, or dissent—has cited the opinion since it was decided.”); Chad Flanders, Comment, *Please Don’t Cite This Case!: The Precedential Value of Bush v. Gore*, 116 YALE L.J. POCKET PART 141, 142–44 (2006). In 2013, *Bush v. Gore* finally received its first (and to date only) Supreme Court citation, in Justice Thomas’ dissenting opinion in *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 35 n.2 (Thomas, J., dissenting).

225. Flanders, *supra* note 224, at 143 (“By letting the Supreme Court issue a rule good for one case and one case only, lower courts could leave the impression that the Court just *was* indulging its political preferences in *Bush v. Gore*.”).

226. *N. Sec.*, 193 U.S. at 400 (Holmes, J., dissenting).

227. Katyal, *supra* note 28, at 1251–53.

228. *Ex parte Quirin*, 317 U.S. 1 (1942).

229. Katyal, *supra* note 28, at 1252.

In part, Katyal suggests that there are material differences in fact between World War II and the contemporary war on terrorism which make *Quirin* inapposite. World War II was “a war of limited duration,” and it was typically easy to distinguish between those who violated the laws of war and ordinary, uniformed combatants. The war on terrorism, by contrast, is of indefinite length and the combatants often wear no uniform—making it much harder to determine whether an alleged unlawful combatant was even engaged in hostilities at all.²³⁰ These suggest why *Quirin* ought to be distinguished in the present day, but unless the Justices in the mid-1940s could be expected to anticipate the dramatic changes in the contours of armed conflict seen at the dawn of the twenty-first century, it could not have given them notice that their decision ought to be temporally limited.

But as Katyal also observes, *Quirin* was decided at a particular historical moment not conducive to ideal legal deliberation. In the middle of a global conflict on a scale never before seen, it is plausible—and reasonable—that the Justices may not have “want[ed] to shackle the President at that moment.”²³¹ The pressing need to offer an immediate decision—and the intense pressure not to interfere with the President’s authority to conduct war—is reflected in the peculiar timeline of the case, where the Court ruled immediately but did not issue its opinion for months (and not until after several of the saboteurs had already been executed).

Under these circumstances, it is entirely predictable *ex ante* that a judicial opinion on the legality of military commissions may not reflect optimal legal reasoning *and* to nonetheless believe that the Court was obliged to expeditiously offer a binding decision. It is also at least reasonable to suspect that in the foreseeable future—in times of peace or even once the state of conflict had reached a more stable equilibrium—the Court might be able to more fairly and accurately address the legal questions presented. Under these circumstances, a sunset offers a sensible middle ground: respecting the need for the speedy resolution of pressing legal controversies in high-stakes situations while also enabling the issue to be revisited later, when passions have cooled and the matter can potentially be addressed more dispassionately.

230. *Id.* at 1253.

231. *Id.* Indeed, it appears the Justices feared that President Roosevelt might simply ignore an unfavorable court ruling and order the prisoners executed anyway. See David J. Danelski, *The Saboteurs’ Case*, 1996 J. SUP. CT. HIST. 61, 69.

C. ANTI-INERTIAL SUNSETS

Both of the two doctrinal sunset forms discussed above are notable in that, ideally, they are single-shot endeavors. That is, the sunset is implemented with the expectation that a permanent rule will follow at the end of the sunset. A stop-gap sunset creates a placeholder rule for a defined period until a permanent rule can be put into place. A decision-delaying sunset likewise is implemented in the hope that it will be followed by a permanent rule decided in more felicitous deliberative circumstances.

Yet sometimes, sunsets should reoccur—a sunsetted doctrine should be followed by yet another sunset. One reason this might occur is if a given issue is expected to remain contentious over time—here it might be advisable to provide an explicit opportunity to reopen debate and allow the issue to be contested on a clean slate. Alternatively, certain doctrines (particularly fact-tracing or fact-modifying doctrines) predictably demand some degree of recalibration over time to ensure that the content of the doctrinal rule remains in line with the relevant predicate fact patterns. As Allison Orr Larsen observes, this is one of the most commonly cited justifications for sunsets at the legislative level: it “force[s] legislative reevaluation of policies in the case of changed circumstances.”²³² When circumstances change in significant (and doctrinally relevant) ways, it may be necessary to recalibrate the content of a given legal rule in response. The purpose of these sunsets is for the judiciary to periodically—but repeatedly—reassess the contours of a given doctrine and so ensure that it continues to match whatever social problem or issue it was designed to track.

1. Revisitation Sunsets

One reason for such a sunset is simply to overcome inertial barriers to revisiting decisions in circumstances where periodic renewed debate and deliberation on the question might be thought especially important. Article I, Section 8 of the Constitution provides an example. Among the powers accorded to Congress is the authority to create a standing army, but with a catch. Each Congress must decide anew that the military budget requires funding, or it will lapse.²³³ Justifying this measure, Alexander Hamilton argued in *Federalist No. 26* that sunseting military appropriations forces additional and regular deliberation on an important policy matter that otherwise might be overlooked.²³⁴ While Congress may have good reasons

232. Larsen, *supra* note 25, at 107.

233. U.S. CONST. art. I, § 8, cl. 12 (granting Congress the power to “raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years”).

234. THE FEDERALIST NO. 26 (Alexander Hamilton) (George W. Carey & James McClellan eds.,

for preserving a standing army for lengthy periods of time, that the existing army simply occupies the status quo high ground is not one of them.²³⁵ The goal of the provision is hence not to bar a standing army but to prevent one from accruing simply through legislative inertia.²³⁶

Hence, one function of sunsets is simply to ensure that the issue in question is considered regularly, with at least somewhat fresh eyes. As Adrian Vermeule notes in the legislative context, a “sunset clause pushes the question onto the legislative agenda a second time and thus encourages the legislature to take a second look at the policy.”²³⁷ Even though courts—like legislators or constitutional drafters—are not foreclosed from revisiting issues even without a sunset, by changing the default rule, a sunset clause significantly lowers the cost of reassessment and thus makes it more likely that a given decision will actually be reviewed. This may be particularly important in the judicial context where precedents are meant to be “sticky” by design.

What are the circumstances where encouraging such reassessment will be most advantageous? One possibility is that courts should sunset decisions that they expect to be socially controversial or polarizing. The resolution of politically contentious issues can be facilitated, if not entirely smoothed over, by the promise that the current word is not the last word.²³⁸ Moreover, it is at least arguable that such timed revisitation serves a legitimating function as well. Where an issue remains the subject of live controversy, the attempt to rely on nothing more than raw appeal to precedent as a reason for carrying the status quo forward will often fail to satisfy. As Justice Holmes observed, “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV[,] . . . and the rule simply persists from blind imitation of the past.”²³⁹ In matters of great and ongoing controversy, inertia alone will likely not suffice to render continued adherence to a doctrinal rule legitimate; people might reasonably expect there be a genuine opportunity for revisitation. Sunsetting these decisions

2001) (“The Legislature of the United States will be obliged, by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter . . .” (emphasis omitted)).

235. See Gersen, *supra* note 3, at 251.

236. See Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 499 n.215 (2011) (“The two-year rule is rooted in a deep Anglo American suspicion of standing armies. Once such forces were established, they would make it too easy for politicians to practice tyranny and launch unnecessary wars.”).

237. Vermeule, *supra* note 9, at 1439.

238. See *supra* text accompanying note 12.

239. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

means that, if the earlier decision is renewed, there will likely be at least some contemporary reassessment of the virtues and vices of the precedent that goes beyond rote obedience to earlier judicial declarations.

