TEMPORAL EQUAL PROTECTION*

BY DAVID A. SUPER**

In law as in life, we make both cross-sectional comparisons between analogous things at the same time and temporal comparisons involving the same thing at different times. Equal protection analysis, however, has been entirely cross-sectional. Applying equal protection temporally would address the all-too-common situation where the dominant group benefits from laws and then pulls up the ladder behind it before minorities can follow.

Courts have struggled when confronted with temporal denials of equal protection. State and local governments terminated public services during the "massive resistance" period. Similarly, after Obergefell*, some jurisdictions stopped issuing marriage licenses. Subtler problems have arisen as schools and other public programs have steadily lost funding after being opened to people of color and as states tighten voter identification rules when people of color vote in larger numbers. Debates on the intent required for an equal protection claim obscure questions about how to measure inequality.*

Temporal equal protection would add to a wide range of constitutional and quasi-constitutional doctrines that inhibit change. These stasis-reinforcing doctrines provide valuable guidance on how temporal equal protection could function. Because the remedy of blocking, rather than forcing, change is less intrusive on the political branches, courts have applied searching scrutiny more freely under exacting stasis-reinforcing doctrines than when forcing change under cross-sectional equal protection. They have recognized economic-based oppression, have not demanded overwhelming evidence of intent, and have considered context more seriously.

Temporal equal protection alone will not remedy persistent inequality, but it can address some problems that current doctrine cannot.

** Professor of Law, Georgetown University. The author is grateful for the research of Thanh Nguyen and Anne Parham; the outstanding editing of Jill Refvem; and the comments of Bruce Ackerman, Bill Buzbee, Nancy Cantalupo, Deborah Hellman, Jon Michaels, Kathy Shin, and the participants in the Georgetown faculty workshop.

INTRODUCTION

Almost everyone, from serious social scientists to ordinary people going about their daily affairs, assesses the world through two distinct kinds of comparison. We compare different things that exist at the same time for their similarities and differences—cross-sectional analysis in the language of statisticians. And we compare the same thing over time looking for consistency and change—what statisticians call time-series analysis. Each analysis provides important insights, springing in part from its distinctive baseline for the comparison. It is unfair to criticize an airline for being late more often this month than last because the weather may have been worse, but we may gain insight from comparing one airline's on-time performance to the industry average. Similarly, comparing my soccer game to Lionel Messi's is unfair because I could never be that good, but you may gain insight from assessing how much better or worse I am doing relative to the last time I played.

Strikingly, however, contemporary equal protection analysis is essentially all cross-sectional. If, at any given time, a legal regime imposes different rules on whites and on people of color without sufficient justification, the courts deem that regime to have violated its duties of equal protection. If, however, a legal regime changes its rules when, over time, the characteristics of the people to whom those rules apply change, we rarely attempt serious equal protection analysis. If the change does not infringe upon a limited set of protected

expectations, and if it was procedurally acceptable, it gets a pass constitutionally.

A simple example illustrates the point. Few would argue that any constitutional principle prevents state parks from closing either at noon or at 8:00 p.m. Furthermore, nothing prohibits the delegation of authority to set the closing time to the superintendent of the park. What if, however, the superintendent changes the closing time frequently, adopting the 8:00 p.m. closing when a large group is scheduled to arrive from a predominately white community and the noon closing when a tour group from a largely African American neighborhood is expected? Indeed, what if the superintendent changed the park's closing time for each new carload of prospective visitors, elongating it when whites are approaching and shortening it when a family of color drives up? What if the superintendent adopts longer hours for the days of the week, or seasons, when visitors tend to be white and shorter hours during the periods when more of the park's visitors are people of color? At no point are whites treated better than people of color wishing to use the park at the same moment, yet the effect of these strategic shifts in policy over time is to give whites far more access to the park than people of color. One could argue that the superintendent is applying a covert policy of shortening hours for African Americans and elongating them for whites, but current doctrine imposes difficult standards of proof for such a claim, especially if the superintendent only acts most of the time that the racial composition of park visitors shifts.

Temporal reductions also are troubling when they involve fundamental rights. No obvious, transcendent principle tells us how often governors or state legislators ought to be elected. But we instinctively rebel against the notion that officials, having won an election, may extend their own terms, depriving their opponents the same right to contest and win an election that they enjoyed. Similarly, although arguments may be made for broad discovery and liberal joinder or for limited discovery and restrictive joinder, it would be troubling if my allies changed the procedures that applied when I sued you by the time you took me to court.

Awareness of both kinds of discrimination permeate our culture. We demand cross-sectional equality when we say "what's good for the goose is good for the gander," but we also recognize the importance of temporal equality when we say "what goes around, comes around."

Many equal protection problems are actually intertemporal problems. Senator Jacob Howard said that the proposed Equal Protection Clause would prohibit a Black man from being executed for a crime for which a white man would not be.[1] This surely is true for simultaneous trials. But that disparity in treatment would be no better if the law of capital punishment was changed

1. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

between the time of the two trials to spare the white man or to condemn the African American. Similarly, challenges to the administration—rather than the substance—of laws address situations when administrators act differently at different times, sometimes harshly enforcing laws to the benefit of favored groups but at other times ignoring them to the detriment of those they dislike.[2] Given the Equal Protection Clause's textual focus on administration of the laws,[3] the absence of formal shifts in the legal rules between disparate applications of those rules should not be grounds for refusing to apply temporal equal protection.

