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Backdoor Balancing

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BACKDOOR BALANCING AND THE CONSEQUENCES OF LEGAL CHANGE

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Abstract: The U.S. Supreme Court has employed various mechanisms to blunt the systemic impact of legal change. The Warren Court balanced the interests advanced by new rules against the disruption of their retroactive application and frequently limited new rules to prospective effect. The Rehnquist Court decisively rejected this approach in the mid-1990s and committed itself to full adjudicative retroactivity as to pending cases. This Article argues that, although the Court slammed a door, it subsequently opened a window. The Court has spent the intervening decades devising ostensibly independent and unrelated doctrines to mitigate disruption. Despite the Rehnquist Court's insistence that these doctrines do not relate to retroactivity, they reflect the same balance and, in almost every case, yield the same results as Warren-era balancing. This Article makes the descriptive case that the balancing of interests has survived intact and the normative case that finding a mechanism for softening the blow of legal change promotes respect for existing rules and the Court's institutional legitimacy. Finally, this Article explores how the Court's *sub silentio* balancing is likely to play out in the next big retroactivity challenge, the Appointments Clause context post-*Lucia v. SEC*.

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INTRODUCTION

The Warren Court's practice of issuing opinions with prospective effect is dead. Or is it? In an effort to blunt the disruptive effects of legal change, the freewheeling, rights-generating Warren Court often made new rules with prospective effect or effect limited to the prevailing litigants.[1] Thus,

1. *See, e.g.*, Mackey v. United States, 401 U.S. 667, 674–75 (1971) (declining retroactive effect of the rule allowing a Fifth Amendment defense against compelled production of tax returns); Stovall v. Denno, 388 U.S. 293, 299–301 (1967) (limiting retroactive effect of the right to counsel for post-indictment lineups); Linkletter v. Walker, 381 U.S. 618, 627–29 (1965) (limiting retroactive effect of the exclusionary rule). For purposes of this analysis, "pure" prospectivity means the new rule applies only to conduct arising in the future; "selective" prospectivity means the Court applies the new rule to the litigants in the case in which it announces the rule but does not allow its application to other pending cases. During the Warren era, the Court generally preferred selective prospectivity. *But see*

the protections of *Miranda v. Arizona*,[2] the right to counsel at pre-indictment lineups,[3] the narrowed scope of searches incident to arrest in *Chimel v. California*,[4] and rules barring the imposition of harsher sentences after successful appeal[5] supplied a victory to the named and future defendants but did not confer benefits on other litigants in the pipeline—either those similarly situated on direct appeal or those whose cases were already final. The Court rationalized this practice in cases like *Linkletter v. Walker*[6] and *Chevron Oil Co. v. Huson*[7] by candidly considering the potential systemic impact of its holdings, differentiating between mere procedural or prophylactic rules, as to which the balance favored prospective effect,[8] and rules going to our confidence in the underlying determination of guilt or innocence, as to which the balance favored retroactivity.[9]

After a series of fits and starts, and as the Warren Court faded in the rearview, *Griffith v. Kentucky*[10] and *Harper v. Virginia Department of Taxation*[11] shut the door on this practice of according decisions prospective or selectively prospective effect, establishing emphatically that prospective rulemaking is inconsistent with the judicial function.[12] Since the mid-1990s, then, adjudicative retroactivity has been our accepted norm. A new principle of law laid down by the Supreme Court is immediately effective in other pending cases, even as to events

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Morrissey v. Brewer, 408 U.S. 471, 490 (1972) (setting up new rules the regarding revocation of parole "which are applicable to future revocations").

2. 384 U.S. 436 (1966).

3. The Court recognized this right in two companion cases, *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967).

4. 392 U.S. 752 (1969).

5. The Court recognized this right in *North Carolina v. Pearce*, 395 U.S. 711 (1969).

6. 381 U.S. 618 (1965).

7. 404 U.S. 97 (1971).

8. *See, e.g.*, Desist v. United States, 394 U.S. 244, 253–54 (1969) (declining retroactivity of the rule that the Fourth Amendment applies even without physical trespass); Johnson v. New Jersey, 384 U.S. 719, 730–33 (1966) (declining retroactivity for *Miranda*).

9. *See, e.g.*, Roberts v. Russell, 392 U.S. 293, 294–95 (1968) (requiring retroactive effect of *Bruton v. United States*, 391 U.S. 123 (1968), which barred admission of a co-defendant's confession implicating the defendant because the error went to guilt or innocence); Witherspoon v. Illinois, 391 U.S. 510, 523 n.22 (1968) (indicating the rule barring a death-certified jury in capital cases goes "to the very integrity . . . of the process" and would have full retroactive effect (citation omitted)).

10. 479 U.S. 314 (1987).

11. 509 U.S. 86 (1993).

12. *See id.* at 97; *Griffith*, 479 U.S. at 328.

predating its formulation.[13] Whether motivated by Article III-based antipathy to advisory opinions[14] or by a post-Warren Court aversion to rights-generation, these cases mandated that the full consequences of any new rule be borne widely and immediately—at least in non-final cases—without regard to whether the rule was foreseeable, wrought major change, or gave rise to unfair consequences.[15] The Court has resisted bald efforts to circumvent this regime. *Reynoldsville Casket Co. v. Hyde*[16] avowed that *Harper* was to have more than "symbolic significance," unanimously rejecting a litigant's effort to reinsert balancing of fairness and reliance interests by way of a remedial inquiry.[17]

That door firmly shut, we officially no longer balance. But the Court has spent the past couple of decades comfortably deploying a variety of doctrines to blunt the impact of new rules, and its patchwork of ostensibly unrelated devices brings many of the selfsame considerations that were in play during the Warren era back in through a window.[18] Where a plaintiff seeks damages from official actors, those officers enjoy immunity for all but violations of "clearly established" rules of which they should have been aware.[19] In other words, a plaintiff cannot benefit from a new rule to obtain compensation for injuries suffered at the hands of a state or federal officer. So, too, a criminal defendant cannot claim "retroactivity" to obtain the benefit of any new rule in the Fourth Amendment context, for

13. *See Harper*, 509 U.S. at 97 ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."); *Griffith*, 479 U.S. at 328 ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.").

14. Strong hostility to advisory opinions, tethered to the nature of the judicial power and reflected in Article III, emerged almost immediately after adoption of the Constitution. *See* Letter from John Jay, Chief Justice, and Associate Justices, to George Washington, President of the United States (Aug. 8, 1793), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488–89 (Henry P. Johnston ed., 1891) (rejecting Secretary of State Thomas Jefferson's request for "extra-judicial" advice on the construction of a treaty). It has been "an uncontroversial and central element of our understanding of federal judicial power" since. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 50 (7th ed. 2015).

15. *See Harper*, 509 U.S. at 97; *Griffith*, 479 U.S. at 328.

16. 514 U.S. 749 (1995).

17. *Id.* at 754. *See generally* Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. REV. 808, 832–43 (2018) (describing the Rehnquist Court's decisive rejection of selective and, implicitly, pure prospectivity).

18. *See generally* Toby J. Heytens, *The Framework(s) of Legal Change*, 97 CORNELL L. REV. 595, 599 (2012) [hereinafter Heytens, *The Framework(s)*] (observing that "courts have at their disposal multiple strategies for limiting the disruptive effects of law-changing decisions").

19. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

officers are allowed to rely in good-faith on old rules, adjudicative retroactivity principles notwithstanding.[20] The Court has employed the doctrine of forfeiture to bar criminal defendants on direct appeal from taking advantage of many new rules when they failed to object at trial, even when those new rules were unforeseeable and foreclosed by then-existing precedent.[21] The Court has laid out a blueprint for states to avoid tax refund liability, thus softening adjudicative retroactivity's blow considerably.[22]

These various doctrines, the Court has instructed, are *unrelated* to adjudicative retroactivity.[23] However, the circumstances of their creation reflect concern for the same issues of fairness, reliance, and institutional legitimacy—and the same assessment of the underlying importance of the right enjoyed—that were motivating factors during the ancien regime. This Article examines the hodgepodge of seemingly unrelated doctrines that work to alleviate the disruptive consequences of judicial change through the lens of *Linkletter* and *Huson.* It seeks to demonstrate that, just as in the pre-*Griffith* and *Harper* era, the Court has consistently given weight to the fairness of subjecting litigants to rules that unforeseeably arose after the activities that gave rise to suit. With few exceptions, the areas in which the Court has comfortably permitted retroactivity are areas in which the Court perceives the newly-recognized right to be significant enough to outweigh reliance interests. Conversely, when a new rule either serves as a prophylactic or advances aims only tangentially related to the claimant, the Court has scrutinized reliance and systemic effects of retroactive application and has not hesitated to recognize other and so-called "distinct" doctrines that block its operation.[24] This Article makes the descriptive case that balancing survived the Rehnquist Court's repudiation of the *Linkletter*/*Huson* regime mostly intact. It then makes the normative case that even if the Court's efforts lack transparency, a

20. *See* Davis v. United States, 564 U.S. 229, 243–45 (2011).

21. *See* Johnson v. United States, 520 U.S. 461, 466–70 (1997) (undertaking forfeiture analysis when the defendant had not objected at trial to the judge's determination of materiality, even though the Supreme Court had not required that juries decide the question until after the conclusion of defendant's trial). *See generally* Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 925–28 (2006) [hereinafter Heytens, *Managing Transitional Moments*] (noting the Court's use of forfeiture to minimize disruption of legal change and arguing for a return to selective prospectivity).

22. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 100 (1993).

23. *See* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 758–59 (1995) (describing these various doctrines that thwart retroactive application of new rules as "special circumstance[s]" supported by different, "well-established legal reasons"); *Davis*, 564 U.S. at 243–45 (noting that the good-faith exception to the exclusionary rule and retroactivity are "two distinct doctrines").

24. *Davis*, 564 U.S. at 243.

balancing regime is a good thing both for institutional legitimacy and for systemic fairness.

Finally, this Article examines the next frontier where the Court may be inclined to improvise a "separate"[25] doctrine to blunt the impact of legal change: structural challenges under the Appointments Clause. Appointments Clause challenges have peppered the Court's docket in the last few years.[26] Thus far, these challenges have threatened little disruption, with few more than a handful of other cases affected by the Court's opinions invalidating the appointment of challenged officers.[27] This is likely to change, as the Court's most recent decision invalidating the appointment of Securities and Exchange Commission (SEC) administrative law judges in *Lucia v. SEC*[28] is likely to have spillover effects in areas with much greater likelihood of disruption.[29] If an invalid appointment affects too many pending cases, there may be renewed calls for some mechanism to blunt the impact of separation of powers rulings, particularly where retroactive application may jeopardize thousands of cases in the pipeline.[30]

This Article finds ample room in the balancing of interests the Court has undertaken both before and after the *Linkletter*/*Huson* regime to minimize disruption occasioned by the Court's more structural, separation-of-powers jurisprudence. Because the interests of individual litigants raising Appointments Clause challenges are so modest that the

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25. *Id.*

26. *See* Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1608 (2015) ("The federal appointments process is having its proverbial day in the sun.").

27. *See infra* notes 371–372 and accompanying text.

28. 585 U.S. __, 138 S. Ct. 2044 (2018).

29. *See, e.g.*, Case Comment, *Article II – Appointments Clause – Officers of the United States*: Lucia v. SEC, 132 HARV. L. REV. 287, 291 (2018) ("The holding of Lucia has modest implications for the SEC, but it threatens to alter drastically the workings of other agencies, especially the Social Security Administration (SSA)."); Jeffrey McCoy & Oliver Dunford, *Symposium: The Future of the Appointments Clause*, SCOTUSBLOG (June 21, 2018, 3:42 PM), https://www.scotusblog.com/2018/06/symposium-the-future-of-the-appointments-clause [https://perma.cc/SR9Y-JAEE] ("There are over 1,300 ALJs dispersed over 30 federal agencies. Many of these ALJs are 'near-carbon copies' of the SEC's ALJs, who preside over adversarial hearings, take testimony, conduct trials, rule on the admissibility of evidence and have the power to enforce compliance with discovery orders."). The Fifth Circuit has also flagged the resemblance between SEC administrative law judges (ALJs) and FDIC ALJs. *See* Burgess v. Fed. Deposit Ins. Corp., 871 F.3d 297, 301–03 (5th Cir. 2017) (likening FDIC ALJs to tax court special trial judges held to be inferior officers in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), and holding that the appellant had made a "strong showing" of likely success on his Appointments Clause challenge). *But see* Landry v. Fed. Deposit Ins. Corp., 204 F.3d 1125, 1133–34 (D.C. Cir. 2000) (holding that FDIC ALJs are not inferior officers).

30. Although the Court rejected application of the de facto doctrine in *Ryder v. United States*, 515 U.S. 177 (1995), it did so primarily because the defective appointments at issue required reversal of only seven to ten other cases. *Id.* at 184–85. *See infra* notes 369–373 and accompanying text.

Court is often at pains to incentivize these claims, there is little risk that failing to accord an Appointments Clause holding retroactive effect will give rise to injustice. At the same time, the input on the other side of the scale—potentially massive disruption—may make the benefits of anything but prospective relief pale in comparison. This Article argues that the Court's precedents support carving out another exception to the generally prevailing norm of adjudicative retroactivity; although it is a central conceit that in doing so, the Court would be undertaking the same exercise it has pursued, albeit rather stealthily, for half a century and counting.

Part I looks at the *Linkletter*/*Huson* regime and the development of adjudicative retroactivity under *Griffith* and *Harper*, paying special attention to what factors inclined the Court to prospectivity in the Warren era and to what the Rehnquist Court rejected and why.[31] Part II surveys the patchwork of doctrines that currently prevent application of new rules to pending cases and examines in each case who suffers harm either from the application of the new rule or from the refusal to accord it retroactive effect.[32] This Part concludes that virtually every case makes sense given the Court's understanding of relative harms and systemic impacts—in other words, nearly every case is explainable on the basis of sub silentio consideration of the same factors that held sway in the days before *Griffith* and *Harper*. It then considers the normative implications of backdoor balancing and concludes that, while greater transparency might be optimal, and while the official rejection of *Linkletter*/*Huson* may be more aspirational than actual, consideration of fairness and systemic impacts enhances the legitimacy of the federal courts. Finally, Part III takes these insights and applies them to the context of the Appointments Clause, examining how the Court is likely to heed the next call to moderate the effects of its handiwork.[33] It goes on to demonstrate that the Court's steady impulse to upset reliance interests only where the interests are strong and the disruption relatively modest, combined with its precedents in this area to date, should give rise to a reasonable, de facto validity accommodation that reflects impulses entirely consistent with those obtained in the *Linkletter*/*Huson* era.

I. ADJUDICATIVE RETROACTIVITY AND ITS ANTECEDENTS

To understand where the Court is today, it is necessary to examine three eras of retroactivity: (A) the pre-Warren era, under which retroactive

31. See discussion *infra* Part I.

32. See discussion *infra* Part II.

33. See discussion *infra* Part III.

application of new rules was the norm; (B) the *Linkletter*/*Huson* balancing era that prevailed from 1965 to the early 1990s, during which the Court permitted prospective and selective prospective judicial rulemaking; and (C) the *Harper*/*Griffith* era that ensued, during which the Court brought itself back—at least on the books—to a no-balancing norm, according retrospective effect to its decisions in all non-final cases.

A. A Thousand Years of Presumed Retroactivity

Before the 1960s, the application of new legal rules to other pending cases was generally presumed.[34] Retroactive application had its origins in the common law and reflected a Blackstonian conception that judges did not make law; rather, they found it.[35] As such, there was no concept of "new" rules. A rule announced in any case predated its official recognition (in some metaphysical sense). The "old," now-discredited rule was a "failure at true discovery" that consequently is not now and never had been the law.[36]

The unquestioned retroactive application of new legal rules in the pre-Warren era had minimal disruptive effect for a variety of reasons. As an initial matter, key protections of the Bill of Rights did not bind the states

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34. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 94 (1993) (Scalia, J., concurring) (citing Justice Holmes for this "fundamental rule" of retroactive application); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("Judicial decisions have had retrospective operation for near a thousand years.").

35. *See* Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 62 (1965) (arguing that the courts' "prestige and power" depend upon the symbolism of the law declaration model); Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What It Might*, 95 CALIF. L. REV. 1677, 1680–81 (2007) (observing that under the declaratory theory of law that obtained until 1965, the source of new law "is never the Court").