Of course, even with a sunset it is not guaranteed that future decisionmakers will truly review the initial policy choice with an open mind—the renewal process itself can be routinized (as has essentially happened with the Constitution’s standing army provision).²⁴⁰ This may not be a problem, however, if the goal of the sunset was to ensure that a socially controversial question was given close attention and then later the issue ceased to provoke much controversy. At that point, the sunset would be archaic, but mostly harmless.²⁴¹

Yet a revisitation sunset solely designed to promote renewed deliberation of contentious issues would likely itself prove controversial. One reason is that precedent is designed to provide settled finality to these contentious issues; leaving them explicitly open for revisitation subverts these values. “Liberty finds no refuge in a jurisprudence of doubt,” Justices Kennedy, O’Connor, and Souter wrote in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁴² and Antonin Scalia likewise observed that a core feature of establishing a doctrinal *rule* in a case is that in doing so “I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle.”²⁴³ In cases of significant political import, putting up high barriers to revisitation may be more, not less, important.²⁴⁴

More importantly, it may not be possible for judges to reliably predict which of their decisions will prove controversial over time and which will be widely accepted. Recall that a sunset only makes sense if the decisionmaker recognizes *ex ante* that there is a need for one.²⁴⁵ Yet some precedents which triggered sharply divided public reactions on the date they

240. As Ackerman and Hathaway observe, Americans have lost their aversion to standing armies and thus the two-year sunset has become little more than a curiosity. Ackerman & Hathaway, *supra* note 236, at 499 n.215.

241. The constitutional sunset in Article I, Section 8 has likely not been eliminated because of the onerous requirements of an Article V amendment. A doctrinal sunset, by contrast, would probably just be culled from the doctrine at some point once it became vestigial.

242. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

243. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

244. *See Casey*, 505 U.S. at 867 (“[T]o overrule under fire in the absence of the most compelling reason . . . would subvert the Court’s legitimacy beyond any serious question.”).

245. *See supra* notes 152–53 and accompanying text.

were handed down quickly become settled parts of our constitutional fabric, while other cases greeted with relative equanimity later become flash points for considerable political and legal dispute. Compare, on this point, the popular trajectory of *Roe v. Wade*²⁴⁶ with *Lawrence v. Texas*.²⁴⁷

At the time *Roe* was decided, large majorities of the American populace supported “full liberalization of abortion laws.”²⁴⁸ While there was some immediate protest against the decision amongst social conservatives, the rise of abortion jurisprudence to its status as a major political wedge issue did not begin in earnest until several years after *Roe* came down.²⁴⁹ Now, by contrast, *Roe* may well be the single most controversial precedent still enforced in American law—yet this was hardly predictable at the time of its announcement in 1973.

Meanwhile, *Lawrence* received savage criticism when it was decided in 2003. Justice Scalia’s dissent called the case a “product of a Court . . . that has largely signed on to the so-called homosexual agenda,”²⁵⁰ and religious conservatives fulminated that “[s]ix lawyers robed in black have magically discovered a right of privacy that includes sexual perversion.”²⁵¹ This was not out of sync with popular attitudes—in 2002 almost sixty percent of Americans thought consensual homosexual activity between two adults was “always” or “almost always” wrong.²⁵² It was entirely plausible to describe the Court’s decision as, if not wholly out of step with public attitudes, then at least ahead of the curve.

Today, the controversy over *Lawrence* has basically faded into non-existence.²⁵³ A plurality of Americans now believe that consensual

246. *Roe v. Wade*, 410 U.S. 113 (1973).

247. *Lawrence v. Texas*, 539 U.S. 558 (2003).

248. Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2058 (2011) (citing Gallup polling from 1972).

249. *Id.* at 2059 (“In fact, it appears to have been some years after the *Roe* decision before conservative strategists again began to focus on the opportunity the abortion debate presented to recruit new voters for the Republican Party.”).

250. *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

251. Bob Moser, *Anti-Gay Movement Reacts to Decision Overturning Arrest of Two Texas Men for Having Sex*, S. POVERTY L. CTR: INTELLIGENCE REP. (Apr. 28, 2005) (quoting Jan LaRue, chief counsel for Concerned Women of America), <https://www.splcenter.org/fighting-hate/intelligence-report/2005/anti-gay-movement-reacts-decision-overturning-arrest-two-texas-men-having-sex> [<https://perma.cc/8F7N-BA9A>].

252. TOM W. SMITH, NAT’L OPINION RESEARCH CTR., PUBLIC ATTITUDES TOWARD HOMOSEXUALITY (2011), http://www.norc.org/PDFs/2011%20GSS%20Reports/GSS_Public%20Attitudes%20Toward%20Homosexuality_Sept2011.pdf [<https://perma.cc/KK28-2XK9>].

253. Steve Chapman, *How Republicans Made Their Peace with Sodomy*, REALCLEARPOLITICS (July 4, 2010), https://www.realclearpolitics.com/articles/2010/07/04/how_republicans_made_their_peace_with_sodomy_106189.html [<https://perma.cc/7MN7-XNHS>] (“[A]fter the initial denunciations,

homosexual activity is “not wrong at all.”²⁵⁴ Even sharp critics of the Supreme Court’s gay rights jurisprudence mostly leave *Lawrence* alone.²⁵⁵ Hence, even if the Court did think that it should “sunset” decisions it deemed likely to prove controversial so as to grant future courts a freer hand to reassess the doctrine, it is far from clear it would be able to predict which cases would retain their contentious status over a significant period. It is entirely possible that a court attempting to apply such a criterion would have sunsetted *Lawrence* while preserving *Roe*.

2. Recalibration Sunsets

A pure revisitation rationale for a sunset is thus somewhat contentious, though not wholly unjustifiable. It depends on the degree to which courts can accurately predict which of their decisions will warrant revisitation at a later date. Where this revisitation is justified on the basis of the perceived controversial character of the ruling, this may be hard to predict. But in other circumstances, aspects of the doctrine itself strongly imply that some amount of periodic alteration will predictably be required.

Consider *Carpenter v. United States*²⁵⁶ in this light. In *Carpenter*, two defendants were charged with armed robbery at electronic stores in the Detroit area. Among the evidence presented by the prosecution was cell-site records collected from the cellular companies, which helped establish that the defendants were within a half-mile to two miles of the victimized stores at the time of the robbery.²⁵⁷ The Supreme Court concluded that cell-site

something odd happened: The [*Lawrence*] decision vanished from public debate.”)

254. ASSOCIATED PRESS-NAT’L OPINION RESEARCH CTR., SAME-SEX MARRIAGE AND GAY RIGHTS: A SHIFT IN AMERICANS’ ATTITUDES 3 (2015), http://www.apnorc.org/PDFs/SameSexStudy/LGBT%20issues_D5_FINAL.pdf [<https://perma.cc/U496-CCBZ>].

255. See, e.g., George W. Dent, Jr., *Straight Is Better: Why Law and Society May Justly Prefer Heterosexuality*, 15 TEX. REV. L. & POL. 359, 363, 435–36 (2011) (two passing citations to *Lawrence*). It remains to be seen whether the gay marriage cases will follow a similar trajectory, but the surge in public support for marriage equality since 2009 suggests that it will. *Attitudes on Same-Sex Marriage*, PEW RES. CTR. (May 14, 2019), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage> [<https://perma.cc/3BGE-47T3>] (finding that support for marriage equality rose from thirty-seven percent in favor in 2009 to sixty-one percent in 2019); see also Jonathan Bernstein, *Gay Marriage Won’t Be Controversial*, BLOOMBERG (June 26, 2015, 8:05 AM), <https://www.bloomberg.com/view/articles/2015-06-26/gay-marriage-won-t-be-controversial> [<https://perma.cc/WZV2-KXWY>] (noting that, at the state-level, political opposition to same-sex marriage rapidly receded once it was enacted and implemented).