To date, however, the Supreme Court generally has sought to avoid considering temporal equal protection claims. For a time after *Brown v. Board of Education*,[4] the Court seemed to embrace a theory of equal protection that attacked racial aggression or subordination without regard to any comparisons, cross-sectional or temporal. But when it decided cases based on comparisons, it considered only cross-sectional ones. When confronted with obvious temporal abuses during the "massive resistance" period, it either accepted policy changes that denied African Americans what whites long had enjoyed[5] or insisted on reframing the problem as cross-sectional discrimination by finding some current favorable treatment for whites that was not being afforded to African Americans.[6]

The basic principle should be that for a governmental body to apply a more favorable legal rule to members of a dominant group and a harsher rule to those of a systematically disadvantaged minority is a denial of equal protection. It should not matter whether those two groups exist at the same time or at different times. Put another way, if we reject the principle of temporal equal protection, we accept that the government may deny rights or services to people of a disfavored racial or religious group solely because of their race or religion so long as it is not simultaneously providing that right or service to members of the dominant group. This seems a disturbingly narrow vision of equal protection.

This Article contends that we are unlikely to achieve meaningful equality without taking temporal equal protection seriously and that doing so would not seriously burden representative democracy. Although the values it upholds are

2. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (describing the unequal application of an ordinance against people of Chinese ancestry).

3. *See* MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 120 (1994).

4. 347 U.S. 483 (1954).

5. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 226 (1971) (allowing the city to close public swimming pools rather than open them to African Americans).

6. *See, e.g.*, Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 218, 230–31 (1964) (finding discrimination in the closing of all public schools because the county was assisting all-white private academies).

similar to those of cross-sectional equal protection, its function would be similar to the many change-inhibiting principles well-established in our constitutional law.

Part I examines the limited influence temporal ideas have already had on equal protection thinking. This includes modest substantive applications as well as some impact on remedies.

Part II contends that the limitations we have been told are inevitable in equal protection actually are specific to judicial review of line drawing rather than inherent in the concept of equal protection itself. As such, when equal protection is applied temporally, scrutinizing policy changes rather than distinctions within policies, many of those problems attenuate or disappear altogether. This part considers how an explicitly temporal equal protection doctrine might operate, drawing guidance from other change-inhibiting doctrines as well as from cross-sectional equal protection. In particular, it contends that the combined effect of temporal equal protection's narrower scope—only changes in law—and its far less intrusive remedies—preserving a status quo crafted by democratic institutions—ameliorates the institutional concerns the Court has invoked to cabin cross-sectional equal protection. This makes viable a more pragmatic, though still highly deferential, mode of scrutiny.

Part III demonstrates that although equal protection law has neglected temporal analysis, many other areas of constitutional law have imposed analogous change-inhibiting doctrines. In important respects, the challenges of inhibiting change differ from those of forcing it, making these aspects of constitutional law valuable in understanding temporal equal protection's potential. Several important principles uniting other change-inhibiting doctrines offer valuable insight into how temporal equal protection might operate. This survey shows us that we already have numerous rules and institutional arrangements that entrench the status quo against majoritarian change. Applying equal protection principles temporally would not break new ground in anti-majoritarianism but rather would add equal opportunity to the list of concerns that we sometimes elevate above majoritarian democracy in our republic.

The conclusion offers a few necessarily superficial sketches of claims that might be brought under temporal equal protection. Some of these are problems that have vexed cross-sectional equal protection; others are social problems that previously have been thought outside the ambit of equal protection analysis. Not all of these claims would likely prevail, but in each instance the temporal perspective helps identify the essential issues.

I. TEMPORAL EQUAL PROTECTION TO DATE

At present, the Court recognizes only a cross-sectional form of equal protection. This dominance is somewhat odd because, in a loose sense, cross-sectional equal protection reflects civil law sensibilities, which presume that the benefit of a statute is extended to others similarly situated. Temporal equal protection, by contrast, exemplifies the common law tradition that relies on consistent application of rules across time.[7]

At one time, however, the Court took some tentative steps down a path that could have led it to temporal equal protection. The Court's subsequent narrowing of the scope of equal protection eliminated that possibility. Some of the Court's struggles with crafting remedies for cross-sectional discrimination highlight the advantages of a temporal approach. This part surveys the degree to which temporal equal protection ideas already have penetrated constitutional thinking.

A. *The Prevalence of Temporal Discrimination*

Larry Alexander posits that many purported changes camouflage as consistent, discriminatory meta-rules.[8] And indeed fair housing, employment, and other fields of antidiscrimination law occasionally look to such purported temporal changes as evidence that covert cross-sectional discrimination is underway: the apartment or job that was supposedly unavailable for an applicant of color turns out to be open after all when white applicants arrive. No doubt some purported temporal changes are indeed fraudulent attempts to conceal cross-sectional discrimination.

Sometimes, however, the change is real and is applied consistently at a given time. When southern governments closed public facilities they had been ordered to integrate, those facilities often were truly closed.[9] When some jurisdictions tried to withdraw government licensure of marriages rather than opening themselves to same-sex couples, they genuinely shut down licensing.[10] These are not cases of cross-sectional discrimination.

Well-timed policy changes become highly attractive means of disadvantaging protected classes. Only the naive would expect that bigots will meekly abandon their agendas when prevented from engaging in cross-sectional discrimination. Changing longstanding rules that are benefiting the groups the bigots dislike—temporal discrimination—often will be an appealing alternative means of achieving similar ends. More broadly, as government programs, and

7. *See* Note, *The Legitimacy of Civil Law Reasoning in the Common Law: Justice Harlan's Contribution*, 82 YALE L.J. 258, 272–74 (1972) (describing the civil law approach).

8. Larry Alexander, *Rules, Rights, Options, and Time*, 6 LEGAL THEORY 391, 399–401 (2000).

9. *Palmer*, 403 U.S. at 219.

