

# Do Laws Have a Constitutional Shelf Life?

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*Times change. A statute passed today may seem obsolete tomorrow. Does the Constitution dictate when a law effectively expires? In *Shelby County v. Holder*, the 2013 decision that invalidated a provision of the Voting Rights Act, the Court seems to answer that question in the affirmative. Although rational and constitutional when written, the Court held that the coverage formula of the law grew to be irrational over time and was unconstitutional now because it bears “no logical relation to the present day.” This reason for invalidating a law is puzzling. The question answered in *Shelby County* was not about whether Congress had constitutional power to pass the Voting Rights Act. It was not even about whether our understanding of the scope of that power had changed from 1965 to 2013. The question was whether the passage of time and changed circumstances created a distinct reason to nullify the law.*

*In this Article, I label this question one of a “constitutional shelf life.” The plaintiffs in *Shelby County* were not the first ones to ask for invalidation of an unconstitutionally stale law, and they will not be the last. Indeed, since the decision, plaintiffs as varied as marijuana enthusiasts and funeral-home directors have cited *Shelby County* for the claim that the “current burdens” of a law “must be justified by current needs.” The goal of this Article is to track the idea of a shelf life across various aspects of constitutional law, to demonstrate that the issue arises in far more contexts than one might anticipate, and then to offer an approach for principled application.*

“[T]imes change.”<sup>1</sup> Those were the words of Justice Kennedy when the Supreme Court heard oral argument in *Shelby County v. Holder*,<sup>2</sup> the 2013 decision that invalidated a key section of the Voting Rights Act (VRA).<sup>3</sup> The Court found the law’s coverage formula—which determined if a state or local government must obtain permission before changing voting laws—to be

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1. Transcript of Oral Argument at 35, *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96) 2013 WL 6908203, at \*35 (“GENERAL VERRILLI: I think the—the formula was—was rational and effective in 1965. The Court upheld it then, it upheld it three more times after that. JUSTICE KENNEDY: Well, the Marshall Plan was very good, too, the Morrill Act, the Northwest Ordinance, but times change.”).

2. 133 S. Ct. 2612 (2013).

3. *Id.* at 2631.

outdated and unconstitutional.<sup>4</sup> The formula was designed to cover jurisdictions most vulnerable to race discrimination.<sup>5</sup> The Chief Justice, writing for the majority, explained that this part of the law (which was written in 1965, revised in 1982, and reauthorized without change by Congress in 2006<sup>6</sup>) was based on “decades-old data,” “eradicated practices,” and needed to be “updated.”<sup>7</sup>

All parties agreed the law was “rational” when written, but the Court reasoned that it now ignores developments in racial conditions such that it has grown to be irrational and bears “no logical relation to the present day.”<sup>8</sup> Stale factual assumptions in the formula rendered the law unconstitutional today even though it was constitutional in the past.<sup>9</sup> In the Chief Justice’s words, “the Act imposes current burdens and must be justified by current needs.”<sup>10</sup>

This reason for invalidating a law is puzzling. Adjusting for changed circumstances when interpreting the Constitution is nothing new—indeed, that argument is basically as old as the Constitution itself. John Marshall wrote that a Constitution is “intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”<sup>11</sup> Oliver Wendell Holmes said the Constitution must be interpreted in light of “what this country has become.”<sup>12</sup>

But the *Shelby County* Court answered a question different from the one asked by these jurists. Much ink has been spilled on *the* theoretical question in constitutional law: when do changed facts (or a changed “understanding of the facts”<sup>13</sup>) alter the way we interpret the Constitution?<sup>14</sup> When does the

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4. *Id.* The coverage formula is found in § 4(b) of the Voting Rights Act. Voting Rights Act of 1965 § 4(b), 42 U.S.C. § 1973b(b) (2012), *invalidated* by *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

5. *Shelby Cty.*, 133 S. Ct. at 2625.

6. *Id.* at 2619–21.

7. *Id.* at 2627, 2629.

8. *Id.* at 2625, 2629.

9. To be sure, the nature of the constitutional violation in *Shelby County* is also wrapped up in notions of federalism and “equal sovereignty” of the states. *Id.* at 2623. But whatever work federalism notions are doing in the decision, they cannot explain the statute’s ultimate invalidation. Put differently, the federalism injury was not enough to invalidate the law in 1965 or 1972 or 1982 but only after the passage of time “in light of current conditions” and because “[o]ur country has changed.” *Id.* at 2627, 2631.

10. *Id.* at 2619 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (Roberts, C.J., writing for the Court on the same subject)).

11. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted).

12. *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

13. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 863 (1992).

14. For an interesting series of articles from Lawrence Lessig considering this question, see Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165, 1169–71 (1993) (arguing that changes in the way the Constitution is interpreted may often bring its interpretation closer to an original or textual understanding); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 396 (1995) (arguing that changed readings of the Constitution

meaning of the Fourteenth Amendment, for example, change to forbid racially segregated schools or bans on gay marriage? The question I will address in this Article is a different one: whether, and under what circumstances, a statute that was constitutional at the time of enactment might become unconstitutional over time—not because the prevailing understanding of the Constitution has changed but simply because things in the world around us have changed.<sup>15</sup>

The question answered in *Shelby County* was not whether Congress had constitutional power to pass the Voting Rights Act.<sup>16</sup> It was not even about whether our understanding of the scope of that power had changed from 1965 to 2013. The question was whether the passage of time and changed circumstances created a distinct reason to invalidate the law—rendering it obsolete and effectively expired.

The concept I use as shorthand for this question is the prospect of a “constitutional shelf life.”<sup>17</sup> The goal of this Article is to track this idea of a shelf life across various aspects of constitutional law, to demonstrate that the issue arises in far more contexts than one might anticipate, and then to consider whether it is a concept capable of principled application.

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are not always changes of infidelity to its original meaning); Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365, 1366 (1997) (asserting that “understanding how changed readings can be readings of fidelity depends upon understanding how the constraints of context matter in a theory of interpretive fidelity”). For other views on the subject, see generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997) (criticizing the notion of an evolving Constitution and celebrating textualism); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010) (arguing that the Constitution’s meaning has and must change as time passes).

15. For helpful elaboration on the difference between discerning constitutional meaning and applying constitutional doctrine, see Mitchell N. Berman, *Constitutional Decision Rules*, 90 *VA. L. REV.* 1, 9–13 (2004). Berman identifies a growing branch of constitutional scholarship that focuses not on what any provision of the Constitution “means,” but rather on what he calls “constitutional decision rules”—rules that establish how that meaning should be applied in constitutional adjudication. *Id.* at 9. The subject of this Article is an example of the latter.

16. This question on the scope of Congressional power under the Fourteenth and Fifteenth Amendments was briefed in the case, of course, but was not the route ultimately taken by the majority. See Jon Greenbaum et al., *Shelby County v. Holder: When the Rational Becomes Irrational*, 57 *HOW. L.J.* 811, 814 (2014) (explaining that the Court declined to apply the “congruence and proportionality test” as was expected, opting instead to find the provision “irrational”); Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 *WASH. L. REV.* 379, 381 (2014) (noting that the Court failed to explain why Congress had the authority to reauthorize § 5 but not § 4(b)).

17. I recognize, of course, that the concept of a “shelf life” is not a perfect analogy. The notion of expiration may imply that the law is doomed from the start, which is not the case. But just like food becomes perishable because of the arrival of bacteria, I ask in this Article whether a law can meet its end because of external changes that destabilize its premise over time. For a very different take on this question and an example of someone who does not think laws can have a constitutional shelf life, see Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 *STAN. L. REV.* 1209, 1279 (2010) (“The *when* must be the moment that Congress made the law. The current state of state law cannot matter, because it cannot have ‘retroactive’ effect. . . . [N]o facts that arise after the enactment of the statute can matter to the merits of the claim.”).

Although others have previously wrestled with this question from time to time,<sup>18</sup> it is one that remains “radically under-theorized.”<sup>19</sup> Moreover, it is a question that is growing in significance today as two things change: (1) judges find themselves with new tools to examine the factual premise of a law,<sup>20</sup> and (2) the Supreme Court is embarked on “a widespread empirical turn” where its opinions now rest more explicitly on factual claims about the way the world works.<sup>21</sup> But, as I will demonstrate, even though facts matter a great deal to constitutional doctrine, the Supreme Court has not given clear guidance about what to do when those facts change over time.

Consider, by way of comparison to *Shelby County*, the 1989 decision of *Michael H. v. Gerald D.*<sup>22</sup> That case involved a constitutional challenge to an 1872 California law about proving paternity.<sup>23</sup> Under the law, a child born

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18. The most extensive discussion of this question comes in Guido Calabresi’s book, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). There, Judge Calabresi addresses the problem of obsolete statutes—laws that he says are out of step with prevailing legal principles. *Id.* at 1–2. He argues that courts should have the authority to determine whether a statute is obsolete, and he calls for judicial updating and “sunsetting” of such laws. *Id.* at 62–65. Judge Calabresi does not, however, depend on a link to the Constitution for his theory of judicial sunseting. *See id.* at 24 (“[A] link to constitutional infirmity, though a possible ground for nullification of statutes, is neither a necessary nor a sufficient ground.”). For others who have asked the question in the constitutional context, see DAVID L. FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* 16 (2008) (“An intrinsic problem presented, however, is the abiding truth that whatever the facts may be today, they might change tomorrow.”); Robert W. Bennett, “*Mere*” *Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1065–67 (1979) (arguing that courts should strike down laws no longer supported by the facts that caused their enactment).

19. These words come from John McGinnis and Charles Mulaney in their discussion of a related literature on the deference owed to congressional fact-finding. John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 69 (2008). For others who have joined this discussion, see FAIGMAN, *supra* note 18, at 129–30 (2008) (arguing that the level of deference to legislative fact-finding should follow the applicable standard of review protecting the constitutional right); Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 1, 35–36 (2009) (stating that the “judicial treatment of legislative fact-finding is sorely in need of a coherent theory” and offering a new paradigm); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1170–71 (2011) (calling for judicial review of legislative fact-finding that takes account of the comparative institutional strengths and weaknesses of courts and legislatures).

20. For my prior work on the subject of judicial fact-finding in a digital age, see generally Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012) [hereinafter Larsen, *Confronting Supreme Court Fact Finding*] (noting the tendency of the Supreme Court to conduct its own factual investigations outside of the record and briefing); Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59 (2013) [hereinafter Larsen, *Factual Precedents*] (observing the phenomenon of “factual precedents” where lower courts cite the Supreme Court for factual propositions rather than relevant expert work); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014) [hereinafter Larsen, *The Trouble with Amicus Facts*] (challenging the conventional wisdom that Supreme Court amicus briefs are a good source for factual expertise).

21. Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 118 (2003).

22. 491 U.S. 110 (1989).

23. *Id.* at 117, 119.

to a married woman living with her husband was presumed to be a child of the marriage.<sup>24</sup> In 1872, of course, there were no DNA or blood tests that could establish paternity, but in 1989 times had changed.<sup>25</sup> When Michael H. sued for the right to a hearing to establish his paternal rights he could have easily argued—foreshadowing the words from *Shelby County*—that “‘current burdens’ must be justified by ‘current needs.’”<sup>26</sup> His brief did in fact make the claim that “‘present day technology’ rendered the presumption in the law obsolete and unnecessary.”<sup>27</sup>

The Supreme Court did not bite, however. Justice Scalia, writing for the Court, dismissed Michael’s due process claim and the child’s equal protection claim, relying on English bastardy laws and Blackstone’s commentaries to support the notion that fathers have traditionally been unable to assert parental rights of a child born to a married woman.<sup>28</sup> What makes the “‘times have changed’” argument good for *Shelby County* but not for *Michael H.*?

More pressing even than past inconsistency, what will become of this idea of a constitutional shelf life in future contexts? The question is not just theoretical. For example, federal district court dockets today are speckled with claims to legalize marijuana (either broadly or at least for medical use).<sup>29</sup> These lawsuits argue specifically that the science behind the decision to list marijuana as a Schedule I drug is old and that there is now a “‘veritable mountain of peer reviewed scientific evidence’”<sup>30</sup> documenting both that marijuana is effective in treating medical conditions and that its potential for abuse has been overstated.<sup>31</sup>

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24. *Id.* at 117–18.

25. *See id.* at 161 (White, J., dissenting) (recognizing that arguments about the “stigma of illegitimacy” are based on times when there were no authoritative ways to establish paternity).

26. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2627 (2013) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

27. Brief for Appellant at 17, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (No. 87-746), 1987 WL 880072, at \*17.

28. *Michael H.*, 491 U.S. at 124–25.

29. *E.g.*, *Sacramento Nonprofit Collective v. Holder*, 552 F. App’x 680, 683 (9th Cir. 2014); *United States v. Pickard*, No. 2:11-cr-449, 2015 WL 1767536, at \*1 (E.D. Cal. Apr. 17, 2015), *Kadonsky v. Holder*, No. (UNA), 2014 WL 2739303 (D.D.C. June 10, 2014).

30. Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss at 3, *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100 (E.D. Cal. 2012) (No. 2:11-cv-02939), 2012 WL 1580711.

31. *E.g.*, Memorandum in Support of Defendant’s Motion to Dismiss Indictment at 15–16, *Pickard*, No. 2:11-cr-449, 2013 WL 10629793 (“[M]arijuana has a notably low potential for abuse. . . . [T]he facts [about marijuana’s potential for abuse] upon which marijuana was scheduled as one of the most dangerous narcotics in 1970 have been disproven.”).

These plaintiffs explicitly urge, “We rely on our courts to step in and pronounce that the laws are outdated and are no longer valid in light of changed circumstances.”<sup>32</sup> Will their invitation be accepted? As these cases wind their way to the Supreme Court, should we expect to see a decision that the Controlled Substances Act as it relates to marijuana is invalid because—echoing *Shelby County*—it bears “no logical relation to the present day?”<sup>33</sup>

Similarly, a recent cert petition filed by funeral home directors challenging old regulations on their businesses asks: Does the Constitution allow the government to enforce obsolete laws that lack any justification today?<sup>34</sup> Citing *Shelby County*, these plaintiffs explicitly urge the Court to intervene when “current burdens” are not justified by “current needs.”<sup>35</sup>

There is something very intuitive about asking courts to police the effect of time on legal restrictions. Lawmakers are not fortune-tellers, and it seems quite likely that laws will outlast the conditions they were meant to address. Moreover, the Constitution contains at least an implicit requirement that all laws must be rational, and it seems quite plausible that monitoring changing facts falls under the Court’s role in enforcing the Constitution’s guarantee that citizens should not be governed by arbitrary laws. Like other parts of the Constitution where line drawing is difficult, sniffing out stale laws may just be part of the whole enterprise of judicial review, warts and all.

And yet, recognizing a constitutional shelf life requires something more: it requires judicial confidence that the world has changed in a real and relevant way.<sup>36</sup> Where does that confidence come from? Should we trust the judicial grasp of changed facts? Facts are easy to manipulate and the pace of factual change today is rapid, so it is hard for courts to keep up. I confront and refute the idea that policing stale facts is a modest and narrow way to evaluate legislative choices.

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32. Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss, *supra* note 30, at 1, 2012 WL 1580711.

33. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2629 (2013).

34. See Petition for a Writ of Certiorari at i, *Heffner v. Murphy*, 135 S. Ct. 220 (2014) (No. 14-53), 2014 WL 3530761, at \*i (“In applying rational-basis review, does a court evaluate the rationality of enforcing a challenged law under the factual circumstances of the world today, or must a court consider only the rationality of the law when enacted, no matter how long ago and no matter how much the facts have changed?”).

35. *Id.* at 5.

36. I acknowledge, as I must, that this same criticism can be launched at those who believe in the “Living Constitution” whenever the Court struggles to interpret a clause of the Constitution in a new way. How, for example, does the Court know that “equality” means something different in 1954 than it did in 1896? As I elaborate below, however, asking if a law is irrational because it is too old is the sort of judicial inquiry that is even less limited than asking if the country’s notions of equality have changed over time or if a certain right is rooted in the country’s tradition. For this reason, concerns about judicial competence are at their apex when the Court engages in a free-form quest about changed facts.

After wrestling with the idea of a constitutional shelf life, this Article offers some preliminary suggestions on how courts should deal with such a claim. First, I argue that a court is authorized to find a shelf life only when employing a heightened form of review. Second, I identify two conditions for finding a shelf life that are drawn from patterns in the judicial opinions where this issue has arisen. I note first that courts pay special attention to the Executive Branch's enforcement practices over time and second that they seem to defer to the legislature when there is evidence of an ongoing political dialogue.

While nothing in constitutional law is purely objective, these two criteria provide a somewhat neutral yardstick for judges to measure the passage of time's effect on a once-valid law—a way to gauge, for example, when the necessary has become no longer necessary. When an agency—an actor with an institutional advantage at recognizing factual change—urges that a law is outdated, a court does not stand alone in recognizing constitutional expiration, and at least the appearance of opportunism is diminished. Similarly, when the legislature anticipates a factual change affecting its law in the future (through a sunset provision or factual findings on point), that indicates that the political process is still functioning and open to addressing changed facts on its own.

In *Shelby County*, all of these criteria pointed the other direction: the Department of Justice continued to believe the law was necessary to confront current conditions, and Congress had addressed the idea of changed circumstances in its 2006 record. Moreover, although the case could have been evaluated on heightened scrutiny, the test the majority seems to have chosen was a form of rationality review. Thus, even recognizing that laws can expire and courts can enforce a constitutional shelf life in some circumstances, *Shelby County* was still the wrong place to find one.

This Article proceeds in five parts. Part I explains the history behind the idea of a constitutional expiration date and describes how the idea will become more important as constitutional doctrine is increasingly entrenched in empirical assertions of fact. Part II chooses six different types of cases across various constitutional tests—in which plaintiffs have challenged a law as unconstitutionally expired—and explains the Court's treatment of those claims. Part III articulates a concern that the threat of stale facts is used opportunistically, and Part IV then offers thoughts on when a court is authorized to find a constitutional shelf life. Part V concludes by arguing that *Shelby County* does not meet any of the limiting principles I have identified and that the Court was thus incorrect to find a constitutional shelf life in that case.