36. Linkletter v. Walker, 381 U.S. 618, 623 (1965); *see also* Norton v. Shelby Cty., 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."). The old-chestnut American case frequently cited for this proposition was *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), which arose in the context of legislative retroactivity. It was "general[ly] true," Chief Justice Marshall observed, that the appellate court's role "is only to enquire whether a judgment when rendered was erroneous or not." *Id.* at 110. However, "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *Id.* Where "the law be constitutional," he concluded, "I know of no court which can contest its obligation." *Id.* So far, so clear. However, Chief Justice Marshall hinted in dictum at the tension that would ultimately give rise to prospective and selectively prospective application in the Warren era, noting that "in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties." *Id.*; *see also* Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 542 (1941) (noting extension of *Schooner Peggy* principle to adjudicative retroactivity).

before the 1950s,[37] so the impact of many new rules in the criminal context was restricted to a small pool of potential federal defendants.[38] Before the New Deal expansion of the Commerce Clause,[39] moreover, the number of federal crimes on the books, and hence the number of federal criminal prosecutions, was comparatively smaller than it is today.[40] Given the more modest compass of federal criminal laws during this period, a default rule of retroactivity imposed few costs on the system. Finally, in the immediate post-war period, the Supreme Court, chastened by President Franklin Delano Roosevelt's Court-packing plan, "was not doing much to arouse attention, let alone popular ire."[41] The Court took on few ambitious cases, and its modest work posed little potential for grave disruption.[42] In this climate, it is rather unremarkable that retroactivity was "the dominant principle," even when it required "the reversal of judgments which were correct when entered."[43]

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37. *See generally* Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 247–48 (1833) (holding that the limitations reflected in the Bill of Rights did not bind the states). Beginning with *Palko v. Connecticut*, the Court selectively incorporated into the Fourteenth Amendment's Due Process Clause those rights deemed fundamental to "the concept of ordered liberty." 302 U.S. 319, 325 (1937). The 1960s witnessed a particular flurry of activity on the incorporation front. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 6 (1964) (incorporating the Fifth Amendment right against self-incrimination in the protections of the Fourteenth Amendment); Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (extending the Sixth Amendment right to counsel to the states); Mapp v. Ohio, 367 U.S. 643, 655–56 (1961) (extending the exclusionary rule under the Fourth Amendment to the states).

38. *See* Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253, 253 (1982) ("Measured by the number of prosecutions affected, the selective incorporation rulings had a monumental impact; in a single decade those rulings expanded the reach of constitutional regulation of criminal procedure many times beyond that which had been attained through all of the Court's constitutional rulings over the previous 170 years.").

39. *See generally* Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (permitting Congress to reach wheat grown purely for home consumption under its interstate commerce powers).

40. *See* J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law*, 46 U. RICH. L. REV. 457, 467–69 (2012) (observing that post-New Deal expansive view of Commerce Clause gave rise to numerous new federal crimes); Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 51–52 (1998) (noting that the number of federal criminal laws surged in the second half of the twentieth century).

41. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 178 (2002).

42. Professor Friedman cites Professor John Frank for the observation that, "If an historian were to do a one-volume study of American life in the 1940s, he might very well omit any reference to the Court-Constitution, 1946–50." Friedman, *supra* note 41, at 180 (quoting John P. Frank, *Court and Constitution: The Passive Period*, 4 VAND. L. REV. 400, 418 (1951)). Professor Frank noted that this modest output was not due to the absence of hot-button issues in petitions for certiorari: "The docket turned up opportunities which, had the Court chosen, might have resulted in striking developments, and this without absurd stretchings of doctrine." Frank, *supra*, at 418.

43. Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543 (1941).

B. Balancing in the Warren Era

The era of balancing and prospectivity arrived with the Warren Court and went hand in hand with its increasingly activist work. Pure and selective prospectivity developed in both the criminal and civil contexts, and it is useful here to take these separately.

1. The Criminal Context

Particularly in the criminal context, the Warren Court dramatically reshaped the federal judicial power in a way that measurably expanded the potential systemic impact of its decisions.[44] The Court read the Bill of Rights expansively and, in a series of cases, incorporated these protections into the Fourteenth Amendment's Due Process Clause so that they equally bound the states. A trio of cases, *Mapp v. Ohio*,[45] *Massiah v. United States*,[46] and *Miranda v. Arizona*, extended the Fourth Amendment's exclusionary rule to the states,[47] imposed significant limitations on investigative law enforcement contact with suspects after the initiation of adversary proceedings,[48] and massively reshaped the rules regarding custodial interrogation.[49] The criminal procedure decisions, in particular, risked a public backlash and ultimately "so turn[ed] the public against [the Court] that a presidential election would turn partly on this issue, and bring the era of the Warren Court to a close."[50]

To a significant degree, these signature pieces of the Warren Court's criminal procedure revolution set in place a system of prophylactic overprotection.[51] The innovation of *Miranda* was not that it barred

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44. *See generally* Corinna B. Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Justice Revolution*, 152 U. PA. L. REV. 1361, 1364–65 (2004) (characterizing the Warren Court's criminal procedure cases as "doctrinally revolutionary," albeit less countermajoritarian than popularly assumed); Sarah Mayeux, *What* Gideon *Did*, 116 COLUM. L. REV. 15, 22–23 (2016) (assessing the impact of the Warren Court's innovations that "transformed criminal practice nationwide"); Israel, *supra* note 38, at 292–98 (describing the selective incorporation revolution that had, by the end of the 1960s, "changed the 'face of the law'") (citation omitted).

45. 367 U.S. 643 (1961).

46. 377 U.S. 201 (1964).

47. *Mapp*, 367 U.S. at 654–56.

48. *Massiah*, 377 U.S. at 206–07.

49. *Miranda*, 384 U.S. at 444–45.

50. Friedman, *supra* note 41, at 210.

51. *See* Michigan v. Payne, 412 U.S. 47, 53 (1973) (observing that *Miranda* laid down a prophylactic rule); Neal Devins, *Ideological Cohesion and Precedent (Or Why the Court Only Cares About Precedent when Most Justices Agree with Each Other)*, 86 N.C. L. REV. 1399, 1426–27 (2008) (noting the post-1962 Warren Court's embrace of "prophylactic rules – rules intended to bind lower courts and government officials (even if it meant sometimes prohibiting otherwise constitutional

coerced confessions; settled case law already forbade them.[52] What *Miranda* added, instead, was a set of "proper safeguards" designed to minimize the likelihood of coerced confessions.[53] The Court made clear that the Constitution does not compel any particular formulation and assured that Congress and the states were free to come up with other alternatives.[54] Similarly, *Mapp* laid out the consequence for constitutional violations—exclusion of wrongfully-seized evidence—in an express effort to deter law enforcement officers' misconduct.[55] These key decisions were less about guilt, innocence, or the factfinding process than the creation of a solid, fair system. The Warren Court sought to align incentives and procedures in an effort to minimize constitutional violations going forward.[56]

The Court thus put in place a series of wide-sweeping new rules that offered safeguards and protections irrespective of the merits of any individual defendant's case.[57] It is against this backdrop, and in an

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behavior)"); Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 934 (1999) (noting that *Miranda* "took as a given that the Court legitimately could fashion a rule that might foreclose some constitutionally permissible interrogations in order to ensure against those that were unconstitutional"); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) (contending that *Miranda* "reads more like a legislative committee report with an accompanying statute").

52. *See, e.g.*, Chambers v. Florida, 309 U.S. 227, 238–39 (1940) (holding that the state's five-day interrogation of defendants amid threats of mob violence compelled defendants' confessions in violation of the Fourteenth Amendment's Due Process Clause); Brown v. Mississippi, 297 U.S. 278, 285–86 (1936) (concluding that the confessions obtained after state officers whipped defendants with leather straps violated the Fourteenth Amendment's Due Process Clause).

53. *Miranda*, 384 U.S. at 467. These "proper safeguards" evolved into the now-familiar Miranda warnings. *See* Missouri v. Seibert, 542 U.S. 600, 609–09 (2004). Professor Monaghan contended that *Miranda* and *Mapp* set out constitutional common law, operative as gap-filling mechanisms in the absence of any contrary legislative interpretation. *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 23 (1975). The Court subsequently placed *Miranda* on somewhat firmer constitutional footing. *See* Dickerson v. United States, 530 U.S. 428, 442–43 (2000) (holding that the Constitution requires either Miranda warnings or "an adequate substitute").

54. *See Miranda*, 384 U.S. at 467.

55. Mapp v. Ohio, 367 U.S. 643, 656 (1961).

56. Professor Carol S. Steiker distinguished between rules governing officers' primary conduct ("conduct rules") and rules governing the consequences of violating these instructions ("decision rules"). *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2504 (1996). She observed that in the Rehnquist era, the Court left the Warren Court's conduct rules largely intact but developed a series of exceptions to the Court's decision rules, riddling these prophylactic schemes with exceptions. *Id.*

57. In *Oregon v. Elstad*, 470 U.S. 298, 307 (1985), the Court acknowledged that, "in the individual case, Miranda's preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm." *See also* Michigan v. Payne, 412 U.S. 47, 53 (1973) (noting that retrospective application of a prophylactic rule would confer "windfall benefits" on defendants who have not suffered a constitutional injury).

atmosphere of significant backlash,[58] that the Court pondered the systemic effects of all-in retroactivity and found room to give its decisions prospective and selectively prospective effect in proper circumstances.[59] To do so, the Court had to reject Blackstonian metaphysics and articulate a different understanding of the judicial function. In *Linkletter v. Walker*, the Court carefully traced its own evolution from a Blackstonian view to an Austinian view that judges can, and in fact do, make law.[60] The Court forthrightly acknowledged that any new rule it made represented a change from what had preceded it. The "old" rule was a fact, a guide pursuant to which actors had conducted their affairs, and in measuring the impact of any new rule, it was worthwhile to gauge the scope of possible disruption.[61]

At issue in *Linkletter* was the retroactive effect of *Mapp v. Ohio*.[62] A case decided twelve years prior to *Mapp*, *Wolf v. Colorado*,[63] had said that while the protections of the Fourth Amendment were implicit in "the concept of ordered liberty," and thus applicable to the states,[64] the exclusionary rule was not.[65] *Wolf* reasoned that states had discretion as to "[h]ow such arbitrary conduct should be checked, what remedies against it should be afforded, [and] the means by which the right should be made

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58. The New York Times Editorial Board found it "regrettable" that the Court "chose to read into the Constitution authorization for what amounts to a detailed code of station-house procedure," which it saw as an "overhasty trespass into the legislative area." Editorial, *Freely and Voluntarily*, N.Y. TIMES, June 15, 1966, at 46.

59. The *Linkletter* regime initially represented a compromise between liberal justices eager to blunt criticism of their activist decisions and more conservative justices eager to mitigate damages. *See* Beske, *supra* note 17, at 830; Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1739 (1991) ("It was much easier for the Court to lay down the *Miranda* rules, for example, knowing that the prison doors need not necessarily swing open for every inmate convicted with the aid of confessions not preceded by the requisite warnings.").

60. *See* Linkletter v. Walker, 381 U.S. 618, 625–28 (1965). Legal philosopher John Austin put forth a theory of positivism that rejected the natural law so dear to Blackstone, tethering law instead to the existence of human lawmakers. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 136–37 (London, John Murray 1832), https://archive.org/details/provincejurispr02austgoog/ [https://perma.cc/N59U-9LY3] ("Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, ... [or] is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author.").

61. *See Linkletter*, 381 U.S. at 629.

62. While *Linkletter* arose in a habeas corpus proceeding, the Court made no attempt to limit its holding by means of "habeas is different" argument.

63. 338 U.S. 25 (1949).

64. *Id.* at 27–28.

65. *Id.* at 33. Professor Frank, writing contemporaneously of *Wolf*, noted that allowing the admissibility of wrongfully-seized evidence in state court made it "unlikely that any policeman will change his practices." Frank, *supra* note 42, at 415.

effective."[66] *Mapp* retracted this remedial flexibility, overruling *Wolf* and holding that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments."[67] In requiring the exclusionary rule, the *Mapp* Court noted that "more than half" of states passing upon the issue since *Wolf* had adopted some form of it.[68] With slightly fewer than half the states having *not* adopted the exclusionary rule in the wake of *Wolf*, the retroactive application of *Mapp* to cases that were final or pending on direct raised the specter of significant disruption. Any trial in which the prosecutor had introduced evidence seized in violation of the Fourth Amendment—as had been entirely permissible in a post-*Wolf*, pre-*Mapp* universe—was now subject to possible reversal.

Facing this prospect, the *Linkletter* Court parsed the import of *Mapp* and decided to accord it prospective effect as of the date of the *Mapp* Court's decision.[69] After satisfying itself that cases did not preclude according prospective effect to the Court's decisions where "the interest of justice" might require it,[70] the Court evaluated "the merits and demerits" of retroactive application of the exclusionary rule.[71] This required examination of "the prior history of the rule in question, its purpose and effect, and whether retrospective operation [would] further or retard its operation."[72] The Court noted that the exclusionary rule's primary purpose was to serve as "a deterrent safeguard."[73] Because the rule sought to influence the choices of law enforcement, rather than to vindicate a defendant's rights, it made little sense to apply it retroactively. A deterrent only worked to influence behavior before the behavior occurred; a deterrent applied after the fact made no sense.[74] Finally, the Court noted and found very significant that the application—or not—of the exclusionary rule did not go to "the very integrity of the fact-finding

66. *Wolf*, 338 U.S. at 27–28.

67. Mapp v. Ohio, 367 U.S. 643, 657 (1961).

68. *Id.* at 651.

69. Linkletter v. Walker, 381 U.S. 618, 639–40 (1965).

70. *Id.* at 628.

71. *Id.* at 629.

72. *Id.*

73. *Id.* at 634–35; *see also id.* at 636 (noting that *Mapp* had found the exclusionary rule to be "the only effective deterrent to lawless police action").

74. *See id.* at 637 ("We cannot say that this purpose would be advanced by making the rule retrospective.").

process,"[75] a point that allowed it to distinguish cases involving coerced confessions.[76]

The *Linkletter* Court thus set up a dichotomy between prophylactic rules designed to deter misconduct and rules that enhance the reliability of the guilt-innocence determination. The Court deliberately housed the exclusionary rule in the deterrence cubbyhole.[77] From there, it was easy to disclaim a result that would confer major systemic catastrophe on the many states whose officers and prosecutors had relied on twelve-year-old *Wolf*, "an operative fact . . . [with] consequences which cannot justly be ignored."[78] Where the retroactive application of a rule would serve no arguable purpose, vindicate no right actually possessed by the defendant, and not enhance the reliability of the conviction, it simply was not worth the formidable cost. In freeing itself to circumscribe the retroactive effect of new rules, the Court was able to sidestep additional controversy that its broad decisions generated by blunting their systemic impact.[79]

Subsequent cases elaborated upon this balancing test, reinforcing the Court's dichotomy between procedures designed to enhance confidence in the guilt-innocence determination and procedures designed primarily to keep police officers in line and to bolster confidence in the system. A comparison of two cases involving the Sixth Amendment demonstrates the point. In *Stovall v. Denno*,[80] the Court considered the retroactivity of a rule that criminal defendants have a Sixth Amendment right to counsel for pre-indictment lineups.[81] The Court declined to accord the rule retroactive effect after finding, as it had in *Linkletter*, that the rule's primary purpose was to deter police misconduct.[82] The Court reasoned

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75. *Id.* at 639.

76. *See id.* at 638 (distinguishing *Fay v. Noia*, 372 U.S. 391 (1963), and *Reck v. Pate*, 367 U.S. 433 (1961), both of which dealt with coerced confessions that called into question the basic fairness of the underlying conviction).

77. Even in *Linkletter* though, which directly said the purpose of the exclusionary rule is to deter police misconduct, one finds language to the effect that the exclusionary rule is "an essential part of both the Fourth and Fourteenth Amendments, and the only effective remedy for the protection of rights under the Fourth Amendment." *Id.* at 634 (citation and internal quotation marks omitted).

78. *Id.* at 636 (citing Chicot Cty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940)).

79. *See* Heytens, *Managing Transitional Moments*, *supra* note 21, at 974 (observing that "the lure of making new decisions less than fully retroactive proved impossible to resist, both for Justices anxious to contain the harms of what they saw as badly flawed decisions and those wanting to ensure that 'long[] overdue reforms' would not be inhibited" (footnote omitted) (quoting Jenkins v. Delaware, 395 U.S. 213, 218 (1969)).

80. 388 U.S. 293 (1967).

81. *See* Gilbert v. California, 388 U.S. 263, 271–72 (1967); United States v. Wade, 388 U.S. 218, 236–38 (1967).