10. *See infra* note 69 and accompanying text.

the protection of laws, broadened over the past half-century to include more African Americans and other people of color, women, and sexual-identity minorities, this country has become increasingly resistant to funding many kinds of programs and hostile to protective regulations.[11] Some of this is no doubt philosophical, but a malign bloc that supports spending and government intervention for whites, for men, or for traditional families—but not for interventions from which all people benefit—is decisive when big- and small-government forces are near equipoise.[12] Thus, in cities where many white students left for suburban or private schools, white legislators and voters have cut funding for public schools that now serve predominately students of color—but all students in those schools suffer the same. Scholars on both the Left[13] and Right[14] have argued that public welfare policy in this country became far more restrictive after the "Civil Rights Revolution" opened programs up to African Americans.[15]

A robust temporal equal protection doctrine would limit the government's ability to withdraw policies that have benefited members of a dominant group when those policies are about to benefit members of a vulnerable group. If cross-sectional equal protection seeks to "protect against substantive outrages by requiring that those who would harm others must *at the same time* harm themselves,"[16] temporal equal protection guards against such outrages by forcing would-be malefactors to harm themselves *previous* to harming others. Temporal equal protection would limit the government's ability to withdraw certain beneficial policies when the population those policies serve changes to include more members of unpopular groups.

B. *Temporal Equal Protection and Constitutional Theory*

Temporal equal protection fits well in the broader framework of constitutional theory. As Section I.B.1 shows, concern about change—both forcing change in corrupt, oppressive regimes and guarding against the sudden elimination of important rights—has long been at the core of much of the

11. *See, e.g.*, *Why So Many People Hate Obamacare*, CNN (Jan. 6, 2017), https://money.cnn.com/2017/01/05/news/economy/why-people-hate-obamacare/index.html [https://perma.cc/WAL5-ZTRP].

12. *See* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 171–72 (2000) (urging this sort of disaggregation of legislative intent).

13. *See, e.g.*, DOROTHY K. NEWMAN ET AL., PROTEST, POLITICS, AND PROSPERITY: BLACK AMERICANS AND WHITE INSTITUTIONS, 1940–75, at 264–65 (1978).

14. *See, e.g.*, LAWRENCE M. MEAD, THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA 33 (1992) (finding that African Americans' enrollment in Aid to Families with Dependent Children after racial barriers fell "damag[ed] antipoverty policy").

15. *See* David A. Super, *Protecting Civil Rights in the Shadows*, 123 YALE L.J. 2806, 2810–11, 2824, 2827, 2830 (2014) (comparing the difficulty people of lower income and racial minorities have organizing).

16. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 170 (1980) (emphasis added).

theoretical underpinning of constitutional law. Moreover, Section I.B.2 shows that the central objection to vigorous equal protection scrutiny—the need to respect majoritarian decisionmaking—takes on a different, and generally less troubling, form in temporal analysis than it does in cross-sectional critiques. Finally, Section I.B.3 shows that John Locke's theory of the role private property plays in a liberal democracy, a theory that deeply influenced the Founders, by its own terms works only when opportunities remain open to all over time.

1. The Central Role of Change in Equal Protection Theory

At least since Footnote 4,[17] cross-sectional equal protection has been described in terms of political market failure.[18] Because some groups form discrete and insular minorities against whom many voters will rally and with whom few other voters will ally, the usual majoritarian process will not properly reflect their views. That same political market failure causes increased support for policy changes at times when they are likely to harm discrete and insular minorities disproportionately.

Indeed, much of contemporary constitutional theory is at least implicitly about change and hence implicates temporal equal protection. For example, part of the justification for judicial enforcement of fundamental rights is to prevent regimes that took power democratically from changing the rules so that they may not be deposed in the same way. Similarly, much of what gives a presidential administration its force is the President's ability to impose legal change much more rapidly than the other branches can respond. Where legal change will increasingly face no effective institutional constraints, the danger that incumbents act to privilege members of their coalition and deny similar opportunities to those coming along later will inevitably rise. Yet on those rare occasions where constitutional theorists consider the effect of temporal inequality, they have seemed to assume without close analysis that the political branches' right to change rules is far more inviolable than their right to impose classifications.[19]

2. Temporal Equal Protection and the Anti-Majoritarian Difficulty

More broadly, judges and scholars across the ideological spectrum have argued for cabining judicial intervention out of respect for the democratic

17. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) (suggesting that the end of the *Lochner* era did not preclude invocation of equal protection to protect fundamental rights of discrete and insular minorities).

18. *See, e.g.*, ELY, *supra* note 16, at 103 (arguing that judicial review is justified primarily to keep the machinery of democracy functioning and to prevent majorities from oppressing permanent minorities).

19. *See* Alexander, *supra* note 8, at 391–92.

process.[20] Yet even the strongest advocates of deliberative democracy concede that truly democratic results are impossible as long as a large segment of the electorate is impoverished and heavily dependent on the outcome of the political process for the basic means of subsistence.[21] These people will be subject to strong influence by their more affluent compatriots in the process. Those dependent on the political process for protection of their vital interests experience the political process in a way altogether different from those whose core interests have constitutional security: the former must proceed from the perspective of self-interest while the latter may choose to pursue still-greater personal advantage but also may choose to vote to achieve their ideological preferences. Mitt Romney famously captured this dynamic when he complained that nearly half of the population's votes would be dominated by their desire to retain government benefits and hence would not be available to him even if they ideologically agreed with his message.[22] Having some protection against devastating withdrawals of subsistence benefits would free these voters to select candidates on other criteria as well.