## I. Laying the Groundwork

“In virtually every constitutional case,” as David Faigman explains in his book on the subject, “the soaring language of the Constitution is brought down to earth by plain facts.”<sup>37</sup> The government can prohibit abortions only after the point of fetal viability, a medical fact.<sup>38</sup> Congress can regulate homegrown medical marijuana only because it will substantially affect the larger marijuana market, an economic fact.<sup>39</sup> And the Voting Rights Act coverage formula grew to be unconstitutional because it contained “40-year-old facts [concerning voting patterns of minorities] having no logical relation to the present day.”<sup>40</sup>

These are not the sort of facts specific to one case and typically assigned to juries, however.<sup>41</sup> They are more generalized facts about the world, so-called “legislative facts.”<sup>42</sup> As I have observed before, this kind of fact is becoming increasingly central to Supreme Court decisions.<sup>43</sup> The more the Court makes a self-conscious attempt to ground its opinions in fact and to anchor its reasoning in factual authorities, the more important it is to contemplate the possibility of a constitutional expiration date when those facts begin to change.

### A. *How New Is the Idea of a Constitutional Shelf Life?*

The Supreme Court has flirted with the idea of a constitutional shelf life before its *Shelby County* decision. The first extended discussion came in the 1938 decision of *United States v. Carolene Products Co.*<sup>44</sup> in a passage outside of the footnote that made the case famous. The challenge there was

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37. FAIGMAN, *supra* note 18, at xii.

38. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

39. *Gonzales v. Raich*, 545 U.S. 1, 19 (2005).

40. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2629 (2013).

41. As an initial matter, I must concede (as I have in the past) that the line between law and fact is fuzzy at best. Several scholars have argued that “[t]here is no analytic dichotomy between law and fact.” McGinnis & Mulaney, *supra* note 19, at 71. Even if this is true, however, the label of “fact” is one deeply entrenched in our legal system and one that most lawyers seem to intuitively understand. As a practical matter, therefore, when I say “fact,” I mean a statement that can be theoretically falsified and is followed by a secondary authority pointing to some sort of evidence. For elaboration on this definition, see generally Larsen, *Factual Precedents*, *supra* note 20, at 67–73 (establishing a working dichotomy between law and fact).

42. This phrase was coined by Kenneth Culp Davis in 1942. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942).

43. For my previous thoughts on the centrality of fact-finding to the Court’s recent opinions and its consequences, see generally Larsen, *Confronting Supreme Court Fact Finding*, *supra* note 20; Larsen, *Factual Precedents*, *supra* note 20 (discussing the use of facts in Supreme Court opinions and the possible consequences of lower courts relying on the Court’s factual conclusions in their own decisions); Larsen, *The Trouble with Amicus Facts*, *supra* note 20 (discussing the role of amicus briefs in the Supreme Court’s decision-making process and expressing concern that the Court relies on unverified amicus briefs when making its decisions).

44. 304 U.S. 144 (1938).

to the federal Filled Milk Act, a law that prohibited the sale of milk compounded with nondairy oil or fat.<sup>45</sup> The challengers threw the constitutional kitchen sink at the law, claiming it was beyond the scope of Congress's Commerce Clause power, a violation of the Fifth Amendment's Due Process Clause, and a denial of equal protection.<sup>46</sup>

The Court upheld the law, explicitly deferring to the Congressional finding that filled milk was harmful to public health, and thus, that there was a rational basis for forbidding it.<sup>47</sup> In dicta, however, Justice Stone suggested that "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."<sup>48</sup>

This recognition of a shelf life for the constitutionality of a law—like the one acknowledged in *Shelby County* seventy-five years later—has something to do with the ability of a law's rationality to erode.<sup>49</sup> Although it was rational to believe filled milk was unhealthy in 1938, the Court reasoned, that might not always be the case.<sup>50</sup> Moreover, and significantly, the *Carolene Products* majority specifically contemplated that it would be for a court to determine when the science behind the law no longer supported its constitutionality: "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . . ."<sup>51</sup> For support, the Court relied on *Chastleton Corp. v. Sinclair*,<sup>52</sup> a 1924 opinion by Justice Holmes strongly suggesting that the emergency rent-control statute in Washington, D.C., should be invalidated when it was shown the emergency no longer existed.<sup>53</sup>

Yet, even within both *Carolene Products* and *Chastleton*, the Supreme Court expressed a strong hesitation about actually invalidating a law because its factual premise was obsolete. Justice Holmes remanded in *Chastleton* for fact-finding on the continuing state of emergency.<sup>54</sup> And in *Carolene Products*, after noting that rationality can change over time, Justice Stone

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45. *Id.* at 145–46.

46. *Id.* at 146–47.

47. *Id.* at 152 ("[T]he existence of facts supporting the legislative judgment is to be presumed.").

48. *Id.* at 153. Interestingly, Justice Black—who had recently been appointed to the Court when this case was decided—refused to join this part of Justice Stone's opinion. Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 204 (1976).

49. Subsequently, most states have eliminated restrictions on filled milk, and a district court in 1972 found the Filled Milk Act to be unconstitutionally irrational. *Milnot Co. v. Richardson*, 350 F. Supp. 221, 224 n.1, 225 (S.D. Ill. 1972).

50. *Carolene Prods.*, 304 U.S. at 153–54.

51. *Id.* at 153.

52. 264 U.S. 543 (1924).

53. *Id.* at 547–48.

54. *Id.* at 549.

added a strong caveat about deference to Congress: “But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.”<sup>55</sup>

These mixed messages likely explain why lower court judges express confusion and a sense of being at sea with claims that a statute has reached its constitutional shelf life. Judge Guido Calabresi, when confronting such a claim in a case before him on the Second Circuit, offered some reasons for the hesitancy:

It is not, however, easy for courts to step in and say that what was rational in the past has been made irrational by the passage of time . . . . Precisely at what point does a court say that what once made sense no longer has any rational basis? What degree of legislative action, or of conscious inaction, is needed when that (uncertain) point is reached?<sup>56</sup>

A handful of lower court judges have discussed the possibility of a law reaching the end of its constitutional shelf life—for example, an old law banning pit bulls<sup>57</sup> or old regulations forbidding food sales in funeral homes.<sup>58</sup> But the collective sense among these courts is reluctance to actually so conclude. As the Ninth Circuit explained, “[t]he Supreme Court has been ambivalent on whether changed circumstances can transform a once-rational statute into an irrational law.”<sup>59</sup> Even scholarly attention to this question has been thin.<sup>60</sup>

55. *Carolene Prods.*, 304 U.S. at 154.

56. *United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring). This case concerned the 100-to-1 disparity between sentencing for crack and sentencing for cocaine under then-existing law. *Id.* at 466. For more on this specific issue, see *infra* section II(B)(3).

57. *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1183–84 (10th Cir. 2009) (remanding for fact-finding on plaintiff’s claim that a pit-bull ban violated substantive due process because it was not rationally related to a legitimate government interest based on modern understandings of the pit-bull breed).

58. *Heffner v. Murphy*, 745 F.3d 56, 86 (3d Cir. 2014) (upholding restrictions on funeral directors to sell food despite the fact that the law seemed antiquated). For other examples where courts have come the closest, see *TJS of N.Y., Inc. v. Town of Smithtown*, 598 F.3d 17, 18–19 (2d Cir. 2010) (holding that changed circumstances are relevant to a First Amendment challenge to a zoning law, but remanding to the district court to make the fact-specific inquiry); *Jones v. Schneiderman*, 888 F. Supp. 2d 421, 422–24 (S.D.N.Y. 2012) (upholding a New York law prohibiting live mixed martial arts performances, but noting that since the passage of the ban, the sport had evolved to become safer).

59. *Burlington N. R.R. Co. v. Dep’t of Pub. Serv. Regulation*, 763 F.2d 1106, 1111 (9th Cir. 1985); see also *Murillo v. Bambrick*, 681 F.2d 898, 912 n.27 (3d Cir. 1982) (“[T]he Supreme Court appears not to have determined definitively whether changed conditions are a relevant consideration in equal protection analysis.”); *Schneiderman*, 888 F. Supp. 2d at 425 (first quoting *Murillo*, 681 F.2d at 912 n.27; and then *Burlington*, 763 F.2d at 1111).

60. There are some others who have raised this question before. See CALABRESI, *supra* note 18, at 2 (“[B]ecause a statute is hard to revise once it is passed, laws are governing us that would not and could not be enacted today, . . . some of these laws . . . do not fit, are in some sense inconsistent with, our whole legal landscape.”); Bennett, *supra* note 18, at 1065–66 (arguing that courts must consider the “all too easily neglected time dimension” to rationality review); Linde,

Despite the uncertainty and lack of recognition, however, the types of laws ripe for claims of constitutional expiration are vast indeed. They include regulations on network-television broadcasters arguably made unnecessary by the advent of digital broadcasting,<sup>61</sup> environmental import restrictions made obsolete by new ways to protect certain species,<sup>62</sup> and zoning laws on adult-oriented businesses that seem too strict in light of population and land-use changes.<sup>63</sup>

*Carolene Products* and ostensibly *Shelby County* asked the question in the context of rationality review (whether a legislature has a rational basis and legitimate reason for legislating), but there are many other doctrinal tests that can be affected by the passage of time, and there is no logical reason to confine considering the effects of time to a law's rationality.

Indeed, once one starts to think about it in this way, any constitutional test that turns on conditions—what is necessary, what is compelling, what is a sufficient alternative—is vulnerable to an allegation that the condition has changed and the law is no longer valid. To analogize to math, the claim is that the formula remains the same, but the variables have changed and so the output should change as well. The implications are quite significant and far-reaching. Notions of the evolving Constitution aside, the invocation of changed facts in application of settled doctrine can lead to invalidation of any sort of legislation challenged under a whole host of constitutional provisions.

At this point it is important to identify two related but distinct concepts: sunseting judicial opinions and dynamic statutory interpretation. Neal Katyal has written about the possibility that the Court announce prospectively

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*supra* note 48, at 215 (“[L]aws are made at one time and challenged at another. The problem of time is whether a law is to be judged for its rationality when it was enacted or at the time when it is challenged.”); *cf.* Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEXAS L. REV. 269, 306–07 (1999) (“The only way for lawmaking bodies to shut down all litigation that might present the issues raised in this Article would be for them to revise all their previous enactments by adding an exception for situations where facts are changing rapidly.”). For an excellent student note that raises the question, see generally Maria Ponomarenko, Note, *Changed Circumstances and Judicial Review*, 89 N.Y.U. L. REV. 1419 (2014) (arguing that a court can declare a once-valid law unconstitutional in light of “changed circumstances” but only when the underlying test is “substantive” and not “motives-based”).

61. *Compare* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (upholding content-based regulations on the theory that “[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium”), *with* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 533 (2009) (Thomas, J., concurring) (arguing that the “spectrum scarcity” rationale makes no sense in light of changes in the television market).

62. *Maine v. Taylor*, 477 U.S. 131, 147 (1986) (upholding a state import ban, but warning that “if and when [scientifically-acceptable sampling and inspection] procedures are developed, Maine no longer may be able to justify its import ban”).

63. *TJS of N.Y.*, 598 F.3d at 23, 30 (holding that application of the First Amendment must confront and address “extralegal” changes in the community but remanding to trial court to make those factual findings).

a time limit to its decision—a time when the decision will cease to become binding authority.<sup>64</sup> Perhaps the most familiar example of this is when Justice O’Connor announced in *Grutter v. Bollinger*<sup>65</sup> (the 2003 decision upholding some affirmative action in higher education) that “25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>66</sup> The idea of a judicial sunset, however, is distinct from a constitutional shelf life because the latter leads to invalidation of a law while the former is about the binding power of precedent.

Likewise, “dynamic statutory interpretation,” a phrase coined by Bill Eskridge, is related to but distinct from the idea of a constitutional shelf life. Dynamic statutory interpretation is a school of thought committed to reading a statute “in light of [its] present societal, political, and legal context.”<sup>67</sup> When a court finds what I am calling a constitutional shelf life, by contrast, it is not “updating” a statute but finding it to have reached the end of its constitutional legitimacy.

In sum, the idea of a law expiring in a constitutional sense dates back at least to 1938.<sup>68</sup> Although the Supreme Court has at times endorsed the concept theoretically, it had never invalidated a law on that basis until its 2013 decision in *Shelby County*. A skeptical reader may be tempted to assume the idea was used opportunistically for one case and one case only. There is, however, real change at work in Supreme Court opinions these days, and the Justices’ factual observations about the world have a heightened significance. This change, as demonstrated below, will make it easier for plaintiffs in the future to allege that a constitutionally enacted law has reached its expiration date, and it will make the *Shelby County* decision reverberate well beyond election-law circles.

#### B. *Why Stale Facts Matter More in Constitutional Doctrine Today*

A consistent thread between *Shelby County*, *Carolene Products*, and the lower court cases that have wrestled with the question of constitutional expiration is an emphasis on the role of facts in constitutional questions. This makes sense. Invalidating a law because it is outdated requires a judicial

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64. Neal Katyal, *Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237, 1237 (2004) (“I contend that the Supreme Court should prospectively declare that some of its national security opinions will sunset, meaning that they will lapse as binding precedent.”); see also Michael Gentithes, *Sunsets on Constitutionality & Supreme Court Efficiency*, 21 VA. J. SOC. POL’Y & L. 374, 380–81, 394 (2014) (following up on Katyal’s essay and also arguing in favor of judicial sunsets for efficiency reasons).

65. 539 U.S. 306 (2003).

66. *Id.* at 343.

67. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987).

68. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938).

certainty that the world against which the old legislators acted has changed in a significant and relevant way.

At oral argument in the *Shelby County* case, for example, the Chief Justice quizzed the advocates about modern voter turnout by race using statistics taken from the Census Bureau's 2004 Current Population Survey.<sup>69</sup> His point was to show that Mississippi—which was covered by the VRA formula and thus had to get approval from the federal government before changing its voting laws—actually had the best ratio of African-American to white turnout, while Massachusetts on the other hand (a state not covered) had the worst.

This colloquy prompted statistics guru Nate Silver to criticize the way the Chief Justice used the numbers: “As much as it pleases me to see statistical data introduced in the Supreme Court,” Silver wrote in the *New York Times* a few days later, “the act of citing statistical factoids is not the same thing as drawing sound inferences from them.”<sup>70</sup> A “statistical sin,” Silver explains, is “[c]herry-picking the evidence in this way” because “it involves making misleading rather than merely imprecise claims.”<sup>71</sup>

The Chief Justice is not the only one to grapple with difficult factual questions embedded in an allegation that a law is too old and out of touch with reality. In each of the lower court cases that specifically address this possibility, the court was tasked with evaluating a difficult question of fact informed by nonlegal evidence: Are pit bulls as aggressive as the city lawmakers banning them twenty years ago believed?<sup>72</sup> Have the rules of professional mixed martial arts evolved to the point that the sport is safer and it is no longer rational for a state to forbid it?<sup>73</sup> Do we know more today about the effects of crack and powder cocaine on the body such that the

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69. Transcript of Oral Argument at 30–32, *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96) 2013 WL 6908203, at \*30–32; Louis Jacobson, *Was Chief Justice John Roberts Right About Voting Rates in Massachusetts, Mississippi?*, POLITIFACT (Mar. 5, 2013, 4:03 PM), <http://www.politifact.com/truth-o-meter/statements/2013/mar/05/john-roberts/was-chief-justice-john-roberts-right-about-voting/> [<http://perma.cc/3VKA-UD3C>].

70. Nate Silver, *In Supreme Court Debate on Voting Rights Act, a Dubious Use of Statistics*, N.Y. TIMES: FIVETHIRTYEIGHT (Mar. 7, 2013, 9:02 AM), [http://fivethirtyeight.blogs.nytimes.com/2013/03/07/in-supreme-court-debate-on-voting-rights-act-a-dubious-use-of-statistics/?\\_r=0](http://fivethirtyeight.blogs.nytimes.com/2013/03/07/in-supreme-court-debate-on-voting-rights-act-a-dubious-use-of-statistics/?_r=0) [<http://perma.cc/EX3Z-WPAG>]. Nina Totenberg of NPR went further in her criticism, alleging that the Chief “misconstrued” the data. Nina Totenberg, *In Voting Rights Arguments, Chief Justice Misconstrued Census Data*, NPR (Mar. 1, 2013), <http://www.npr.org/sections/itsallpolitics/2013/03/01/173276943/in-voting-rights-arguments-chief-justice-may-have-misconstrued-census-data> [<http://perma.cc/8WM9-EX2V>].

71. Silver, *supra* note 70.

72. See *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1183–84 (10th Cir. 2009) (citing evidence in the record from the American Kennel Club and United Kennel Club).

73. See *Jones v. Schneiderman*, 888 F. Supp. 2d 421, 430 (S.D.N.Y. 2012) (rejecting plaintiffs’ contentions that the “adoption of [new] rules . . . [to] reduce[] the health and safety risks to fighters” is enough to render a ban on professional mixed martial arts unconstitutionally irrational).

disparate sentencing laws of the two drugs enacted thirty years ago are no longer permissible?<sup>74</sup>

When pressed to answer these questions, most of the judges in the aforementioned cases remanded for further fact-finding at the trial-court level, but they need not have done so. As the *Carolene Products* dicta candidly acknowledged, the decision to find a law expired in a constitutional sense permits and almost requires judges to take “judicial notice” of factual change.<sup>75</sup> And significantly, the concept of judicial notice itself has changed radically since the dawn of the digital age.<sup>76</sup>

Today’s volumes of the U.S. Reports are peppered with nonlegal sources supporting the Justices’ factual assertions about the way the world works.<sup>77</sup> These observations need not come from the record below. It is increasingly common to find Justice Breyer citing studies he found on neuroscience<sup>78</sup> or Justice Kennedy sorting through statistics in amicus briefs about the fatality rate connected with police car chases.<sup>79</sup> Like the rest of us, Supreme Court Justices can access an infinite world of information at their fingertips now, and it is perhaps only natural that they will anchor their legal decisions in factual claims backed by easily found factual authorities.

This change matters significantly for the present discussion for two reasons. First, for a Justice who is hostile to an old law, it could become quite tempting to find the law unconstitutionally outdated, particularly when there are so many factual sources available to mount that charge. Facts can be

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74. *United States v. Then*, 56 F.3d 464, 467 (2d Cir. 1995) (“[W]hat is known today about the effects of crack and cocaine, and about the impact that the crack/cocaine sentencing rules have on minority groups, is significantly different . . .”).

75. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938). “Judicial notice” refers to a rule of evidence that allows a fact into evidence if it is “generally known” or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” FED. R. EVID. 201(b). Legislative facts are specifically exempt from the rule on judicial notice, and those can be acknowledged by a court without reference to the record. *See* FED. R. EVID. 201(a) advisory committee’s note on proposed rules (contrasting legislative facts and adjudicative facts); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 112 (1988) (“The advisory committee believed that judicial absorption of general nonlegal knowledge should not be circumscribed . . .”).

76. *See generally* Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 NW. U. L. REV. 1137 (2014) (discussing the effect of the Internet on the application of judicial notice).

77. Larsen, *Confronting Supreme Court Fact Finding*, *supra* note 20, at 1255–57; Larsen, *Factual Precedents*, *supra* note 20, at 77; *see also* Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 658–68 (1988) (surveying the use of facts in judicial opinions); Zick, *supra* note 21, at 118 (“Constitutional law is now in the throes of a widespread empirical turn, a quantitative mood swing that is consistent with a more general societal turn toward all things scientific.”); *cf.* Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 912 (2011) (observing that the digital revolution has blurred the line between legal and nonlegal authority in recent judicial opinions).

78. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2768 (2011) (Breyer, J., dissenting).

79. *Sykes v. United States*, 131 S. Ct. 2267, 2274–75 (2011).

easily manipulated, and as the sea of factual information expands rapidly, so too does the range of evidence available to make an old law seem irrational and out of touch with modern times.

Not only does the field of data increase, but also the Internet Age gives judges a bolstered confidence in wielding that data. Note that Nate Silver was not accusing the Chief Justice of finding faulty information—the Chief’s numbers came from census figures and were part of the record. Instead, the bigger problem, according to Silver, was “not with the statistics he cites but with the conclusion he draws from them.”<sup>80</sup> He cautioned against assuming the Massachusetts and Mississippi examples were representative of a larger trend, and he worried about using statistics to infer causality when that inference is not supported.<sup>81</sup> This judicial confidence with and hunger for facts, in other words, creates the potential for misusing information.

Second, and related, as constitutional decisions are increasingly grounded in facts and justified by appealing to factual authorities, they will be more vulnerable in the future to invalidation on the basis of new facts. Depending on one’s point of view, this could be a positive development, but it is hard to deny that it adds a layer of instability to constitutional law.

David Faigman has explored this facet of fact-bound constitutional doctrine before, using the iconic case of *Brown v. Board*<sup>82</sup> as his example.<sup>83</sup> One could easily describe the holding in *Brown* as grounded in fact: black children are psychologically harmed by attending segregated schools (citing, of course, the social-science studies in the decision’s famous footnote eleven).<sup>84</sup>

Because facts are fickle and easy to manipulate (even fifty years ago), a county in Georgia challenged the *Brown* decision and defended segregation by reasoning that children in Georgia were not actually psychologically harmed by segregation (citing their own expert testimony for support).<sup>85</sup> In 1963, a trial judge agreed with them in a case called *Stell v. Savannah-Chatham*,<sup>86</sup> distinguishing *Brown* since it was based on “facts, not law.”<sup>87</sup> “Whether Negroes in Kansas believed that separate schooling denoted inferiority,” he explained, “was as much a subject for scientific inquiry as the braking distance required to stop a two-ton truck moving at ten miles an hour on dry concrete.”<sup>88</sup>

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80. Silver, *supra* note 70.

81. *Id.*

82. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

83. FAIGMAN, *supra* note 18, at 16–19.

84. *Brown*, 347 U.S. at 494 n.11.

85. *Stell v. Savannah-Chatham Cty. Bd. of Educ.*, 220 F. Supp. 667, 668–76 (S.D. Ga. 1963).

86. 220 F. Supp. 667 (S.D. Ga. 1963).

87. *Id.* at 678.

88. *Id.*

This 1963 interpretation of *Brown* reveals an interesting quirk about the question of a constitutional shelf life. While modern constitutional law students see *Brown* as the quintessential law-transformation case (embracing a change to the prevailing interpretation of the Equal Protection Clause), it is quite possible that the Justices who decided *Brown* saw it as a shelf-life case (a case involving the application of new facts to settled law). After all, the *Brown* Court emphasized the “changed circumstances” of public education between 1896 and 1954,<sup>89</sup> and Justice Jackson’s unpublished concurrence included a section entitled “does the Amendment contemplate changed conditions?”<sup>90</sup> If one believes that Supreme Court decisions have life cycles and stand for different propositions over time, then perhaps *Brown* began as a shelf-life case and evolved to a case that today stands for a change in constitutional meaning.

In any event, on appeal the Fifth Circuit in *Stell* reversed this modest understanding of *Brown*, holding that *Brown* was not “limited to the facts of the cases there presented.”<sup>91</sup> But the larger point about the power of facts to undermine constitutional decisions remains—particularly when a judge is hostile to the law in question. As Faigman puts it, “[g]iven their proclivity for change, either because our knowledge of the facts improves over time or the facts themselves change, [facts] seem to provide a disturbingly unsteady foundation for constitutional doctrine.”<sup>92</sup>

If this was true in 1963, it is significantly truer today. For one thing, the social-science evidence in *Brown* and *Stell* was introduced at trial and came from the record.<sup>93</sup> Now, however, this type of evidence can come to the Court’s attention in a myriad of different ways: from dozens of amicus briefs, from the Supreme Court librarians, or from the Justices’ independent research.<sup>94</sup>

Moreover, as the Justices’ decisions increasingly turn on claims of generalized facts, future parties and future judges will inevitably start to impeach those factual assertions with readily available information. Consider, for example, the events following the Court’s *Citizens United*<sup>95</sup> decision, in which it held there was no evidence that campaign expenditures led to political corruption.<sup>96</sup> Not even a full year later, litigants in Montana challenged an almost identical campaign finance restriction in their state on

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89. *Brown*, 347 U.S. at 489–90, 489 n.4.

90. Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the Brown Case*, 1988 SUP. CT. REV. 245, 258 n.51.

91. *Stell v. Savannah-Chatham Cty. Bd. of Educ.*, 333 F.2d 55, 61 (5th Cir. 1964).

92. FAIGMAN, *supra* note 18, at 19.

93. *Stell*, 220 F. Supp. at 672; Frederick Schauer, *The Decline of “The Record”*: A Comment on Posner, 51 DUQ. L. REV. 51, 55 (2013).

94. Larsen, *Confronting Supreme Court Fact Finding*, *supra* note 20, at 1286–90.

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

96. *Id.* at 360.

the basis of a new and different factual record.<sup>97</sup> Although they eventually lost at the U.S. Supreme Court (in a summary reversal), they met success below because the Montana Supreme Court explained that “*Citizens United* was decided under its facts or lack of facts.”<sup>98</sup> The supposedly factual dimension of the Court’s *Citizens United* decision, in other words, simply invites distinctions and dissenters when other facts are readily available.

The point for now is to call attention to the significance that constitutional pressure from stale facts can bring. As facts become more central to constitutional doctrine and with new tools available to access those facts quickly and more conveniently, the threat of finding constitutional staleness becomes quite meaningful.

## II. Examples of Allegedly Stale Laws

The Voting Rights Act is not the first law ever to be challenged as unconstitutionally stale, and it will not be the last. Below are six categories of cases (past and pending) in which plaintiffs have claimed that the factual premise behind a law is too old, therefore rendering the law unconstitutional. The examples vary in both the nature of the constitutional violation alleged and the standard of review or doctrinal test employed. A closer inspection of these cases, however, reveals a few consistent themes.

### A. *Due Process Clause*

Perhaps the most natural doctrinal home for a claim that a law has reached the end of its constitutional shelf life is the Due Process Clauses of the Fourteenth and Fifth Amendments. Dating back at least to the mid-nineteenth century (and before that if one counts the interpretation of due process clauses in state constitutions), the Supreme Court has interpreted the words “liberty” and “property” in the Due Process Clause to prevent not just procedurally deficient laws but also substantively arbitrary ones.<sup>99</sup>

Although now known by the perhaps oxymoronic name, “substantive due process,” the idea that the Constitution includes a general substantive protection against arbitrary laws has a deep-rooted pedigree in the American

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97. *W. Tradition P’ship, Inc. v. Attorney Gen.*, 271 P.3d 1, 5 (Mont. 2011), *rev’d sub nom.* *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam).

98. *Id.* at 6.

99. See Linde, *supra* note 48, at 199 (asking about due process of lawmaking and observing that the rule against substantively arbitrary laws is not a new one). Gerald Gunther in fact argued for a revival in rationality review over forty years ago. He “would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends.” Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20 (1972); see also Linde, *supra* note 48, at 215 (“For a main difficulty with reviewing laws for rationality is the problem of time . . .”).

constitutional tradition.<sup>100</sup> It is not a stretch to assume this protection guards against injuries that occur when one is subject to an outdated law.<sup>101</sup>

Since 1937 and the “constitutional revolution” that ended the *Lochner*<sup>102</sup> era, however, allegations that a law is based on outdated facts and thus a violation of Due Process generally fall under the very deferential standard of review known as “rationality review.”<sup>103</sup> Under this standard, government action will pass muster if it is rationally related to a legitimate interest.<sup>104</sup> As long as there is not a fundamental right at stake or a class of citizens in need of special protection (e.g., race, gender), rationality review generally gives the government the benefit of the doubt.<sup>105</sup>

Not surprisingly, therefore, the Court has shown little sympathy for allegations that facts have changed and laws have grown to be irrational.<sup>106</sup> “[T]hose challenging the legislative judgment,” the Court has explained, “must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true . . . .”<sup>107</sup>

100. Justice Bradley is often given credit for this doctrinal development with his dissent in the *Slaughter-House Cases*. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 116 (1872) (Bradley, J., dissenting) (arguing that liberty and property are not truly recognized if they may “arbitrarily assailed”). This general protection against arbitrary laws has an even older pedigree, however. State courts enforcing constitutions with due process clauses often invoked the Magna Carta for the proposition that the language of “due process” includes a substantive protection against arbitrariness. EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING AND DECLINE OF A FAMOUS JURIDICAL CONCEPT* 90–91 (photo. reprint 1978) (1948); see also *Washington v. Glucksberg*, 521 U.S. 702, 764 (Souter, J., concurring) (noting that the Due Process Clause imposes on courts an “obligation to give substantive content to the words ‘liberty’ and ‘due process of law’”).

101. Indeed, criminal law scholars might be reminded of the ancient doctrine of “desuetude,” which is the judicial abrogation of a criminal statute that has gone unenforced for a long period of time. Note, *Desuetude*, 119 HARV. L. REV. 2209, 2210 (2006). The principal rationale for desuetude has been about fair notice for illegal acts, but advocates of the doctrine often advance a constitutional variation with a substantive due process component: “[T]he constitutional argument for desuetude doctrine sees in the Constitution a means of protecting an individual against being plucked from a sea of conspicuous offenders and charged with committing a crime . . . .” *Id.* at 2216. As it currently stands, only West Virginia recognizes desuetude as a viable defense. *Id.* at 2209.

102. *Lochner v. New York*, 198 U.S. 45 (1905).

103. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938) (holding that legislators are entitled to deference and listing categories of cases that would be subject to the Court’s more stringent review).

104. See *Katzenbach v. McClung*, 379 U.S. 294, 303–04 (1964) (“[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary . . . our investigation is at an end.”).

105. *Id.*

106. Indeed, for over seventy years now, “the Court . . . has turned back every due process attack based on a mere lack of rationality.” Linde, *supra* note 48, at 204. The tide may be turning, however. At least one Fifth Circuit case has recently found that state regulations on caskets irrationally excluded certain producers in violation of the Due Process Clause. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217 (5th Cir. 2013).

107. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

Although Supreme Court plaintiffs have made these arguments about changed circumstances and the Due Process Clause, they have never once been victorious.

In 1907 and 1913, for example, Arkansas passed two “full-crew laws” that specified the personnel and size of the crew that certain trains had to employ.<sup>108</sup> The Supreme Court dismissed challenges to those laws shortly after they were passed, but by 1968, the plaintiffs had a new argument in hand.<sup>109</sup> In *Brotherhood of Locomotive Firemen & Enginemen*,<sup>110</sup> the plaintiffs built a voluminous record documenting the changes to the industry and the “progressive obsolescence of the jobs of firemen and third brakemen in freight and yard service as a consequence of technological and other changes which have occurred over the past forty years.”<sup>111</sup> The “overwhelming evidence,” the challengers argued, was that the old law overestimated the number of crew needed; it was a law based on an outdated understanding of how the industry operated.<sup>112</sup> Therefore, they argued, it was an arbitrary law prohibited by the Due Process Clause of the Fourteenth Amendment.<sup>113</sup>

The plaintiffs won their case in the district court on this argument, but the Supreme Court disagreed.<sup>114</sup> The Court found relevant the long history of dispute over crew size between employers, unions, and lawmakers.<sup>115</sup> Justice Black, writing for the Court, emphasized the “frequent and recent legislative re-evaluation of the full-crew problem.”<sup>116</sup> He observed that although this specific law remained unchanged, railroad safety laws in general had been “subject to close scrutiny” over the years, and “some safety requirements considered out of date have been repealed.”<sup>117</sup> He also observed that a proposal to repeal the full-crew statutes in Arkansas was placed on the ballot for popular referendum in 1958 and defeated.<sup>118</sup>

Given this political back-and-forth, Justice Black thought it inappropriate for a court to “indulge” in what was really a legislative call.<sup>119</sup> The evidence on the need for additional crew even in the face of modern

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108. *Bhd. of Locomotive Firemen & Enginemen v. Chi., Rock Island & Pac. R.R. Co.*, 393 U.S. 129, 133 (1968).

109. *Id.* at 130–31.

110. *Bhd. of Locomotive Firemen & Enginemen v. Chi., Rock Island & Pac. R.R. Co.*, 393 U.S. 129 (1968).

111. Brief for Appellees at 30–31, *Bhd. of Locomotive Firemen & Enginemen*, 393 U.S. 129 (Nos. 16, 18), 1968 WL 112592, at \*30–31.

112. *Id.* at 63–74.

113. *Id.* at 19.

114. *Bhd. of Locomotive Firemen & Enginemen*, 393 U.S. at 144.

115. *Id.* at 133–34.

116. *Id.* at 134.

117. *Id.*

118. *Id.*

119. *Id.* at 136.

technology was mixed, he explained.<sup>120</sup> It was inappropriate for the Court to make “findings of fact” (the quotation marks are Justice Black’s), when in reality it was just supplanting a democratic judgment.<sup>121</sup> The ongoing discussion in the political branches made it an inappropriate place for the Court to step in and find an old law too stale.<sup>122</sup>

Lest one think this type of due process challenge is a thing of the past, a recently filed cert petition at the Court made a very similar claim (and in fact relied on *Shelby County* to do so). In *Heffner v. Murphy*,<sup>123</sup> a group of Pennsylvania funeral directors challenged that state’s regulations of their type of business.<sup>124</sup> Specifically, they allege that “modern realities” make the once-rational laws (restricting, for example, the selling of food at funeral homes) now obsolete.<sup>125</sup> With the advent of air conditioning and modern hygiene practices, they argue, it no longer makes sense to prevent funeral homes from serving food, even if such a restriction was rational in 1952 when the law was written.<sup>126</sup>

Citing the language about changed circumstances in *Carolene Products* and the “current burdens” language from *Shelby County*, these modern petitioners argue that it is the Court’s job to ensure “when government officials take away a liberty interest *today*, they do so for reasons that are rational *today*, not merely for reasons that were rational long ago.”<sup>127</sup> The appeals court in that case, however, rejected the plaintiff’s claims, explaining that being “antiquated” is not “a constitutional flaw.”<sup>128</sup>

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120. *Id.* at 136–37.

121. *Id.* at 138–39.

122. *Id.* at 144.

123. 745 F.3d 56 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 220 (2014).

124. *Id.* at 61–62.

125. Petition for a Writ of Certiorari, *supra* note 34, at 7–10, 2014 WL 3530761, at \*7–10. This claim has been made in other similar contexts. Florists in Louisiana, for example, have challenged state operating license laws as “totally outdated and a complete waste of time.” Appellants’ Brief at 11, *Meadows v. Odom*, 198 F. App’x 348 (5th Cir. 2006) (No. 05-30450), 2005 WL 6111808, at \*11.

126. Petition for a Writ of Certiorari, *supra* note 34, at 9–12, 2014 WL 3530761, at \*9–12.

127. *Id.* at 5, 33. Like I do, this petition clarifies that they are not arguing the Constitution itself has changed, just that “laws can become so obsolete as to be irrational under the Constitution.” Funeral Consumers Alliance, *Pennsylvania Funeral Directors Appeal to US Supreme Court*, FUNERAL CONSUMERS ALLIANCE: THE DAILY DIRGE (July 21, 2014, 12:28 PM), <https://www.funerals.org/newsandblogsmenu/blogdailydirge/3176-2014heffnerappeal> [http://perma.cc/M9P4-QMJG].

128. *Heffner*, 745 F.3d at 62. The Supreme Court eventually denied cert in this case. *Heffner*, 135 S. Ct. at 220.

### B. *Equal Protection Clause*

A doctrinal cousin to the Due Process Clause cases just discussed are claims that statutes have grown obsolete such that they now deny “equal protection of the laws” in violation of the Fourteenth Amendment.<sup>129</sup> Allegations like these of course are either given rationality review or a brand of heightened scrutiny (intermediate or strict) if a race or gender classification is involved.<sup>130</sup> Examples from all three standards are discussed below.

*1. Rationality Review.*—In 1924, Congress created the Foreign Service, then revised the law in 1946 to establish a new retirement system for Foreign Service officers.<sup>131</sup> Part of that law required a mandatory retirement age of sixty. The compulsory retirement was justified because “the Foreign Service involves extended overseas duty under difficult and often hazardous conditions and that the wear and tear on members of this corps is such that there comes a time when these posts should be filled by younger persons.”<sup>132</sup>

In 1979, a group of Foreign Service officers who were being forced into retirement brought a lawsuit claiming that the law violated their constitutional rights guaranteed by the Equal Protection component of the Due Process Clause in the Fifth Amendment.<sup>133</sup> They argued (backed up by evidence in the record) that times had changed since Congress last visited the issue thirty years earlier: “Foreign Service employees today—in the tropics and elsewhere—have air-conditioned offices, cars and government-supplied housing, government-furnished airplane transportation, government furnished inoculations against those contagious diseases which are still prevalent, and government-furnished medical facilities for any illness which does occur.”<sup>134</sup> These changes, they argued, rendered the reasons for the mandatory retirement age arbitrary, outdated, unnecessary and now a violation of their equal protection rights.<sup>135</sup>

On rationality review in a case called *Vance v. Bradley*,<sup>136</sup> the Supreme Court responded with great deference to the Congressional choice.<sup>137</sup> Once again, it was important to the Court that Congress “ha[d] gone to great

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129. U.S. CONST. amend. XIV, § 1. Of course analogous federal claims arise under the equal protection component of the Fifth Amendment’s Due Process Clause. U.S. CONST. amend. V.