82. *Stovall*, 388 U.S. at 297.

that the presence or absence of counsel at the pre-indictment lineup stage had little to no impact on the reliability of the guilt-innocence determination.[83] Although the rule was a prophylactic aimed at "minimizing [the] possibility" of unfairness, the actual risk of unfairness due to misconduct at this stage was not so great as to require retroactive effect.[84] The Court contrasted this rule with that at issue in *Gideon v. Wainwright*,[85] which recognized a Sixth Amendment right to counsel at trial.[86] The *Stovall* Court held that a rule like that recognized in *Gideon* should have full retroactive effect because the whole purpose of trial was the ascertainment of truth.[87] The requirement of an attorney at trial was fundamental to the reliability of the guilt-innocence determination, whereas the requirement of an attorney at other, less crucial stages, was not.[88]

Looking at these cases as a whole, the *Linkletter* regime reflects the straightforward recognition that, where many convictions have been obtained under preexisting rules, it makes sense to insist that new rules have retroactive (and thus significantly disruptive) effect only where operation of the old rules gives reason to question the accuracy of the underlying guilty verdict. Moreover, in cases where the rule exists primarily to deter the police officer or prosecutor in the abstract and is

83. *Id.*

84. *Id.*

85. 372 U.S. 335 (1963).

86. *See id.* at 342–45.

87. *See Stovall*, 388 U.S. at 297–98.

88. The distinction between rights that secure confidence in the underlying verdict and rights that overprotect as a prophylactic to keep police officers within bounds of good behavior was a persistent theme during this period. In *Johnson v. New Jersey*, 384 U.S. 719 (1966), the Court rejected retroactive effect for *Miranda* and a related case, *Escobedo v. Illinois*, 378 U.S. 478 (1964). The Court observed that, while these rules "guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subject to overt and obvious coercion." *Johnson*, 384 U.S. at 730. The risk of getting the guilt-innocence determination wrong by permitting admission of un-Mirandized statements, in other words, was not significant, and preexisting rules barring admission of actual coerced confessions served as an adequate backstop. In a similar vein, *Desist v. United States*, 394 U.S. 244 (1969), held that the rule of *Katz v. United States*, 389 U.S. 347 (1967), permitting Fourth Amendment protection and applying the exclusionary rule against non-physical searches, would not have retroactive effect. *Desist*, 394 U.S. at 249–50. The *Desist* Court again noted that the purpose of the exclusionary rule was to deter police, calling it "but a procedural weapon that has no bearing on guilt." *Id.* at 250 (internal quotations omitted). These cases contrast with cases like *Roberts v. Russell*, 392 U.S. 293 (1968), which required retroactive application of the rule of *Bruton v. United States*, 391 U.S. 123 (1968), barring admission of a co-defendant's confession that implicated the defendant. *See Roberts*, 392 U.S. at 294–95. The *Roberts* Court characterized *Bruton* error as a "serious flaw[]" that might materially influence the jury and thus undermine confidence in the guilt-innocence determination at trial. *Id.*

unrelated to the guilt-innocence determination, the "right" possessed by the previously-convicted defendant is not robust,[89] and refusing retroactive effect to others in the pipeline arguably creates little injustice.[90]

2. The Civil Context

The Court definitively established its ability to make new rules prospective or selectively prospective in the civil context as of 1971.[91] In *Chevron Oil Co. v. Huson*, the Court considered the retroactive effect of its decision in *Rodrigue v. Aetna Casualty & Surety Co.*,[92] which held that state statutes of limitation, rather than the more lenient admiralty laches doctrine, governed disputes under the Outer Continental Shelf Lands Act.[93] Relying on laches, the plaintiff had brought his personal injury action after the one-year state statute of limitations lapsed.[94] After the lapse, the Court announced *Rodrigue*. In deciding whether the state statute should preclude the plaintiff's action, the *Huson* Court examined the extent to which the new rule represented a major break with prior precedent, the new rule's purpose and effect, and the unfairness of retroactive application to the litigants.[95] Applying this construct to the facts, the Court found that the plaintiff's reliance on the old rule was justifiable, as "the most he could do was rely on the law as it then was."[96] The Court observed, moreover, that Congress's incorporation of state statutes of limitation was designed to facilitate suits by injured employees by giving them "comprehensive and familiar remedies."[97] Because the plaintiff's reliance was reasonable and barring the plaintiff's suit

89. *See, e.g.*, United States v. Janis, 428 U.S. 433, 446 (1976) (stating that prime "if not the sole" purpose of rule is deterrence); United States v. Calandra, 414 U.S. 338, 348 (1974) (describing exclusionary rule as a deterrent, "rather than a personal constitutional right of the party aggrieved").

90. *See* Michigan v. Payne, 412 U.S. 47, 53 (1973) (noting that retroactive application of prophylactic rules could confer "windfall" benefits on defendants who had not faced constitutional deprivations); *Stovall*, 388 U.S. at 301 (acknowledging that "chance beneficiaries" were inevitable due to limitation on advisory opinions).

91. In *Cipriano v. City of Houma*, 395 U.S. 701 (1969), the Court refused to grant broad retroactive effect to its holding that municipal restrictions on who could vote in elections approving revenue bonds were unconstitutional. *See id.* at 706. The Court cited *Linkletter* for this proposition and did not engage in significant analysis, noting only that "[s]ignificant hardships" would inure to retroactive invalidation of securities sold or issued prior to the decision. *Id.*

92. 395 U.S. 352 (1969).

93. *See* Chevron Oil Co. v. Huson, 404 U.S. 97, 98–99, 105 (1971).

94. *Id.* at 99.

95. *Id.* at 106–07.

96. *Id.* at 107.

97. *Id.* at 107–08.

thwarted, rather than advanced, the underlying purpose of the statute, the Court refused to give the new rule retroactive effect.[98]

In the civil context, as in the criminal context, the Court continued to balance the costs of retroactivity against its purported benefit. The Court applied principles of prospectivity in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[99] to lessen the impact of a decision invalidating bankruptcy court adjudication of private contract claims.[100] The Court noted prior cases had not foreshadowed its opinion and concluded that retroactive application of the rule would impose great cost and little benefit.[101] Implicit in the conclusion, of course, was the idea that the injury to any individual litigant from having a non-Article III entity decide a private contract claim was not significant and rarely bore on the merits of the tribunal's decisionmaking. As such, limiting the decision's retroactive effect would not work profound injustice.[102]

In this era, too, the Court struggled with Title VII[103] cases, particularly those cases in which backpay remedies would impose significant unanticipated liabilities on state treasuries. Ultimately, the Court decided to accord them prospective rather than retrospective effect. In *City of Los Angeles Department of Water & Power v. Manhart*,[104] the Court held that a state rule requiring female employees to pay more into the state pension fund than male employees violated Title VII.[105] Turning to the question of remedy, the Court noted the equitable nature of Title VII remedies and observed that state administrators had acted in good-faith in addressing a complex problem.[106] The Court saw the overarching goal of Title VII in deterrence terms, concluding that "[t]here is no reason to believe that the threat of a backpay award" would be necessary to bring administrators into prospective compliance.[107] Five years later, the Court reached the same conclusion in *Arizona Governing Committee for Tax Deferred*

98. *Id.* at 109.

99. 458 U.S. 50 (1982) (plurality opinion).

100. *Id.* at 87–88.

101. *See id.* at 87–89.

102. The Court had done much the same thing in *Buckley v. Valeo*, 424 U.S. 1 (1976), albeit without significant discussion. *See id.* at 142–43 (according de facto validity to past acts of the Federal Election Commission despite holding that the method by which Commissioners had been appointed violated the Appointments Clause). *See infra* notes 351–56 and accompanying text.

103. 42 U.S.C. §§ 2000e–2000e-17 (2018).

104. 435 U.S. 702 (1978).

105. *Id.* at 711.

106. *Id.* at 719–20.

107. *Id.* at 720–21.

Annuity & Deferred Compensation Plans v. Norris.[108] After joining four Justices to find the underlying violation, Justice O'Connor joined the other four Justices in refusing to accord the decision retroactive effect.[109] In a concurrence justifying her vote Justice O'Connor observed *Manhart*'s holding "that a central purpose of Title VII is to prevent employers from treating individual workers on the basis of sexual or racial group characteristics," a purpose that did not *require* the Court to impose backpay and that was outweighed by the risk that compelling refunds would bankrupt state funds and impose catastrophic, unforeseeable damage on innocent third-parties.[110]

Two 1987 opinions highlight the overarching importance of the reasonableness of plaintiff's reliance on the "old" rule in the Court's retroactivity inquiry. In *Goodman v. Lukens Steel Co.*,[111] the plaintiff class relied on Pennsylvania's six-year statute of limitations for contract actions in pursuing a 1973 claim under 42 U.S.C. § 1981.[112] Four years after the plaintiffs filed suit, a court of appeals decision held that the six-year statute of limitations, rather than Pennsylvania's two-year statute of limitations for personal injury claims, applied. In *Goodman*, the court of appeals overruled this prior decision and concluded instead that the state's two-year limitations period for personal injury actions governed, a conclusion with which the Supreme Court agreed.[113] Turning to the retroactivity question, the Court found that the 1973 plaintiffs' reliance on a six-year period was unreasonable; at the time the plaintiffs filed suit, there was no clear precedent on which they could have relied, and as such, they should have known that the applicable limitations period was an unsettled question.[114] In *Saint Francis College v. Al-Khazraji*,[115] in contrast, different Pennsylvania plaintiffs filed a civil rights claim *after* the 1977 court of appeals decision had specifically selected the six-year statute of limitations.[116] Under the circumstances, the Court found

108. 463 U.S. 1073 (1983) (per curiam) (concluding that Title VII prohibits the state retirement plan from including options that pay out smaller benefits to female employees).

109. *Id.* at 1075.

110. *Id.* at 1110–12 (O'Connor, J., concurring).

111. 482 U.S. 656 (1987).

112. *Id.* at 658–59. Section 1981 provides that "[a]ll persons within the jurisdiction of the United States" have the same right to "make and enforce contracts" as "white citizens." 42 U.S.C. § 1981(a) (2018).

113. *See Goodman*, 482 U.S. at 662.

114. *Id.* at 662–64.

115. 481 U.S. 604 (1987).

116. *Id.* at 606–07.

plaintiffs' reliance reasonable; there was a case on point that eliminated all doubt as to the applicable period on which the plaintiffs based their litigation decisions.[117] As to these plaintiffs, but not the *Goodman* plaintiffs, the Court disclaimed retroactive application of the new two-year period.

3. Putting it All Together: Balancing in the Linkletter/Huson *Era*

"[R]econciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is 'among the most difficult [processes] which have engaged the attention of courts, state and federal.'"[118] Looking carefully at the Court's approach to this vexing problem in both the criminal and civil contexts during the *Linkletter*/*Huson* era, it is possible to discern a method to the Court's madness.[119] In the criminal context, the Court took a hard look at the purposes of any new rule that it announced. The Court perceived some rules to be significant and rooted in both fundamental fairness and the very essence of the guilt-innocence determination.[120] These rules served purposes that were vital to the defendant; any ancillary benefits achieved by the new rule were just that—a bonus rather than an overt objective. Other rules, in contrast, were either less weighty in that they served as prophylactics or less important to the criminal defendant in that they primarily, or even exclusively, served other, unrelated purposes, like deterrence. The Court set up these perceived individual interests, weighty or comparatively insubstantial, on one side of the scale. On the other, it placed the inevitable disruption that would arise by according new rules retroactive effect. Only where individual fairness interests outweighed disruption did the Court allow its new rules to apply to other cases in the pipeline; in other circumstances, it did not.[121]

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117. *Id.* at 608–09.

118. Lemon v. Kurtzman, 411 U.S. 192, 198 (1973) (citing Chicot Cty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940)).

119. This "method" resembles in significant respects Professors Fallon and Meltzer's proffered post-*Griffith* remedial framework. *See* Fallon & Meltzer, *supra* note 59, at 1807–11. The same insights and instincts arguably obtained in the *Linkletter* balancing era.

120. *See* Hankerson v. North Carolina, 432 U.S. 233, 243–44 (1977) (noting that the Court had "never deviated" from the rule that retroactivity is required where a new rule corrects an error that substantially threatens the truth-determining function of the trial); *cf.* Johnson v. New Jersey, 384 U.S. 719, 728–29 (1966) (noting that the *Miranda* violation did not cast doubt upon reliability of verdict); Linkletter v. Walker, 381 U.S. 618, 637–38 (1965) (calling the exclusionary rule a "procedural weapon that has no bearing on guilt").

121. *See* Michigan v. Payne, 412 U.S. 47, 53 (1973) ("It is an inherent attribute of prophylactic constitutional rules, such as those established in *Miranda* and *Pearce*, that their retrospective

On the civil side, the Court likewise examined the importance and purpose of the new rule and weighed it against the perceived disruption of requiring retroactive effect. In *Huson*, imposing a shorter statute of limitations conferred a windfall benefit on a defendant who had inflicted injury when a longer one applied. At the same time, it undermined the plaintiff-protective regime Congress had sought to create.[122] Against this insubstantial benefit to retroactive application, the preclusion of a plaintiff's lawsuit altogether by a clear, post hoc change in the rules gave rise to substantial injustice. The Court's decision to apply its separation of powers holding in *Northern Pipeline* prospectively, too, reflects the intuition that individual claimants did not suffer actual unfairness or injury from adjudication of their claim by a non-Article III tribunal.[123] The system encourages litigants to raise these claims, but any individual litigant's interest in application of the new rule to his or her case is not robust; retroactivity in this context gives rise to needless disruption while conferring either nonexistent or windfall benefits. Finally, the Court's Title VII cases laid bare its conflict between recognizing rules and blunting their impact. In *Norris*, Justice O'Connor made a point of justifying Title VII in deterrence terms.[124] Once she had distanced Title VII from a victim-compensating purpose, she was able to weigh a comparatively weaker value—marginal additional deterrent—against the possibility of bankrupted state pension funds.[125]

During the *Linkletter*/*Huson* regime, the Court's core motivating principle was fairness, and it acted to spare litigants the effects of new rules where applying them would work injustice[126] and to require that litigants obtain the benefits of new rules where refusing to apply them would work injustice.[127] This impulse reflected and gave effect to the

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application will occasion windfall benefits for some defendants who have suffered no constitutional deprivation."); *Linkletter*, 381 U.S. at 637 (noting that making *Mapp* retroactive would "tax the administration of justice to the utmost").

122. Chevron Oil Co. v. Huson, 404 U.S. 97, 107–08 (1971).

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

124. Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1110–11 (1983) (O'Connor, J., concurring).

125. *Id.*

126. *See, e.g.*, *id.* (flagging inequity of requiring state pension funds to issue refunds); *Huson*, 404 U.S. at 108–09 (noting injustice of barring suit filed in reliance on prior understanding of statute of limitations period).

127. *See, e.g.*, Roberts v. Russell, 392 U.S. 293, 294–95 (1968) (requiring application of new rule barring admission of co-defendant's confession that implicated defendant); Stovall v. Denno, 388 U.S. 293, 297–98 (1967) (suggesting that the *Gideon* rule recognizing Sixth Amendment right to counsel should have full retroactive effect).

basic insight that, in general, a system works best when people can rely on rules that govern their primary conduct.[128] The light turns green, and people may enter the intersection. Thereafter, the rules may change so that purple, not green, means go, and society can and does adjust. But the Court's *Linkletter*/*Huson* rulings reflect appreciation for the basic unfairness of imposing sanction for having ventured into the intersection under then-prevailing green rules unless doing so is of utmost importance. Perceived unfairness can erode the respect for the rule of law generally, which can be very destabilizing and can undermine the Court's institutional legitimacy.[129] In permitting upset to reliance interests only where vital concerns of fairness were at stake, the Court struck a careful balance after precisely defining the interests advanced by new rules. Where a new rule served primarily as a deterrent or prophylactic, the injustice to defendants in refusing application was small, and the overarching value of allowing the public to rely on old rules easily outweighed it.