Professor Derrick Bell persuasively argued that African Americans obtain the most positive public policies when their interests align well with those of whites.[23] Arranging circumstances so that whites and African Americans benefit from the same policies at the same time, however, is exceedingly difficult. Temporal equal protection expands the application of Professor Bell's principle to many more situations by protecting minorities if they can benefit from policies that *previously* benefitted the dominant group. Indeed, temporal analysis can provide real-world insights analogous to a Rawlsian veil of ignorance[24]: members of the dominant group established a rule not considering that it might benefit those to whom they are unsympathetic. Preventing opportunistic reversal of that rule preserves their insight when they were free of corrupting knowledge about whom the rule would serve.

20. *See, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135–42, 148–49 (1893).

21. AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 142–43 (2004).

22. David Corn, *Secret Video: Romney Tells Millionaire Donors What He Really Thinks of Obama Voters*, MOTHER JONES (Sept. 17, 2012), https://www.motherjones.com/politics/2012/09/secret-video-romney-private-fundraiser/ [https://perma.cc/VF63-HB8P] (published in conjunction with the original video). Governor Romney was, in fact, wrong on two counts: the fraction of the electorate receiving government transfer payments fell far short of forty-seven percent, and, as the 2016 election demonstrated, millions of people who do receive public benefits will occasionally vote for candidates threatening to remove those benefits. This, however, is aberrational behavior, and his basic notion that current conditions prevent elections from being full debates about what is best for the nation has considerable force.

23. *See* Derrick A. Bell Jr., Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523–25 (1980).

24. *See* JOHN RAWLS, A THEORY OF JUSTICE 137 (1971).

The key reason for limiting any equality-promoting doctrine is respect for the political processes.[25] Both cross-sectional and temporal equal protection limit what legislatures and executive officials may do. The balance between the principle of equality and that of democratic self-governance depends on the degree to which upholding the former compromises the latter. Cross-sectional and temporal equal protection impact the democratic process quite differently, with those differences being an important factor in how much each doctrine should be permitted to override executive and legislative decisions.

The crucial factor forcing curtailment on cross-sectional equal protection is the need and right of the legislature to enact classifications.[26] "There is hardly a law on the books that does not affect some people differently from others,"[27] and legislatures cannot function if prevented from making both principled and pragmatic judgments about whom should be covered by which rules.

By contrast, the interests justifying temporal discrimination can be framed as essential to the right of the legislature to change its mind or of the electorate to change its legislature. This concern is real: if we do not allow legislatures to change their policies once adopted, we can no longer say that "elections have results" and we may no longer operate "laboratories of democracy" to seek out optimal solutions. The *Lochner* era taught us the perils of constitutionalizing any one system of legal rules.[28] On the other hand, because successful temporal equal protection litigation, unlike many cross-sectional equal protection claims, would leave in place policies that the people's elected representatives designed, it is far less of an affront to democracy and hence can reasonably be applied in situations where courts would hesitate to honor an analogous cross-sectional claim. Indeed, our constitutional law leans heavily in favor of change-inhibiting doctrines, as temporal equal protection would be, rather than change-forcing ones, as cross-sectional equal protection tends to be. In *Federalist No. 62*, James Madison cautioned that "the mischievous effects of a mutable government" are "innumerable" and argued for constitutional measures to guard against the

25. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 245–48 (1976) (describing intrusions on the political process likely to result if the Court were to extend cross-sectional equal protection to cases where discriminatory animus could not be shown); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40–55 (1973) (describing how extending heightened constitutional scrutiny would undermine state democratic processes).

26. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 221–28 (1962); ELY, *supra* note 16, at 30–31; MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 60–61 (1999); *see* James B. Thayer, *supra* note 20, at 135–42, 148–49 (explaining the origins of judicial deference to legislative decisions). *But see* PERRY, *supra* note 3, at 149–55 (questioning the originalist legitimacy of extending equal protection scrutiny beyond rules failing to recognize persons' humanity).

27. *Rodriguez*, 411 U.S. at 60 (Stewart, J., concurring).

28. "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.". Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

hazards of policy changes, even those resulting from majorities of voters selecting different representatives.[29]

3. Temporal Equal Protection and Property Theory

A legal regime in which people of color, or other disfavored groups, consistently encounter more difficult barriers than did their forebears in the dominant group is deeply problematic. It tends to discredit the notion of an opportunity society—the American Dream that hard work and playing by the rules get one ahead. It makes our strong preference for prospective-only remedies to cross-sectional discrimination highly problematic: if the dominant group need only sustain a preferential legal regime long enough to give its members an advantage, those disadvantaged by the cross-sectional wrong will continue to labor under an undeserved disadvantage absent reparations, affirmative action, or other means. Employment discrimination affects workers' abilities to compete for good homes in neighborhoods with good schools.[30] With education and home equity being the two most important means of inter-generational transmission of wealth, initial advantages bestowed on one segment of society may spawn many decades of inequality if other groups do not get a comparable moment in the sun.[31]

By contrast, if the act of granting a head start to its own members compels the dominant group to afford similar opportunities to those coming after it, the payoffs from discrimination will be far less. This principle of justice is embedded in the Lockean concept of private property rights that undergirds our legal order: mixing one's labor with the land creates property rights only so long as there is enough, and land as good, for those that come later.[32]

C. *Temporal Equal Protection in Existing Substantive Doctrine*

The equal protection analysis the *Lochner* court conducted prior to 1937 was simply too different from the contemporary version to allow beneficial comparisons. After entrenching the New Deal's legitimacy, the Court began to revive equal protection law under the new framework set out in Footnote 4 of *Carolene Products*.[33] Its initial cases were unclear as to whether they would require a mechanical comparison at all or merely scrutinize laws harming members of suspect classes. By rejecting the "separate but equal" approach on legal rather than factual grounds, the Court extended equal protection to guard

29. *See* THE FEDERALIST NO. 62, at 303–05 (James Madison) (Terence Ball ed., 2003).

30. *See* Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 198–99 (2008).

31. *See id*.