130. See *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1277 (9th Cir. 2004) (explaining how to decide which level of scrutiny to apply in equal protection cases).

131. *Vance v. Bradley*, 440 U.S. 93, 98 (1979).

132. *Id.* at 103.

133. *Id.* at 94–95.

134. Brief for the Appellees at 34, *Vance*, 440 U.S. 93 (No. 77-1254), 1978 WL 207230, at \*34.

135. See *id.* (explaining that such changes have substantially increased life expectancy and improved overseas conditions so that there is no justification for a lower retirement age of sixty in the Foreign Service).

136. 440 U.S. 93 (1979).

137. See *id.* at 108–09 (finding that a mandatory retirement age of sixty rationally furthers Congress’s legitimate objective of maintaining the Foreign Service’s competence).

lengths” to ponder this issue by legislating separately for the Foreign Service and by revisiting the issue twice.<sup>138</sup> Even if the line drawn by Congress was imperfect, the Court reasoned, “perfection is by no means required” for the Constitution to be satisfied.<sup>139</sup>

2. *Gender Classifications & Immigration.*—Even when laws classifying by race or gender are challenged under the Equal Protection Clause and thus given a more critical judicial eye, the Court has turned its back on allegations that the laws are constitutionally expired.

One good example comes from the immigration context concerning how to prove parentage for claims of citizenship. The Immigration and Nationality Act of 1952 imposed different requirements for acquiring citizenship depending on whether a child’s citizen parent was the mother or the father.<sup>140</sup> For children born abroad and out of wedlock to U.S. citizen mothers, citizenship is established at birth.<sup>141</sup> For similarly situated children born to U.S. citizen fathers, the law imposed a set of requirements necessary before establishing citizenship.<sup>142</sup>

Tuan Nguyen, a lawful permanent resident born in Vietnam to a Vietnamese mother and a U.S. citizen father, challenged this distinction as part of his deportation proceedings.<sup>143</sup> Nguyen argued that the law drew distinctions based on gender in violation of equal protection.<sup>144</sup> Gender distinctions are subject to an intermediate scrutiny: the discrimination must be substantially related to an important government interest.<sup>145</sup>

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138. *Id.* at 106.

139. *Id.* at 108 (quoting *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 385 (1960)).

140. *Nguyen v. INS*, 533 U.S. 53, 59–60 (2001). The law was amended in 1986 to include an additional option for the father to prove he was the providing parent, but the principal gender distinction remained. *Id.* at 60.

141. *Id.* at 59–60.

142. *Id.* There are three cases in recent years that address this issue. *Miller v. Albright*, 523 U.S. 420 (1998), and *Nguyen*, 533 U.S. at 53, involved challenges to the father–mother disparity in proof of parentage, although only *Nguyen* was decided on that ground. *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), *aff’d by an equally divided court*, 131 S. Ct. 2312 (2011), involved the slightly different issue of disparate parental residency requirements that apply to fathers and mothers of children born outside of this country to unmarried parents. For an interesting argument explaining “the development and durability of gender-asymmetrical” citizenship law in these three cases, see generally Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014).

143. *Nguyen*, 533 U.S. at 57–58.

144. Brief of Petitioners at 11, *Nguyen*, 533 U.S. 53 (No. 99-2071), 2000 WL 1706737, at \*11.

145. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

The government emphasized as its interest “the importance of assuring that a biological parent-child relationship exists.”<sup>146</sup> This assurance, they said, is verifiable naturally upon birth in the case of the mother but not so with the father.<sup>147</sup>

Both Nguyen and other plaintiffs who had challenged the law before him argued that changes in technology rendered this once-important interest not so important anymore. As the petitioner explained in *Miller v. Albright*<sup>148</sup> (a case presenting the same issue but not decided on those grounds):

Before the advent of reliable genetic testing, this requirement of legitimation may well have been a reasonable method for preventing fraud, as false fathers would be more likely to claim paternity once a child had reached majority . . . .

. . . .

[But r]ecent progress in developing highly specific tests for genetic markers now permits the exclusion of over 99 percent of those wrongly accused of paternity . . . . These advances . . . eliminate the rationale for placing arbitrary time limitations on the establishment of paternity . . . .<sup>149</sup>

Like the plaintiffs in *Shelby County*, these plaintiffs argued that the passage of time changed the constitutional calculation: the current burdens of the law (disparate treatment of men and women) were not justified by current conditions (the fact that now DNA testing allowed for a gender-neutral way of ascertaining parentage).<sup>150</sup>

But even on an admittedly tougher standard of review, the Court did not accept the “times have changed” argument. Citing great deference to Congress, the Court found this purported interest to be important even in the face of DNA testing and then went on to reject the claim that it perpetuated gender stereotypes as opposed to recognizing a real difference between men and women. The Court held that “[t]he Constitution . . . does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity, even if that mechanism arguably might be the most scientifically advanced method.”<sup>151</sup>

Interestingly, a few pages later the Court did credit an argument made by the government about a change in the times. It held:

[W]e find that the passage of time has produced additional and even more substantial grounds to justify the statutory distinction. The ease of travel and the willingness of Americans to visit foreign countries

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146. *Nguyen*, 533 U.S. at 62.

147. *Id.*

148. 523 U.S. 420 (1998).

149. Brief of Petitioner at 18, *Miller*, 523 U.S. 420 (No. 96-1060), 1997 WL 325338, at \*18 (emphasis omitted).

150. *Id.* at 18–19.

151. *Nguyen*, 533 U.S. at 63.

have resulted in numbers of trips abroad that must be of real concern when we contemplate the prospect of [granting citizenship based on male parentage to children born to unmarried parents abroad].<sup>152</sup>

It is hard not to suspect opportunism when in the same opinion the Court credits the “times have changed” argument concerning travel frequency but ignores it with respect to the more obvious change in DNA testing. Admittedly, the Court gives Congress a sort of superdeference when it comes to immigration matters, and that “plenary power” must be a factor in these cases even when the standard of review is supposedly stricter.<sup>153</sup> That being said, as will be described below, absent any neutral standards to guide the evaluation of the constitutional pressure caused by the passage of time, the Court has ample opportunity to credit changed facts only when it is convenient to do so.

3. *Race & Crack/Cocaine Sentencing.*—A more complicated story about the Supreme Court’s treatment of stale facts involves the disparity in sentences for offenses involving crack and powder cocaine. “Crack and powder cocaine are two forms of the same drug”—the latter is typically inhaled through the nose and the former is blended with baking soda and divided into “rocks” that are smoked.<sup>154</sup>

In 1986, Congress passed the Anti-Drug Abuse Act, which created a series of mandatory minimum sentences for drug offenses linked to the drug’s weight.<sup>155</sup> In 1986, crack cocaine was a relatively new drug, but its dangers were highlighted as great cause for alarm.<sup>156</sup> The legislative record reveals that Congress believed crack was significantly more harmful than powder cocaine because it was highly addictive, led to more violence, and was particularly harmful for children who had been exposed to the drug during their mother’s pregnancy.<sup>157</sup> Based on these assumptions, Congress adopted a 100-to-1 sentencing ratio that “treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine.”<sup>158</sup>

By the mid-1990s, defendants across the country began to challenge this 100-to-1 sentencing disparity as a violation of their equal protection rights.<sup>159</sup> These arguments alleged changed circumstances because: (1) modern science

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152. *Id.* at 65–66.

153. See Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEXAS L. REV. 1615, 1615 (2000) (noting that “the Supreme Court has explicitly accorded Congress unusual deference” in immigration matters).

154. *Kimbrough v. United States*, 552 U.S. 85, 94 (2007).

155. *Id.* at 95.

156. *Id.*

157. *Id.* at 95–96.

158. *Id.* at 96.

159. *E.g.*, *United States v. Then*, 56 F.3d 464, 466 (2d Cir. 1995); *United States v. Peterson*, 143 F. Supp. 2d 569, 571 (E.D. Va. 2001); *State v. Russell*, 477 N.W.2d 886, 887 (Minn. 1991).

did not support the view that crack was more addictive or dangerous than powder cocaine, and (2) the sentencing disparity had caused an adverse and unfair impact on racial minorities who statistics show are the primary consumers of crack cocaine.<sup>160</sup>

These claims were largely unsuccessful across the lower courts, although they drew a sympathetic ear from Judge Calabresi on the Second Circuit in a case called *United States v. Then*.<sup>161</sup> Judge Calabresi concurred in the judgment sustaining the 100-to-1 ratio because he did not find purposeful race discrimination and, thus, did not think the heightened scrutiny justified.<sup>162</sup> He did, however, suggest that because “what is known today about the effects of crack and cocaine” has changed significantly, “constitutional arguments that were unavailing in the past may not be foreclosed in the future.”<sup>163</sup>

To support this intuition, he observed that the U.S. Sentencing Commission—the agency charged with drafting guidelines to cabin judicial sentencing discretion—had conducted an extended investigation on this issue and reported to Congress its opinion “that there is scant evidence to support the notion that crack poses a substantially greater threat to drug users.”<sup>164</sup>

Despite this strong evidence of changed circumstances, however, Judge Calabresi was unwilling to find a constitutional shelf life. In particularly candid language, he worried about how a court should measure when time erodes a law’s constitutionality. He explained: “Too many issues of line drawing make such judicial decisions hazardous. Precisely at what point does a court say that what once made sense no longer has any rational basis? . . . These difficulties . . . counsel restraint, and do so powerfully.”<sup>165</sup>

Several years after Judge Calabresi contemplated this issue, the U.S. Supreme Court considered it too but in a slightly different context. In 2004, the law governing sentencing generally in this country took a sharp turn. In

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160. *Then*, 56 F.3d at 466.

161. 56 F.3d 464 (2d Cir. 1995).

162. *Id.* at 467 (Calabresi, J., concurring).

163. *Id.*

164. *Id.* (citing U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995), <http://www.ussc.gov/news/congressional-testimony-and-reports/drug-topics/special-report-congress-cocaine-and-federal-sentencing-policy-february-1995> [<http://perma.cc/9G9H-29SU>]). In an additional report released in 2002, the Commission reported to Congress that (1) the 1986 law overstates the relative harmfulness of crack cocaine, (2) the negative effects of prenatal crack-cocaine exposure are identical to the negative effects of prenatal powder-cocaine exposure, and (3) that the sentencing differential fostered disrespect for the criminal justice system due to the widely held perception that it promotes disparity based on race. *Kimbrough v. United States*, 552 U.S. 85, 97–98 (2007) (citing U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 94, 103 (2002), [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205\\_Cocaine\\_and\\_Federal\\_Sentencing\\_Policy.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf) [<http://perma.cc/Q5ZC-SHUU>]).

165. *Then*, 56 F.3d at 468 (Calabresi, J., concurring).

*United States v. Booker*,<sup>166</sup> the Court held that the Sentencing Guidelines were unconstitutional, must be “effectively advisory,” and could not mandatorily bind the discretion of sentencing judges.<sup>167</sup> This mattered for the crack/cocaine issue because the relevant sentencing guideline adopted the 100-to-1 ratio straight from the 1986 law.<sup>168</sup>

In 2004, a district judge in Virginia took advantage of this new *Booker* discretion and sentenced a defendant with a crack offense to far less than what the 100-to-1 statute and sentencing guidelines would require.<sup>169</sup> The district court explained his actions by saying “the case exemplified the disproportionate and unjust effect that crack/cocaine guidelines have in sentencing.”<sup>170</sup> In a 2007 case called *Kimbrough*,<sup>171</sup> the Court held that the judge was permitted to do so given its freedom in *Booker*.<sup>172</sup>

The *Kimbrough* Court did not hold that the 1986 law had expired or that a reduction in the 100-to-1 ratio was required by the Constitution. It nonetheless bears on the current discussion because Justice Ginsburg (writing for the Court) did question whether the assumptions Congress legislated against in 1986 continued to hold true today.<sup>173</sup> And, interestingly, for that inquiry she emphasized the role of fact-finding by the relevant agency.<sup>174</sup>

Because the crack/cocaine sentencing guideline was passed by the Commission immediately after the 1986 statute, Justice Ginsburg wrote it was done quickly and not based on “empirical data and national experience.”<sup>175</sup> By contrast, the 1995, 2002, and 2007 reports from the Commission recommending lowering the ratio were based on an elaborate review by an agency with significant expertise.<sup>176</sup> It was this later “research and experience”—developed after what Congress knew in 1986—that got the Court’s

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166. 543 U.S. 220 (2005).

167. *Id.* at 245.

168. *Kimbrough*, 552 U.S. at 96–97.

169. *Id.* at 92–93, 92 n.2.

170. *Id.* at 93.

171. *Kimbrough v. United States*, 552 U.S. 85 (2007).

172. *Id.* at 111.

173. *Id.* at 95–96. The Court was invited to consider these changed circumstances in *Kimbrough*. See, e.g., Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioner at 12–13, *Kimbrough*, 552 U.S. 85 (No. 06-6330) (“Twenty years after the promulgation of the 100:1 ratio, it is universally understood that these assumptions were factually incorrect. With the benefit of further research, expert testimony, and more experience with crack offenses in the criminal-justice system, even the Sentencing Commission has concluded that the 100:1 ratio . . . seriously overstates the harm of crack offenses.”).

174. *Kimbrough*, 552 U.S. at 108–09.

175. *Id.* at 109 (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

176. *Id.* at 99–100. As Justice Ginsburg explains, the 2007 recommendation from the Sentencing Commission did more than just await Congressional action. *Id.* at 99. It adopted a change to the guidelines, reducing the ratio. *Id.* at 99–100. The Commission called this only a “partial remedy,” however, and still requested appropriate legislative action. *Id.* at 100.

attention.<sup>177</sup> Given the new reality as reflected in the Commission's more recent actions, the Court held, it was reasonable for the district court to adjust a sentence for the disproportionate effect the 100-to-1 ratio had on racial minorities generally.<sup>178</sup> It was changed circumstances concerning what we know now about dangers of crack—changes acknowledged by a federal agency—that justified altering the sentence.<sup>179</sup>

### C. Emergencies

The lapse of time between a law's enactment and its constitutional expiration need not be fifty years or even thirty years. When the question at hand involves an emergency (due to military conflict or otherwise), what is necessary at one point may cease to be necessary relatively quickly. Emergencies thus present a special context where a law can meet its constitutional expiration date.

The Court has basically said as much in the 1924 decision about rent control, written by Justice Holmes and mentioned briefly above.<sup>180</sup> In *Chastleton v. Sinclair*, the Court heard a constitutional challenge to a D.C. rent control statute that was enacted to prevent rent profiteering in the wake of World War I and the increased population the city was experiencing.<sup>181</sup> The law was originally enacted as temporary legislation in 1919 (sunsetting in two years); the statute specifically described a national emergency stemming from the war with Germany.<sup>182</sup> It was reenacted in 1921<sup>183</sup> and extended again for two more years in 1922, with a legislative finding “that the emergency . . . still exists and continues in the District of Columbia.”<sup>184</sup>

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177. *Id.* at 97.

178. *See id.* at 109–10 (holding that it would “not be an abuse of discretion” for the district court to adjust the sentence).

179. Following *Kimbrough*, Congress passed The Fair Sentencing Act of 2010 and reduced the disparity between crack and powder cocaine sentences from 100:1 to 18:1. *Dorsey v. United States*, 132 S. Ct. 2321, 2329 (2012). There are still lawsuits challenging this new ratio as a violation of the Equal Protection Clause, and at least some sentencing courts continue to take account of changed circumstances when refusing to apply it. *E.g.*, *United States v. Williams*, 788 F. Supp. 2d 847, 892 (N.D. Iowa 2011) (“In one respect the ‘new’ 18:1 guideline ratio is more irrational and pernicious than the original 100:1. When the 100:1 ratio was enacted, Congress and the Sentencing Commission did not have access to the overwhelming scientific evidence that they now have. This overwhelming scientific evidence now demonstrates that the difference between crack and powder is like the difference between ice and water—or beer and wine.”).

180. *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547–48 (1924).

181. *See* ROBERT M. FOGELSON, *THE GREAT RENT WARS: NEW YORK, 1917-1929*, at 133, 163 (2013) (discussing the Saulsbury Resolution and the Ball Rent Act in D.C.).

182. Food Control and District of Columbia Rents Act § 122, 41 Stat. 297, 304 (1919) (“It is hereby declared that the provisions of this title are made necessary by emergencies growing out of the war with the Imperial German Government . . . . It is also declared that this title shall be considered temporary legislation, and that it shall terminate on the expiration of two years from the date of the passage of this Act, unless sooner repealed.”).

183. Act of Aug. 24, 1921, 42 Stat. 200, 200.

184. Act of May 22, 1922, 42 Stat. 543, 543–44.

When a challenge to the law reached the Supreme Court in 1921, Justice Holmes wrote the majority opinion upholding it.<sup>185</sup> But in 1924, times had changed. Justice Holmes demanded to know whether the D.C. population was still artificially high due to the war.<sup>186</sup> He refused to rely on what he would call a Congressional “prophecy” about the end of the emergency conditions and instead remanded for fact-finding at the district court.<sup>187</sup> Holmes explained “[a] law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.”<sup>188</sup> A different lower court—relying on Justice Holmes’s language—went on to find the emergency extinct and the statute invalid.<sup>189</sup>

This language from Justice Holmes has been picked up by subsequent litigants arguing that changed circumstances and the fleeting nature of emergencies should affect the constitutional evaluation of military action.<sup>190</sup> *Korematsu v. United States*<sup>191</sup> provides a controversial example where such an allegation was made. In that familiar case (the first, in fact, to articulate that racial classifications must be strictly scrutinized), an American citizen was convicted for remaining in his California home despite an executive order—validated by Congressional act—requiring all persons of Japanese ancestry to evacuate.<sup>192</sup>

Following the Japanese attacks at Pearl Harbor on December 7, 1941, the United States feared a Japanese invasion of the West Coast.<sup>193</sup> By the time the Supreme Court decided *Korematsu* in 1944, this fear had abated.<sup>194</sup> *Korematsu* claimed in fact that the threat of invasion “had disappeared” by

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185. *Block v. Hirsh*, 256 U.S. 135, 153, 158 (1921).