4. Dissent During the Linkletter/Huson *Era*

Although the *Linkletter*/*Huson* era commenced with broad agreement among the justices that pure and selective prospectivity were permissible, over time that consensus fractured. In *Desist v. United States*[130] and *Mackey v. United States*,[131] Justice Harlan urged that "[r]etroactivity must be rethought."[132] For Justice Harlan, the problems with prospectivity were twofold. First, he noted that the Court had made various pronouncements about *when*, exactly, an opinion was to have effect, applying some rules to cases in which trials had not commenced, others to cases in which

128. *See* Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) (recognizing that unpredictable variance in rules governing primary conduct would give rise to "debilitating uncertainty in the planning of everyday affairs"); Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1904 (2004) (acknowledging fundamental importance of predictability in rules governing primary conduct). In the context of personal jurisdiction, the Court has underscored the importance of "allow[ing] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." Burger King v. Rudzewicz, 471 U.S. 462, 472 (1985) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

129. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 489 (1954) ("People repeatedly subjected, like Pavlov's dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown.").

130. 394 U.S. 244 (1969).

131. 401 U.S. 667 (1971).

132. *Desist*, 394 U.S. at 258 (Harlan, J., dissenting) (internal quotations omitted).

questionable evidence had not yet been introduced, and others to cases in which the underlying conduct of law enforcement, now proscribed, had not yet occurred.[133] Second, Justice Harlan faulted the *Linkletter*/*Huson* regime for according different treatment to similarly situated criminal defendants, all of whom may have raised identical claims on appeal, thus giving rise to unequal treatment and "chance beneficiaries."[134]

With respect to the first criticism, although Justice Harlan's dissent made the Court look positively unprincipled, he created a bit of a straw man. The Court's triggers for when an opinion was to have effect generally dovetailed with the moment at which the offense to the Constitution took place. Thus, if the rule mandated that the state do or refrain from doing something before trial, the Court held that its decision applied to cases in which the state's action or inaction took place after announcement of the new rule.[135] If the rule barred admission of tainted evidence or testimony at trial, the Court generally held its opinion applied to any case in which the tainted evidence had not yet been introduced or the trial had not yet commenced.[136] The common thread unifying the Court's selective prospectivity opinions was that law enforcement officers and prosecutors generally could know, under the Court's prospectivity rules, that they would not be punished or otherwise disadvantaged for heeding an existing rule.

Justice Harlan's concern about different treatment among similarly situated litigants, too, is not beyond reproach. This criticism overlooked the Court's distinction between rights that inured to the benefit of criminal defendants and those that existed primarily to serve another purpose, like deterring law enforcement misconduct and fostering systemic regularity. If the exclusionary rule did not protect the defendant so much as it deterred law enforcement misconduct, then benefitting one defendant while withholding that benefit from others did not work major injustice. The *Stovall* majority grappled with and rejected Justice Harlan's criticism head-on, suggesting that it was constrained to give the benefit to the rule to Stovall, even though it was designed purely as a deterrent, because of Article III's injunction against advisory opinions and the need to maintain

133. *Id.* at 257 (Harlan, J., dissenting).

134. *See id.* at 258–59 (Harlan, J., dissenting). The "chance beneficiaries" terminology is used in the majority and dissenting opinions in *Stovall v. Denno*, 388 U.S. 293, 301, 304 (1968).

135. *See, e.g.*, *Stovall*, 388 U.S. at 300–01 (holding that the rule governing pretrial identification should not have retroactive effect); DeStefano v. Woods, 392 U.S. 631, 635 (1968) (holding that the rule governing unanimous juries in criminal contempt trials should not have retroactive effect).

136. *See, e.g.*, Fuller v. Alaska, 393 U.S. 80, 81 (1968) (restricting the rule barring admission of evidence obtained in violation of federal communications statute to "trials in which the evidence is sought to be introduced after the date of our decision").

"the incentive of counsel to advance contentions requiring a change in the law."[137] The *Stovall* Court saw the creation of "chance beneficiaries" as an unavoidable part of the process that required it to ground legal change in an adversarial context.[138]

C. The Backlash: The Rehnquist Court and Adjudicative Retroactivity

The Warren Court could not keep backlash at bay indefinitely, and during the 1968 election, Richard Nixon "ran against the liberal Warren Court almost as much as his actual opponent."[139] Nixon "made no secret of his agenda for the Court: he wanted to appoint justices who would take a different approach, particularly to criminal defendants' rights."[140] In his first term, President Nixon appointed four Supreme Court justices, thus palpably shifting the Court rightward.[141] The Burger Court, while not outright overruling key Warren Court precedents like *Miranda* and *Mapp*, set to work limiting their application and circumscribing defendants' ability to take advantage of them.[142] Continuing this course, the Rehnquist Court revisited the issue of retroactivity, starting first in the criminal context before tackling the civil.[143] As Professors Richard H. Fallon and Daniel J. Meltzer have noted, in this post-Warren Court era, full retroactivity, and "Justice Harlan's portrait of a judicial process that is reasoned, restrained, traditional, and distinctly non-legislative," conformed neatly with the conservative ideal.[144]

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137. *Stovall*, 388 U.S. at 301. The *Stovall* majority cited Professor Paul Mishkin's Harvard Foreword, in which he recognized that our system requires adversarial presentation of issues, which depends, "not unnaturally, upon the incentive supplied by the possibility of winning a rewarding judgment." Mishkin, *supra* note 35, at 60.

138. *See Stovall*, 388 U.S. at 301.

139. THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 4 (2004).

140. David A. Strauss, *Why the Burger Court Mattered*, 116 MICH. L. REV. 1067, 1068 (2018) (reviewing MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT (2016)).

141. President Nixon appointed Chief Justice Burger and Associate Justices Blackmun, Powell, and Rehnquist.

142. *See* GRAETZ & GREENHOUSE, *supra* note 140, at 42–54 (describing the Court's use of procedural obstacles to limit the assertion of rights under the Fourth, Fifth, and Sixth Amendments).

143. For a more in-depth treatment of adjudicative retroactivity during the Rehnquist Court, see Beske, *supra* note 17, at 832–43.

144. *See* Fallon & Meltzer, *supra* note 59, at 1745.

1. The Criminal Context

Although Justice Harlan's criticisms of the *Linkletter*/*Huson* regime were not unassailable, they gained traction in the decades that followed before finally finding acceptance in the Rehnquist Court. In *Griffith v. Kentucky*,[145] the Court formally rejected selective prospectivity.[146] *Griffith* considered the retroactive effect of the rule of *Batson v. Kentucky*,[147] which invalidated the race-based use of peremptory challenges under the Equal Protection Clause. Relying heavily on criticisms of prospectivity advanced decades previously by Justice Harlan, the *Griffith* Court rejected balancing, holding that new rules would have effect in all cases pending on direct appeal.[148] The Court reasoned that, if it did not resolve cases "in light of our best understanding of governing constitutional principles" but instead laid down rules that would have largely prospective effect, it would be usurping the role of the legislature.[149] The Court additionally noted that "treating similarly situated defendants" differently by affording benefit only to the litigants in the case in which the new rule is announced violated principles of fairness.[150]

Two years later, the Court issued *Teague v. Lane*,[151] which made clear that the *Griffith* retroactivity rule would not apply in the habeas context. In *Teague*, the plurality[152] indicated that it would neither make nor apply new rules on habeas save in situations where a rule placed "certain kinds of primary . . . conduct beyond the power of the criminal law-making authority to proscribe" or set forth a "watershed rule[] of criminal procedure" without which application confidence in the verdict would be misplaced.[153] Over time, the Court characterized this first exception as an exception for "new substantive rules," which generally bore on the guilt-innocence determination and would apply retroactively, and the second

145. 479 U.S. 314 (1987).

146. *Id.* at 322–23.

147. 479 U.S. 79 (1986).

148. *Griffith*, 479 U.S. at 323.

149. *Id.* (quoting Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in the judgment in part and dissenting in part)).

150. *Id.*

151. 489 U.S. 288 (1989).

152. Justice O'Connor's plurality opinion, for four justices, was adopted by the Court shortly thereafter in *Penry v. Lynaugh*, 492 U.S. 302, 313–14 (1989).

153. *Teague*, 489 U.S. at 311. The *Teague* exceptions bear considerable resemblance to the situations in which the Warren Court found itself compelled to find rules retroactive. *See supra* notes 85–88 and accompanying text.

exception as a carve-out for procedural rules, which almost invariably would not.[154]

Together, *Griffith* and *Teague* set up a clear enough regime: All new rules have immediate, retroactive effect in cases pending on direct review, but only a small subset of new rules—those vital rules without which we would lack confidence in the guilt-innocence determination—would have retroactive effect to cases arising on habeas. The Court cited both *Griffith* and *Teague* approvingly in 2016 in *Montgomery v. Louisiana*.[155] The framework they set out remains officially in place today.

2. The Civil Context

Griffith specifically left *Huson* intact in the civil context,[156] and flexibility and balancing remained the governing approach in this sphere until a series of cases invalidating discriminatory state taxes under the dormant commerce clause prompted reexamination. In *Bacchus Imports, Ltd. v. Dias*,[157] the Court struck down a Hawaii excise tax that exempted in-state liquor producers.[158] In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*,[159] the Court held that a state that had collected taxes in violation of *Bacchus Imports* without providing a pre-deprivation remedy had to provide a meaningful post-deprivation remedy that cured the underlying violation—either a refund of taxes collected by out-of-state producers or a collection of back taxes from in-state producers.[160] Taken together, these cases spelled potential financial ruin for states that had employed these kinds of discriminatory schemes, and state litigants immediately sought to use *Huson* to blunt their retroactive effect.

The Court's decisions proceeded haltingly. In *American Trucking Ass'ns v. Smith*,[161] five justices rejected retroactive effect of a rule invalidating a complicated scheme preferring in-state truckers, but took

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154. *See* Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004). As of this writing, the Court has not recognized a "watershed rule" of procedure meriting retroactive effect post-*Teague*. It bears mention that the dichotomy between substantive rules affecting confidence in the guilt-innocence determination and procedural rules mirrors the distinction drawn in the *Linkletter* regime: under *Linkletter*, procedural rules typically had prospective effect and substantive rules typically had retroactive effect. *Teague*'s first exception preserves this framework explicitly in the habeas context.

155. 577 U.S. __, 136 S. Ct. 718, 727–28 (2016). Justice Scalia, in dissent, stated that "the *Griffith* rule is constitutionally compelled." *Id.* at 738 (Scalia, J., dissenting).

156. Griffith v. Kentucky, 479 U.S. 314, 322 n.8 (1987).

157. 468 U.S. 263 (1984).

158. *Id.* at 270–73.

159. 496 U.S. 18 (1990).

160. *Id.* at 22–23.

161. 496 U.S. 167 (1990).

very different paths to get there.[162] Justice O'Connor, writing for herself and three other justices, followed *Huson* and found the disruption of requiring a tax refund militated in favor of prospective effect.[163] She noted that the state had justifiably relied on the old rule, and "the inequity of unsettling actions taken in reliance on those precedents is apparent," particularly where a refund "could deplete the state treasury."[164] Justice Scalia, writing for himself, disclaimed retroactive application of the rule because he rejected the new rule and believed the Court should overrule it.[165] He pointedly noted, though, that Article III generally required retroactive application of new rules, thus bringing his reasoning into direct conflict with the rationale employed by Justice O'Connor and the other three justices.[166]

The next year, in *James B. Beam Distilling Co. v. Georgia*,[167] six justices voted to permit retroactive application of *Bacchus Imports*, but the majority broke into three camps, each of which had a different take on the doctrine. Justice Souter deemed selective prospectivity incompatible with *Griffith*, which he said "cannot be confined to the criminal law."[168] Justice Souter called pure prospectivity into question offhandedly, noting that even "[a]ssuming that pure prospectivity may be had at all, moreover, its scope must necessarily be limited to a small number of cases."[169] Justice White, too, rejected selective prospectivity because it treated similarly situated litigants differently.[170] However, Justice White, in contrast to Justice Souter, sought to preserve *Huson* by permitting pure prospectivity.[171] Finally, Justice Blackmun, joined by Justice Scalia, was willing to go furthest of all, seeking to shelve *Huson* altogether and adopt a rule of full retroactivity in all non-final cases.[172] Justice Scalia, writing for himself, tied this rule specifically to Article III, arguing that permitting

162. *Smith* involved the retroactive effect of *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987). The *Scheiner* Court held that preference-based taxes on highway use discriminated against interstate commerce but remanded the question of remedy to the state court. *Id.* at 297–98.

163. *Smith*, 496 U.S. at 182–83, 187.

164. *Id.* at 182.

165. *Id.* at 201–02 (Scalia, J., concurring in the judgment).

166. *Id.*

167. 501 U.S. 529 (1991).

168. *Id.* at 540 (Souter, J.).

169. *Id.* at 541.

170. *Id.* at 545 (White, J. concurring in the judgment).

171. *Id.* at 545–46.

172. *Id.* at 547 (Blackmun, J., concurring in the judgment).

selective or pure prospectivity would nullify a crucial constitutional limitation on the business of Article III courts.[173]

Rejection of prospectivity and balancing finally found five votes and a single rationale in *Harper v. Virginia Department of Taxation* in 1993. *Harper* concerned a challenge to a state tax scheme that taxed federal retiree benefits but exempted state retiree benefits.[174] A 1989 case, *Davis v. Michigan Department of the Treasury*,[175] had invalidated such a scheme on the basis of intergovernmental tax immunity.[176] Hoping to obviate the blow of paying out refunds to all federal retirees, the state argued that, under *Huson*, the *Davis* rule should have prospective effect.[177] The Court, per Justice Thomas, held that *James B. Beam* controlled and that, when the Court applies a new rule to the parties before it, the rule "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[178]

After *Harper*, then, adjudicative retroactivity has full force in both the criminal and civil contexts: officially, at least, any litigant whose case is still pending when a new rule issues may lay claim to that rule and ask a court to apply it in his or her case. The Court has frequently suggested that the Constitution requires adjudicative retroactivity, although it has always been a little murky about the basis for this suggestion. First, drawing upon Justice Harlan's dissents in the Warren Era, the Court has manifested routine discomfort with the arbitrariness of giving one litigant the benefit of a rule while denying its effect in similar cases, a concern with equal treatment that at least *sounds* like it has constitutional underpinnings.[179] Second, and perhaps more compellingly, the Court has suggested that Article III's case or controversy requirement limits judges to

173. *Id.* at 549 (Scalia, J., concurring in the judgment).

174. Harper v. Va. Bd. of Taxation, 509 U.S. 86, 90–91 (1993).

175. 489 U.S. 803 (1989).

176. *Id.* at 817.

177. *See* Brief for Respondent at 11–25, *Harper*, 509 U.S. 86 (No. 91-794), 1992 WL 541272, at *11–29.

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

179. *See, e.g.*, Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (stating that selectively applying new rules "violates the principle of treating similarly situated defendants the same"). Although it has frequently sounded the fairness and equal treatment refrain in this context, the Court is unlikely to tie adjudicative retroactivity specifically to due process or equal protection because doing so will require it to impose similar adjudicative retroactivity requirements on state courts. *See* Beske, *supra* note 17, at 845–46. In *Great Northern Railway Co. v. Sunburst Oil & Refining Co*., 287 U.S. 358, 364 (1932), the Supreme Court stated emphatically that "the federal constitution has no voice upon the subject" of state retroactivity: "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." *Id.*

decisionmaking as an incidental byproduct of taking each case as it comes and precludes abstract rulemaking.[180] Prospective rulemaking also gives rise to separation of powers concerns, trenching on the legislative function. As the *Harper* Court emphasized, "the nature of judicial review" strips the federal courts of this "quintessentially legislative prerogative."[181]

3. Entrenchment of Adjudicative Retroactivity

Once adjudicative retroactivity was in place, the Court firmly rejected attempts to walk it back. In *Reynoldsville Casket Co. v. Hyde*, the Court evaluated the retroactive effect of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*,[182] which had invalidated a statute of limitations tolling provision that benefited in-state actors over out-of-state actors.[183] Hyde, the respondent, found her suit time-barred after *Bendix* and asked the Court to consider principles of equity, fairness, and reasonable reliance in fashioning a remedy.[184] In other words, she sought to invoke remedial discretion as a mechanism for escaping application of *Bendix* and permitting an otherwise time-barred suit to proceed. The Court, per Justice Breyer, rejected use of "remedy" to avoid retroactive operation of *Bendix*.[185] States had discretion amongst remedies that might cure constitutional violations, but they could not invoke "remedial discretion" to avoid any cure whatsoever.[186] To permit such machinations, the Court found, would deprive *Harper* of all but "symbolic significance."[187]

In the course of the opinion, the Court rejected Hyde's argument that the Court had, in the interests of fairness, recognized other situations in which new rules would not have effect.[188] Hyde sought to override rigid application of *Harper* by pointing to qualified immunity under *Harlow v.*

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180. *See Harper*, 509 U.S. at 106 (Scalia, J., concurring) (calling prospective decisionmaking "incompatible with the judicial power"); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 547 (1991) (Blackmun, J., concurring in the judgment) (permitting prospectivity would "warp the role that we, as judges, play in a Government of limited powers").