32. *See* Carol M. Rose, *'Enough, and as Good' of What?*, 81 NW. U. L. Rev. 417, 423 (1987) (exploring what is required for property formation to be just under a Lockean framework).

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

against legislation hostile to discrete and insular minorities without requiring formal comparisons. *Loving v. Virginia*[34] similarly recognized that rules that nominally affected people of all races equally could have a degrading effect on people of color.[35] Had this trend in the Court's equal protection doctrine continued, the need for temporal equal protection would have been far less.[36]

When the Court later moved to narrow its equal protection jurisprudence, however, it more rigidly required cross-sectional comparisons. Indeed, cross-sectional comparisons became so central to the Court's doctrine that it began to scrutinize the precision of proffered analogies.[37] As Section I.C.1 shows, equal protection doctrine did recognize the importance of temporal change. Whatever promise those moves might have had, however, was lost in cases suggesting that temporal claims must be reframed in cross-sectional terms or lose completely. Section I.C.4 finds indications that state constitutional law may be more readily adapted to consider temporal equal protection claims.

1. Partial Acceptance of Temporal Analysis in Equal Protection Doctrine

Temporal equal protection concepts have appeared in several areas of constitutional doctrine, but the Court has fallen far short of explicitly recognizing the principle. The Court has acknowledged the importance of temporal equality by ruling that newly admitted states enjoy the same rights as the original thirteen.[38] Its doctrine disallowing facially neutral rules if enacted with a discriminatory purpose[39] places the emphasis on the act of legislating, rather than the legislation itself, and thus has the effect of disallowing a particular, albeit narrow, class of regressive changes.[40]

In upholding part of the Voting Rights Act against a cross-sectional equal protection challenge to its failure to eradicate all comparable harms, the Court made an explicitly temporal argument, granting Congress far greater latitude for legislation that enhances access to fundamental rights, however imperfectly,

34. 38 U.S. 1 (1967).

35. *Id.* at 11.

36. Throughout this period, the Court continued to analyze some cases involving fundamental rights on the basis of cross-sectional comparisons, *see, e.g.*, Baker v. Carr, 369 U.S. 186, 232–37 (1962) (holding that congressional districts with large population disparities are unconstitutional), although it addressed many fundamental rights claims without invoking equal protection, *see, e.g.*, Boddie v. Connecticut, 402 U.S. 371, 382–83 (1971).

37. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 22–23 (1973) (noting that low-income students do not always live in school districts with low tax bases); Dandridge v. Williams, 397 U.S. 471 (1970) (asserting that complete denial of aid to one child could be characterized as a partial reduction to all children in a family).

38. Coyle v. Smith, 221 U.S. 559, 573 (1911).

39. Washington v. Davis, 426 U.S. 229, 239–41 (1976).

40. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 229 (1985) (finding discriminatory intent in post-Reconstruction changes to the Alabama Constitution).

relative to legislation that restricts rights.[41] More recently, however, the Court has backed away from that idea.[42] The Court also has relied on temporal comparisons to strike down attempts to repeal or override civil rights protections, even ones that go beyond what it holds the Constitution to require.[43] In these situations, the end state—no civil rights protections beyond those in federal law—is not constitutionally offensive,[44] but the act of removing heightened protections is.

Moreover, in two important respects, temporal analysis permeates contemporary cross-sectional equal protection analysis. First, its requirement that those disproportionately harmed prove discriminatory intent in challenging a facially neutral rule focuses attention on the act of changing policy rather than on comparisons of how that policy treats members of different groups. If the act of enacting facially neutral policy was performed improperly, it is invalid and may open the door to reinstating prior policy. Second, the state action requirement focuses on specific interventions to change what is otherwise occurring in society. When the state merely sits back and allows powerful private entities to prey on others, the Court finds no state action.[45] It is only the affirmative act of exercising state power that implicates equal protection doctrine.[46] Here again, it is the act that is scrutinized, not the resulting state of the world; the effect is making the status quo easier to maintain than to change.

2. Missed Opportunities to Embrace Temporal Equal Protection

When confronted directly with denials of temporal equal protection, to date the Court has looked away. At times it has found ways to stretch the facts to make out a fuzzy cross-sectional equal protection claim, but on other occasions it has upheld withdrawals of public policies when a disfavored group was set to benefit from them.

In *Griffin v. School Board of Prince Edward County*,[47] a white-dominated government closed its public schools rather than integrate them in compliance with *Brown v. Board of Education*. The Court recognized that allowing the county to close its public schools would devastate the desegregation enterprise

41. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

42. *See* City of Boerne v. Flores, 521 U.S. 507, 527–28 (1997) (arguing that an interpretation of *Katzenbach* expanding Congress's power to interpret the Constitution is misguided).

43. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996) (overturning ballot initiative preventing efforts against anti-LGBTQ discrimination); Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (overturning ballot initiative overriding California's fair housing law).

44. *Romer*, 517 U.S. at 628–31; *Reitman*, 387 U.S. at 374–75.

45. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972) (finding no state action in the granting of a liquor license to a discriminatory social club).

46. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (finding the Equal Protection Clause applicable to a restaurant operating in a state facility with which government was working closely).

47. 377 U.S. 218 (1964).

but struggled with how to characterize the violation. It acknowledged that cross-sectional inequities between counties—all other Virginia counties maintained public schools—did not merit heightened scrutiny under its doctrine.[48] It recognized that the problem was the closure of the public schools[49] but could not find a cross-sectional comparison that would allow it to invoke equal protection. Ultimately, because both the state and the county provided extensive aid to private, all-white schools operating in place of the closed public schools, the Court essentially treated the closures as a scam violating its cross-sectional equal protection decision in *Brown*.[50] Accordingly, it ordered the county to reopen its public schools on a desegregated basis.[51] The Court might have had a more difficult time had the case come before it during the first year of the public schools' closure, when the private replacement schools relied on private funding.[52] That would have forced it to address directly the termination of public services because of a change—brought about by *Brown*—in who would benefit from those services. Cross-sectional equal protection would not have an obvious response to that action, but temporal equal protection clearly would.