186. *See Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548–49 (1924) (remanding to the district court for more fact-finding on this issue).

187. Adrian Vermeule, *Holmes on Emergencies*, 61 STAN. L. REV. 163, 191–92 (2008) (explaining Holmes’s holding and reasoning in *Chastleton Corp. v. Sinclair*).

188. *Chastleton*, 264 U.S. at 547–48.

189. Vermeule, *supra* note 187, at 167–68.

190. *E.g.*, Brief for National Lawyers Guild, as Amicus Curiae at 8, *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965) (No. 3), 1965 WL 130085, at \*8 (“Surrounding circumstances have greatly changed since July 1, 1952. . . . It can scarcely be presumed that the Communist Party’s activities have remained stable and unchanging, despite changing personnel and circumstances, over so long a period.”); Reply Brief for Petitioners at 26, *Kent v. Dulles*, 357 U.S. 116 (1958) (No. 481), 1958 WL 92031, at \*26 (“Let us assume that, as the Government contends, 8 U. S. C. § 1185 authorizes travel control in the event of a Presidential declaration of national emergency. This would not insulate the declaration from judicial scrutiny to determine whether the emergency exists and whether it is a justifiable basis for the controls.”).

191. 323 U.S. 214 (1944).

192. *Id.* at 215–16.

193. *Id.* at 223.

194. By December 1944, the federal government had issued Public Proclamation 21 allowing detained Japanese Americans to return home. COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 235–36 (1982), <https://www.archives.gov/research/japanese-americans/justice-denied/> [<https://perma.cc/KRQ4-SMHZ>].

March 1942 when the executive order was written and certainly in May when he was charged with violating it.<sup>195</sup> An amicus brief filed on his behalf in that case put it this way:

In short, General DeWitt justifies an action that he took at the end of March, 1942, on the basis of conditions which existed more than three months before and which had been corrected or markedly altered by the time he issued his orders. The question to be asked is not whether evacuation *would* have been reasonable if no wartime controls had been instituted, but whether it was necessary and reasonable in the face of the long series of safeguards to West Coast and national security which were established by the civil authorities *before* evacuation.<sup>196</sup>

Asking what is necessary to national security is a question with an answer that will unavoidably change with the passage of time. War is a concept with a temporal limitation, and a military order justified in December may well be stale by the next spring. Is it proper for a court to police that line? The *Korematsu* Court thought not; it did not address the argument—even on strict scrutiny and even under “the calm perspective of hindsight.”<sup>197</sup>

More recent wars have made the question even more difficult, as the nature of war evolves and the question of what is a “necessary and appropriate” use of force is colored by the passage of time. Adrian Vermeule has even suggested that we might see *Hamdan v. Rumsfeld*<sup>198</sup>—the 2006 Supreme Court decision striking down military commissions as illegal—as a case of judicial “sunsetting of emergency powers” and a declaration that “the post-9/11 emergency had passed.”<sup>199</sup>

As Vermeule explains, Holmes viewed the existence and duration of emergencies as questions of fact that could change over time and believed that judges were required to evaluate these factual questions as part of a check on government emergency powers.<sup>200</sup> Interestingly, this is the opposite view from the one typically articulated by courts where constitutional expiration is alleged. In other contexts, as we have seen, the dominant view is skepticism and hesitation when presented with arguments about a law’s shelf life.<sup>201</sup> This leads one to wonder whether the fleeting nature of an emergency—by definition—invites and authorizes a court to find a constitutional shelf life in a unique way.

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195. *Korematsu*, 323 U.S. at 218.

196. Brief of Japanese American Citizens League, Amicus Curiae at 70, *Korematsu*, 323 U.S. 214 (No. 22), 1944 WL 42852, at \*70.

197. *Korematsu*, 323 U.S. at 224.

198. 548 U.S. 557 (2006).

199. Vermeule, *supra* note 187, at 192–93.

200. *Id.* at 164–65.

201. *See supra* notes 54–58 and accompanying text.

D. *First Amendment*

Another Constitutional provision ripe for claims that old laws impose arbitrary and antiquated burdens is the First Amendment. The constitutional shelf life claim comes up in a variety of First Amendment contexts and under a variety of different doctrinal tests.

1. *Red Lion and Broadcast Spectrum Scarcity*.—Perhaps the most familiar allegation that a law has reached constitutional expiration is a call to relieve federal regulation of broadcasters.

In the 1950s, the Federal Communication Commission (FCC) imposed a series of regulations requiring that the discussion of public issues by broadcasters be even sided.<sup>202</sup> This “fairness doctrine” required that broadcasters allot equal on-air time to political candidates and allow for the discussion of all sides of any public issue.<sup>203</sup> In 1967, a broadcaster challenged this law as an unconstitutional infringement of its editorial judgment in violation of the First Amendment.<sup>204</sup> But in a decision called *Red Lion*<sup>205</sup> the Supreme Court rejected that argument and sustained the regulation.<sup>206</sup>

Justice White, writing for the Court, explained that broadcast regulation was necessary because broadcast spectrum is scarce.<sup>207</sup> As others have explained it, “broadcast media have established a uniquely pervasive presence in the lives of all Americans”<sup>208</sup>—they are positioned to enjoy a “broadcasting monopoly”<sup>209</sup> and are thus subject to government rules in a way other speakers are not.<sup>210</sup> Because there are only a limited number of frequencies (or channels), the idea is that regulation is necessary “to ensure the audience

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202. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 377–78 (1969).

203. *Id.* at 377–79.

204. *Red Lion Broad. Co. v. FCC*, 381 F.2d 908, 910 (D.C. Cir. 1967), *aff’d*, 395 U.S. 367 (1969).

205. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

206. *Id.* at 375.

207. Even in 1969, the *Red Lion* plaintiffs argued to the Court that advances in technology made broadcast-spectrum scarcity not so scarce anymore and rendered the FCC regulation obsolete. Brief for Respondents Radio Television News Directors Association et al. at 45–46, *Red Lion*, 395 U.S. 367 (No. 717) (“Whatever the validity of the assumption that a radio audience had few stations among which to choose in 1929, it has been outmoded by radical changes in technology.”). But Justice White did not agree: “Scarcity is not entirely a thing of the past,” he explained, and it is “unwise to speculate on the future allocation of that [broadcast] space.” *Red Lion*, 395 U.S. at 396, 399.

208. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

209. See *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 75 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) (arguing that fears of broadcasting monopoly are dated).

210. See *Red Lion*, 395 U.S. at 399 (justifying Congress’s special regulation of the broadcasting industry because of the industry’s growing importance and the scarcity of available broadcasting frequencies).

receives an uninhibited marketplace of ideas and a diversity of viewpoints.”<sup>211</sup>

Since 1969, the “spectrum scarcity rationale” has been invoked by the FCC to support broadcast regulation more generally—well beyond the fairness doctrine (a rule in fact that has long since been repealed).<sup>212</sup> Indeed, at least some have said the *Red Lion* rationale serves as a “bedrock for valuable telecommunications policy” generally including media ownership limits, must-carry rights, and even allocation of broadcast licenses to favor universal service.<sup>213</sup>

*Red Lion* has also been subject to repeated criticism and challenges over the years—specifically with claims that it is out-of-date.<sup>214</sup> With the advent of cable television, satellite television, HD radio, and the Internet (to name but a few advances in technology), many observers and litigants claim that the scarcity justification for broadcast regulation has met its constitutional shelf life.<sup>215</sup> These critics say “[n]ow, 45 years after *Red Lion*, scarcity is a relic,”<sup>216</sup> and that “[f]rom the outset . . . the scarcity doctrine was on a collision course with the future.”<sup>217</sup>

The Supreme Court, however, has yet to credit these claims, despite several invitations to do just that (complete with empirical evidence on the factual changes buttressing their claims).<sup>218</sup> In 1984, for example, the Court explained, “We are not prepared . . . to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast

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211. Josephine Soriano, Note, *The Digital Transition and the First Amendment: Is It Time to Reevaluate Red Lion’s Scarcity Rationale?*, 15 B.U. PUB. INT. L.J. 341, 341 (2006).

212. FED. COMM’N COMM’N, GEN. DOCKET NO. 83-484, JOINT STATEMENT OF COMMISSIONER SUSAN NESS AND COMMISSIONER GLORIA TRISTANI CONCERNING THE POLITICAL EDITORIAL AND PERSONAL ATTACK RULES 21 (1998), <http://www.fcc.gov/Speeches/Ness/States/stsn819.pdf> [<http://perma.cc/2E5M-ZPCT>].

213. Brief in Opposition at 27, *Media General, Inc. v. FCC*, 133 S. Ct. 63 (2012) (Nos. 11-691, 11-696, 11-698), 2012 WL 748421, at \*27.

214. See, e.g., Thomas W. Hazlett et al., *The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTELL. PROP. 51, 53 (2010) (criticizing the continued influence of *Red Lion* in modern jurisprudence in part due to the vast advances in technology that have been made since *Red Lion* was decided in 1969).

215. In cases over the years challenging various forms of FCC broadcast regulation, plaintiffs claim that the constitutional shelf life is up. See, e.g., Brief of Respondents NBC Universal, Inc. et al. at 37, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (No. 07-582), 2008 WL 3153438, at \*37 (“Whatever its validity when *Red Lion* affirmed it in 1969, . . . today the scarcity rationale is totally, surely, and finally defunct.”); Petition for a Writ of Certiorari at 15, *Minority Television Project, Inc. v. FCC*, 134 S. Ct. 2874 (2014) (No. 13-1124), 2014 WL 1090035, at \*15 (arguing that broadcast regulation has a “limited shelf life”).

216. Petition for a Writ of Certiorari, *supra* note 215, at 15, 2014 WL 1090035, at \*15.

217. Petition for Writ of Certiorari at 17, *Media General, Inc.*, 133 S. Ct. 63 (Nos. 11-691, 11-696, 11-698), 2011 WL 6069620, at \*17.

218. Soriano, *supra* note 211, at 352–54.

regulation may be required.”<sup>219</sup> And in cases involving FCC profanity fines in 2009 and 2012, the Court was pressed by the parties to overrule *Red Lion* and to find a constitutional expiration date for broadcast regulations generally, but it did not budge.<sup>220</sup>

These calls for change do not generally ask for a modification in our understanding of the First Amendment or even for a change in the standard of review due to broadcast regulations. Rather, they claim that the passage of time means “the First Amendment balance struck in *Red Lion* would look different today.”<sup>221</sup> And yet, unlike *Shelby County*, a majority of the Supreme Court has (to date) shown no interest in refereeing this particular claim of constitutional expiration.

2. *Virtual Child Pornography*.—A second example of First Amendment doctrine that will be affected by time is an example with a twist. The best way to conceptualize it is with a question: If constitutional laws can grow to become unconstitutional over time, is the reverse also true? Can a law be unconstitutional at point A, but—using the same doctrinal test—become constitutional because facts have changed due to the passage of time? At least some Justices think the answer is yes.

In 2002, the Supreme Court heard a First Amendment challenge to the Child Pornography Protection Act.<sup>222</sup> The law banned “virtual child pornography,” or pornographic pictures created without actual children.<sup>223</sup> The Supreme Court invalidated the law as overbroad and a violation of the First Amendment,<sup>224</sup> but Justice Thomas concurred with an interesting argument: There may soon come a day, he predicted, where this now unconstitutional law will grow to become constitutional.<sup>225</sup> “[T]echnology may evolve,” he said, “to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain por-

219. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 n.11 (1984).

220. See Brief of Respondents NBC Universal, Inc. et al., *supra* note 215, at 37–38, 2008 WL 3153438, at \*37–38 (advocating the overruling of *Red Lion*); Brief for Respondents ABC, Inc. et al. at 10–11, *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 5373703, at \*10–11 (advocating the overruling of *Red Lion* if it is necessary to deciding the case). Justice Thomas concurred in *FCC v. Fox Television* noting the “dramatic technological advances” that have “eviscerated the factual assumptions” in *Red Lion*. *Fox Television*, 556 U.S. at 533 (Thomas, J., concurring). He expressed a willingness to revisit *Red Lion* and added that when “constitutional issues’ . . . turn on a particular set of factual assumptions, “[the] Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained.” *Id.* at 535 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)).

221. *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (Arnold, C.J., concurring).

222. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239 (2002).

223. *Id.* at 241.

224. *Id.* at 258.

225. *Id.* at 259–60 (Thomas, J., concurring).

nographic images are of real children.”<sup>226</sup> If that happens, the government would have a much more compelling reason to regulate virtual child pornography as it would become the only way to stop pornography made with actual children—and the First Amendment would be satisfied.<sup>227</sup>

Note the implications of this reasoning; Justice Thomas presents the mirror image of the shelf life question. An unconstitutional law today could become constitutional tomorrow—not because the Constitution changes, but because the government interest in the law strengthens by virtue of technological progress and the passage of time. If changed circumstances can alter a constitutional test and impose a constitutional expiration, it seems the reverse should also be true—that is, the effect of time should run both ways.

Interestingly, Justice Thomas’s words appear to have prompted Congressional action. Congress’s second attempt to regulate virtual child pornography—the PROTECT Act of 2003—included some Congressional findings on the passage of time, the evolution of technology, and the difficulties that afflict child-pornography prosecutions as a consequence.<sup>228</sup> When this new law was before the Court, Justice Souter seemed sympathetic to the shelf life argument in his opinion: “Conditions can change, and if today’s technology left no other effective way to stop professional and ama-

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226. *Id.* at 259. The technology to which he is referring includes the ability to:

- (1) create computer-generated depictions of children that are indistinguishable from those of real children; (2) use parts of images of real children to create a composite image that is unidentifiable as a particular child in a way that prevents experts from concluding that parts of real children were actually used; or (3) disguise pictures of real children being abused by making the image look computer-generated.

Gray Mateo, *The New Face of Child Pornography: Digital Imaging Technology and the Law*, 2008 U. ILL. J.L. TECH. & POL’Y 175, 178.

227. *Free Speech Coal.*, 535 U.S. at 259. This argument was pressed to the Court in the briefs. *See, e.g.*, Motion for Leave to File Brief as Amicus Curiae and Brief of the National Center for Missing & Exploited Children as Amicus Curiae at 14–15, *Free Speech Coal.*, 535 U.S. 234 (No. 00-795), 2001 WL 417664, at \*14–15 (“Technology and the Internet have advanced the use and production of child pornography in ways that were not available in 1982 or even in 1990. If we are to achieve progress in attacking the growing problem of child pornography and its resulting harms, we must be prepared to adapt our responses to meet this very real threat in a world of ‘virtual realities.’”).

228. *See* Brief for the United States at 49, *United States v. Williams*, 553 U.S. 285 (2008) (No. 06-694), 2007 WL 1724329, at \*49 (“Congress made specific legislative findings. . . . Congress found that, ‘[i]n the absence of Congressional action, the difficulties in enforcing the child pornography laws will continue to grow increasingly worse,’ as ‘the mere prospect that the technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution.’” (alteration in original) (quoting Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 501(13), 117 Stat. 650, 678 (2003))); *id.* app. at 12a (“Evidence submitted to the Congress . . . demonstrates that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated. The technology will soon exist, if it does not already, to computer generate realistic images of children.”).

teur pornographers from exploiting children there would be a fair claim that some degree of expressive protection had to yield to protect the children.”<sup>229</sup>

### E. “Undue Burden” & Abortion Restrictions

The Court’s decisions about abortion are perhaps notoriously embedded with factual assumptions vulnerable to change over time. The trimester framework and the viability line in *Roe v. Wade*,<sup>230</sup> for example, were criticized almost since their inception for having a limited shelf life.<sup>231</sup>

Not surprisingly, the connection between science and abortion doctrine has led to a variety of challenges capitalizing on scientific change.<sup>232</sup> To date, the U.S. Supreme Court has not announced any sort of constitutional expiration date for laws regulating abortion—even in light of changes in medicine.<sup>233</sup> There is, however, one facet of abortion doctrine that is particularly relevant to the present discussion, and it may be headed to the Supreme Court in the not-so-distant future.

Recently enacted laws in several states require all who perform abortions to have admitting privileges at a local hospital.<sup>234</sup> These laws are justified as a measure to protect a woman’s health in the case of a compli-

229. *Williams*, 553 U.S. at 323 (Souter, J., dissenting).

230. 410 U.S. 113 (1973).

231. See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 828 (1986) (O’Connor, J., dissenting) (describing *Roe*’s trimester framework as “outmoded”); Dahlia Lithwick, *Foreword: Roe v. Wade at Forty*, 74 OHIO ST. L.J. 5, 10 (2013) (noting that “scientific and medical advancements are making it clear that arbitrary lines about fetal viability that were drawn in *Roe* are clearly outdated”).

232. In Justice O’Connor’s words:

The *Roe* framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception.

*City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 458 (1983) (O’Connor, J., dissenting). For calls that changed facts demand a change in doctrine, see Jennifer M. Miller, *Understanding Fetal Pain: How Changed Circumstances Demand a Legal Response*, 40 CUMB. L. REV. 463, 464 (2010); and Nancy R. Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639, 640–41 (1986).

233. I am not counting the change from *Roe* to *Casey* in which the Court abandoned the trimester framework in favor of the undue burden test. Granted, the Court rationalized its choice in light of medical advances, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870–71 (1992), but this is not quite the same thing as finding a once-valid law unconstitutional because of changed circumstances.