256. *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

257. *Id.* at 2211–13. Cell-site records are not the same as GPS recording. Rather, they document which tower a cell phone uses when attempting to acquire a signal from the cellular network. Since the cell phone seeks the strongest (typically, nearest) available signal, the use of such records can establish the approximate location of the cellular user—within a very wide range in rural areas where towers are sparse, or within a considerably narrower one in urban locales where towers are more closely spaced together. See *id.* (summarizing expert testimony from FBI agent Christopher Hess).

record searches invade a citizen's reasonable expectation of privacy, reversing the conviction.²⁵⁸

The Court's path to reach that conclusion, however, was quite intriguing. The majority began its canvassing of the evolution of Fourth Amendment doctrine around tracking technology by citing *United States v. Knotts*, which found no Fourth Amendment violation where police planted a beeper on a criminal suspect's vehicle and used it to track him as he drove from Minnesota to Wisconsin.²⁵⁹ The defendant in *Knotts* had complained that permitting such a search would sanction "twenty-four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision." However, the Court said, "if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable."²⁶⁰

The *Carpenter* court intimated that the day *Knotts* envisioned had now arrived.²⁶¹ But in reality, it took a quite different approach to the perceived future track of technology than *Knotts* did. The *Carpenter* majority conceded that cell site records are not currently as precise in tracking an individual's location as a GPS device, though it observed that the technology is moving in that direction.²⁶² But unlike *Knotts*, which based its decision on the technology as it stood at the time, not on how the Court anticipated it might develop, *Carpenter* insisted that its Fourth Amendment analysis must take these coming advances into account. It worried that failing to consider the likely future usage of cell-site records could lead it to announce a rule today that "embarrass[es] the future."²⁶³

There was clearly some anxiety on the Court's behalf in framing its ruling this way. After all, why not cross the technological bridge when it arrives?²⁶⁴ This was the path taken in *Knotts*, and it is an approach supported by the fact that the actual technological state of affairs, its level of

258. *Id.* at 2223.

259. *Id.* at 2215; *United States v. Knotts*, 460 U.S. 276, 277–78, 284–85 (1983).

260. *Knotts*, 460 U.S. at 283–84 (first quoting Brief of Respondent at 9, *United States v. Knotts*, 460 U.S. 276 (1983) (No. 81-1802)).

261. *Carpenter*, 138 S. Ct. at 2215 (suggesting that *United States v. Jones*, 565 U.S. 400 (2012) marked the turning point where "more sophisticated surveillance" technology meant that "different principles did indeed apply"); see also *Jones*, 565 U.S. at 404–05.

262. *Carpenter*, 138 S. Ct. at 2216–19.

263. *Id.* at 2220 (quoting *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300 (1944)).

264. Justice Gorsuch alluded to this point in dissent. *Id.* at 2272 (Gorsuch, J., dissenting); see also Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 657 (1988) (arguing that it is impossible to realistically adjudicate a constitutional challenge without a factual accounting of "the actual burdens and benefits of a law").

intrusiveness and the degree to which our societal expectations of privacy have evolved around them will all presumably be much clearer at that point. Yet at the same time, the Court had good reason to take the approach that it did. Precedent is a sticky thing, and decisions made at one scientific moment cannot be easily cordoned off when technology changes.

The core problem both *Knotts* and *Carpenter* encountered was that they were seeking to apply a fact-tracing rule: the right doctrinal answer as to whether searches of this sort are constitutionally permissible depends on the state of the technology, and the technology is liable to change. *Knotts* sought to solve the problem by issuing its judgment based on the current technological state of affairs, assuming (albeit somewhat cavalierly) that future courts could always adjust the relevant precedents as technology evolved. *Carpenter* offered a different answer: courts should do their best to predict how the factual landscape will change in advance and craft doctrine accordingly, knowing full well that this might yield a mismatch between doctrine and fact in the intervening period (or longer, if the court's prediction does not pan out).

Both of these options may be unsatisfactory for different reasons. The *Knotts* solution is almost certainly too optimistic regarding courts' willingness to adjust precedents given changes in underlying facts. *Carpenter* tries to account for this possibility by linking its holding to its best estimation of what the relevant facts will be prospectively. But this approach suffers both because the rule it laid down may be mismatched to *contemporary* facts and because the court may get its assessment of future technological developments wrong.

Another possible path, however, would have been for the Court to announce a sunset rule. The announced Fourth Amendment rule would be tied to the facts as they currently stood in the case and controversy before them (as in *Knotts*). But the rule also would come with a timed-expiration date demanding reassessment, allowing for adjustment to account for actual new technological advances (as envisioned in *Carpenter*). The post-sunset reassessment, which would not be tied to the stickiness of (unsettled) precedent and would be evaluating facts in the present moment (as opposed to trying to predict the future), would likely do better in terms of actually ensuring facts and doctrinal rules stay in line with one another.

Notice too how the sunset rule also resolves the problem raised in Part II regarding the difference between legislative and adjudicative facts.²⁶⁵ A

265. See *supra* text accompanying notes 105–13 (explaining why alterations in “legislative facts” are unlikely to suffice as a means of distinguishing prior precedents).

change in the technology used by the police is an adjudicative fact, and so perhaps a future case dealing with more advanced technology could be distinguished from *Carpenter* even without a sunset. But lower courts cannot usually distinguish binding precedent which relies on *legislative* facts—for example, the degree to which surveillance of this quality is socially perceived to violate Americans’ reasonable expectations of privacy. If *that* fact changes in the ensuing years—and there is reason to believe that how Americans *perceive* the privacy implications of technological surveillance piggybacking on omnipresent gadgets like cellphones will shift over time—there is little that can be done unless and until *Carpenter* is explicitly overturned. By contrast, a sunset provision would accommodate anticipated factual changes of either sort: if *Carpenter* became obsolete either because technology evolved *or* because social views on privacy changed, a sunset would allow the efficient modification of the doctrine to realign with the relevant social facts.

V. WHEN IS SUNSETTING WORTHWHILE? THE CASE OF SUSPECT CLASSIFICATIONS

As expressed at the outset, the normative ambitions of this Article are modest: the goal is not to elevate doctrinal sunsets as a panacea curing all manner of judicial ailments, but rather to defend their potential utility and validity as tools in the toolkit of doctrinal design. The above taxonomy accordingly describes several different kinds of doctrinal sunsets which may prove useful as solutions to certain regularly encountered juridical problems. A sunset, however, is not the only potential mechanism for resolving these problems. As critics of sunsets in the legislative context have stressed, deliberative bodies (whether courts or legislatures) retain the authority to revisit prior decisions and modify, amend, or repeal them as needed.²⁶⁶ As against this alternative, what makes a *sunset* an advisable doctrinal option?

I suggest that this question can itself be divided into three subsidiary questions:

- (1) Can a relevant change in surrounding facts be *predicted* in advance?
- (2) Is a hard rule like a sunset necessary to ensure these changes are indeed taken into account?
- (3) Is the future judge better positioned to account for these factual changes compared to the present judge considering a sunset?

266. See Kysar, *supra* note 16, at 1042.

If the first two questions are answered in the affirmative, a doctrinal sunset may make sense; at which point the third question determines whether the sunsetting judge should also announce the governing rule following the expiration of the sunset (as in a stop-gap sunset) versus allowing future courts a free hand.

I conclude by applying these principles to a concrete case: that of suspect classifications. As a prime exemplar of a fact-modifying rule, suspect classifications make for an ideal example to illustrate the practical advantages of implementing a doctrinal sunset over alternative mechanisms for accounting for relevant factual changes. Sunsetting suspect classification designations allows for regular integration of predictable factual changes surrounding the actual socio-political status of protected classifications, reduces inertial barriers to tinkering with a high-profile and politically explosive constitutional doctrine, and helps promote doctrinal clarity by forcing courts to regularly reprise their reasons for granting heightened protection to various social groups beyond simply reflexive reference to prior precedent.

A. THREE QUESTIONS BEFORE (A) SUNSET

The first and by far the most important question a prospective sunsetter must answer is whether *ex ante* there is good reason to predict that the best decision on a given legal question will be different across time. Of course, it is always possible that circumstances will change in *unpredictable* ways. Several examples of such unpredicted changes were raised above, including the massive difference between the character of a “War on Terror” versus the sort of war being fought at the time of *Ex Parte Quirin*,²⁶⁷ and newly emergent psychological research, discussed in *Dassey v. Dittmann*, which undermined the assumption of a great body of prior doctrine that “innocent people do not confess to crimes.”²⁶⁸ Such alterations can justify revisiting or overturning a precedent *ex post*, but unless one wanted to adopt a Jeffersonian rule whereby all precedents expire after a set time period,²⁶⁹ the raw possibility that new doctrinally-relevant information might emerge does not itself generate a justification for a sunset.