This unwillingness to analyze discrimination temporally caused the Court greater difficulties when confronted two years later with a Georgia park that a municipality held under a trust document mandating racial discrimination.[53] The city resigned as trustee, seeking to discontinue the park's public status and allow African Americans to continue to be excluded.[54] At first, a bare majority held that the city's ongoing involvement in park maintenance continued to implicate the city in racial exclusion.[55] The Court acknowledged that years of municipal involvement had given the park "momentum"[56] but failed to examine whether the city had sufficiently contributed to that momentum to make its termination unlawful. Here, as in *Griffin*, it found racial animus and essentially ruled on that basis alone, essentially admitting that it could not make out a coherent cross-sectional comparison.[57]

A Georgia court responded by declaring that the trust had failed and that the park land should revert to the residual heirs of the settlor, refusing to reform the trust through cy pres to remove the racial condition.[58] Although the Georgia

48. *Griffin*, 377 U.S. at 230–31.
49. *Id.* at 231.
50. *Id.* at 232.
51. *Id.* at 233.
52. *Id.* at 223.
53. Evans v. Newton, 382 U.S. 296, 297 (1966).
54. *Id.* at 298.
55. *Id.* at 301.
56. *Id.*
57. *See id.* at 301–02.
58. Evans v. Abney, 396 U.S. 435, 438–39 (1970) (deciding whether the Georgia Supreme Court violated equal protection and due process when it failed to order integration of the park on remand after *Newton*).

court seemed to be disregarding both the terms of the will and basic Georgia trusts and estates law,[59] the more technical nature of these questions obscured the racial animus.

Now, the sole question was the elimination of a park once its beneficiaries were to include African Americans. The Court declared itself "disheartened"[60] but could find no objection within cross-sectional equal protection law.[61] In his dissent, Justice Brennan focused on the act of closing a longstanding public park and, invoking *Griffin*, argued that that act itself should be scrutinized.[62]

The following year, the Court had to confront the viability of temporal comparisons in equal protection analysis. When ordered to desegregate five municipal parks and swimming pools, Jackson, Mississippi, instead chose to close them. The Fifth Circuit upheld this action by a single vote, and the Supreme Court did the same.[63] The Court began by noting the absence of any persuasive cross-sectional comparison as people of all races currently lacked access to the parks.[64] It then found that the city's claimed fiscal and public safety reasons for closing the pools made racial animus less apparent and, in any event, irrelevant where no valid cross-sectional comparison showed different rules simultaneously being applied to people of different races.[65] Choosing to read *Griffin* narrowly as a cross-sectional comparison case—with the state covertly providing education to white students but not African American ones—the Court rejected any temporal reach for the Equal Protection Clause.[66]

Similar issues can arise whenever changes in demographics, economics, or law broaden the scope of who might benefit from particular rules or public programs. For example, when the Court held that excluding same-sex couples from the right to marry was unconstitutional,[67] some states sought to discontinue issuing marriage licenses at all. From a cross-sectional perspective, this was no different from the swimming pools closed in *Palmer v. Thompson*[68]: once those policies were adopted, both gay and straight couples wishing to obtain marriage licenses were treated the same. Indeed, the Alabama district court that ordered state probate judges to stop distinguishing between same- and opposite-sex couples in issuing marriage licenses explicitly suggested that issuing none at all might be an acceptable solution.[69] In the litigation concerning

59. *Id.* at 448–50 (Douglas, J., dissenting).
60. *Id.* at 443 (majority opinion).
61. *Id.* at 439.
62. *Id.* at 453 (Brennan, J., dissenting).
63. Palmer v. Thompson, 403 U.S. 217, 219 (1971).
64. *Id.* at 220.
65. *Id.* at 225.
66. *Id*. at 221–23.
67. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).
68. 403 U.S. 217 (1971).
69. Strawser v. Strange, 105 F. Supp. 3d 1323, 1329 n.3 (S.D. Ala. 2015).

a Kentucky county clerk's refusal to issue any marriage licenses, plaintiffs and the amici focused entirely on the extent of the burden on the fundamental right to marry rather than the inequity of withdrawing a public service that had been available when only heterosexual couples could use it.[70] Temporal analysis would have made that litigation much simpler.

3. Temporal Equal Protection in Remedial Doctrine

In wrestling with remedies to cross-sectional equal protection violations, the Court has illustrated the shortcomings of that doctrine and the ways in which temporal equal protection can be more effective in promoting true equality of opportunity. Thus, even in implementing its most important initiative of the second half of the twentieth century, school desegregation,[71] the Court was extremely hesitant to intervene forcefully in crafting remedies to the segregation it had found unlawful[72] and hurried to extricate the federal courts despite risks of recurrent violations.[73]

A central challenge in cross-sectional equal protection is determining what remedies are feasible. Courts naturally proceed cautiously when pressing the political branches to implement policies that may have unforeseeable side effects. The Court has thus shown great deference to states wishing to "address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others,'"[74] without much attention to whether the next "step" is ever taken. Because temporal equal protection seeks only to preserve existing policies, it is largely free of this difficulty. To be sure, current policy may have proven unsustainable or counterproductive since being implemented,[75] but it should be subject to specific proofs rather than the necessarily speculative estimation of what new policies might do.