181. *Harper*, 509 U.S. at 95 (quoting *Griffith*, 469 U.S. at 322) (internal quotations omitted).

182. 486 U.S. 888 (1988).

183. *Id.* at 891.

184. Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 752–53 (1995).

185. *Id.* at 755–56. Recall that remedial discretion had surfaced in *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1110–12 (1983) (O'Connor, J., concurring). *See supra* notes 108–110 and accompanying text.

186. *Reynoldsville Casket*, 514 U.S at 752–53, 759–61.

187. *Id.* at 754.

188. *Id.* at 757–59.

Fitzgerald,[189] under which officers are immune from liability for violations of new rules, and *Teague v. Lane*, which, as noted, had held that only a small subset of new rules apply in habeas corpus proceedings. The Court was not persuaded. Justice Breyer reasoned that qualified immunity permits officers to rely on old law "lest threat of liability 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[190] These "special federal policy considerations" had "nothing to do with retroactivity" and did not justify creating a different, ad hoc exception to *Harper*.[191] With respect to *Teague*, the Court said it reflects a limitation on the applicability of the doctrine of adjudicative retroactivity rather than "an exception."[192] The Court explained that, *Teague*, too, was based on concerns for finality and federalism that were unrelated to principles of adjudicative retroactivity.[193]

In *Davis v. United States*,[194] the Court again differentiated its retroactivity scheme—which remained in place—from the "distinct doctrine[]" permitting law enforcement to rely in good faith on existing precedents.[195] This "distinct doctrine" will be discussed in greater depth in the next section, but for now it bears mention that the *Davis* Court specifically upheld the Court's retroactivity regime while announcing that good-faith reliance rules bore no relationship to the retroactivity inquiry, in that way treating good-faith reliance just as the Court had treated qualified immunity in *Reynoldsville Casket*.

Subsequent to *Griffith* and *Harper*, and as amplified in *Reynoldsville Casket*, there is a firm rule of adjudicative retroactivity that imposes a duty upon courts fielding pending cases to grapple with the impact of new rules. As Hyde observed in *Reynoldsville Casket*, this firm rule is often honored in the breach, and the next Part analyzes the hodgepodge of exceptions in search of a unifying set of principles.[196]

189. 457 U.S. 800, 818 (1982).

190. *Reynoldsville Casket*, 514 U.S. at 757–58 (quoting *Harlow*, 457 U.S. at 814).

191. *Id.* at 758–59.

192. *Id.* at 759.

193. *Id.*

194. 564 U.S. 229 (2011).

195. *Id.* at 243.

196. *Reynoldsville Casket*, 514 U.S. at 757–59.

II. "INDEPENDENT" DOCTRINES THAT BLUNT THE IMPACT OF NEW RULES

Its commitment to adjudicative retroactivity notwithstanding, the Court has employed many different doctrines and devices to soften the impact of new rules and mitigate the unfairness of judicial change, including qualified immunity, good-faith reliance on existing rules, forfeiture, harmless error, and remedial discretion in tax refund cases. These rules can be loosely grouped. Qualified immunity and rules permitting officers' good-faith reliance on existing Fourth Amendment rules broadly allow law enforcement officers to operate without concern that a change in the rules will give rise to personal or professional consequence. Forfeiture and harmless error doctrines both incorporate the notion that only outcome-determinative or fundamental errors command backward-looking attention and justify overturning a criminal conviction.

This Part aims to show that these doctrines incorporate a balance between the importance of the new rule and the interests it serves against justifiable reliance on the old rule and the disruption of applying the new rule retroactively. Each doctrine therefore subsumes the values and inquiries the Court undertook during the now-repudiated *Linkletter*/*Huson* regime. Almost without exception, the Court today would reach the same results that it reached under *Linkletter* and *Huson*, for most of the same reasons.[197]

A. Qualified Immunity Permitting Officers to Rely on Settled Rules

Under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[198] individuals may bring damage actions against state and federal officers, respectively, in their personal capacities

197. This Part addresses doctrines that the Court has used self-consciously to limit the impact of a new rule. Professors Daniel B. Rice and Jack Boeglin have recently identified the practice of confining prior cases to their facts as another mechanism by which the Court can preserve reliance interests, at least in identical or near-identical factual contexts, and thereby limit new rules to prospective effect. *See* Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3240320 [https://perma.cc/CUZ2-MQ4M]. As a nice example of this point, they cite *Radovich v. National Football League*, 352 U.S. 445 (1957), in which the Court declined to extend to analogous circumstances, but kept intact, professional baseball's antitrust exemption because of the "injustices of retroactivity and surprise" that would attend a contrary result. *See* Rice & Boeglin, *supra* note at 22 (quoting *Radovich*, 352 U.S. at 452) (noting that *Radovich* "permitted a salutary change in the law, while ensuring the continued survival of an industry that had been structured in reliance on it"). Rice and Boeglin aptly deem confining and prospective rulemaking "jurisprudential cousins." *Id.* at 28–29.

198. 403 U.S. 388 (1971).

for certain constitutional violations.[199] These actions are subject to officers' assertion of the defense of qualified immunity.[200] The qualified immunity that state and federal actors presently enjoy against § 1983 and *Bivens* actions for damages emerged in *Harlow v. Fitzgerald*,[201] while the *Linkletter*/*Huson* regime was in full swing. Before *Harlow*, the Court had protected officers who acted with a subjective, good-faith belief in the lawfulness of their conduct.[202] In an effort to streamline the process and foster quicker pre-discovery resolution of immunity claims, *Harlow* rejected the subjectivity inquiry.[203] The Court instead tethered qualified immunity to an objective assessment of whether the officer had violated clearly established law,[204] holding that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[205]

Armed with qualified immunity, then, state and federal officers generally face no exposure to damage actions unless their actions violate already-established law. It follows, obviously, that prospective plaintiffs will not get the benefit of any "new" rule announced after an officer engages in the complained-of conduct. If the rule is new, then by

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199. *Id. Bivens* recognized an implied right of action against federal officers for Fourth Amendment violations. *Id.* at 397. The Court has sharply limited *Bivens* actions to a narrow set of circumstances. *See* Ziglar v. Abbasi, 582 U.S. __, 137 S. Ct. 1843, 1857 (2017) (noting that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity") (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).

200. For a detailed look at the doctrine of qualified immunity, see generally Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155, 1159–68 (2005) (tracing the evolution of the doctrine), and Michael L. Wells, *Qualified Immunity After* Ziglar v. Abbasi: *The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 387–402 (2018) (examining qualified immunity after the Court's most recent lengthy application).

201. *Harlow* itself dealt with qualified immunity in the *Bivens* context but specifically extended its holding to § 1983 actions against state actors: "This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U.S.C. § 1983. We have found previously, however, that it would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.'" Harlow v. Fitzgerald, 457 U.S. 800, 818 n.30 (1982) (quoting Butz v. Economou, 438 U.S. 478, 504 (1978)).

202. *See* Pierson v. Ray, 386 U.S. 547, 557 (1967) (recognizing "the defense of good faith and probable cause").

203. *See Harlow*, 457 U.S. at 818.

204. *Id.* at 818. The Court reasoned that reference to clearly established law did enough work: "Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct '*cannot reasonably be characterized as being in good faith*.'" *Id.* at 819 n.33 (emphasis added) (quoting Procunier v. Navarette, 434 U.S. 555, 565 (1978)).

205. *Id.* at 818.

definition, the law was not clearly established at the time the officer acted. This regime, in other words, "permits government officials to rely on the old law."[206] It is designed to "protect[] all but the plainly incompetent or those who knowingly violate the law."[207] In depriving the plaintiff of the benefit of the new rule, it leads to precisely the same result that would obtain if the Court had said that the new rule had only prospective effect.

Much obviously turns on the definition of "new," and in subsequent decisions, the Court confirmed it would define the concept to immunize broad swaths of officer conduct. In *Ashcroft v. al-Kidd*,[208] for example, the Court indicated that an officer would face liability only "if existing precedent . . . placed the statutory or constitutional question beyond debate."[209] Commentators note the Court's "quiet" expansion of qualified immunity through its definition of newness, its restriction of what opinions can give rise to "clearly established" precedent, and its unusual willingness to summarily reverse lower court opinions that withhold it.[210]

At the same time, the provenance and utility of qualified immunity are currently a matter of considerable debate. Professor William Baude has recently argued that the doctrine cannot be defended as a matter of statutory interpretation, given that the good-faith defense lacked a pedigree in 1871 before passage of § 1983.[211] He has also pointed out that the doctrine cannot be justified as a mechanism for redressing prior unwarranted expansion of § 1983 in *Monroe v. Pape*,[212] or as an extension

206. Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 757 (1995).

207. Kisela v. Hughes, 584 U.S. __, 138 S. Ct. 1148, 1152 (2018) (per curiam) (internal quotations omitted).

208. 563 U.S. 731 (2011).

209. *Id.* at 740.

210. *See*, *e.g.*, Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 63–66 (2016) (noting the Court's efforts to "covertly broaden[]" the defense).

211. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 60 (2018); Kinports, *supra* note 210, at 62 (noting that "the Court no longer engages in any pretense that its qualified immunity rulings are interpreting the congressional intent underlying § 1983"). The Court, per Justice Scalia, acknowledged in *Anderson v. Creighton*, 483 U.S. 635 (1987), that it had reformulated the doctrine to reflect principles "not at all embodied in the common law." *Id.* at 645; *see also* Ziglar v. Abbasi, 582 U.S. __, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) (arguing that qualified immunity is "no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act").

212. 365 U.S. 167 (1961). *Monroe* approved the use of § 1983 as a federal remedy against state officers who abused their official positions despite the availability of state-law remedies to plaintiff. *See id.* at 172. "All agree" that, post-*Monroe*, § 1983 litigation has expanded greatly. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 994 (7th ed. 2015).

of the rule of lenity.[213] Professor Joanna Schwartz conducted a study of over a thousand cases and concluded that, in fact, qualified immunity "is not achieving its policy objectives; the doctrine is unnecessary to protect government officials from financial liability and ill suited to shield government officials from discovery and trial in most filed cases."[214] Writing separately in *Ziglar v. Abbasi*,[215] Justice Thomas cited many of these concerns and urged that, "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence."[216]

Qualified immunity thus may not serve the ends traditionally invoked to justify it. For the purposes at hand, though, the key aspect of qualified immunity is what the Court *thinks* it is doing and what policies the Court *thinks* it is vindicating. As the Court has underscored over time, the purpose of requiring officers to pay money damages for violations of constitutional rights—whether under § 1983 or *Bivens*—is to deter misconduct.[217] In this respect, damage actions are analogous to the Fourth Amendment exclusionary rule; both endeavor to create an incentive structure that discourages bad conduct.[218] Qualified immunity represents a limit on how far the Court is willing to take that deterrent. In *Harlow*, the Court acknowledged that overdeterrence imposes systemic costs: penalizing officers too much may dampen both the officers' "ardor" necessary to enforce the law and their willingness to participate in law enforcement in the first place.[219] Where the rules are unclear or unknowable, the deterrent value of assessing money damages against law

213. *See* Baude, *supra* note 211, at 66–69. Professor Baude calls this the "[t]wo wrongs . . . can make a right" theory and traces it to Justice Scalia's dissent in *Crawford-El v. Britton*, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting). *See* Baude, *supra* note 211, at 62–63, 74–77.

214. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 11 (2017).

215. 582 U.S. __, 137 S. Ct. 1843 (2017).

216. *Id.* at 1872 (Thomas, J., concurring in part and concurring in the judgment).

217. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."); FDIC v. Meyer, 510 U.S. 471, 485 (1994) ("It must be remembered that the purpose of *Bivens* is to deter *the officer*."); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 268 (1981) (affirming that "deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983"); Carlson v. Green, 446 U.S. 14, 21 (1980) (noting that *Bivens* actions represent a more effective deterrent than suits against the government); John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 100 YALE L.J. 259, 266 (2000) ("Of course, awarding money damages for constitutional violations is intended to deter. That is the point.").

218. *See* Hudson v. Michigan, 547 U.S. 586, 596–99 (2006) (comparing effectiveness of exclusionary rule and civil actions for damages as deterrents). The *Hudson* Court characterized "extant deterrences" against misconduct, including the threat of civil action, as "substantial." *Id.* at 599.

219. Harlow v. Fitzgerald, 487 U.S. 800, 814 (1982).

enforcement officers is questionable at best.[220] Because the purpose is deterrence, moreover, plaintiffs' interests in reparations and claims of possible injustice are subsidiary.[221] The remedy sought by plaintiffs in § 1983 or *Bivens* actions—money damages—is the classic substitutionary remedy that will neither reverse nor head off the constitutional harm.[222] Through qualified immunity, the Court has struck a balance, opting to penalize officers only for breaking old rules and to permit officials "breathing room to make reasonable but mistaken judgments about open legal questions."[223]

The doctrine of qualified immunity thus limits litigants' ability to use new rules after balancing the value of a deterrent remedy against the costs it imposes. Where imposing a financial consequence after the fact punishes, but will not effectively deter, qualified immunity circumscribes the use of that mechanism to avert other negative systemic consequences. Tinkering with the application of a new rule in order to achieve the optimal balance between the express purpose of that new rule—deterrence of misconduct—and legitimate reliance on settled rules, of course, is exactly what the Court did under the *Linkletter*/*Huson* regime. *Linkletter* itself examined the benefits of retroactive enforcement of *Mapp*'s exclusionary-rule deterrent in pending appeals and final cases and concluded that doing so would not deter officers from misconduct and would impose wide-ranging, burdensome consequences.[224] With the doctrine of qualified immunity, the Court has engaged in the same calculus and achieved a similar result. Rather than reflecting "special federal policy considerations" unrelated to retroactivity,[225] qualified immunity is a horse of the same color.

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220. *See* Pierson v. Ray, 386 U.S. 547, 557 (1967) (recognizing that "a police officer is not charged with predicting the future course of constitutional law").

221. *Cf.* Linkletter v. Walker, 381 U.S. 618, 637 (1965) ("[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late."); Elkins v. United States, 364 U.S. 206, 217 (1960) (discussing the exclusionary rule and noting that deterrent remedies are "calculated to prevent, not to repair").

222. *See* John M. Greabe, *Remedial Discretion in Constitutional Adjudication*, 62 BUFF. L. REV. 881, 907 (2014) (observing that monetary damages are "[t]he paradigmatic substitutionary remedy").

223. Ziglar v. Abbasi, 582 U.S. __, 137 S. Ct. 1843, 1866 (2017) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011)).

224. *Linkletter*, 381 U.S. at 636–37; *see supra* notes 77–79 and accompanying text.

225. Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 757–58 (1995).

B. Good-Faith Exception to the Exclusionary Rule

To understand the relevance of the good-faith exception to adjudicative retroactivity, it is necessary to backtrack briefly. In *United States v. Leon*,[226] the Court held that the Fourth Amendment's exclusionary rule does not apply where an officer relied in good faith on a search warrant issued by a neutral and detached magistrate that was later found to lack probable cause.[227] The Court started with the proposition that the exclusionary rule is a "judicially created remedy" that exacts "substantial social costs."[228] It then examined the utility of the exclusionary rule as a deterrent under the circumstances and found little, if any, marginal value to exclusion of evidence where an officer had acted reasonably; the officer's conduct was definitionally beyond reproach, and it was unlikely that exclusion of evidence would have deterrent value against a neutral and detached magistrate.[229] The fundamental takeaway from *Leon* was that the value of a deterrent varies with the culpability of the underlying conduct.[230] Over time, the Court has extended this good-faith reliance exception to situations in which officers relied reasonably on subsequently invalidated statutes,[231] erroneous information in a database of arrests maintained by judicial employees,[232] and mistaken information in databases of warrants.[233]

Davis v. United States, decided in 2011, extended the *Leon* rule further to situations where an officer relied in good faith on an existing judicial precedent—an "old" rule—that was invalidated by another decision during the pendency of defendant's appeal. The Court, per Justice Alito, again found "the acknowledged absence of culpability" on the part of the police officer dispositive.[234] Examining the deterrent value of the exclusionary rule where the officer had relied on binding precedent, the Court found that "[a]bout all that exclusion would deter in this case is conscientious police work."[235] The Court concluded, "[i]t is one thing for

226. 468 U.S. 897 (1984).