234. Sandhya Somashekhar, *Admitting-Privileges Laws Have Created High Hurdle for Abortion Providers to Clear*, WASH. POST, (Aug. 10, 2014), [http://www.washingtonpost.com/national/2014/08/10/62554324-1d88-11e4-82f9-2cd6fa8da5c4\\_story.html](http://www.washingtonpost.com/national/2014/08/10/62554324-1d88-11e4-82f9-2cd6fa8da5c4_story.html) [http://perma.cc/J38R-GVJT]. As this Article goes to print, two cert petitions challenging these laws (from Texas and Mississippi) are pending at the U.S. Supreme Court, and Court watchers suspect the Court will decide to hear at least one of them. See Josh Gerstein, *5 Cases to Watch as Supreme Court Term Begins*, POLITICO (Oct. 4, 2015, 7:41 AM), <http://www.politico.com/story/2015/10/supreme-court-abortion-obamacare-214400> [http://perma.cc/XU9V-BLSE].

cation.<sup>235</sup> But in practice, critics say, these laws have the effect of closing clinics (like Planned Parenthood) because either the physicians live too far away from the relevant hospital or because the local hospitals do not want to grant privileges to abortion doctors for religious or other reasons.<sup>236</sup> Plaintiffs have challenged these laws as violating the fundamental right to an abortion articulated in *Roe v. Wade*.<sup>237</sup>

Since the *Casey*<sup>238</sup> decision in 1992, the doctrinal test employed whenever a state restricts abortions is whether the law's purpose or effect places a substantial obstacle—or “undue burden”—in the path of a woman seeking an abortion before the fetus attains viability.<sup>239</sup> This “undue burden” test is one that is vulnerable to pressure from changed circumstances over time—particularly when one thinks about the cumulative effect of abortion laws within one geographic area. A law requiring licenses at local hospitals, for example, may or may not amount to a “substantial obstacle” depending on how many clinics the law affects and how many locations remain open and available to women seeking abortion. But of course the answer to that question will change over time depending on some legal variables (new laws) and some nonlegal ones (funding problems).

This dilemma recently faced a district judge in Alabama, a state that has passed one of these licensing laws.<sup>240</sup> In granting a request for a temporary restraining order enjoining the law, the court explained:

[T]he law threatens a permanent destabilizing effect on the provision of abortions in this State . . . . The number of abortion clinics in Alabama has already dwindled from seven to five in recent years. Thus, while the court's decision today hinges only on the three clinics imminently impacted by [the law], the evidence raises the specter of an Alabama in which women are unable to exercise this due-process right at all.<sup>241</sup>

The Fifth Circuit Court of Appeals considered the same argument in a similar case even more recently.<sup>242</sup> After a 2012 state law required abortion providers to have admitting privileges in local hospitals, the lone Mississippi abortion clinic faced imminent closure.<sup>243</sup> It filed a lawsuit seeking to enjoin the law, which the district court granted and the state appealed.<sup>244</sup>

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235. Somashekhar, *supra* note 234.

236. *Id.*

237. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 587–88 (5th Cir. 2014).

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

239. *Id.* at 874.

240. *Planned Parenthood Se., Inc. v. Bentley*, 951 F. Supp. 2d 1280, 1282 (M.D. Ala. 2013).

241. *Id.* at 1288; *see also* *Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858, 862–63 (W.D. Wis. 2013) (implying a similar argument).

242. *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014).

243. *Id.*

244. *Id.* at 450.

Interestingly, the Fifth Circuit—citing circuit precedent—did not question the constitutionality of the law as originally enacted.<sup>245</sup> Instead, it dealt with what it called the “thornier question”—whether the effect of closing clinics in Mississippi and neighboring states created a “domino effect” and established an undue burden over time.<sup>246</sup>

The Fifth Circuit ultimately decided to grant the temporary restraining order, but it noted the difficult soothsaying task it was being asked to perform:

It would be exceedingly difficult for courts to engage in an as-applied analysis of an abortion restriction if we were required to consider not only the effect on abortion clinics in the regulating state, but also the law, potential changes in the law, and locations of abortion clinics in neighboring states.<sup>247</sup>

And yet the applicable doctrinal test—is there a substantial obstacle in a woman’s ability to get an abortion?—is necessarily one that can change over time and lead to a constitutional shelf life for the law in question.

#### F. *Congressional Power: Marijuana*

My final example of a potential constitutional shelf life concerns Congress’s power to regulate marijuana. In lawsuits across the country plaintiffs are claiming, in a nutshell, that the forty-five-year-old congressional decision to list marijuana as a Schedule I drug is antiquated and thus unconstitutional.<sup>248</sup> These litigants have built records attempting to document the medicinal benefits and exaggerated dangers of marijuana, and they are all seeking to expose this aspect of the Controlled Substances Act (CSA) as out-of-date.<sup>249</sup> Because we now know much more about marijuana, the argument goes, courts should conclude the old law is irrational, beyond the scope of Congress’s power, or otherwise constitutionally deficient.<sup>250</sup> As one

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245. *Id.* at 453–54.

246. *Id.* at 454; *id.* at 465 n.14 (Garza, J., dissenting); Brief of Plaintiffs-Appellees at 20–21, *Currier*, 760 F.3d 448 (No. 13-60599), 2014 WL 407737, at \*20–21.

247. *Currier*, 760 F.3d at 456 n.8.

248. *See, e.g.*, *Sacramento Nonprofit Collective v. Holder*, 552 F. App’x 680, 683 (9th Cir. 2014) (addressing the argument that the federal prohibition on medical marijuana has no rational basis anymore); *Ams. for Safe Access v. DEA*, 706 F.3d 438, 440 (D.C. Cir. 2013) (same); *Kadonsky v. Holder*, No. (UNA), 2014 WL 2739303, at \*1 (D.D.C. June 10, 2014) (addressing the argument that marijuana does not meet the requirements for classification under 21 U.S.C. § 811); Memorandum in Support of Defendant’s Motion to Dismiss Indictment, *supra* note 31, at 12–28, 2013 WL 10629793 (arguing that medical evidence proves marijuana’s classification unreasonable and arbitrary).

249. *E.g.*, Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss, *supra* note 30, at 18–21, 2012 WL 1580711.

250. Challenges like this wear various constitutional stripes. Plaintiffs argue that banning marijuana is no longer rational and is therefore a violation of substantive due process, that banning marijuana violates equal protection rights of the terminally ill, and that Tenth Amendment and

plaintiff puts it, “[l]aws are written then circumstances change and those laws must bow to those changes.”<sup>251</sup> For this point some recent briefs even cite *Shelby County* picking up the language that “current burdens must be justified by current needs.”<sup>252</sup>

The Supreme Court has seen this argument about marijuana before, if only tangentially. In 2005, the Court decided *Gonzales v. Raich*,<sup>253</sup> in which it held that Congress was permitted under the Commerce Clause to regulate homegrown marijuana used for medicinal purposes.<sup>254</sup> In that litigation, as Justice Stevens credited in a footnote, the plaintiffs and their amici proffered evidence of marijuana’s positive medicinal qualities, of the weakness in the case for the drug’s dangerousness, and of the changes in medical research that had brought this new knowledge to light.<sup>255</sup>

Justice Stevens, writing for the Court, noted that over time this type of evidence may “cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I.”<sup>256</sup> But, he continued, “the possibility that the drug may be reclassified in the future has no relevance to the question whether Congress now has the power to regulate its production and distribution.”<sup>257</sup>

It may not have been enough for the Court in 2005, but plaintiffs ten years later—armed with *Shelby County*—claim that the expiration date for marijuana’s Schedule I classification has in fact arrived.<sup>258</sup> These litigants not only point out the changed facts about our current understanding of marijuana’s effects on the body, but they also argue that as states begin to legalize the drug, the federal government’s argument for containing it diminishes.<sup>259</sup> As Will Baude has argued, the CSA’s broad prohibitions are justified only because of the “potential spillovers from the in-state market to

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Commerce Clause limitations prevent Congress from regulating marijuana, which should be left to the states. For an example of a brief with all of the above arguments, see *id.*

251. *Id.* at 1.

252. *E.g.*, Memorandum in Support of Defendant’s Motion to Dismiss Indictment, *supra* note 31, at 31.

253. 545 U.S. 1 (2005).

254. *Id.* at 22.

255. *See id.* at 27 n.37 (acknowledging that the evidence from the litigation may cast doubt on marijuana’s classification as a Schedule I substance); Brief Amici Curiae for the California Nurses Association and the DKT Liberty Project in Support of Respondents at 15, *Raich*, 545 U.S. 1 (No. 03-1454), 2004 WL 2336548, at \*15 (“[I]n the 1980’s, medical research began to resurface, suggesting that in fact, cannabis did have some specific therapeutic usefulness . . .”); Brief Amicus Curiae of the Institute for Justice in Support of Respondents at 9, *Raich*, 545 U.S. 1 (No. 03-1454), 2004 WL 2336487, at \*9 (observing that the CSA does not “provide any evidence about either the universal dangers of marijuana or the necessary interdependence between a specialized local market and the general trafficking of marijuana”).

256. *Raich*, 545 U.S. at 27 n.37.

257. *Id.*

258. *See supra* note 248.

259. *See supra* notes 248–52 and accompanying text.

the interstate market.”<sup>260</sup> This, of course, changes as states legalize the drug. Baude argues that “[s]ometimes a law is constitutionally justified specifically because of certain real-world conditions . . . . If the real-world conditions go away, so does the justification.”<sup>261</sup>

Interestingly, once again, a key feature of these arguments in the lower courts is the position of the Executive. By law, the Drug Enforcement Administration (DEA), in consultation with Health and Human Services is authorized to switch the Schedule classification of a controlled substance after notice and comment rulemaking.<sup>262</sup> In recent years advocacy groups petitioned the agency to change the classification of marijuana from a Schedule I drug to a less restrictive Schedule.<sup>263</sup> Their petition included dozens of medical reports and empirical studies emphasizing the change in what we know about marijuana’s effects on the body.<sup>264</sup>

In 2011, however, the DEA denied this request—crediting different scientific evidence that emphasized marijuana’s risk of abuse and lack of accepted medical utility in the United States.<sup>265</sup> This administrative finding has subsequently played a role in the lower court cases where plaintiffs argue for a constitutional shelf life to the CSA’s treatment of marijuana.<sup>266</sup> In one recent case, for example, the government cited the DEA’s decision to argue that whether marijuana should be criminalized given current evidence on the drug is a “thorny question” assigned to “the expert agencies” and not the province of courts to decide at all.<sup>267</sup>

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In sum, allegations that a law is too old to remain constitutional are not new and are not confined to election law. These claims cut across constitutional doctrines and are evaluated through the lens of several different standards of review. Outside of *Shelby County* (and a strong suggestion in the

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260. William Baude, *State Regulation and the Necessary and Proper Clause*, 65 CASE W. RES. L. REV. 513, 520 (2015).

261. *Id.* at 532.

262. 21 U.S.C. § 811(a)–(b) (2012).

263. *Ams. for Safe Access v. DEA*, 706 F.3d 438, 441–42 (D.C. Cir. 2013).

264. *Id.* at 442.

265. *Denial of Petition to Initiate Proceedings to Reschedule Marijuana*, 76 Fed. Reg. 40,552, 40,552 (July 8, 2011). This ruling was upheld by the D.C. Circuit in *Americans for Safe Access v. DEA*, 706 F.3d at 452.

266. *See, e.g.*, Government’s Supplemental Brief at 3, *United States v. Pickard*, No. 2:11-cr-449, (E.D. Cal. Apr. 17, 2015) (referencing the administrative finding to show that these decisions have not typically been made by courts); Defendants’ Reply In Support of Motion to Dismiss at 10 & n.8, *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100 (E.D. Cal. 2012) (No. 2:11-CV-02939), 2012 WL 1580710 (arguing that the DEA administrative process is the exclusive way marijuana could be reclassified).

267. Government’s Supplemental Brief, *supra* note 266, at 3.

D.C. rent control case), the Supreme Court has never struck down a law on this basis, but it has been more receptive to some arguments (as in the crack/cocaine example) than others (as in immigration or marijuana). Is the question of constitutional staleness capable of principled application?

### III. Concerns about the Constitutional Shelf-Life Inquiry

It should shock no one that the idea of statutory staleness is subject to manipulation. A realist might argue that whether or not a court is swayed by the argument that “times have changed” may be best explained by whether the judges cared about the underlying law to begin with. On this view, Justice Black did not lose sleep about the burdens imposed on the railroads by the full-crew law, but Chief Justice Roberts cared very much about subjecting Southern states to more stringent voting discrimination remedial measures.

Cries of opportunistic judicial behavior, of course, are not unique to the issue of a shelf life. In constitutional law alone, the Court has been accused of manipulating standards of review,<sup>268</sup> strategically choosing when to defer to Congress,<sup>269</sup> and conveniently deciding to either follow or hollow precedent.<sup>270</sup> Why not just add the strategic recognition of the effects of time to the list? On this view, the possibility of a shelf life should cause no more concern than any other facet of constitutional law and any other aspect of judicial review.

But there is something new to fret about—some concerns that are unique to the concept of a shelf life and that are worth pausing to consider independently.

After the *Shelby County* decision was announced, William Consovoy (one of the County’s lawyers) called the decision “modest, not

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268. See William D. Araiza, *Justice Stevens and Constitutional Adjudication: The Law Beyond the Rules*, 44 LOY. L. REV. 889, 891 (2011) (“Justice Stevens was a well-known skeptic of rigid rules in equal protection and First Amendment law, among other subjects.”); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 954 (2002) (arguing “that existing accounts of equal protection leave the decision whether to treat a classification as suspect . . . to almost completely unguided normative judgment”).

269. See William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 881 (2013) (explaining the divergent approaches on legislative facts and acknowledging that “[c]ynics can easily rationalize the divergent results by referring to the politics”); McGinnis & Mulaney, *supra* note 19, at 76–77 (“[T]he Court has been unable to formulate a consistent approach towards Congress’ fact-finding. Sometimes the Court explicitly defers to the facts found by Congress, sometimes it makes an independent judgment of the facts, and sometimes it engages in a combination of these approaches.”).

270. See Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1863 (2014) (noting the criticism the Roberts Court has received due to its willingness to “narrow apparently applicable precedents”). See generally Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2111 (2015) (analyzing the current Supreme Court’s tendency to read statutes narrowly to opportunistically avoid deciding constitutional questions as a way to “camouflage acts of judicial aggression”).

revolutionary.”<sup>271</sup> Not only did the Court avoid deciding whether the preclearance regime was within Congress’s power, he said, but it also *only* found the formula to be irrational because it was outdated.<sup>272</sup> The Court “left for another day,” Consovoy emphasized, “the question of whether congressional findings of discrimination could lead to the exact same set of jurisdictions to be covered under an alternative formula.”<sup>273</sup>

This claim picks up themes from the Court’s opinion itself. In Richard Hasen’s words, *Shelby County* “purports to be a modest decision written with reluctance and humility.”<sup>274</sup> The majority spends very little time discussing the Fifteenth Amendment and its history or modern significance. And it did not clearly articulate what standard of review applies to Congress’s choices in the Voting Rights Act. Evading those big fights, the majority opinion instead focuses on the dramatic changes since the law was enacted—including a chart demonstrating the changes in minority voter turnout over the last fifty years.<sup>275</sup> The Court addresses not whether Congress can do this at all, but whether Congress can do it without an update.<sup>276</sup> In the Court’s words, “We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress. . . . [Congress’s] failure to act leaves us today with no choice but to declare [the law] unconstitutional.”<sup>277</sup> And then, in conclusion, the opinion emphasized that “Congress may draft another formula based on current conditions.”<sup>278</sup>

These choices are deliberate and revealing. Arguments that laws are outdated—like the one credited in *Shelby County*—emphasize facts over doctrine. And this change in focus has very significant implications.

First, finding a law to be unconstitutional because it is outdated as a factual matter sounds somehow more objective, more scientific, and less politically motivated than second-guessing a legislative policy choice. The Court did not need to find that Congress was without power to pass the Voting

271. NATHANIEL PERSILY & THOMAS MANN, *SHELBY COUNTY V. HOLDER AND THE FUTURE OF THE VOTING RIGHTS ACT* 5 (2013), [http://www.brookings.edu/~media/research/files/papers/2013/08/09-shelby-v-holder-policy-mann/persily\\_mann\\_shelby-county-v-holder-policy-brief\\_v9.pdf](http://www.brookings.edu/~media/research/files/papers/2013/08/09-shelby-v-holder-policy-mann/persily_mann_shelby-county-v-holder-policy-brief_v9.pdf) [<http://perma.cc/88Y4-UB3N>].

272. *See id.* (explaining that “the Court ruled against the coverage formula on grounds that it was not rational in theory” because the data was from the 1960s and 1970s, not because the Court decided that the geographic scope was irrational).

273. *Id.*

274. Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 713 (2014). Hasen then argues that “[d]espite the projected judicial modesty, the *Shelby County* Court was doing much more than calling balls and strikes.” *Id.* at 714.

275. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2625–26 (2013).

276. *See id.* at 2629 (“But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day.”).

277. *Id.* at 2629, 2631.

278. *Id.* at 2631.

Rights Act; it only needed to hold that it couldn't do it with an outdated mechanism. For Justices who call themselves minimalists and pride themselves on respecting legislative policy choices, this is a very attractive rationale.

Faulting Congress for using old numbers is tempting for any number of reasons. It is an argument that can be described with charts and data. In a legal culture that has long equated science with legitimacy,<sup>279</sup> this is a most appealing option. Moreover, it avoids having to wrestle with thorny doctrinal issues such as precisely identifying or applying a standard of review. And—what is more—the consequences of the ruling can be remedied if Congress ever gets its act together. This sounds like minimalism. The Court is not changing what the Constitution means; it is *merely* addressing changed facts and calling things like it sees them. This “just the facts, ma'am” strategy is attractive because it appears judicially modest.

But this modesty of course is just an illusion. Deciding that the Voting Rights Act formula is too old to be rational as a factual matter is just as consequential as holding that the law exceeded Congressional power as we now understand the Fifteenth Amendment.

Recall that Justice Black put “findings of fact” in scare quotes when he denounced what he called the judicial indulgence in a legislative call about the proper size of railroad crews.<sup>280</sup> What he was alluding to was the temptation to make big changes in the law through so-called modest findings of fact. It is a risk highlighted in *Shelby County*, but it is a danger inherent simply in the idea of a constitutional expiration date.

If this temptation is true for certain Justices about the Voting Rights Act, it could be true for other Justices about, for example, marijuana laws. It is not difficult to imagine a judicial opinion one day—complete with charts—that carefully describes the state of our understanding about the dangers of marijuana in 1975 compared with our understanding about the drug today. Particularly in a post-Internet world where facts are so easy to access on all sides of a debate, this type of argument would not be difficult to make. There would be no need to find four votes agreeing on the scope of federal power under the Commerce Clause or defining fundamental rights. A constitutional shelf life only requires a consensus that “times have changed” . . . which, of course, they always do.