By contrast, a sunset is far more viable in circumstances where the possibility (or better, probability) of change is known to the court in advance. The most obvious cases where this would be true are when the doctrine itself

267. See *supra* text accompanying notes 228–30.

268. See *supra* notes 144–53 and accompanying text.

269. See Letter from Thomas Jefferson to James Madison, *supra* note 4.

hinges upon facts expected to change, as in the cases of fact-tracing or fact-modifying rules. Yet this need not always be the case. In the example of decision-delaying sunsets, the change in circumstances that yields a better decision is not necessarily any doctrinal fact, but rather the comparative epistemic capacity of the courts in a given historical moment (consider again the pressures facing the Court deciding *Bush v. Gore* as compared to a similar voting controversy pertaining to basically any other electoral office in America).²⁷⁰

Finally, there may be particular historical moments where a court is better positioned to anticipate a coming material factual change. Compare the example of *Quirin* to the situation facing Justice O'Connor in *Hamdi*.²⁷¹ Whereas the prospect of an endless war that might never be formally concluded by a peace treaty or a declaration of an end to hostilities would have been bizarre to the *Quirin* court in 1942, it was very much a live possibility for the Justices considering Hamdi's situation in 2004. Hence, sunsetting the rule in *Hamdi* would have been a far more viable and justifiable decision compared to *Quirin* (putting aside the decision-delaying rationale for sunsetting national security decisions made in the heat of combat, which would have applied to *Quirin* as well).²⁷²

It is notable that while only a few court decisions have ever announced anything akin to a "sunset"—*Grutter*²⁷³ and *Northern Pipeline*²⁷⁴—a great many courts have suggested that changes in future factual circumstances may render the rule announced today obsolete. In the latter category fall, for example, *United States v. Leon*,²⁷⁵ *Miranda v. Arizona*,²⁷⁶ and *Hamdi v. Rumsfeld*.²⁷⁷ Such cases suggest a standards-based alternative to a sunset, where a court simply announces the factual predicates it is relying upon and then declares that the rule it is promulgating only applies so long as those factual predicates remain true. In what circumstances is a sunset—declaring flatly that the announced doctrinal rule will expire at a given time—preferable to this option?

270. See *supra* text accompanying note 226.

271. See *supra* text accompanying notes 180–83, 230.

272. See *supra* text accompanying note 231.

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

274. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982); see also *supra* text accompanying notes 208–09.

275. *United States v. Leon*, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring); see also *supra* text accompanying notes 159–64.

276. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966); see also *supra* notes 90–92 and accompanying text.

277. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004); see also *supra* text accompanying notes 180–83.

In many ways, this is a classic rules versus standards question, and the case for a rule-like sunset is strongest in circumstances where one prefers clarity and predictability to flexibility and adaptability. The example given above regarding *Northwest Austin* putting the VRA “on the clock” is illustrative.²⁷⁸ As a means of emphatically communicating to Congress that it must take action or the law will be struck down, an explicit sunset represents a far clearer signal than a vaguer, standards-based declaration.²⁷⁹

In general, a sunset rule is preferable to an enunciation of standards in circumstances where one wants greater assurance that the announced doctrinal rule will expire, and either be replaced or at the very least renewed based on genuine *de novo* doctrinal analysis. Return to the example of apportioning congressional seats via the Census. We already noted the stop-gap sunset contained in Article I, Section 2 of the Constitution—providing a temporary allocation of seats to the House of Representatives until such time as a more permanent rule could be implemented.²⁸⁰ But the standing apportionment formula also incorporates a sunset of its own: House seats “shall be apportioned among the several States . . . according to their respective Numbers,” and the enumeration of these numbers (via a Census) is instructed to occur once every ten years.²⁸¹ Note that while the apportionment rule is fact-tracing—House seats are supposed to proportionately track the population of the several states—it is not strictly necessary to include the requirement that the Census be redone every ten years. The constitutional drafters could have simply written that House seats “shall be apportioned among the several States . . . according to their respective Numbers,” and then left it to Congress to decide when the actual enumeration of state populations needed to be revisited. The risk, of course, is that Congress would not always voluntarily engage in these reassessments in a timely manner—preserving a status quo which might drift ever further from the actual population proportions of the several states. By sunseting the validity of each census after ten years and requiring that a new one be conducted, the Constitution ensures that apportionment rules are regularly recalibrated so as to track evolving population shifts in the nation.

The history of reapportionment within each state provides a cautionary tale regarding what happens if the fact-tracing rule of reapportionment is not matched with periodic mandatory recalibration. Until *Baker v. Carr* and its

278. See *supra* text accompanying notes 97–103.

279. See ELIZABETH F. COHEN, *THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE* 6–7 (2018) (discussing the utility of “countdown deadlines”).

280. U.S. CONST. art. I, § 2, cl. 3.

281. *Id.*

companion cases were decided in the mid-1960s,²⁸² there was no formal rule requiring states to adjust how they allocated their state or federal legislative districts given changes in their domestic population.²⁸³ Perhaps unsurprisingly, many states simply declined to engage in any such reapportionment—the plaintiff in *Baker* sued after Tennessee failed to revisit its district lines for a sixty-year period.²⁸⁴ The result was that political power was wildly out of sync with population figures—in Georgia, for instance, the “County Unit” system used in primaries gave residents of rural Echols County nearly one-hundred times the voting power as those in urban Fulton County.²⁸⁵ Following the reapportionment cases, states were forced to readjust their districting lines every ten years based on the regularly-occurring census figures—the timed-expiry of the old lines ensuring that the new ones actually adhere to the principle of “one man, one vote”.²⁸⁶

The problem of the census and reapportionment was that, even if certain features of constitutional design strongly implied that congressional seats needed to be allocated according to population, without a formal rule requiring periodic revisitation, legislatures might routinely fail to alter pre-existing apportionment schemes as population patterns shifted. And it is fair to worry that even more explicit standards-based recalibrating language—a requirement that Congress apportion House seats “among the several States according to their respective Numbers”—would not significantly overcome this inertia. On that score, it is notable that even where courts seemingly have included language that appears to temporally cabin their holdings to current factual circumstances, and expressly acknowledged that future developments may demand a reassessment, subsequent courts have been noticeably reluctant to take up the invitation. This is the story of *Miranda v. Arizona*—the Court’s explicit announcement in *Miranda* that Congress could come up with an alternative to the “*Miranda* warnings” to ensure

282. *Baker v. Carr*, 369 U.S. 186, 187–95, 236–37 (1962) (applying a one person, one vote rule to state legislative assemblies); *see also* *Reynolds v. Sims*, 377 U.S. 533, 542–43, 587 (1964) (extending rule to apply to all state legislative chambers); *Wesberry v. Sanders*, 376 U.S. 1, 1–5, 14 (1964) (congressional districts); *Gray v. Sanders*, 372 U.S. 368, 377–81 (1963) (primaries).

283. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (finding any challenges to state apportionment plans to be non-justiciable political questions), *overruled by* *Baker v. Carr*, 369 U.S. 186 (1962).

284. *Baker*, 369 U.S. at 189–91 (noting that Tennessee had not altered the apportionment of its assembly districts since 1901).

285. *Gray*, 372 U.S. at 371 (“One unit vote in Echols County represented 938 residents, whereas one unit vote in Fulton County represented 92,721 residents. Thus, one resident in Echols County had an influence in the nomination of candidates equivalent to 99 residents of Fulton County.”).