227. *Id.* at 919–21.

228. *Id.* at 906–07 (citations omitted).

229. *Id.* at 916–17.

230. *See* Davis v. United States, 564 U.S. 229, 238 (2011) ("When the police exhibit "deliberate," 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." (citation omitted)).

231. Illinois v. Krull, 480 U.S. 340, 349–50 (1987).

232. Arizona v. Evans, 514 U.S. 1, 14–15 (1995).

233. Herring v. United States, 555 U.S. 135, 145–46 (2009).

234. *Davis*, 546 U.S. at 230.

235. *Id.* at 241.

the criminal 'to go free because the constable has blundered.' It is quite another to set the criminal free because the constable has scrupulously adhered to governing law."[236]

Along the way, the majority encountered, and rebuffed, the dissent's protests that the holding violated principles of adjudicative retroactivity.[237] Citing *Griffith*, a dissenting Justice Breyer argued that "[a] new 'good faith' exception and this Court's retroactivity jurisprudence are incompatible."[238] Justice Breyer noted that the Court's decision amounted to a categorical exception from settled principles of retroactivity, one that gave rise to a "*Linkletter*-like result."[239] Unmoved, the majority charged the dissent with "conflat[ing] what are two distinct doctrines."[240] Per *Griffith*, the new rule "applies retroactively to this case;"[241] however, given the operation of an independent doctrine, the defendant was not entitled to a remedy. Recognition of a new good-faith exception, the Court concluded, "neither contravenes *Griffith* nor denies retroactive effect to [the new rule]."[242]

In the Fourth Amendment context, after *Davis*, a litigant cannot claim the benefit of a new rule announced during the pendency of his appeal to exclude wrongfully seized evidence. This is so because "[e]xcluding evidence in such cases deters no police misconduct and imposes substantial social costs."[243] Instrumental in the *Davis* Court's analysis were the following observations: (1) the officer had justifiably relied on the old rule;[244] (2) the purpose of the new rule—mandating exclusion of evidence to deter misconduct—would not be served;[245] (3) the defendant had no skin in the game given that the exclusionary rule operates as "a windfall" serving other purposes;[246] and (4) any other result would "exact[] a heavy toll on both the judicial system and society at large."[247]

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236. *Id.* at 249 (quoting People v. Defore, 150 N.E. 585, 587 (N.Y. 1926)).

237. *Id.* at 243–45.

238. *Id.* at 254 (Breyer, J., dissenting).

239. *Id.* at 255.

240. *Id.* at 243 (majority opinion).

241. *Id.* at 244.

242. *Id. See generally* Beske, *supra* note 17, at 844 (arguing that after *Davis*, retroactivity gives rise to a duty to grapple with new rules that is defeasible by several "independent" doctrines).

243. *Davis*, 564 U.S. at 249.

244. *Id.* (finding the officer's reliance "objectively reasonable").

245. *Id.* at 241 (concluding that penalizing the officer in this context "cannot logically contribute to the deterrence of Fourth Amendment violations" (citation omitted)).

246. *Id.* at 248.

247. *Id.* at 237.

Disdaining *Linkletter*, the Court nonetheless engaged in *Linkletter* balancing, considered every *Linkletter* factor, and reached the identical result for identical reasons.

C. The Doctrine of Forfeiture

Another way the Court has increasingly moderated the everything-is-retroactive approach is through robust use of procedural mechanisms like forfeiture.[248] Forfeiture, which is usually inadvertent, differs from waiver, which is an "intentional relinquishment" of a known right.[249] A defendant forfeits an objection when his lawyer fails to raise it in a timely fashion before the tribunal that has jurisdiction to decide it.[250] The doctrine of forfeiture is designed to foster efficiency by incentivizing defendants and counsel to present claims at the appropriate place and time.[251] A timely lodged objection may eliminate error altogether by providing a trial judge the opportunity to correct it, or may at least inspire the trial judge to create a more developed record.[252]

A court will review an issue notwithstanding a criminal defendant's failure to object when the error is "plain."[253] Federal Rule of Criminal Procedure 52(b) codifies this exception, allowing that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[254] The Court circumscribed the plain error category further by requiring that the error must "seriously affect[] the fairness, integrity or public reputation of judicial proceedings."[255]

The Court first hinted at the use of forfeiture rules to preclude application of a new rule announced after trial in *Hankerson v. North Carolina*.[256] *Hankerson* addressed the retroactivity of *Mullaney v.*

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248. *See generally* Heytens, *Managing Transitional Moments*, *supra* note 21, at 942–53 (discussing use of forfeiture in lieu of nonretroactivity to mitigate disruptive impact of changes in the law).

249. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938); United States v. Olano, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture.").

250. *See* Yakus v. United States, 321 U.S. 414, 444 (1944).

251. *See* Heytens, *Managing Transitional Moments*, *supra* note 21, at 956 ("Forfeiture doctrines encourage adherence to claim-presentation rules by imposing a sanction when parties fail to do so.").

252. *See id.* at 958.

253. The Court indicated in *Hormel v. Helvering*, 312 U.S. 552, 557 (1941), and echoed in *Olano*, that "[a] rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with . . . the rules of fundamental justice." *Olano*, 507 U.S. at 732.

254. FED. R. CRIM. P. 52(b).

255. *Olano*, 507 U.S. at 736–37.

256. 432 U.S. 233 (1977); *id.* at 244 n.8.

Wilbur,[257] a case that struck down a state requirement that a defendant affirmatively prove provocation in order to reduce his conviction from murder to manslaughter.[258] In *Hankerson*, which arose during the *Linkletter*/*Huson* era, the Court rejected North Carolina's effort to restrict *Mullaney* to prospective effect, holding that retroactive effect was required because the *Mullaney* rule corrected an error that "substantially impairs the truth-finding function."[259] The Court then noted, offhandedly and in a footnote, that its decision would not give rise to significant disruption because the states "may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error."[260]

Several cases took up this suggestion that procedural rules might mitigate the effects of a full retroactivity regime after *Griffith*. In *Johnson v. United States*,[261] Johnson appealed her perjury conviction on the basis that the judge, not the jury, had decided the question of materiality in violation of *United States v. Gaudin*,[262] a case handed down after her trial.[263] The trial judge had acted in accord with then-binding circuit precedent, and neither Johnson nor her attorney had objected at trial. Despite the contemporaneous futility of lodging this objection, a unanimous Court,[264] per Chief Justice Rehnquist, reviewed for plain error under *Olano*.[265] Citing *Griffith*, pursuant to which *Gaudin* had retroactive effect, the Court found error.[266] It then agreed with Johnson that it would assess the obviousness of the error at the time of appeal rather than at trial.[267] Turning to whether the error affected "substantial rights," the Court expressed skepticism about Johnson's argument that the trial court's error was plain because it was "structural"—analogous to total

257. 421 U.S. 684 (1975).

258. *Id.* at 703–04.

259. *Hankerson*, 432 U.S. at 242.

260. *Id.* at 244 n.8. The Court did not speculate about the possible intersection of its conclusion that the *Mullaney* error impaired confidence in the verdict and the concept of plain error, but its subsequent decision in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), that defective reasonable doubt instructions represent "structural error," suggests that plain error analysis may no longer be suitable on *Mullaney*-type facts. *Id.* at 281–82; *see infra* note 299 and accompanying text.

261. 520 U.S. 461 (1997).

262. 515 U.S. 506 (1995).

263. *Johnson*, 520 U.S. at 464.

264. Justice Scalia did not join the portions of the opinion addressing whether the error was obvious and expressing doubt that the error was structural. *Id.* at 462.

265. *Id.* at 466–70.

266. *Id.* at 467 (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)).

267. *Id.* at 467–68.

deprivation of counsel, lack of an impartial trial judge, exclusion of jurors of the defendant's race from the grand jury pool, and the like.[268] The Court decided that it did not need to answer that question definitively given its conclusion that the error did not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings."[269] Evidence against Johnson on materiality was "overwhelming," so much so that she had not really put up a defense at trial.[270] Under the circumstances, given her obvious guilt, the Court had no trouble upholding her conviction.[271] Five years later, in *United States v. Cotton*,[272] the Court considered whether a defendant who had not objected at trial could raise a claim under *Apprendi v. New Jersey*,[273] a case rendered subsequent to his conviction.[274] A unanimous Court, again per Chief Justice Rehnquist, reviewed for plain error under *Olano* and again agreed that the error was manifest and obvious.[275] As in *Johnson*, the Court expressed doubt that the claimed error was structural but then proceeded to find resolution of that question unnecessary given "overwhelming" and "essentially uncontroverted" evidence of Cotton's guilt.[276]

Based on *Johnson* and *Cotton*, a leading treatise opined that "it is not clear what showing other than innocence would warrant relief."[277] Last term, though, the Court found a little more flexibility in the standard in *Rosales-Mireles v. United States*.[278] An error in the probation office's

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268. *Id.* at 468–69. The "structural error" concept emerged in *Arizona v. Fulminante*, 499 U.S. 279 (1991). Writing for the Court in that portion of his opinion, Chief Justice Rehnquist differentiated between "trial error[s]," as to which harmless error analysis applied, and "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.* at 309–10 (internal quotation marks omitted). He cited total deprivation of the right to counsel, a biased judge, and exclusion of black jurors from the grand jury pool as examples of such defects. *Id.*

269. *Johnson*, 520 U.S. at 469–70.

270. *Id.* at 470.

271. The Court concluded, in fact, that *reversing* her conviction would have an unsettling effect, "encourag[ing] litigants to abuse the judicial process and bestir[ring] the public to ridicule it." *Id.* (quoting R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50 (1970)).

272. 535 U.S. 625 (2002).

273. 530 U.S. 466 (2000). *Apprendi* was a groundbreaking case holding that a trial court could only rely on facts decided by a jury beyond a reasonable doubt in enhancing a defendant's sentence. *See id.* at 490. The decision imperiled then-prevailing federal and state sentencing practices all over the country. *See* Heytens, *Managing Transitional Moments*, *supra* note 21, at 935 (observing that, as of December 2005, the case had been cited over thirteen thousand times).

274. *Cotton*, 535 U.S. at 627.

275. *Id.* at 631–32.

276. *Id.* at 633.

277. 7 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.5(d) (4th ed. 2018). The authors speculated that perhaps some structural errors might qualify. *Id.* at n.159.

278. 585 U.S. __, 138 S. Ct. 1897 (2018).

report double-counted petitioner's prior state misdemeanor conviction, so the sentencing judge relied on an incorrect, higher sentencing range.[279] The Fifth Circuit interpreted *Olano*'s "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings" standard to require an error that "shock[s] the conscience of the common man, serve[s] as a powerful indictment against our system of justice or seriously call[s] into question the competence or integrity of the district judge."[280] The Court, per Justice Sotomayor, reversed, characterizing the Fifth Circuit's standard as "unduly restrictive."[281] The Court distinguished *Johnson* and *Cotton* and found that "public legitimacy of our justice system" depends on correcting errors that likely increased the amount of time an individual is incarcerated.[282]

The post-*Griffith* Court has made emphatically clear that it knows it is using the *Olano* test as a mechanism for limiting the disruptive effect of sea change in the law to a small subset of cases pending on direct review. *United States v. Booker*,[283] which rendered the U.S. Sentencing Guidelines advisory, arguably "meant that virtually every federal sentence handed down during the last twenty years had been imposed in an illegal fashion."[284] The Court acknowledged that under *Griffith*, its decision "must apply" to all cases on direct review.[285] However, the Court said that every appeal would not necessitate resentencing because "[it] expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test."[286]

Others have very persuasively demonstrated that use of plain error in the new-rule context cannot be justified by the traditional purposes of forfeiture;[287] forfeiture is an ill-fitting suit that clothes a basic instinct that

279. *Id.* at 1905.

280. United States v. Rosales-Mireles, 850 F.3d 246, 249–50 (5th Cir. 2017).

281. *Rosales-Mireles*, 138 S. Ct. at 1906.

282. *Id.* at 1908–09, 1908 n.3.

283. 543 U.S. 220 (2005).

284. Heytens, *Managing Transitional Moments*, *supra* note 21, at 940; *see also* Heytens, *The Framework(s)*, *supra* note 18, at 607.

285. *Booker*, 543 U.S. at 268.

286. *Id.* The *Booker* Court also indicated that it expected application of the harmless error doctrine would confine the number of situations in which resentencing was necessary. *Id.* Harmless error is discussed in Section II.D, *infra*.

287. *See* Heytens, *Managing Transitional Moments*, *supra* note 21, at 955–65 (arguing that forfeiture's primary purpose—"promot[ing] compliance with claim-presentation rules"—is not served by incentivizing lawyers to make objections precluded by existing law); Meir Katz, *Plainly Not "Error": Adjudicative Retroactivity on Direct Review*, 25 CARDOZO L. REV. 1979, 2025–27

not every claimant who can demonstrate that a new rule taints a prior conviction should get relief. What matters for present purposes, though, is not whether use of plain error in this context is a good or legally defensible idea. The key inquiry for purposes of this article is which defendants, under the Court's test, get the benefit of a new rule and under what circumstances. Where an objection is plainly foreclosed by existing precedent, it is safe to assume that attorneys lodging a futile objection will be few and far between. The majority of potential claimants, then, will face forfeiture analysis and review for plain error, as the Court predicted in *Booker*.

Given *Johnson*, no "new rule" claimant will falter on the requirement that an error exist or be "plain."[288] The key hang-ups are whether it "affect[s] substantial rights" and "seriously affects the fairness, integrity or public reputation of judicial proceedings." [289] As noted, the Court has repeatedly dodged the question what errors, other than errors undermining confidence in the underlying guilt-innocence determination, "affect[] substantial rights."[290] In *Johnson*, the defendant tried unsuccessfully to argue that a judge deciding the materiality question, rather than a jury, was a "structural error" that thereby affected her substantial rights.[291] The skeptical Court was not impressed with her argument, noting that it had found structural errors "only in a very limited class of cases," including deprivation of the right to counsel, a biased trial judge, exclusion of grand jurors of defendant's race from the pool, denial of right to self-representation, denial of a public trial, and flawed reasonable doubt instructions.[292] It is probably safe to assume that a litigant raising an error that can fit within this "very limited class of cases"—if in fact it is possible that a newly recognized error *can* fit within this category[293]—will be able

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(2004) (arguing that use of plain error in this context undermines the core principles underlying adjudicative retroactivity).

288. The Court buttressed this point in *Henderson v. United States*, 568 U.S. 266 (2013), where it underscored that the time for determining "plainness" of an error is the time of appellate review, not the time of trial. *Id.* at 276–77.

289. Rosales-Mireles v. United States, 585 U.S. __, 138 S. Ct. 1897, 1901 (2018) (quoting Molina-Martinez v. United States, 578 U.S. __, 136 S. Ct. 1338, 1343 (2016)).

290. *Id.* at 1903.

291. Johnson v. United States, 520 U.S. 461, 468–69 (1997).

292. *Id.*

293. The right to counsel, enshrined in *Gideon v. Wainwright*, surfaces both on this list and as the paradigmatic example of a "watershed rule[] of criminal procedure" that is an exception to *Teague v. Lane*'s no-retroactivity-on-habeas maxim. *See* Whorton v. Bockting, 549 U.S. 406, 419 (2007). The Court has not clarified the relationship between structural errors and watershed rules, but it does bear mention that since *Teague*, the Court has not recognized a single new rule that fits within the "watershed rule" category. *See Eighth Amendment–Retroactivity of New Constitutional Rules –*

to satisfy this criterion, but then she must proceed to the next step. As *Johnson* and *Cotton* reflect, thus far, the Court has been reluctant to make such a finding when evidence of guilt is "overwhelming."[294] Consideration of guilt and innocence thus seems central to the inquiry of which defendants get to claim the benefit of a new rule. Those defendants who can show an error that calls into question the factual basis for their conviction have a theoretical ability to surmount the plain error hurdle. So, too, after *Rosales-Mireles*, defendants who can establish that they face extra time in prison due to a sentencing error seem to be on solid footing.