My argument, therefore, is not that stale facts are easier to manipulate than any other choice before the Court. My claim is that it is dangerous to pretend that they are any better. This particular manipulation comes in a modest façade that belies the importance of what is actually happening. Put

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279. See Dean M. Hashimoto, *Science as Mythology in Constitutional Law*, 76 OR. L. REV. 111, 116 (1997) (“By reciting scientific facts, the Court shows why its rulings are in harmony with a culture that accords legitimacy to findings made by scientists.”).

280. *Bhd. of Locomotive Firemen & Enginemen v. Chi., Rock Island & Pac. R.R. Co.*, 393 U.S. 129, 139 (1968).

simply, as constitutional law becomes increasingly steeped in factual claims, we must guard against the understandable temptation to see everything as a question of fact—refutable, objective, and almost scientific. That use of the factual label translates to a very robust brand of judicial power.

Of course, recognizing changed facts affects more than just claims that a law has expired. As articulated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, sometimes the Court uses changed facts to justify a turn in constitutional doctrine.<sup>281</sup> The *Casey* Court explained that a precedent can be overruled if “facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”<sup>282</sup>

Why should one be nervous about using facts to invalidate a law because it is too old but not concerned with using facts to justify a constitutional change in meaning? In other words, if one is comfortable with the Justices knowing that the world has changed such that our reading of the Equal Protection Clause must change (like from *Plessy*<sup>283</sup> to *Brown*), should not that same confidence extend to claims of a constitutional shelf life?

My answer is a very pragmatic one. Shifts in our understanding of the Constitution are a big deal. They do not happen often, and when they occur, everyone—all members of the Court and all of the Court watchers—is aware of the historic significance of the decision at hand.

With the heightened significance that accompanies shifts in understanding the Constitution comes a natural prudence. As the discussion in *Casey* keenly demonstrates, when debating a change in the Constitution’s meaning, the Justices are at their most vulnerable—they are concerned with their own legitimacy in the public eye. This context explains why the *Casey* Court—when asked to overrule *Roe v. Wade* and knowing that the whole country was watching—decided to opine on the nature of stare decisis and concerns about its institutional legitimacy. Overruling a precedent or announcing that the Constitution’s meaning has changed is extremely significant—for the Justices as individuals, for the Court as an institution, and for the country. The scale of the responsibility serves as a form of restraint. The Court will not easily hold, in other words, that “[s]ociety’s understanding of the facts” relevant to constitutional interpretation has changed.<sup>284</sup>

By contrast, when the Justices are not poised to consider a change in the Constitution’s meaning, but are rather just applying a settled meaning to so-called changed facts, the magnitude of the moment is less apparent and their discretion is therefore less constrained.

To use a colorful analogy, this is like breaking up with a person by saying one needs more time to focus on work. It is the easier way out. The

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281. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 861–64 (1992).

282. *Id.* at 855.

283. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

284. *Casey*, 505 U.S. at 863.

outcome is the same—Section Five of the Voting Rights Act is essentially a dead letter without the formula—but the way to reach that outcome appears more conservative because it is something judges have done from the beginning of time; it is “just” the application of new facts to settled law. And like the heartbreaker in my analogy, finding a law to be outdated is a much easier judicial move than the more difficult task of finding the meaning of the Constitution to have changed over time. Even if it is easier to accomplish and easier to stomach, however, striking down a law because it is premised on outdated facts carries equally significant implications for judicial review and constitutional law in the future.

#### IV. Conditions Necessary for a Court to Find a Constitutional Shelf Life

I am not the first person to worry about the implications of a constitutional shelf life. Lower courts faced with these claims commonly display a sense of unease and vulnerability—how is one to tell whether a law is too outdated?<sup>285</sup>

If I am correct that the opportunity and the temptation to make these claims will only grow, it seems imperative to develop some sort of framework to guide judicial discretion in how to deal with them. As Corinna Lain put it recently, “[c]onstitutional decisionmaking comes down to judgment calls, and those judgment calls have to come from somewhere.”<sup>286</sup> Is there any way to guide judicial discretion on the question of a shelf life? Can a court measure factual change in any principled way?

Below I offer preliminary thoughts on an answer. I first claim that the answer to the shelf-life question must be guided by the applicable level of scrutiny. The possibility of constitutional expiration should be present only when a court is applying a form of heightened scrutiny. I argue that on rationality review, the prospect of a constitutional shelf life should be off the table. Then, even on a stricter standard of review, I point to two indicators (taken from the cases collected above) that the factual change is enough to change the constitutional status of a law: (1) when an agency has recognized the changed circumstances first, and (2) when the factual dispute is not subject to an ongoing political process. While neither barometer for gauging constitutional expiration is perfect, there are significant benefits to recognizing each as a limiting principle.

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285. *E.g.*, *United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring).

286. Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 *UCLA L. REV.* 365, 405 (2009).

A. *Importance of the Standard of Review*

Recall in the crack/cocaine example discussed above, Judge Calabresi contemplated the possibility of a constitutional shelf life and candidly lamented the lack of manageable standards to apply.<sup>287</sup> Ultimately he hung his hat on the standard of review: he voted to dismiss the defendant's claim for a constitutional shelf life on rationality review, even though he indicated a different result might follow if strict scrutiny applied.<sup>288</sup>

Judge Calabresi was correct to rely on the standard of review in this way. To be sure, standards of review are not perfect constraints on discretion. As others have argued, they are used at best unpredictably and at worst opportunistically.<sup>289</sup> But as Justice Souter once explained, having different rules for review "keeps the starch" in the law.<sup>290</sup> Put differently (and less elegantly), although the guidance and restraint supplied by levels of review are not perfect by any means, the self-control they embody is necessary to further the rule of law.

In looking for guidance on the shelf-life question, therefore, the various standards of review should be the first place to start. There are at least two reasons why this must be true. First, considering a constitutional shelf life will necessarily require a careful review of the legislative factual record at question. Determining how carefully a court, in the words of Justice Scalia "check[s] Congress's homework,"<sup>291</sup> should be guided by whether the level of scrutiny is ratcheted up. "If a particular doctrine reflects judicial suspicion of legislative action," as Bill Araiza helpfully explains, "then that suspicion should extend to the legislature's findings supporting its chosen policy."<sup>292</sup>

Some constitutional tests, by their own terms, require increased fact-checking judicial oversight. It is hard to rule on whether a law is an undue

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287. *Then*, 56 F.3d at 468.

288. *Id.* at 466–68.

289. As Michael Dorf has argued (in the specific context of Equal Protection doctrine), deciding which standard of review applies is left "to almost completely unguided normative judgment," leaving us with a "messy hodgepodge" that is "highly subjective." Dorf, *supra* note 268, at 954, 966–67.

290. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring).

291. *Tennessee v. Lane*, 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting) (complaining about the "flabby" congruence and proportionality test applied when Congress is using its enforcement power under Section Five of the Fourteenth Amendment).

292. Araiza, *supra* note 269, at 900. There is a growing literature on when the Court should defer to Congressional findings of fact, and that is a topic too large and too complicated to be adequately addressed here. That being said, however, I am not the first to claim that the substantive constitutional doctrine should play an important role in the level of deference to Congressional fact-finding. *See, e.g.*, FAIGMAN, *supra* note 18, at 129–30 (claiming that the amount of deference given to Congressional fact-finding should track the level of judicial review applied to the kind of law at issue); Borgmann, *supra* note 19, at 35 ("Independent judicial review of constitutionally-significant facts goes in tandem with the importance of judicial review more generally when basic personal liberties are at issue.").

burden or not, for example, without some decision about the facts—including changed facts. Similarly, the “one person one vote” standard in voting reapportionment cases demands inquiry into changed factual circumstances. What else would you call a test that turns on population changes? And the “congruent and proportional” test that applies when Congress is exercising its enforcement power under Section Five of the Fourteenth Amendment likewise requires some sort of judicial “homework checking” of the factual record (which is why Justice Scalia calls the test “flabby” and hard to apply).<sup>293</sup>

What all of these tests have in common is that they are all a form of heightened scrutiny. They each empower a court to look under the hood of the law, so to speak, and to check the factual underpinnings. But without that doctrinal permission, I submit, a court is not authorized to check the homework of the legislature. Finding a law to have outgrown its rationality on a baseline minimal rationality review, therefore, should be out of bounds.

A second reason for this line in the sand is that a more forgiving standard of review generally establishes that the political process is still functioning. In the present context, this means that the legislature can recognize the changed facts and address them in future legislation. Don’t cry for the funeral directors in Pennsylvania, in other words, because they can bring their grievances to the Pennsylvania legislature.

By contrast, when a heightened scrutiny applies, one rationale for the tough standard of review is that there is reason to believe the political process is broken, at least for some people. The significance of that here is that there is a decreased chance the legislature will recognize the changed circumstances on its own, perhaps justifying judicial interference. Those challenging an abortion law, for example, may have difficulty bringing the changed circumstances to the attention of the legislature; at least, that is part of the justification for the heightened judicial standard that applies when their claims are addressed.

#### *B. Two Indications that a Law’s Factual Premise Has Grown Stale*

Putting weight on the standard of review, however, is just a beginning. There is still very little guidance for a court as to how to measure changed facts that might justify a constitutional shelf life. A vacuum of standards is dangerous and unhelpful. But if just looking at the factual record alone is not enough, how is a court to determine when a law is too antiquated, even on a heightened standard of review?

Two patterns emerge in the cases that have confronted the shelf-life question to date. First, courts seem more willing to credit the “times have changed” argument when it is following the Executive’s lead—when an

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293. *Lane*, 541 U.S. at 557–58 (Scalia, J., dissenting).

administrative agency has considered the shelf-life claim first. Second, courts seem less willing to find a law constitutionally out-of-date when the controversy has been subject to a prolonged political dialogue.

*1. Role of the Executive.*—Courts are not the only government entity capable of recognizing changed circumstances. As Jody Freeman and David Spence observed recently, administrative agencies are commonly tasked with implementing old statutes to address new problems.<sup>294</sup> Agencies perform quite well in these circumstances and, according to Freeman and Spence, manage these statutory-fit problems carefully, strategically, and often with deliberate restraint.<sup>295</sup> Particularly in an era with a polarized and often inactive Congress, federal agencies are the best “statutory updaters” because “they are more nimble than Congress, more accountable than courts, and more expert than both in responding to changing conditions.”<sup>296</sup>

If agencies can be trusted to “update” statutes, in the words of Freeman and Spence, perhaps they can also serve as a guide to courts struggling with claims that a law is unconstitutionally out-of-date. I think this deference not only makes sense for functional reasons, but it is also consistent with the way most federal courts have dealt with claims of constitutional expiration in the past.<sup>297</sup>

Recall two examples discussed above: the 100-to-1 crack/cocaine sentencing disparity and the listing of marijuana as a Schedule I controlled substance. Both laws have been subject not just to lawsuits alleging constitutional expiration but also to review of the changed circumstances by administrative agencies. In both contexts, the respective agency’s position has greatly influenced the judicial answer to the constitutional question.

In *Kimbrough v. United States*, for example, when contemplating the validity of the old 100-to-1 sentencing disparity between crack and cocaine offenders, the Supreme Court was influenced by the “additional research and experience” that the U.S. Sentencing Commission brought to bear on the controversy.<sup>298</sup> It was critical to the Court that the federal agency charged with establishing sentencing policy and practices thought the old law to be problematic, and that this conclusion was reached only after the agency

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294. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 2–3 (2014).

295. *Id.* at 3.

296. *Id.* at 4.

297. Judicial deference to the Executive with respect to evaluating old laws is nothing new. In addition to the examples discussed above, the old English doctrine of desuetude forbids criminal prosecution under an old law when enforcement has been exceedingly rare. See Dan T. Coenen, *The Pros and Cons of Politically Reversible “Semisubstantive” Constitutional Rules*, 77 FORDHAM L. REV. 2835, 2849–50 (2009) (citing desuetude as an explanation for the U.S. Supreme Court’s invalidation of Texas’s sodomy ban in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

298. *Kimrough v. United States*, 552 U.S. 85, 97 (2007).

devoted much time and several lengthy fact-laden reports to reexamining the Congressional assumptions behind the old law.<sup>299</sup>

Similarly—although this dispute has yet to reach the Supreme Court—the lower courts tasked with determining whether it is constitutional to list marijuana as a Schedule I drug anymore have looked to the Executive with a deferential eye.<sup>300</sup> The executive position on marijuana is complicated. As noted above, the Drug Enforcement Agency has considered and declined to remove marijuana from the list of Schedule I controlled substances.<sup>301</sup> However, in a series of memos beginning in 2009, the Department of Justice (DOJ) has issued guidance to federal prosecutors not to waste resources prosecuting individuals who are complying with state laws regarding marijuana (although maintaining that federal law is still supreme in this regard).<sup>302</sup>

Together these directives seem like an incremental step to react to changed circumstances about marijuana. And the courts seem almost relieved to let the Executive take the lead on this issue. To date, no court has credited the claim that marijuana restrictions are constitutionally outdated. Instead, the typical move is for the court to explicitly defer to executive discretion on marijuana enforcement, sometimes examining these DOJ memorandums on the subject line by line.<sup>303</sup>

I do not mean to suggest that the question of when a law has constitutionally expired is a question that can or should be answered entirely by an administrative agency. I make instead the more limited claim that in evaluating a challenge to an old law as constitutionally extinct, a court should

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299. *Id.* at 97–98.

300. *See, e.g.*, *Ams. For Safe Access v. DEA*, 706 F.3d 438, 449–52 (D.C. Cir. 2013) (deferring to DEA’s interpretation of “adequate and well-controlled studies” in the Schedule I context).

301. *Denial of Petition to Initiate Proceedings to Reschedule Marijuana*, 76 Fed. Reg. 40,552, 40,562 (July 8, 2011).

302. Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Justice, to Selected U.S. Att’ys (Oct. 19, 2009), <http://www.justice.gov/opa/documents/medical-marijuana.pdf> [<http://perma.cc/7DCJ2U7S>] (stating that federal prosecutors should not “focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for medical use of marijuana” but also stating that “no state can authorize violations of federal law”); *see also* Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, to all U.S. Att’ys (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<http://perma.cc/2RVX-TVZT>] (directing federal prosecutors to “review marijuana cases on a case-by-case basis” weighing “whether the [marijuana] operation is demonstrably in compliance with a strong and effective state regulatory system”); Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, to U.S. Att’ys (June 29, 2011), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> [<http://perma.cc/7Y8C-KV55>] (affirming the Ogden Memo and clarifying that it did not apply to “large-scale, privately-operated industrial marijuana cultivation centers,” even when “those [centers] purport to comply with state law”).

303. *E.g.*, *United States v. Washington*, 887 F. Supp. 2d 1077, 1090–91 (D. Mont. 2012); *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100, 1111–12 (E.D. Cal. 2012); *Mont. Caregivers Ass’n v. United States*, 841 F. Supp. 2d 1147, 1148 (D. Mont. 2012).

look to an agency's enforcement position as a clue for measuring the magnitude of the factual change on the ground.

Recall this is exactly the Court's position with respect to broadcast scarcity and the FCC. When asked to overrule *Red Lion*, the Court has said: "We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."<sup>304</sup>

Perhaps this intuition is more than just a convenient reason to punt. When the Sentencing Commission recommends changing the sentence for crack users because time has revealed an unfair burden on racial minorities, that recommendation comes after a rather intense and deliberate fact-finding process—one that agencies are in a far better position to undertake than courts given the time constraints of litigation and the resource constraints of the federal bench. The Court has used—and should continue to use—the factually supported determinations of the Executive as a guidepost in determining when exactly times have changed.

2. *Legislative Sensitivity to Effects of Time.*—A second trend in the Court's discussion of constitutional expiration dates is attention to how the legislation in question deals or is dealing with the effects of time. Recall that Justice Black, in evaluating the law on the size of a railroad crew, emphasized that the issue had been subject to "frequent and recent legislative re-evaluation."<sup>305</sup> And Justice White (in *Vance v. Bradley*) rejected the constitutional challenge to the Foreign Service retirement age because Congress "has gone to great lengths" to consider this issue and had revisited it twice "[i]n the intervening years."<sup>306</sup>

Certainly a legislature cannot design its law to fully protect it from constitutional challenge later. But there are ways that a law can have temporal limitations built into it—it can display a legislative sensitivity to changes that will come. And when that is true, it should be treated as a sign to the court that the political process is healthy and capable of tinkering with the underlying problem on its own.

These legislative temporal limitations can take one of several forms. First, and perhaps most obvious, some laws contain sunset provisions. A sunset provision is when a legislature sets its own expiration date—a clause in the statute stating the law will cease to have effect after a certain date.<sup>307</sup>

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304. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376 n.11 (1984).

305. *Bhd. of Locomotive Firemen & Enginemen v. Chi., Rock Island & Pac. R.R. Co.*, 393 U.S. 129, 134 (1968).

306. *Vance v. Bradley*, 440 U.S. 93, 104, 106 (1979).

307. See Emily Berman, *The Paradox of Counterterrorism Sunset Provisions*, 81 *FORDHAM L. REV.* 1777, 1779 (2013) (referring to sunset provisions as an "expiration date").

Sunset clauses have their critics and are used for a number of reasons (some positive and some less so), but at least one reason for a sunset is to force legislative reevaluation of policies in the case of changed circumstances.<sup>308</sup> The existence of a sunset provision thus signals that the legislature assumed time may change its assumptions and that it wants to be the one to address any subsequent shifts at a later date.

A second way for a legislature to address the effects of time is through factual findings. A good example here is the previously discussed PROTECT Act of 2003 concerning virtual child pornography.<sup>309</sup> In that law, Congress made factual findings forecasting the effect of time on laws targeting child pornography.<sup>310</sup> Specifically, it found that technology would soon exist to create realistic but purely digital images of children.<sup>311</sup> With this finding, Congress thus recognized that the constitutional evaluation of its law would change over time (the government's interest in the law would strengthen), and it attempted to predict and weigh in on how that calculation should be made.<sup>312</sup>

A third and final way for a legislature to embed in its law sensitivity to the effects of time is to structure the law so that it can adjust to changing conditions. Justice Ginsburg has referred to this feature of a law as having a dynamic design.<sup>313</sup> An example of this is the Controlled Substances Act.<sup>314</sup> The CSA explicitly authorizes a federal agency (the DEA) to change the classification of a drug after notice and comment rulemaking.<sup>315</sup> This administrative process can be initiated by either the government or any interested party, and it can happen more than once over the course of time.<sup>316</sup> Indeed, in 1988 the National Organization for the Reform of Marijuana Laws obtained a successful ruling from an administrative law judge about reclas-

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308. See *id.* at 1781 (“Sunsets are thus employed as a mechanism to force Congress to reevaluate policies when the crisis atmosphere and, presumably, its accompanying pathologies have passed.”); Melissa J. Mitchell, Comment, *Cleaning out the Closet: Using Sunset Provisions to Clean Up Cluttered Criminal Codes*, 54 EMORY L.J. 1671, 1672–73 (2005) (arguing for sunsets in criminal statutes “to aid in the effective and efficient cleanup of the codes, with an aim towards creating a criminal code that is current and streamlined”). But see Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1009–12 (2011) (warning against sunset clauses and recommending a presumption against finding them).