286. *See, e.g.*, Richard L. Engstrom, *Post-Census Representational Districting: The Supreme Court, “One Person, One Vote,” and the Gerrymandering Issue*, 7 S.U. L. REV. 173, 173–74 (1981) (noting that the Census begins “extensive reapportionment/redistricting as state and local governments . . . redesign representational districts to bring them into compliance with the ‘one person, one vote’ requirement”).

confessions are voluntary was almost entirely ignored when the Supreme Court considered Congress' attempt to do just that in *Dickerson v. United States*.²⁸⁷ The good-faith exception articulated in *Leon* has likewise never been reexamined despite Justice Blackmun's explicit invitation to do so; and while arguably *Hamdi* was decided too recently to judge, it certainly seems plausible that we will come to accept indefinite detention in the War on Terror simply through inertial path-dependence—Justice O'Connor's warning about “unraveling” doctrinal justifications notwithstanding. Where standards fail to sufficiently bind, rules—such as the explicit declaration that a precedent will sunset and at that point lack any binding authority—can force action.

A skeptic might suggest that, in cases where the inertial pull towards the status quo is that strong, there is no reason to suspect a sunset rule would yield a different outcome compared to a standards-based approach. The court would simply renew the old precedential rule at the expiration of the sunset period. In such cases, the argument goes, standards-based language inviting revisitation would be observationally-equivalent to a sunset—in both scenarios, we would see no tangible change in the doctrine itself, only unnecessary duplication of doctrinal work.²⁸⁸ I do not think this is necessarily correct, as a sunset rule further reduces revisitation costs and so may prompt doctrinal alterations that might not otherwise occur.²⁸⁹ But more importantly, even in cases where the doctrinal outcome does *not* change, there can be an important difference between following a rule simply by citing prior precedent versus running through the analysis *de novo*. As argued below in the suspect classification context, forcing judges to reason freshly rather than simply cite reflexively to “controlling” precedent can do important work in facilitating doctrinal clarity, even where the tangible outcome appears identical.²⁹⁰

The final question a judge considering using a sunset should ask is whether a future judge considering the issue at hand would be better positioned to hand down a correct decision. If the answer is “no”, then there is no reason why the judge hearing the case today should not lay down the final rule him or herself—even in cases where there is good reason to predict a change in factual circumstances in advance (first question) and where there is reason to prefer a hard rule over a standards-based approach to implementing a prospective change in doctrine (second question). Note that

287. *Dickerson v. United States*, 530 U.S. 428, 438–44 (2000).

288. *See Kysar, supra* note 16, at 1042.

289. *See supra* text accompanying note 237.

290. *See infra* text accompanying notes 325–42.

in these situations, it still might be appropriate to use a sunset—the primary upshot is that the current judge should announce not just the temporary rule but also the replacement rule that will come into effect following its expiration.²⁹¹ Such is the case in stop-gap sunsets. In *Northern Pipeline* there was a predictable need to change the governing legal rule across time (allowing bankruptcy courts to function under an “unconstitutional” jurisdictional structure, but only temporarily), and good reason to implement a bright-line “countdown” approach (to induce Congress to actually amend the bankruptcy code), but there was no reason why a future Supreme Court would be better positioned to promulgate a permanent doctrinal rule upon expiration of the sunset.²⁹² In such cases, having the current Court leave open the enduring rule would have simply increased transaction costs and duplicated labor.²⁹³

But in many circumstances, there are strong reasons to prefer allowing a future court a blank canvas to craft a doctrinal rule, even where the present court is aware of upcoming factual changes and understands how they might alter the “right” doctrinal answer. Certainly, this is the case in decision-delaying sunsets, where the particular social environment a judge finds themselves in right now causes epistemic disadvantages that a future judge will (presumably) not labor under. But this also applies in the case of anti-inertial sunsets. Consider the story of how technological changes affected the analysis of lawful surveillance from *Knotts* to *Carpenter*.²⁹⁴ Clearly, the Supreme Court recognized that advances in technology and the ability to track individuals on an ever-more fine-grained basis might render a Fourth Amendment decision handed down today archaic a decade later. That said, judges are not futurists. Their ability to accurately grasp and understand how a not-yet-invented technology will materially affect everyday life or police behavior is limited. This is the core insight of Article III’s case and controversy requirement:²⁹⁵ judges are best able to make rulings when facing a concrete case with actual stakes, as against prospectively guessing how to construct doctrine into an uncertain future.²⁹⁶ A sunset clause reduces the

291. Grewal and Herz-Roiphe would label these “sunrise” laws. Herz-Roiphe & Grewal, *supra* note 31, at 1982–83.

292. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86 (1982).

293. *See* Kysar, *supra* note 16, at 1042.

294. *See supra* text accompanying notes 256–65.

295. U.S. CONST. art. III, § 2, cl. 1.

296. *See* *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (observing that the purpose of the case or controversy requirement is that it “tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action”).

barriers to revisiting a precedent that is likely to become outdated, while giving future judges the latitude to determine a new rule that is wholly and properly informed by the full color of the factual context they live in.

B. SUNSETTING SUSPECT CLASSIFICATIONS

The goal of this paper is not to insist upon adding a sunset to any particular legal doctrine. Rather, it is to articulate why doctrinal sunsets should be considered a valid tool in the judicial toolkit generally. That said, it is useful to sketch how a sunset might further doctrinal objectives with reference to a specific example.

The Fourteenth Amendment doctrine of “suspect classifications” is a prime candidate. Suspect classifications refer to certain social categories which, due to the existence of past or present prejudice, stereotyping, or political weakness, are accorded heightened scrutiny when used as the basis of a legal rule.²⁹⁷ As noted in Part II, suspect classification doctrine is an example of a fact-modifying rule: the purpose of the doctrine is to alter the factual predicates (of prejudice, stereotyping, political weakness, and so on) which justify the rule.²⁹⁸ But as I’ve argued elsewhere, suspect classification doctrine has fallen out of sync with itself—it is a doctrine whose legal predicates suggest it should be malleable over time, but which in practice has instead become increasingly rigid and calcified.²⁹⁹ While in theory the list of suspect classifications should grow and contract depending on which social groupings are, for example, “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process,”³⁰⁰ in reality there has been virtually no effort to engage in any sort of continued evaluation of whether groups currently labeled “suspect” continue to meet the relevant doctrinal criteria.

Currently, the doctrine of suspect classifications is functionally “perpetual”: once a classification is designated suspect, it never can lose that status.³⁰¹ A sunset, by contrast, would make that designation temporary: a

297. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 686–87 (1973) (plurality opinion). For a full accounting of the factors which have been cited as relevant to determining suspect status, see Schraub, *Unsuspecting*, *supra* note 2, at 367–72.

298. See *supra* text accompanying notes 187–95.

299. See Schraub, *Post-Racialism*, *supra* note 2, at 616–29 (noting how strict scrutiny doctrine exists in tensions with declarations of a “post-racial” America); Schraub, *Unsuspecting*, *supra* note 2, at 383–96 (explaining how strict scrutiny doctrine has become “transient in theory, but concrete in fact”).

300. *San Antonio*, 411 U.S. at 28 (listing this as among the “indicia of suspectness”).

301. Schraub, *Unsuspecting*, *supra* note 2, at 396–413 (explaining and critiquing the practice of “perpetual suspect classes”).

holding that (for example) race is a suspect classification would expire after a period of years, at which point courts would be able to freshly assess whether it makes sense to renew the designation.

Adding a sunset to suspect classification designations may make sense for three independent reasons. First, as noted above the suspect classification schema is one of the clearest examples of a fact-modifying doctrine—it is almost uniquely explicit in how it relies on factual predicates that it expects to alter over time. This answers the first question in the previous subsection with a “yes”: there is ample reason in the suspect classification context to assume *ex ante* that doctrinally-relevant facts will change over time. And a renewable sunset creates a formal mechanism through which courts can integrate new social developments into their legal conclusions, ensuring that the doctrinal rules and doctrinal consequences remain aligned.