Through use of forfeiture, the Court has taken a potential mountain of follow-on cases pending on direct review and cut down its size dramatically, thus blunting the impact of any change in the rules. Recall the dichotomy drawn in the *Linkletter* regime between prophylactic procedural rules and rules bearing materially on the guilt-innocence determination and the integrity of the system.[295] The former rules—*Miranda*-type overcorrections or mere procedural rules, violations of which do not necessarily undermine confidence in any particular conviction—had prospective effect, aside from the litigants in whose cases the rules were established.[296] The latter rules—those that recognized key rights and protections, violations of which called the underlying guilt-innocence determination into question—applied retroactively.[297]

Except where a rule is "structural," today's Court is more likely to proceed on a case-by-case, rather than categorical, basis. That said, the same results generally obtain now as during the *Linkletter* era.[298] Aside from the presumptively rare defendant whose counsel lodges a futile

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Juvenile Sentencing – Montgomery v. Louisiana, 130 HARV. L. REV. 377, 383–84 (2016) ("In twenty-seven years, the Court has never declared a new procedural rule 'watershed.'"). It is quite possible that the Court may keep dodging the question whether new structural errors "affect[] substantial rights" by refusing to recognize new structural error. FED. R. CRIM. P. 52(b). *But see* United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006) (finding in harmless error case that deprivation of counsel of one's choice is structural error).

294. United States v. Cotton, 535 U.S. 625, 633 (2002); *Johnson*, 520 U.S. at 470.

295. *See supra* notes 77–79 and accompanying text.

296. *See supra* notes 80–88 and accompanying text.

297. *See supra* notes 80–88 and accompanying text.

298. In *Hankerson*, the Court held that *Mullaney* had to have retroactive effect because it invalidated a burden-shifting mechanism that "substantially" impaired the truth-finding function at trial. Hankerson v. North Carolina, 432 U.S. 233, 243–44 (1977). Although the Court's suggestion that forfeiture might have a role to play in mitigating the number of affected cases is certainly in tension with that finding, *see id.* at 244 n.8, the Court's subsequent conclusion in *Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993), that defective reasonable doubt instructions are "structural error" and harmful per se probably retracts the idea that forfeiture has a role to play in the *Mullaney* case. *See* Johnson v. United States, 520 U.S. 461, 468–69 (1997) (citing *Sullivan* as a structural error case in the course of its plain error analysis).

objection precluded by the existing, old rule, defendants do not get the benefit of a new rule if its violation does not undermine confidence in their convictions or sentences. In contrast, those who can demonstrate that the error was outcome-determinative, and possibly those raising structural errors that go to the very legitimacy of our criminal justice system, conceivably may obtain the benefit of a new rule. Through use of forfeiture, as mitigated by plain error, the post-*Griffith* Court has struck a similar balance as obtained in the *Linkletter* regime, and we end not far from where we started.

D. Harmless Error Analysis

The Court in *United States v. Booker*[299] cited harmless error analysis as an additional mechanism that might cut down on the systemic impact of according its decision retroactive effect.[300] While forfeiture and plain error analysis apply where the defendant fails to object at trial, harmless error analysis applies where the defendant makes a timely and appropriate objection. In the new rule context, this mechanism picks up, and delimits, the already-presumptively-small category of cases where an attorney objected in the face of an old rule that precluded that objection.

In *Chapman v. California*,[301] the Court held that constitutional errors do not require automatic reversal where a reviewing court can conclude they were "harmless beyond a reasonable doubt."[302] The Court allowed, however, that there might be some rights so fundamental to systemic integrity that their violation could not be harmless.[303] These include the "structural errors" identified in *Johnson v. United States*[304]—deprivation of the right to counsel, a biased trial judge, exclusion of grand jurors of defendant's race from the pool, denial of right to self-representation,

299. 543 U.S. 220 (2005).

300. *Id.* at 268.

301. 386 U.S. 18 (1967). Professor Greabe describes *Chapman* and its progeny as "taming influences in the criminal procedure field" that reduced the impact of the Warren Court's expansion of constitutional protections. John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 HOUS. L. REV. 59, 71 (2016).

302. *Chapman*, 386 U.S. at 24.

303. *Id.* at 23 n.8; *see also* Neder v. United States, 527 U.S. 1, 7 (1999) (stating that these structural errors "affect substantial rights").

304. Johnson v. United States, 520 U.S. 461, 468–69 (1997); *see also* Arizona v. Fulminante, 499 U.S. 279, 309–10 (1991) (holding that coerced confessions are not structural errors and are subject to harmless error analysis).

denial of a public trial, and flawed reasonable doubt instructions.[305] In *United States v. Gonzalez-Lopez*,[306] the Court added "erroneous deprivation of the right to counsel of choice" to this list.[307]

Harmless error analysis existed and was used to moderate the effects of dramatic legal change during the *Linkletter* regime, so its use today to circumscribe the number of litigants who can obtain the benefit of a new rule is not novel. As in the forfeiture context, the key point here is that the litigants who can surmount this hurdle are either those who raise structural errors going to the very basic and vital underpinnings of the judicial system or those in whose cases the error may have made a difference in the guilt-innocence or sentencing determination. Harmless error analysis compels application of a new rule only where the individual or systemic stakes are high. In that respect, the harmless error doctrine, too, reinforces the balance struck by the Court during the *Linkletter* regime.

E. Remedial Discretion in Refund Cases

As previously noted, proponents of *Huson* balancing generally preferred to spare state treasuries the catastrophic effects of mandatory refunds and invoked prospectivity in order to get there.[308] Thus, in *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*,[309] Justice O'Connor, the deciding vote, invoked *Huson* to avert a backward-looking refund order that would deplete state pension funds on which "[m]any working men and women [had] based their retirement decisions."[310] She sounded a similar refrain in her four-justice plurality in *American Trucking Ass'ns, Inc. v. Smith*.[311] Chief among the concerns of *Huson* proponents was the threat of catastrophic refund orders that might unfairly penalize states that had relied on old rules, thereby distorting state policymaking, and this risk repeatedly inclined them to prospectivity.

The Court's decisions in *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Department of Taxation* rejected the *Huson* balancing

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305. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 148–49, 149 n.4 (2006) (observing that structural errors "defy analysis by harmless error standards" because of "the difficulty of assessing the effect of the error" (citation omitted)).

306. 548 U.S. 140 (2006).

307. *Id.* at 150.

308. *See supra* notes 108–110 and accompanying text.

309. 463 U.S. 1073 (1983) (per curiam).

310. *Id.* at 1110 (O'Connor, J., concurring).

311. 496 U.S. 167, 182 (1990) (plurality opinion) (noting that burden of imposing unexpected tax refund liability on states would pose substantial inequity and threaten to deplete state treasuries).

framework, but it is worth pausing for a moment to examine the remedial flexibility the Court painstakingly laid out, which had the effect, going forward, of permitting states to avoid the systemic burden of unforeseen refunds. The *Harper* Court soundly rejected the idea that the new rule would have prospective effect but noted that "federal law does not necessarily entitle [petitioners] to a refund."[312] States would have future flexibility to insulate themselves from refund liability by putting into place a pre-deprivation challenge scheme, pursuant to which taxpayers could challenge the tax *before* paying it.[313] This pre-deprivation scheme, the Court noted, was a sufficient safeguard to comport with due process.[314] If a state did not have such a scheme in place, it could do one of two things to cure a discriminatory tax scheme: either refund the wrongfully-collected taxes *or* "issue some other order that 'create[s] in hindsight a nondiscriminatory scheme,"[315] presumably by assessing in-state actors not previously taxed. In its rejection of prospectivity, the Court thus set out a blueprint for states to avoid the burdensome possibility of refunds. The remedial discretion invoked by the Court served to mitigate the disruptive systemic effects of the Court's tax decisions.

F. Tying it All Together (Mostly): Balancing Through the Backdoor

The outcome of balancing in the *Linkletter*/*Huson* era was largely dependent on the Court's characterization of the underlying interests.[316] In the criminal context, where the right under consideration significantly enhanced the reliability of the guilt-innocence determination in a particular case, the Court generally made its new rules retroactive. Where, in contrast, the rule served purposes other than protecting the defendant, like deterrence, the Court generally did not.[317] Intuitively, the Court recognized that there is a benefit to allowing law enforcement to rely on old rules and doctrinal repose and that this benefit should only be overcome when necessary to avert significant injustice.[318] In the civil context, the same instincts applied. The Court generally made new rules prospective where individual actors had reasonably relied to their

312. Harper v. Va. Dep't of Taxation, 509 U.S. 83, 100 (1993).

313. *Id.* at 101 (citing McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 38 n.21).

314. *Id.*

315. *Id.* (citing *McKesson*, 496 U.S. at 40).

316. *See supra* notes 77–88 and accompanying text.

317. *See supra* notes 118–121 and accompanying text.

318. *See supra* notes 126–129 and accompanying text.

detriment, particularly when it found that the systemic impact of retroactive effect would be significantly disruptive.[319]

Though courts and academics frequently depict the post-*Griffith* and *Harper* landscape in terms suggesting it represents a profound change, in reality it does not look markedly different. In the criminal context, law enforcement can generally rely on settled rules through use of good-faith reliance. The Court has justified this by examining the purpose of the underlying right and found the additional deterrent value of judging past conduct by new rule metrics does not warrant the significant disruption of freeing guilty defendants. [320] Where the right is characterized in individual terms, rather than in terms of deterrence, the Court has used forfeiture and harmless error to ensure that only significant claims—those that call the guilt-innocence determination into question or are otherwise fundamental to the structure of our system—merit retroactive effect.[321] In the criminal context, in other words, the same results appear to obtain after *Griffith* as obtained in the *Linkletter* universe. Though it has deemed these methods "independent," moreover, the Court has adverted to the same modes of analysis in getting there, assessing the purpose of the underlying rights and balancing them against the burdens that might be imposed by the new rule.

In the civil context, the same results generally, though not invariably, hold. Like good-faith reliance in the criminal context, qualified immunity comes into play to afford officials leeway to rely on clearly settled rules. The Court has seen the underlying damage actions as mechanisms for deterring official misconduct, and qualified immunity represents a limitation: where the marginal benefits of deterrence appear insubstantial, it makes sense to avoid ancillary disruptive effects. [322] In the refund context, the Court has insisted upon retroactivity post-*Harper* but has provided states a blueprint for how to avoid the disruptive effect of *ex post* tax liability by setting up pre-deprivation process. Although the mechanism is slightly different, the Court has set up a system whereby the same result can readily obtain, for the same reasons of averting disruption.[323]

The outlier in this construct, and admitted fly in the ointment, is *Reynoldsville Casket Co. v. Hyde*, pursuant to which Hyde would have

319. *See supra* notes 122–125 and accompanying text.

320. *See supra* notes 242–246 and accompanying text.

321. *See supra* notes 299, 302–308 and accompanying text.

322. *See supra* notes 216–224 and accompanying text.

323. *See supra* note 315 and accompanying text.

prevailed in the *Huson* era given nearly identical statute-of-limitations facts. The Ohio Supreme Court had recognized the rule of *Harper* but found room to "tailor [its] own remedies" in determining "the manner in which the [U.S.] Supreme Court opinion is to be retroactively applied."[324] The underlying right of action favored the seriously injured plaintiff, who had reasonably relied to her detriment on a longer statute of limitations.[325] Holding the defendant to the statute of limitations that applied at the time of the injury-causing conduct, moreover, could not have been perceived as manifestly unfair. Indeed, the Reynoldsville Casket Company received a windfall through retroactive application of the statute-of-limitations-shortening rule. Straightforward application of balancing—weighing the interests at stake against the burden of prospective or retroactive application—thus would have dictated a verdict for Hyde.

The Court, however, would not go there and instead brandished a defiant *Harper* flag.[326] Perhaps, having finally found five votes for the rejection of selective prospectivity in *Harper* two years before, the Court was wary that there would be no cabining principle to contain full-scale resurrection of *Huson* balancing. Although Hyde alluded to traditional equitable tolling, her counsel did not propose any containment, any "special reason," that *Harper* should not apply that would not also mandate prospective application in the next case.[327] In fact, her counsel's argument was marked by the following interchange:

> TIMOTHY B. DYK: Well, I think that Ohio is entitled to make the choice, as it does routinely and across the board. It is not discriminating against the Federal right. It is simply deciding a remedial issue.
>
> JUSTICE GINSBURG: But discriminating or not, it is in effect ruling that the Ohio constitution can make the *Bendix* decision prospective only in Ohio. That's the effect of it, is it not?
>
> TIMOTHY B. DYK: That is the effect of it, but not as a choice-of-law matter, as a remedial matter of saying that where people are surprised—

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324. Hyde v. Reynoldsville Casket Co., 626 N.E.2d 75, 78 (Ohio 1994).

325. *Id.* at 77.

326. *See* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 754 (1995) ("If Harper has anything more than symbolic significance, how could virtually identical reliance, without more, prove sufficient to permit a virtually identical denial simply because it is characterized as a denial based on 'remedy' rather than 'non-retroactivity'?").

327. *Id.* at 759.

> JUSTICE GINSBURG: Whatever label you put on it, the result is a prospective application of a decision that this Court declared to be fully retroactive.[328]

There are reasons why the Court may have balked at finding a way for Hyde to pursue her lawsuit. In all likelihood, it may have been "too soon" to bring such an overt and unlimited *Harper* workaround to the table. *Reynoldsville Casket* admittedly represents one area in which the results of *Huson* balancing do not currently obtain.

Reynoldsville Casket notwithstanding, the Court generally has—in the *Linkletter*/*Huson* era and thereafter—attempted to soften the impact of its ground-breaking decisions, avoiding disruption except where necessary in the interests of justice. During the *Linkletter*/*Huson* era, the Court made its calculus overt. Subsequently, the Court has been intent on deploying "distinct doctrines"[329] that it claims have "nothing to do with retroactivity"[330] to achieve much the same outcomes by considering—and balancing—many of the same criteria.

Setting aside the underappreciated benefits of acknowledging what it is doing more forthrightly, the Court's impulses, both before and after its official embrace of adjudicative retroactivity, are salutary and important for the Court as an institution. Simply put, "[t]he Court's power . . . lies in its legitimacy."[331] This legitimacy depends to a significant degree on public acceptance.[332] Legal rules attach consequences to primary conduct, and we structure basic life decisions around them. Legal rules may change, but "[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."[333] Predictability in how the rules apply, and some protection from adverse post hoc consequences

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328. Oral Argument at 45:00, *Reynoldsville Casket Co.*, 514 U.S. 749 (No. 94-3), https://www.oyez.org/cases/1994/94-3 (last visited May 1, 2019).

329. Davis v. United States, 564 U.S. 229, 243 (2011).

330. *Reynoldsville Casket*, 514 U.S. at 758–59.

331. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 866 (1992).

332. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1840–41 (2005); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 745 (1982) ("Rules are not rules unless they are authoritative, and that authority can only be conferred by a community.").

333. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (Scalia, J., concurring). Justice Scalia was addressing the retroactive effect of legislation, rather than judicial opinions. However, inasmuch as federal judges are not elected, the unfairness of judges retroactively changing the rules governing primary conduct gives rise to even greater institutional legitimacy concerns. *See* Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 722 (1994) (observing that the Court is uniquely vulnerable given that it is not elected and lacks power to coerce compliance).

for reasonable reliance on old rules, is a systemic necessity that gives effect to "enduring notions of what is fair."[334] The Court has generally given effect to this intuition by shielding people from adverse consequences of obeying existing rules.

III. ON THE HORIZON: RETROACTIVITY IN THE APPOINTMENTS CLAUSE CONTEXT

The Court's struggle to reconcile its dueling impulses to soften the blow of disruptive legal change and adhere to principles of adjudicative retroactivity is likely to erupt again soon in a new context. It is interesting to consider how the Court might look at the problem and whether it presents fertile ground for another "distinct doctrine" that effectively precludes retroactive effect.

After decades of doctrinal repose, the Court has decided three significant Appointments Clause[335] cases in the past eight years.[336] Most recently, in *Lucia v. SEC*, the Court held that the SEC's administrative law judges are "Officers of the United States" subject to the Appointments Clause.[337] Based on this conclusion, the Court ordered that the petitioner receive a new hearing before a different, properly-appointed ALJ.[338] As commentators have noted, it will be difficult to cabin this decision to SEC ALJs, and the Court's rationale is likely to reach the more than 1600 federal ALJs who work in the Social Security Administration[339] and who, according to agency statistics, handle upwards of 650,000 hearings a

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334. *Kaiser Aluminum*, 494 U.S. at 855–56 (Scalia, J., concurring). *See generally* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1106 (1997) (arguing that commitment to stability of old rules fosters respect for the legal system).

335. U.S. CONST. art. II, § 2, cl. 2.

336. *See* Lucia v. SEC, 585 U.S. __, 138 S. Ct. 2044 (2018); N.L.R.B. v. Noel Canning, 573 U.S. __, 134 S. Ct. 2550 (2014); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2015). *See generally* Metzger, *supra* note 26, at 1608–09 (noting significant recent work in this area after "two decades [when] these issues had lain largely judicially dormant").