70. Brief of Plaintiffs-Appellees at 19–39, Miller v. Davis, 667 F. App'x 537 (6th Cir. 2016) (No. 15-5880); Brief of Amicus Curiae Americans United for Separation of Church and State in Support of Appellees and Affirmance at 16–24, *Miller*, 667 F. App'x 537 (No. 15-5880); *see also* Miller v. Davis, 123 F. Supp. 3d 924, 935–37 (E.D. Ky. 2015) (finding that plaintiffs were likely to succeed on the merits of their substantive due process challenge to clerk's policy), *appeal dismissed as moot and cause remanded*, 667 F. App'x 537.

71. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

72. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 27–29 (1971) (reluctantly authorizing more intrusive court-ordered remedies seventeen years after *Brown*).

73. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 489–91 (1992) (embracing dissolution of remedies even while some violations remain); Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 247 (1991) (approving dissolution of school desegregation decrees despite lingering concerns of parents).

74. Jefferson v. Hackney, 406 U.S. 535, 546 (1972) (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955)).

75. *See, e.g.*, Califano v. Webster, 430 U.S. 313, 320–21 (1977) (upholding more generous method of calculating women's earnings records for Social Security purposes based on experience that the prior formula unduly favored men).

Prohibitions generally are less intrusive remedies than mandates even if some of the likely consequences may be similar.[76] A meaningful mandate generally requires sufficient detail to allow its purposes to be effectuated; a prohibition could include such detail to guide future action in the same area, but it also can merely reject the action that has been undertaken without addressing whether similar actions would similarly be unlawful.

Existing stasis-reinforcing doctrines lead to remedies and predictable secondary results quite different from those familiar from debates about change-forcing doctrines. The Takings Clause, for example, tends to promote tax increases by prohibiting the government from forcing one or a few individuals to pay for public works that benefit broader society.[77] It also prohibits economic redistribution of a particularly predatory type. In *Stop the Beach Renourishment v. Florida Department of Environmental Protection*,[78] the plurality's view that common law doctrines are entrenched by the Takings Clause has the effect of restricting what democratic majorities may do to change the law when it works to the disadvantage of others.[79] The key difference here is that those doctrines tend to prevent majorities from disempowering those that already have wealth; temporal equal protection tends to protect those that wish to acquire wealth in the way other groups previously did.

4. Temporal Analysis in State Constitutional Law

Some state courts have gone a bit further in exploring temporal equal protection. For example, some state constitutions prohibit "private and special laws," in effect creating a specialized form of equal protection for municipalities.[80] Exhibiting characteristic uneasiness about constitutional limitations on line drawing, courts have typically adopted minimum rationality analysis of de facto special legislation that avoids formal violations by creating classes of municipalities that, not coincidentally, often contain only a single municipality each.[81] When, however, the legislature makes the ruse completely obvious by adjusting the class boundaries when a second municipality seems poised to enter, courts may intervene.[82] In essence, courts are willing to allow cross-sectional privileging of one locality but not to allow that locality to lock in its preferred status over time.

76. *See, e.g.*, Spallone v. United States, 493 U.S. 265, 493 (1990) (disallowing mandatory relief to enforce civil rights where negative options had not been exhausted).

77. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 842 (1987) (warning against exactions leveraged with regulatory powers as a means of funding desirable public projects).

78. 560 U.S. 702 (2010).

79. *See id.* at 715.

80. *See, e.g.*, S.D. CONST. art. III, § 23.

81. *See, e.g.*, Secaucus v. Hudson Cty. Bd. of Taxation, 628 A.2d 288, 294 (N.J. 1993).

82. *See id.* at 297.

II. CHALLENGES DESIGNING A TEMPORAL EQUAL PROTECTION DOCTRINE

Many problems familiar from cross-sectional equal protection analysis will pose significant challenges to temporal equal protection. Some of these problems change significantly in the shift from cross-sectional to temporal analysis. And even when the problems are essentially the same in both contexts, it should not be a foregone conclusion that temporal equal protection, with its far less intrusive remedies and grounding in a broad tradition in constitutional stasis reinforcement, should apply the same rules in resolving those problems. This part explores some of the most prominent among these problems.

A. *Heightened Scrutiny*

Because line drawing is fundamental to all legislation and regulation, a cross-sectional equal protection doctrine that seriously scrutinized more than a tiny fraction of state decisions would be utterly unmanageable. One of the great struggles of cross-sectional equal protection has been to find a workable method for limiting which among the "many classifications" found in statutes the courts will scrutinize.[83]

By contrast, policy changes, although pervasive, are far less numerous than line drawing. Moreover, the consequences of frustrating policy change are far less anti-democratic than those of preventing line drawing: when a court disallows a line drawn by the political branches, it produces a policy that no elected officials selected, while a court rejecting a new policy typically maintains one that elected officials previously designed.[84] Thus, the need for means of limiting the policies that temporal equal protection will scrutinize is not nearly as pressing as was the corresponding quest in its cross-sectional counterpart. As discussed below,[85] many other change-inhibiting doctrines rely on scrutiny-enhancing principles quite different from those in cross-sectional equal protection. Instead, they identify a type of change that tends to be ill-considered or oppressive and scrutinize all actions of that type. Some of these grounds arguably are less important than vindicating the Constitution's guarantees of equality.

Still, denying the political branches the right to change policies is a significant intrusion that should not be undertaken commonly or casually. The

83. Ferguson v. Skrupa, 372 U.S. 726, 732 (1963) ("Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution.").

84. This is not universally true. If the prior policy was the common law, or the lack of any state intervention because sufficient agreement on an intervention had previously proven impossible, voiding a new policy from the political branches would reduce self-governance. With the republic more than two centuries old, and the New Deal expansion of governmental regulation more than seven decades on, genuinely new laws and regulations are relatively rare, although they do exist.