Second, if suspect classifications have remained unduly static over time due to the inertial weight of precedent, sunseting alters the default rules governing suspect classifications (at least at the point of the sunset) and makes it easier to “unsuspect” outmoded categories. This might be especially important given the symbolic importance of the “suspect” designation, and the increasingly mismatched character between that symbolism and what suspect status actually accomplishes. Third, sunseting suspect classifications may bring much needed doctrinal clarity to the process of *creating* suspect classifications, by forcing courts to actually work through the doctrine if they wish to preserve any current suspect classifications (much less create new ones). These provide a “yes” answer to the second question: we have good reason to be skeptical that a standards-based approach—simply instructing courts to cease treating this or that classification as “suspect” once they no longer meet the criteria—will suffice to overcome the massive amount of doctrinal inertia that exists in this area, and we likewise have reason to encourage courts to rerun this analysis *de novo even if* we believe they will end up renewing the same suspect classifications over and over.

The final question in the previous subsection was whether future judges are better positioned than present judges to determine the proper doctrinal impact of changes in the relevant facts. If the answer is no, it still could be appropriate to sunset suspect classifications, but instead of leaving a blank canvas for future judges, the judge sunseting the classification could also declare the new rule that will govern after expiration of the sunset.³⁰² I will not dwell on this question here, as there is no reason to think a court could

302. See *supra* note 31 and accompanying text (discussing “sunrise” rules).

predict decades in advance the socio-political conditions for a given classification with greater accuracy than future courts fully enmeshed in relevant the factual circumstances regarding, for example, racial inequality. However, this does seem to point to the core mistake in Justice O'Connor's *Grutter* sunset—it declares its *expectation*, not just that the circumstances regarding racial inequality in America will change, but that they will change in a specific *direction* and *magnitude* such that affirmative action will not be necessary after twenty-five years.³⁰³ While Justice O'Connor had ample foundation to assume that the relevant facts about racial inequality could change in important ways over this time period, she had little basis to know that they will get better versus worse, much less sufficiently better so as to venture a prediction regarding affirmative action's future validity. It would have been better in these circumstances to note the need to reassess the case in twenty-five years without prejudging the direction the facts will take.

It is important to emphasize that, at least as currently written, the point of suspect classification doctrine is *not* to discern which groups “objectively” and for all time require heightened protection. While some jurists, notably Justice Scalia, have gestured in this direction—positing an intrinsic illegitimacy to, for example, racial classifications³⁰⁴—this perspective is not grounded in the foundational precedents of suspect classification doctrine, nor is it backed by the Fourteenth Amendment's text. The text of the Fourteenth Amendment, which promises “equal protection” but does not specify any particular social classifications deserving of heightened scrutiny (indeed, the Fourteenth Amendment actually makes no mention of “race” at all),³⁰⁵ does not on its face offer any basis for distinguishing between the multitude of ways a state might differentiate and classify in pursuit of legislative goals.³⁰⁶ A series of precedents—beginning from *Carolene Products* and reaching full fruition in *San Antonio Independent School District v. Rodriguez*—provide the foundation for elevating certain classifications above others in receiving heightened scrutiny, but that foundation is explicitly conditioned on transient social facts: aspects like

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

304. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (“[U]nder our Constitution there can be no such thing as either a creditor or a debtor race.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989) (Scalia, J., concurring in the judgment) (“When we depart from this American principle [of constitutional colorblindness] we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns.”).

305. U.S. CONST. amend. XIV, § 1.

306. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 106 (1979) (noting that there is a “vast range of arguably unjust but shared bases for human differentiation which Congress and the courts do not see as their function to police”).

political powerlessness, existence of prejudice, or presence of widespread disadvantage.³⁰⁷

Hence, suspect classification doctrine as currently established is designed to provide a temporary shield based on particular, contingent characteristics operative at a specific point in time. This characteristic of the suspect class doctrine distinguishes it even from many other arenas where judicial doctrine is explicitly fact-bound and invites periodic, timed reassessment of whether the protected groups still need additional judicial solicitude.

In the abstract, it is evident that how much skepticism a court should direct towards a legislative classification is significantly dependent on specific social circumstances. A court could conclude that racial classifications, for example, at one point in time were most likely to stem from prejudice or political exclusion but at another point are outcroppings of egalitarian commitments or even normal democratic horse-trading.³⁰⁸ Faithful application of the suspect classification doctrine seemingly requires attentiveness to these distinctions.

The normal developmental process of a constitutional rule, however, only requires that a court consider the sociological facts (if they do so at all) on the date of the decision itself. Once the initial decision is made, its factual accountings are relied upon as precedential even once circumstances inevitably change.³⁰⁹ A sunset provision, by contrast, would require the court to reappraise these predicates given new social and political developments. In doing so, sunset provides a formal mechanism to integrate this new, doctrinally relevant information into a court's ultimate legal decision.³¹⁰

Moreover, suspect classification doctrine is more unstable than even other doctrines which predictably rely on factual developments. On most occasions where empirical disputes translate into law, it is expected that ongoing research will continually shrink the scope of disagreement as we approach a final core of objective truth.³¹¹ By contrast, the facts relevant to

307. Schraub, *Unsuspecting*, *supra* note 2, at 372 ("The overwhelming majority of the factors the Supreme Court has claimed to look into when determining if a group is a suspect class are not permanent.").

308. See Sherry, *supra* note 112, at 158 (contending that the Supreme Court applied a less strict version of "strict scrutiny" in *Grutter* because it no longer believed that government racial classifications are most likely motivated by invidious prejudice).

309. See generally Larsen, *supra* note 122.

310. Gersen, *supra* note 3, at 266 (arguing that "staged decision procedures facilitate the integration of new information into the policy process, [and thus] they generally increase the probability that an optimal public policy will be selected").

311. See Faigman, *supra* note 89, at 603-07.

a suspect class determination are known in advance to be in considerable flux. Indeed, we do not just expect but hope that our determinations regarding a group's political powerlessness or the degree of prejudice it faces will change considerably over time (albeit we probably cannot predict with confidence *what* those changes will be).

The fact that, doctrinal rules notwithstanding, no court has ever even appeared to conceive of (much less carry out) the unsuspecting of a given classification suggests that there are powerful inertial forces preventing such a move.³¹² To be sure, to the extent that strict scrutiny represents an important shield for certain marginalized groups, the inertia promised by precedent is a feature that entrenches this protection and helps prevent judicial retrogression. A sunset necessarily makes the protections of suspect classification less durable over time, and so opens the door for the removal of important constitutional protections upon the expiry of the sunset.

Yet as I have argued at length elsewhere, the idea that strict scrutiny always and in all contexts redounds to the benefit of those it “protects” is exceptionally dubious.³¹³ As practiced currently, strict scrutiny is applied almost exclusively against government efforts to *remedy* inegalitarian practices while posing little barrier to contemporary practices of discrimination.³¹⁴ The presence of explicitly biased justifications for President Trump's Muslim ban were easily shunted aside by a court majority who insisted that the case demanded extreme deference to the executive branch.³¹⁵

More generally, prior victories bar as often as they enable future needed

312. Schraub, *Unsuspecting*, *supra* note 2, at 363 (noting that “no case has even contemplated, much less seriously threatened, that a hitherto protected class might one day be *removed* from the list” of suspect groupings).

313. *See generally* Schraub, *Post-Racialism*, *supra* note 2; Schraub, *Unsuspecting*, *supra* note 2; Schraub, *Siren Song*, *supra* note 2.

314. Schraub, *Unsuspecting*, *supra* note 2, at 413–14 (“Where the political process supports programs promoting racial equality through integration initiatives or affirmative action programs, the Court continues to apply strict scrutiny analysis and (typically) strikes down the laws. Where the polity approves of initiatives that disfavor these goals, by contrast, the Court preaches deference and extolls the virtues of democratic authority.” (footnote omitted)).