309. See *supra* notes 222–29 and accompanying text.

310. Brief for the United States at 49, *United States v. Williams*, 553 U.S. 285 (2008) (No. 06-694), 2007 WL 1724329, at \*49 (detailing the legislative record of the PROTECT Act of 2003).

311. *Id.* app. at 14a–15a.

312. *Id.* app. at 15a.

313. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2644 (2013) (Ginsburg, J., dissenting) (“Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions.”).

314. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended in scattered sections of 21 U.S.C.).

315. Controlled Substances Act § 201(a).

316. *Id.*

sifying marijuana—a decision that was later overruled by the DEA.<sup>317</sup> And most recently, in 2011 the DEA reaffirmed its position that marijuana was too dangerous to remove from Schedule I classification.<sup>318</sup>

Those seeking the legalization of marijuana will likely scoff at the idea that this process is truly dynamic; there are vocal critics of the DEA's refusal to roll with the times and liberalize laws on marijuana.<sup>319</sup> But the point remains that the potential for change exists and is written into the law. The dynamic structure of the law reveals, in other words, a legislative awareness that time would affect its present factual assumptions.

What implications do we take from these three ways a legislature can demonstrate sensitivity to changes that will affect its laws over time? At the very least there is a lesson for legislators. Surely the best remedy for stale facts in the law is to have the most democratic branch update its laws periodically. Congress can and perhaps ought to be more attentive to the issue of staleness—not necessarily as a constitutional requirement or constraint but as an internal concern.<sup>320</sup>

More relevant for present purposes, however, is what a court should make of a sunset provision, a factual finding speculating into the future, or a statute with a dynamic design. These three characteristics of a law should counsel strongly against finding a constitutional shelf life. When a legislature pledges to review the problem in light of changed conditions in the future, or at least delegates that job to an agency, that decision should signal a legislative intent to be involved in the updating.

Honoring that legislative intent seems to be motivating many of the decisions discussed in this paper. Perhaps because line drawing is so difficult on the question of expiration (as Judge Calabresi lamented in *Then*<sup>321</sup>), or perhaps because the evidence of factual change is so often mixed (as Justice Black pointed out in the railroad cases<sup>322</sup>), the more cautious judicial decision is to avoid a constitutional decision when it seems likely the political branches will address the changed circumstances eventually. When there is

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317. Marijuana Scheduling Petition; Denial of Petition, 54 Fed. Reg. 53,767, 53,783 (Dec. 29, 1989).

318. Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40,552, 40,562–63 (July 8, 2011).

319. See, e.g., Daniel Mortensen, *California and Uncle Sam's Tug-of-War Over Mary Jane Is Really Harshing the Mellow*, 30 J. NAT'L ASS'N ADMIN. L. JUDICIARY 127, 166 n.135 (2010) (noting that the DEA's scheduling of marijuana as a Schedule I substance is in conflict with the opinions of many in the medical health community).

320. Consider an analogy to the federalism cases beginning in 1995 with *United States v. Lopez*, 514 U.S. 549 (1995). The Court's decision in *Lopez* prompted further detail to Congressional fact-finding in conjunction with its commerce clause power. Perhaps *Shelby County* can prompt a similar legislative response with respect to Congressional attention to factual changes over time.

321. *United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring).

322. *Bhd. of Locomotive Firemen & Enginemen v. Chi., Rock Island & Pac. R.R. Co.*, 393 U.S. 129, 138–39 (1968).

a good clue, in other words, that the debate will be updated or at least reconsidered by the legislature later, that is a strong reason for a court to stand down.

At the very least, deferring to the legislature in these contexts is more consistent with the concept of judicial minimalism—something many of the modern Justices purport to embrace.<sup>323</sup> In a nutshell, minimalists favor “narrow” and “shallow” judicial decisions, as opposed to “wide” and “deep” ones.<sup>324</sup> The hallmark of judicial minimalism is “the constructive use of silence” and the willingness to leave things undecided.<sup>325</sup> Leaving the question of statutory staleness to the body that enacted the statute to begin with may be the slower path to change, but it is the one more consistent with minimalism when there are good indications the political dialogue is ongoing and will continue.<sup>326</sup>

#### V. Back to *Shelby County*

Finally, we come full circle back to where this Article began: *Shelby County v. Holder* and the Voting Rights Act of 1965. There is room to argue about the precise nature of the constitutional violation in *Shelby County*. The Court was certainly concerned about federalism and the “principle of equal sovereignty among the States,”<sup>327</sup> but that alone did not cause the statute to fall. The law’s disparate treatment of the states marked the high stakes and

323. Frank B. Cross & James F. Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 EMORY L.J. 407, 491 (2010); Mark C. Rahdert, *Forks Taken and Roads Not Taken: Standing to Challenge Faith-Based Spending*, 32 CARDOZO L. REV. 1009, 1046 (2011); David D. Kirkpatrick, *Judge’s Mentor: Part Guide, Part Foil*, N.Y. TIMES (June 21, 2009), <http://www.nytimes.com/2009/06/22/us/politics/22mentors.html> [<http://perma.cc/R4HD-37CQ>] (portraying Judge Sotomayor as a judicial minimalist and quoting former Yale Law Dean and Second Circuit Judge Guido Calabresi, who described Sotomayor’s approach in a controversial case as one of “judicial minimalism”); Dahlia Lithwick, *Her Honor*, N.Y. MAG. (Nov. 27, 2011), <http://nymag.com/news/politics/elena-kagan-2011-12/#> [<https://perma.cc/G22F-3U6E>] (“[Justice Kagan] is deciding her cases one at a time, without hints or promises about where she may be moved down the road.”); Jonathan H. Adler, *Making Sense of the Supreme Court*, VOLOKH CONSPIRACY (July 2, 2010), <http://volokh.com/2010/07/02/making-sense-of-the-supreme-court> [<http://perma.cc/77SF-2KPX>] (“[A]t present, we can characterize the Roberts Court as a moderately conservative minimalist Court (except when its [sic] not).”).

324. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10–11 (1999).

325. *Id.* at 5.

326. The connection to minimalism explains, I think, why Justice Holmes did not feel constrained by the sunset provision in the D.C. rent control statute at issue in *Chastleton Corp. v. Sinclair*. As Adrian Vermeule helpfully explains, Justice Holmes did not feel judicial minimalism was the correct approach in a time of emergency. Vermeule, *supra* note 187, at 164; *see also id.* at 192 (explaining that to Holmes a sunset provision is just a “prophecy” to be evaluated later). At least in the case of emergencies, therefore, Justice Holmes thought it was perfectly acceptable for a court to discover the end of an emergency—but he did not think this was an act of judicial minimalism.

327. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (emphasis omitted) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

the exceptional nature of the preclearance system, but it was not the ultimate constitutional flaw in it.<sup>328</sup> And although the Court was extensively briefed on the scope of Congress's power under the Fourteenth and Fifteenth Amendments,<sup>329</sup> the majority opinion did not decide whether the Voting Rights Act was an appropriate use of Congress's enforcement power under those constitutional texts.

Instead, the constitutional violation in *Shelby County* had more to do with the passage of time than with anything else. The coverage formula in the law, recall, was reauthorized in 2006.<sup>330</sup> But, according to the Chief Justice, it was reauthorized "as if nothing had changed."<sup>331</sup> "[H]istory," he wrote, "did not end in 1965."<sup>332</sup> Section 4 of the Voting Rights Act is based on "40-year-old facts having no logical relation to the present day."<sup>333</sup> And, he concluded, the Constitution requires that "'current burdens' must be justified by 'current needs.'"<sup>334</sup>

This is the clearest endorsement of a constitutional shelf life the Supreme Court has ever articulated. And the question remains: is it justified? Putting aside the broader question of whether a constitutional shelf life is ever a good idea, was it appropriately invoked in this case? Did the coverage formula of the Voting Rights Act expire—had its rationality eroded to the point where a court is justified in finding it unconstitutional for that reason? For me, the answer is a clear no. Even if one believes in constitutional expiration dates theoretically, *Shelby County* was the wrong place to find one.

To start, the *Shelby County* Court employed a form of rationality review. Granted, the correct standard of review in this case is a bit of a mystery. Congress passed the Voting Rights Act using its enforcement power under the Fifteenth Amendment.<sup>335</sup> Some say that challenges to this exercise of Congressional power should be scrutinized under the "congruence and proportionality test" used when Congress exercises enforcement power under

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328. *See id.* at 2624 (recalling that the Court had previously upheld the Voting Rights Act against federalism and equal sovereignty challenges because the Act was justified by the "blight of racial discrimination in voting" (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966))).

329. *E.g.*, Brief of Reps. F. James Sensenbrenner, Jr. et al. as Amici Curiae in Support of Respondents at 30–32, *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 WL 417739, at \*30–32.

330. *See* 52 U.S.C.A. § 10303(a)(8) (West 2015) (noting the renewal and expiration provisions of the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006).

331. *Shelby Cty.*, 133 S. Ct. at 2626.

332. *Id.* at 2628.

333. *Id.* at 2629.

334. *Id.* at 2630 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

335. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

the Fourteenth Amendment.<sup>336</sup> Others say it should only be subjected to a “rational basis” standard with the deference typically accorded to acts of Congress.<sup>337</sup>

The *Shelby County* Court did not wrestle with this debate and left the standard of review for Fifteenth Amendment cases an “open question,”<sup>338</sup> but the word it chose to use when invalidating the law is “irrational,” leading most commentators to conclude it was employing some sort of rationality review.<sup>339</sup>

This is not your mother’s rationality review, however. As others have argued extensively, *Shelby County* “defied the deferential nature of the rational basis test” by giving short shrift to the legislative record amassed in 2006.<sup>340</sup> If legislative choices are generally given the benefit of the doubt on rationality review and—most importantly here—if the factual premise for legislation is not given a close look, then *Shelby County*’s rationality review was rationality in name only.

I am willing to concede that if the Court was applying a heightened standard of review, the case for a constitutional shelf life would be stronger with respect to the Voting Rights Act.<sup>341</sup> But the *Shelby County* Court must have neglected to articulate any heightened scrutiny for a reason. Perhaps, as some have speculated, there were not five votes to decide whether Congressional power under the Fifteenth Amendment should be scrutinized

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336. E.g., Jeremy Amar-Dolan, Winner of American Constitution Society’s National Student Writing Competition, *The Voting Rights Act and the Fifteenth Amendment Standard of Review*, 16 U. PA. J. CONST. L. 1477, 1478–79 (2014) (noting that the court of appeals in *Shelby County* took the Supreme Court’s precedent to be “a powerful signal that congruence and proportionality is the appropriate standard of review” for the VRA (quoting *Shelby Cty. v. Holder*, 679 F.3d 848, 859 (D.C. Cir. 2012))).

337. E.g., Derek T. Muller, *Judicial Review of Congressional Power Before and After Shelby County v. Holder*, 8 CHARLESTON L. REV. 287, 303–04 (2014). To deepen the mystery, the Court’s prior decisions on the Voting Rights Act could support either view. In *South Carolina v. Katzenbach* the Court spoke in terms of rationality review to review the preclearance scheme in the VRA, 383 U.S. at 324, but the decision was later used as an illustration of the congruence and proportionality test. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997); Muller, *supra*, at 304 (“[T]he Fourteenth Amendment cases treated *South Carolina v. Katzenbach* as instructive.”).

338. Muller, *supra* note 337, at 302.

339. *Id.* at 304 (“The Court in *Shelby County* did not address which test is appropriate for Fifteenth Amendment analysis. The Court’s only expression approaching an articulation of the test was twice mentioning that the Act’s coverage formula was ‘irrational.’”); see Greenbaum et al., *supra* note 16, at 826 (“[T]he majority in *Shelby County* appeared to be applying a rational basis test.”).

340. Greenbaum et al., *supra* note 16, at 814; see also Bertrall L. Ross II, *The State as Witness: Windsor, Shelby County, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027, 2061–63 (2014) (surveying the apparent distrust of the legislative record exhibited by the Court in *Shelby County*).

341. The answer is still not an easy one. For an argument that preclearance is within congressional authority even in light of the changes in the country since 1965, see generally Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1 (2007).

strictly.<sup>342</sup> Or perhaps deciding that the law falls under any standard of review—without choosing one—can be seen by some as “narrow” decision making and “the kind of minimalism one would ordinarily expect” from the Chief Justice.<sup>343</sup>

If the standards of review mean anything, however, they must mean that choosing a deferential standard to avoid a fight still results in applying deference. And, as I argue above, the choice of rationality review should have taken the possibility of a shelf life off the table.

Even putting aside the standard-of-review question, consider the other limiting principles at work in the cases described above: an indication by the Executive that the law is outdated and an absence of congressional attention to the effects of time. Both factors point the other way with respect to the Voting Rights Act.

As to the first point, the Department of Justice clearly indicated its view that § 4 of the Voting Rights Act continued to be necessary and relevant in current times.<sup>344</sup> Right up until the law was declared unconstitutional, in fact, the Attorney General denied requests by covered jurisdictions to change their voting laws.<sup>345</sup> The DOJ did not deny that racial progress had been made in the covered states since 1965, but concluded that “barriers to minority voting would quickly resurface were the preclearance remedy eliminated.”<sup>346</sup>

The DOJ also recorded its observations in the legislative record. It informed Congress in 2006 of countless examples of racial discrimination in the covered jurisdictions in modern times.<sup>347</sup> In fact, as Justice Ginsburg observes in her dissent, the DOJ filed “*more* DOJ objections [to voting practices in covered jurisdictions] between 1982 and 2004 . . . than there were between 1965 and . . . 1982” when the law was last reauthorized.<sup>348</sup> In light of these reports, the House concluded, “[d]iscrimination today is more subtle than the visible methods used in 1965,” but “the effect and results are the same, namely a diminishing of the minority community’s ability to fully participate in the electoral process and to elect their preferred candidates.”<sup>349</sup>

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342. Muller, *supra* note 337, at 305 (observing that Justices Kennedy and Thomas had regularly adhered to the congruence and proportionality test, but Justice Scalia had not—calling the test “flabby” and void of any real meaning).

343. *Id.* at 306.

344. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2639 (2013) (Ginsburg, J., dissenting).

345. *E.g.*, Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, to Melody Thomas Chappel (Apr. 8, 2013), [http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l\\_130408.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_130408.pdf) [<http://perma.cc/Y2R3-XWUN>].

346. *Shelby Cty.*, 133 S. Ct. at 2634 (Ginsburg, J. dissenting); *see also* *City of Rome v. United States*, 446 U.S. 156, 181 (1980) (noting Congressional recognition that, though undeniable progress had been made by the Voting Rights Act, it had been “modest and spotty”).

347. *Shelby Cty.*, 133 S. Ct. at 2640–41 (Ginsburg, J., dissenting) (describing DOJ submissions to the legislative record in 2006 reauthorization).

348. *Id.* at 2639.

349. H.R. REP. NO. 109-478, at 6 (2006).

Regarding the second limiting principle I suggest above—attention to the legislative record with respect to the effects of time—the Voting Rights Act is once again an unusual place to find a shelf life. It is not as if Congress legislated on voting discrimination in 1965 and, as the Chief Justice implies, never touched the subject again. In fact, the Voting Rights Act as reauthorized in 2006 contained all three of the features I discuss above that indicate a legislative intention to update the law itself.

First, in 2006 Congress not only extended the Voting Rights Act in response to an earlier sunset provision (actually several different sunset provisions that were added and then extended in the intervening years), but it included yet another sunset clause, committing itself to reconsider the extension after fifteen years (in 2021) to ensure that the provision was still necessary and effective.<sup>350</sup> Congress thus built in its own temporal limitation in the Act.

Second, as referenced above, the record built in the 2006 reauthorization was over 15,000 pages long and contained extensive documentation of “continuing discrimination in covered jurisdictions.”<sup>351</sup> It also contained a congressional finding that voting in the covered jurisdictions was more racially polarized than elsewhere in the country, and that there was “[a] continued need for Federal oversight” in the covered jurisdictions now.<sup>352</sup>

Third, in the words of Justice Ginsburg, “Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions.”<sup>353</sup> She is referring to the bailout mechanism in the law—the process in place that enables a covered jurisdiction to “bail out” of preclearance by showing that it has complied with the Act for ten years.<sup>354</sup> This feature of the law makes its burdens neither permanent nor overbroad. By its very nature, the statute is designed to roll with the times.

The ultimate irony of *Shelby County*, therefore, is that it reinvigorates an old idea of a constitutional shelf life in the context of a law that is a decidedly poor candidate for such a discussion.

## Conclusion

When one poses a question in her title, a good reader will expect an answer. Do laws have a constitutional shelf life? Perhaps, but only under limited circumstances. Granting courts this power to review statutes for staleness is a very risky endeavor in a world where facts are so easy to access and manipulate. It is a mistake to think that investigating a law for stale facts is somehow a form of judicial modesty. *Shelby County* purports to be modest,

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350. 42 U.S.C. § 1973b(a)(7) (2006); *Shelby Cty.*, 133 S. Ct. at 2636 (Ginsburg, J., dissenting).

351. *Shelby Cty.*, 133 S. Ct. at 2636 (Ginsburg, J., dissenting).

352. *Id.*

353. *Id.* at 2644.

354. *Id.*; 42 U.S.C. § 1973b(a) (2006).

but is anything but. The decision has breathed new life into an old idea of the constitutional shelf life without giving any guidance on its limits. The consequences of *Shelby County*, I suspect, will reverberate way beyond the Voting Rights Act, and the conundrum it exemplifies is one we will be wrestling with for a long time to come.