337. *Lucia*, 138 S. Ct. at 2053.

338. *Id.* at 2055.

339. *See* Alan Morrison, *Symposium:* Lucia v. SEC – *More Questions than Answers*, SCOTUSBLOG (June 22, 2018, 8:57 AM), http://www.scotusblog.com/2018/06/symposium-lucia-v-sec-more-questions-than-answers/ [https://perma.cc/H2U3-8BHV] ("Most of the federal ALJs sit on Social Security Administration cases (over 1,650 out of 1,926), for which it is much less likely that appointments clause objections were preserved, but given the number of cases they have, even a relative few will be bad news for the agency."); Ronald Mann, *Argument Analysis: Justices Worry About Politicizing Administrative Law Judges*, SCOTUSBLOG (Apr. 23, 2018, 5:33 PM), https://www.scotusblog.com/2018/04/argument-analysis-justices-worry-about-politicizing-administrative-law-judges/ [https://perma.cc/3LU9-XTRZ] (noting that several justices seemed skeptical about confining the question to the 150 SEC ALJs).

year.[340] With each new case likely to precipitate many more,[341] the Court will be challenged to articulate a mechanism for confining the systemic disruptions of its handiwork. *Lucia* did not have to deal with the after-effects of its result, but the issue will surface, and it is worth examining how it may play out in light of the Court's impulses in other contexts.

Litigants raising Appointments Clause challenges differ in significant respects from other litigants. The Court has long permitted regulated parties to raise separation of powers challenges to the composition of federal administrative agencies.[342] However, these structural challenges rest uneasily with conventional Article III standing, which traditionally rejects assertion of generalized grievances and requires a demonstration of concrete, particularized injury.[343] Notwithstanding familiar standing precepts, federal courts have consistently afforded litigants subject to agency action standing to assert separation of powers claims even when they cannot show a connection between their claim and any adverse action against them.[344] In other words, courts have not required litigants to demonstrate that a properly-constituted tribunal would have rendered a different decision.[345]

In a sense, courts have conferred standing by necessity in this context in recognition that other mechanisms for vindication of structural harm

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340. *Information About SSA's Hearings and Appeals Operations*, SOC. SECURITY ADMIN., https://www.ssa.gov/appeals/about_us.html [https://perma.cc/Y7MF-2MWY].

341. Jennifer Mascott, *Symposium: The Appointments Clause—a Modest Take*, SCOTUSBLOG (June 22, 2018, 3:35 PM), http://www.scotusblog.com/2018/06/symposium-the-appointments-clause-a-modest-take/ [https://perma.cc/6BJC-DV2A] (noting that "it seems likely that appointments clause scholars and practitioners will be productively employed for at least a few more years").

342. *See generally* Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481, 490–96 (2014) (noting expanding ranks of plaintiffs raising structural challenges).

343. "Individuals have 'no standing to complain simply that their Government is violating the law.'" Bond v. United States, 564 U.S. 211, 225 (2011) (citing Allen v. Wright, 468 U.S. 737, 755 (1984)). Instead, they must show "actual or imminent harm that is concrete and particular, fairly traceable to the conduct complained of, and likely to be redressed by a favorable decision." *Id.* (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).

344. *See* Glidden v. Zdanok, 370 U.S. 530, 533 (1962) ("The claim advanced by the petitioners, that they were denied the protection of [Article III] judges . . . has nothing to do with the manner in which either of these judges conducted himself in these proceedings."); FEC v. NRA Political Victory Fund, 6 F.3d 821, 824 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994) ("A litigant 'is not required to show that he has received less favorable treatment than he would have if the agency were lawfully constituted and otherwise authorized to discharge its functions.'"). *See generally* Barnett, *supra* note 342, at 495 (observing that courts ignore questions of harm in this context).

345. *See* Andrade v. Lauer, 729 F.2d 1475, 1495–96 (D.C. Cir. 1984) (noting that litigants raising structural challenges can "rarely or never" show actual harm).

have considerable flaws. The ancient writ of quo warranto,[346] which enables a private citizen to vindicate the public interest by directly challenging an officer's authority, is accompanied by a gauntlet of procedures that has made it "an extremely difficult and uncertain remedy" for structural claims.[347] Perhaps recognizing the inutility of other vehicles for vindicating structural norms, the Court has not only permitted symbolic (as opposed to concrete) harm but has been quite overt about fashioning remedies to provide appropriate incentive to litigants.[348] In *Ryder v. United States*,[349] the Court noted that it had to provide a remedy in the event of violation of the Appointments Clause because "[a]ny other rule would create a disincentive" to bring such challenges.[350] Most recently, in *Lucia*, the Court ordered that Raymond Lucia have a new hearing before a different ALJ in order to "create '[]incentive[s] to raise Appointments Clause challenges.'"[351] That the Court feels the need to incentivize litigants to raise structural challenges highlights that these litigants play a somewhat different role than conventional litigants, possibly serving public interests as much or more than their own.[352] In *Bond v. United States*,[353] the Court forthrightly acknowledged some dependence on these individual litigants, noting that, "[i]n the precedents of this Court, the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances."[354]

During the period before *Griffith* and *Harper* mandated full retroactivity, the Court was able to balance its interest in this incentive against the reality that invalidating every action of an improperly constituted or appointed agency actor could occasion major disruption. In practice, therefore, the Court would give relief to the litigants before it

346. Quo warranto is a common-law writ that inquires into the authority of a public office-holder. *See Quo Warranto*, BLACK'S LAW DICTIONARY (10th ed. 2014).

347. *Andrade*, 729 F.2d at 1498. The *Andrade* court noted many issues with quo warranto that would "effectively bar . . . access to court." *Id.*

348. Barnett, *supra* note 342, at 509–12 (noting that courts must hold out remedies so that rational litigants have incentive to advance structural claims).

349. 515 U.S. 177 (1995).

350. *Id.* at 183.

351. Lucia v. SEC, 585 U.S. __, 138 S. Ct. 2044, 2055 n.5 (2018) (quoting *Ryder*, 515 U.S. at 183).

352. *See generally* William B. Rubenstein, *On What a Private Attorney General Is—And Why it Matters*, 57 VAND. L. REV. 2129, 2144–45 (2004) (describing "substitute" private attorneys general, like *qui tam* relators, who are given private incentives to advance public policies).

353. 564 U.S. 211 (2011).

354. *Id.* at 222.

while according other actions of the agency de facto validity.[355] In *Northern Pipeline Construction Co. v. Marathon Pipe Line*, for example, a plurality of the Court held that bankruptcy courts lacked authority to adjudicate certain private claims but made its opinion selectively prospective to avoid "substantial injustice and hardship.[356] In *Buckley v. Valeo*,[357] the Court determined that Commissioners of the Federal Election Commission were "Officers of the United States" whose appointments had violated the U.S. Constitution[358] but concluded that this defect should not affect the validity of the Commission's actions to date and accorded those actions "de facto validity."[359]

The Court's first reckoning with the post-*Harper* import of adjudicative retroactivity principles in this context suggested it was inclined to take a harder line. In *Ryder v. United States*, a member of the Coast Guard convicted by court martial challenged the appointment of two civilian judges on the Court of Military Review.[360] Agreeing with his substantive challenge and finding an Appointments Clause violation, the Court of Military Appeals nonetheless affirmed his conviction—thus providing him no remedy—citing *Buckley v. Valeo* and the "de facto officer doctrine" to insulate the officers' appointment from challenge altogether.[361] In seeking to defend this decision before the Supreme Court, the government again cited the de facto officer doctrine and added *Huson*-style "pure prospectivity" for good measure.[362] The Supreme Court rejected each and reversed.[363] The Court correctly observed that, because the litigants in *Buckley* and *Northern Pipeline* had received the relief that they sought, neither case had in fact relied on the "de facto officer

355. De facto validity as used here is distinct from the "de facto officer doctrine," which "limits an individual's 'ability to challenge governmental action on the ground that the officers taking that action are improperly in office.'" Kathryn A. Clokey, Note, *The De Facto Officer Doctrine: The Case for Continued Application*, 85 COLUM. L. REV. 1121, 1122 (1985) (quoting Andrade v. Lauer, 729 F.2d 1475, 1494 (D.C. Cir. 1984)). The de facto officer doctrine would preclude Appointments Clause challenges altogether; in *Northern Pipeline* and *Buckley*, the Court granted relief to the litigants, thus permitting the claim, but invoked "de facto validity" to make its decisions otherwise prospective.

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

357. 424 U.S. 1 (1976).

358. *Id.* at 140–41.

359. *Id.* at 142 (emphasis omitted).

360. 515 U.S. 177, 179 (1995).

361. *Id.* at 180 (emphasis omitted). For the important distinction between "de facto validity" and the "de facto officer doctrine," see *supra* note 355.

362. *Id.* at 183–85.

363. *Id.* at 188.

doctrine."[364] Instead, *Northern Pipeline* and *Buckley* had granted relief and invoked a different doctrine, "de facto validity," as a mechanism for circumscribing the new rules' retroactive effect.[365] Regarding prospective effect, the Court reasoned that, whatever the continuing validity of *Huson* after *Harper* and *Reynoldsville Casket Co.*, "there is not the sort of grave disruption or inequity involved in awarding retrospective relief to this petitioner that would bring that doctrine into play."[366] The Court specifically noted that, in addition to Ryder's case, there were only seven to ten other cases pending on direct review.[367] In *Ryder*, therefore, the Court found itself able to grant relief on an Appointments Clause challenge without unsettling reliance interests or opening any cans of worms.

The *Lucia* Court did not have to grapple with adjudicative retroactivity outright. Lucia argued that the ALJ who charged him with violating the Investment Advisers Act[368] was an "Officer" whose appointment by SEC staff members, rather than the full commission, violated the Appointments Clause.[369] The Court agreed. In a brief paragraph concluding the opinion, the Court cited *Ryder* for the proposition that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief."[370] Awarding Lucia a new hearing, the Court went one step further, requiring that his new hearing be before a different ALJ.[371] The Court did so despite Justice Breyer's point, in dissent, that nothing in the constitutional defect compromised the prior ALJ's substantive merits decision.[372] The Court reasoned that it would not always have the flexibility to take this additional step—for example, where there is no alternative decisionmaker to whom a litigant's case could be assigned—but it would do so here in order to preserve the incentive to raise such structural challenges.[373]

Lucia repeated the *Ryder* principle that any litigants with pending cases who had raised a similar challenge would be able to avail themselves of

364. *Id.* at 183–84, 184 n.3.

365. *See id.*

366. *Id.* at 185 (citations omitted).

367. *Id.*

368. 15 U.S.C. §§ 80b-1 to 80b-21 (2018).

369. Lucia v. SEC, 585 U.S. __, 138 S. Ct. 2044, 2050 (2018).

370. *Id.* at 2055 (internal quotation marks and citation omitted).

371. *Id.*

372. *Id.* at 2055 n.5 (citing *id.* at 2064 (Breyer, J., concurring in judgment in part and dissenting in part)).

373. *Id.*

similar relief.[374] Thus, the Court overtly anticipated application of its standard in other cases. Raymond Lucia's hearing lasted nine days.[375] Lucia's counsel identified thirteen other pending cases in which litigants had preserved objections that will likewise require rehearing,[376] a number sufficiently analogous to the number in *Ryder* to suggest, as Lucia's counsel put it, that "the sky [would] not fall" should the Court order uniform relief.[377] However, the SEC, with its 150 affected ALJs, is not the Social Security Administration (SSA), with its more than 1,600. Although not all of the 650,000 annual litigants before SSA ALJs will have raised a *Lucia* objection, even if some subset have, there will be considerable dislocation.[378] In other words, while *Lucia* may have been sufficiently analogous to *Ryder* in that the hard question of containing the impact of the Court's opinion did not arise, the logic of *Lucia* may compel the Court to confront very hard questions of far greater disruption in the immediate future.

For present purposes, it suffices to note a couple of points. First, *Ryder*, in its situation-specific mention of the number of affected cases, certainly left room for the proposition that cases posing greater dislocation and negative effects may require a different resolution.[379] Given only seven to ten affected cases, the *Ryder* Court had reason to discount the burden of according the decision retroactive effect. *Lucia*, too, with its thirteen affected cases, may pose little disruption if cabined to the specific context of SEC ALJs. Although the Court did not spotlight the minimal nature of the presumed disruption, there is a basis for possible distinction down the line between the SEC context and other, more disruptive, contexts should the need arise. In both *Ryder* and *Lucia*, the weight on the disruption/systemic effects side of the balance was trivial indeed.

But more fundamentally, it is critical to look at the other side of the balance. The Court's frequent suggestion that the injuries of individual

374. *Id.* at 2055.

375. *Id.* at 2049–50.

376. *See* Brief for Petitioners at 48–49, *Lucia*, 138 S. Ct. 2044 (No. 17-130). The underlying facts in some of these cases are over a decade old. *See, e.g.*, Timbervest LLC, No. 3-15519 (Sec. & Exch. Comm'n Sept. 17, 2015), https://www.sec.gov/litigation/opinions/2015/ia-4197.pdf [https://perma.cc/7WUR-2TU5] (recounting thirteen year old facts and proceedings beginning in 2012), *remanded per curiam*, Timbervest LLC v. Sec. & Exch. Comm'n, No. 15-1416, 2018 U.S. LEXIS 32721 (D.C. Cir. Nov. 19, 2018) (setting aside SEC Commission decision and ordering new hearing before different ALJ or the Commission in light of *Lucia*).

377. Brief for Petitioners at 49, *Lucia*, 138 S. Ct. 2044 (No. 17-130).

378. *See* Morrison, *supra* note 339 (noting that "even a relative few will be bad news for the agency").

379. Ryder v. United States, 515 U.S. 177, 185 (1995).

litigants occasioned by Appointments Clause violations are largely symbolic, and its repeated expression of the need to incentivize litigants, permits it to group structural challenges into a category of their own. Litigants called before an improperly appointed tribunal are the best, if not sole, challengers to the composition of the tribunal. However, the Court itself has admitted that rarely, if ever, can they show that the results in their cases would have been different before a properly appointed decision maker.[380] With such modest skin in the game that they require incentives to raise challenges in the first place, it simply cannot be said that these litigants would face major injustice were they to lack a remedy altogether.

Like Fourth Amendment claims seeking exclusion of evidence, then, the asserted right in this separation-of-powers sphere is one that we confer upon a litigant for a purpose unrelated to any specific harm encountered by that litigant.[381] In the Fourth Amendment context, the primary motivation for evidentiary exclusion is deterring law enforcement misconduct, and the Court has made it quite clear that the successful litigant is a "windfall" beneficiary.[382] The successful Fourth Amendment litigant obtains a benefit because that is the nature of judicial resolution under Article III, which abjures advisory opinions. Where the purpose of deterrence is not advanced, and where the concomitant systemic harm is large, however, the Court has—both during the *Linkletter*/*Huson* regime and thereafter—found a mechanism to prevent other litigants in the pipeline from obtaining the benefits of a new rule. In the Appointments Clause context, too, there is ample room for the Court to strike a similar balance. The Court can look carefully at the purpose of the rule—vindicating structural norms, rather than protecting an individual's right—and examine whether widespread disruption of retroactive application is a necessary cost of its advancement. This is not a new exercise, and it is not "unrelated to" adjudicative retroactivity. Instead, it reflects the precise balancing that the Court has been undertaking for years, both during the *Linkletter*/*Huson* regime and, it appears, in years since.

CONCLUSION

Having shut down the intricate balancing of the *Linkletter*/*Huson* era, perhaps it is unsurprising that the Court has found it necessary to rely on other mechanisms for blunting the disruptive impact of novel rules. A system works when people can rely on rules that govern their primary

380. *See supra* note 339 and accompanying text.

381. *Cf. supra* note 53 and accompanying text.

382. Davis v. United States, 564 U.S. 229, 248 (2011).

conduct. That the Court has absorbed this basic intuition makes sense and contributes to its institutional legitimacy. What is surprising, though, is that the Court's insistence that each of the doctrines it currently deploys is "independent" and "distinct" and motivated by completely different considerations does not withstand serious scrutiny. The hodgepodge of mechanisms currently in play in fact operate largely the same way as they always have, reflecting an assessment of the interests at stake, the means by which they are advanced (or thwarted) by retroactive application, and the concomitant burdens they impose.