315. *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018) (contending that the “plaintiffs’ request for a searching inquiry into the persuasiveness of the President’s justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere”); *id.* at 2418 (suggesting that the judiciary should be hesitant to “probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office”); *see also* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 506–13 (2018) (noting the efforts courts have taken to discount *explicit* evidence of unlawful bias, even as such cases are assumed to represent the apex of legally and constitutionally proscribed discrimination).

reforms.³¹⁶ Often times aspects of an initial victory need to be cast aside as circumstances change, but their symbolic importance in legal doctrine makes them difficult to challenge head-on. This problem is magnified when dealing with something as emotionally fraught as strict scrutiny, which represents the legal culmination of some of the most high-profile and highly charged civil rights struggles in our nation's history. Directly attacking strict scrutiny can easily be seen as an attack on the legacy of these decisions themselves.³¹⁷ If it is the case that suspect classification decisions are currently doing more harm than good—that it is solely being applied against racial *equality* efforts, while allowing de facto racial discrimination to rampage unchecked³¹⁸—then this remnant symbolic power is obstructing needed reformations in the judiciary's civil rights doctrines.

A sunset provision can help overcome this inertia both by changing the relevant default rule and by altering our understanding of what a suspect class determination means. In the status quo, a suspect class determination lasts indefinitely. The default rule then becomes that distinctions based on the suspect classification receive and will continue to receive heightened scrutiny, unless a court takes an affirmative step to rule otherwise. With a sunset clause, by contrast, the default rule is democratic control, and heightened scrutiny is a temporary deviation that must be periodically renewed.³¹⁹

Moreover, the very fact that suspect classifications would be subject to a sunset can alter our understanding of what it means to endorse such a classification. As Menachem Mautner observes, one way of thinking about law is that “law, by its participation in the constitution of culture, also participates in the creation of the mind categories through which individuals perceive the social relations in which they take part.”³²⁰ Whereas in the status quo a suspect class is seen as a permanent constitutional feature, the removal of which would be seen as a grave judicial intrusion, the existence of a sunset clause by its terms indicates that the designation is temporary in nature and

316. See Schraub, *supra* note 49, at 1250–52.

317. See *id.* at 1286–87 (noting how proponents of affirmative action have struggled to respond to conservatives' deployment of the colorblind rhetoric used in the *Brown* litigation).

318. Schraub, *Unsuspecting*, *supra* note 2, at 418 (“The lack of an unsuspecting doctrine leaves us with partial racial politics—government can legislate on race freely, except when it expressly seeks to combat ongoing racial inequality.”).

319. See Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383, 410 (2007) (observing, in the corporate law context, that a sunset provision “says that a change from the default rule only applies for a given period of time; after that, the change must be re-approved, or the [entity] reverts to the default”).

320. Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 852 (2011).

2020] tied to particular social facts.

To be sure, providing a sunset does not necessarily mean that legal or political actors will cease believing that it is a natural and inevitable state of affairs that our current suspect classifications deserve that moniker.³²¹ Citizens and judges alike may grow used to the putatively temporary rule and view not renewing as akin to an overt act of repeal.³²² But a sunset provision at least reduces the barriers to a rule change by disabling courts or litigants from relying on *stare decisis* alone as a reason for keeping the current doctrine intact.³²³

Of course, the above analysis depends on accepting my view that suspect classification doctrine—as currently practiced—does more harm than good to the groups it purportedly protects.³²⁴ A reader more attached to the suspect classification status quo might fairly worry: will courts exploit a sunset clause to remove suspect designation too quickly—in effect, declare victory and go home? And the answer to that must be: maybe. But if courts are that bad at assessing whether racism remains a systemic problem in America, we might not want them to possess the extraordinary power to interfere with democratic legislation that suspect status provides. Put simply, either we trust judges or we don't. It is a strange argument to contend that judges *cannot* be relied upon to recognize the ongoing presence of significant racial inequality in America but *can* be entrusted to wield the sword of strict scrutiny in a manner that protects rather than condemns racial outgroups.³²⁵ At the very least, a sunset would have the great virtue of forcing consistency: in order to continue claiming the judicial power suspect classification offers, the courts must either explicitly conclude that racism remains a sufficiently severe factor in public life, or formally articulate an alternate basis for why race ought to remain suspect.

321. See David Schraub, *Our Divine Constitution*, 44 LOY. U. CHI. L.J. 1201, 1259 (2013) (book review) (“[P]eople [do not] stand passive and awestruck in the face of assertions of constitutional meaning. People find creative ways to harmonize their commitments with the law in front of them.” (footnote omitted)).

322. See Charles K. Whitehead, *The Goldilocks Approach: Financial Risk and Staged Regulation*, 97 CORNELL L. REV. 1267, 1305 (2012) (arguing in the financial context that “sunsetting may be difficult if market participants view a particular version of a new rule as the status quo”).

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

324. See Schraub, *Siren Song*, *supra* note 2, at 861, 864 (contending that “being a suspect classification often does more harm than good” and suggesting that the success of gay marriage litigants in securing victory *without* rendering LGBT status suspect was a case of “dodg[ing] a bullet”).

325. Schraub, *Unsuspecting*, *supra* note 2, at 420–21 (“[I]f liberals are afraid that unsuspecting race will mean that the Court does not treat ongoing racial inequity with the requisite amount of seriousness, the obvious rejoinder is that maintaining race as a suspect classification has done nothing to prompt greater sensitivity to the problem.”).

And this points to a final virtue of incorporating sunsets into suspect classification doctrine. Both of the previous two advantages of sunset—its ability to provide a pipeline for incorporating doctrinally-relevant changes in facts, and its ability to overcome the inertia attached to tampering with precedents—are ways of lowering the barriers to judicial sunset. But judges are not guaranteed to avail themselves of these opportunities; they could still maintain the current law by indefinitely renewing it after each sunset. Critics of sunsets suggest that, in such circumstances, the only effect of sunsets is to unnecessarily increase transaction costs.³²⁶ In the legislative context this may be true because legislators need not justify their enactments as part of a coherent whole. But judges do not just issue rulings, they also must situate them inside of a cohesive body of *doctrine*. And so the final advantage of sunsets in the judicial context is that it can, under the right circumstances, help create doctrinal clarity.

The doctrine surrounding suspect classification—how it’s meted out and how it’s maintained—can charitably be described as “murky.”³²⁷ Suspect classification doctrine has suffered because the Court largely put the cart before the horse: most suspect classifications received that designation before the doctrinal superstructure really took root in *Rodriguez*.³²⁸ The result is that none of the current suspect classifications had to go through the *Rodriguez* test, and we lack examples of how a classification can actually meet the criteria. This is also why the most obvious intuitive candidate for an unsuspecting doctrine—checking each currently suspect classification against the initial suspect classification test to see if it still meets the criteria—is unworkable: it is unclear what that doctrine is, much less how any candidate classification might pass it.

A sunset rule would bring long overdue doctrinal clarity to the original question of when classifications should be designated suspect, simply because it is rationale-forcing.³²⁹ A court today applying strict scrutiny to race, for instance, need do nothing more than cite to the litany of cases establishing that racial classifications get strict scrutiny.³³⁰ After a sunset,

326. Kysar, *supra* note 16, at 1042.

327. See Schraub, *Unsuspecting*, *supra* note 2, at 365 (“Suspect classification doctrine is murky even compared to other areas of constitutional law . . .”).

328. See Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 485 (2004) (noting that the Court has not added a classification to the list of suspect classifications since the 1970s—closing the “set” almost immediately after first laying down the doctrinal criteria for suspect status in *Rodriguez*).

329. Katyal, *supra* note 28, at 1247 (“A judicial sunset may even prompt the Court, should it decide to reaffirm a lapsed precedent, to do so in a way that articulates the true basis for its decision, instead of crutching its holding to what the Court has said before.”).

330. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007)

however, a court which wanted to reinstate suspect status for racial classifications would have to walk through the doctrinal steps anew and explain why suspect status remains warranted. This would almost certainly entail pruning some of the myriad considerations which have injected themselves into the suspect classification inquiry and would probably require the Supreme Court to explain how the remaining factors were prioritized relative to one another.³³¹

In this respect, judicial sunsets may be better positioned than their legislative counterparts. Legislatures faced with an upcoming sunset of a high-profile statute may not see increased deliberation so much as increased lobbying by relevant stakeholders seeking to preserve or overturn the status quo.³³² But the judiciary is not subject to (or at least is more insulated from) these pressures. While it is an exaggeration to say that judges are immune to public choice influence, it is fair to say that they are less vulnerable to aggressive lobbying efforts or purely self-interested assessments of the facts.³³³ And while legislators need not explain their votes or explicitly ground them in any sort of principled analysis, the norms of judicial-opinion writing help bring forward some publicly identifiable rationale justifying judicial decisions.

Even in the worst-case scenario where post-sunset judicial opinions justifying heightened scrutiny are wholly uninformative on their own terms, *de novo* judicial review of suspect classifications designations would remain valuable from a purely comparative perspective. Currently, it is unclear whether a new claimant seeking heightened scrutiny needs to compare their situation to that of suspect classes today or to that of the classes at the time they received their suspect designation.³³⁴ The former is an apples-to-

(plurality opinion) (citing, for example, *Johnson v. California*, 543 U.S. 499, 505–06 (2005)) (“It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (“It is by now well established that ‘all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.’” (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995))).

331. See Schraub, *Unsuspecting*, *supra* note 2, at 368 (canvassing suspect classifications precedents and finding that they “proffer[] an armada of considerations that are somehow related to a finding of suspect status without any indication of which (if any) are necessary or sufficient, or how the factors relate to one another”).

332. Kysar, *supra* note 16, at 1043–46 (arguing, in the legislative context, that all that happens around the sunset point is increased lobbying, not increased deliberation).

333. See McGinnis & Mulaney, *supra* note 91, at 103–04.

334. Compare *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 453 (Conn. 2008) (justifying heightened scrutiny for gays and lesbians in part because they possess less political power than do women and blacks today), with *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1007–08 (D. Nev. 2012) (rejecting heightened scrutiny for gays and lesbians in part because the prejudice and discrimination they face is not

oranges comparison, while the latter does little to justify the perpetuation of heightened scrutiny for the already-protected group. A sunset would close considerably this temporal gap, enabling a comparison to occur on even terms. No matter how opaque its reasoning, a court which has declared that the circumstances *today* justify heightened scrutiny for, say, race will have created an explicit baseline that new claimants can refer back to, greatly assisting lower courts in determining what sort of social circumstances justify heightened scrutiny in more novel contexts.

Alternatively, it is possible that courts might use the occasion of a sunset to change the doctrinal character of the suspect classification regime outright: for example, by adopting the view (attributed to Justice Scalia above) that race is simply an illegitimate basis for public legislation—always and for all time.³³⁵ This would render the sunset itself largely archaic, since it would transform suspect classification doctrine from a fact-modifying rule into a non-fact-dependent rule.³³⁶ But even this outcome would represent an improvement over the status quo, because it would at the very least require the Court to make explicit and grounded what is currently implicit and unsupported. Currently, there is a sharp division between the *inputs* of suspect classification doctrine (the criteria which render a group suspect) and the *outputs* (the legal effects of being deemed suspect).³³⁷ The inputs continue to reflect the transient, fact-modifying characteristics described above. The outputs, by contrast, have come increasingly close to declaring a flat ban on the use of suspect characteristics—without regard to the input justifications. This yields significant inconsistencies—if race is a suspect classification because (for example) Latinos are discrete and insular minority, or politically powerless, then why should alleged discrimination against Whites (who are neither of these things) gain heightened judicial scrutiny?³³⁸

This inconsistency has been allowed to fester because the Court has never been forced to explicitly relate its current application of suspect classification doctrine to the foundational precedents which purportedly

comparable that experienced by women and blacks over history).

335. See *supra* note 304 and accompanying text.

336. See *supra* Sections III.A, III.D.

337. Schraub, *Siren Song*, *supra* note 2, at 867–70 (contrasting the content of doctrinal inputs and outputs in suspect classification doctrine); see also Schraub, *Unsuspecting*, *supra* note 2, at 371 (“[T]here is a marked divergence between how suspect classification is *attained* and how it is *applied*.”).

338. This relates to what is sometimes deemed the “class versus classification” distinction: is the class of (say) “women” protected or is it the classification of “sex” that receives heightened scrutiny. See Schraub, *Unsuspecting*, *supra* note 2, at 370–71 (“Latinos may or may not be a discrete and insular minority, but ‘race’ cannot be. Women might be politically powerless, but ‘sex’ surely is not.”).

justify it. A sunset would, at the very least, require the judiciary to state and defend explicit reasons for why it is adopting a “no use of race, period” rule—without simply gesturing back at prior precedents that supposedly establish the point.³³⁹ This would seem a difficult row to hoe: as noted above, the strict colorblindness principle is not encoded in the constitutional text³⁴⁰ and it has seemingly weak support as a matter of original meaning.³⁴¹

Perhaps conservative jurists will find a way around these barriers; perhaps (the cynic or legal realist might suggest) these “barriers” do not really constrain legal practice at all. Regardless, there is always a gain in compelling judges to clearly and forthrightly declare the content of, and basis for, the doctrinal rules they will enforce. Put simply, “[i]f the Court wants to reconfigure the entire suspect classification doctrine so as to affirmatively endorse perpetual suspectness, it should say so and come up with constitutional warrants to justify what would be a radical, permanent intrusion into democratic policymaking.”³⁴² If the only result of adding a sunset to suspect classification doctrine is to press the conservative wing of the Court to explicitly announce its abandonment of the *Carolene Products* line of precedent, that would at the very least clarify the stakes of current constitutional controversies and make clear that the doctrinal moves in cases like *Parents Involved* represent a rupture from, rather than a continuation of, the understanding of the Fourteenth Amendment that guided the Court during the civil rights revolution.

CONCLUSION

The case for doctrinal sunsets is not a general critique of lasting precedents, and is not a Jeffersonian notion that all precedents should expire after a set period.³⁴³ There are ample good reasons why many, if not most, doctrinal rulings by courts should be durable in nature and overturned only after sound consideration of the principle of *stare decisis*.

339. See *supra* notes 329–30 and accompanying text.

340. See *supra* text accompanying notes 305–07.

341. See, e.g., CASS SUNSTEIN, RADICALS IN ROBES 131 (2005); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 427–32 (1997); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 753–54 (1985). For an originalist defense of constitutional colorblindness, see Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 72–74 (2013). It is worth noting, however, that even Rappaport concedes that the purported originalists on the Supreme Court have not themselves attempted to ground their promotion of the colorblind principle on an originalist basis. *Id.* at 73 (agreeing with critics that the originalist Justices on the Supreme Court “have not made any real effort to justify their affirmative action opinions based on the Constitution’s original meaning”).

342. Schraub, *Unsuspecting*, *supra* note 2, at 372.

343. See *supra* text accompanying note 4.

But in certain circumstances, sunsets make sense as a means of allowing courts to readjust to changes in factual circumstances in cases where factual assessments are built into the doctrine itself. To the extent doctrinal law encodes notions like a “reasonable expectation of privacy,” “a suspect classification,” or “evolving standards of decency,” there runs a high risk of precedential doctrine drifting away from the factual underpinnings which supposedly justify it. In these cases, the inertial pull of precedent can run counter to doctrinal aims. A sunset is one mechanism by which the doctrine and facts can remain in alignment.

The ambition of this Article is quite modest. It does not argue that sunsets should be an everyday feature of jurisprudential life, and it does not suggest they are a panacea to all manner of legal ailments. It simply attempts to demonstrate that sunsets are a valid and viable tool in the jurisprudential toolkit, no matter what one’s general beliefs are regarding theories of statutory or constitutional interpretation. Where we can predict *ex ante* that an announced legal rule may, at some point into the future, cease to represent the correct outcome of the relevant legal text, it is worth considering whether an explicitly announced sunset would offer both better reliability and superior doctrinal fidelity than dependence on *ad hoc* judicial reassessments in the indeterminate future.