85. *See infra* Section III.B.

prior electorate is not the same as the current one, and denying voters and their representatives the opportunity to change policies does impair majoritarian democracy. We should not multiply intrusions on the right to change without clear justification for doing so. Indeed, excessively obstructing the means of political change has been recognized as a justification for greater constitutional scrutiny.[86] Moreover, far too much policy change occurs for judicial scrutiny to be feasible for more than a small fraction of the most important and potentially problematic actions. Finally, without reasonably clear principles about which actions are vulnerable to review, people may feel unable to rely upon newly enacted rules.

The two most obvious starting points for focusing judicial scrutiny are the criteria Footnote 4 established for elevated scrutiny in cross-sectional equal protection and those that guide other change-inhibiting doctrines. Sections II.A.1 and II.A.2 consider the former; Section II.A.3, drawing on the analysis of Part III, seeks to distill possible focusing criteria from other change-inhibiting doctrines.

1. Suspect and Semi-Suspect Classes

The narrow definition of suspect classes for cross-sectional equal protection is a function of its model of the proper functions of government and how the political process might go awry. The basic model for cross-sectional equal protection since the *Lochner* era's collapse has assumed that government is allocating consumption across the population. Because so many normative claims could be made for different allocations, and because we prefer allocative decisions to be made within the political process, courts generally defer to those decisions.

Footnote 4 suggested more vigorous scrutiny of rules imposing different, disadvantageous rules on discrete and insular minorities because their ostracism prevents them from forming political coalitions with the ease that other groups enjoy. Heightened scrutiny for policy changes that have negative impacts on members of suspect or semi-suspect classes will accomplish little in temporal equal protection if it comes with the requirement that policymakers explicitly admit what they are doing. Because temporal discrimination is, by its very nature, facially neutral, almost all claims likely will depend on showings of disparate impacts. Several decades of cross-sectional equal protection and civil rights enforcement, primarily under rules that effectively require showing discriminatory intent, has trained bigots to cover their tracks. Efforts to remove benefits from members of politically marginalized groups rarely have the kind of fit the Court has required in cross-sectional cases. Withdrawals of previously available rights and benefits typically occur after the composition of the

86. ELY, *supra* note 16, at 177–78.

benefiting population has changed only partially: some residual members of the dominant group will lose too.

On the other hand, the same political disabilities that prevent discrete and insular minorities from resisting racial aggression in the form of established rules also prevent them from having an effective voice when the dominant group changes longstanding rules to prevent minorities from benefiting. Thus, the rationale for heightened scrutiny in cross-sectional equal protection would apply well to temporal discrimination.

The problems of proving intent and closeness of fit look significantly different in temporal terms, where the potential volume and intrusiveness of cases—and hence the importance of these screens for limiting judicial intrusion on democratic processes—is reduced. Moreover, the focus is on one specific point of decision rather than on classifications that evolved and persisted over time. This may make importing concepts from general tort law easier in temporal cases than in cross-sectional ones. For example, temporal equal protection doctrine could require the party with the greatest access to the facts pertinent to an issue to carry the burden of producing evidence on that issue.[87] This seems especially timely in light of the Court's new restrictions on plaintiffs' ability to prove problematic intent through discovery.[88] Indeed, the recent litigation concerning President Trump's travel ban has shown that, even where such evidence exists, courts may find that the public interest in open political discourse counsels against using it.[89] As discussed below,[90] the Court's stasis-reinforcing doctrines often function in the opposite way, forcing deliberation rather than dampening it.

2. Important Rights

Another set of exceptions to the minimum rationality principle in cross-sectional equal protection allows courts to intervene to prevent the political process from seizing up and locking one group into power for the long term. Cross-sectional equal protection's scrutiny of infringements on fundamental rights has been focused on situations where no right need be provided at all but, once provided, it may not be offered to one group and not another. Although this has been theorized as preventing those in power from obstructing the

87. *See* Ybarra v. Spangard, 154 P.2d 687, 689 (Cal. 1944) (discussing the doctrine res ipsa loquitur).

88. Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009); *see* Ziglar v. Abbasi, 137 S. Ct. 1843, 1868–69 (2017) (restricting a civil rights conspiracy statute to preserve the opportunity for candid conversation between government officials).

89. *See generally* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir.) (considering whether campaign statements by the candidate ultimately elected President are admissible to show discriminatory intent), *vacated as moot*, 138 S. Ct. 353 (2017).

90. *See infra* Section III.B.1.d.

channels of political change that could lead to their ouster,[91] the Court has applied it to rights with little direct connections to political or economic change.[92] Temporal equal protection can and should do much the same thing: examine situations where a right, previously bestowed, has been withdrawn.

Consistent with the theorization of "fundamental rights" equal protection, and with temporal equal protection's purpose of preventing those achieving success from denying similar opportunities to those coming behind them, temporal equal protection should be particularly energetic in scrutinizing withdrawals of rivalrous rights. Some rules and public programs confer absolute benefits on those receiving them but do not directly diminish the positions of others. When a public art museum buys new paintings, it brightens the days of those that visit the museum, but it does not harm or undermine those that do not. Nor will the museum's closure obstruct opportunities for political or economic change. By contrast, when the government facilitates the speech of one group but not another, or makes it easier for one group to win public office, it increases the chances that their opponents' policy preferences will be rejected.

Temporal equal protection analysis is most crucial where a right is rivalrous. If the state allows you to speak your mind but then shuts down the forum before I can respond, you are likely to gain a lasting advantage over me. If elections are conducted under rules that favor you and then those rules disappear when conditions change so that they would favor me, I will have less opportunity to reverse the policies you installed with your augmented representation. Some benefits are indirectly rivalrous. Charles Reich showed that having large numbers of people dependent on the government for occupational licenses, transfer payments, and other "largesse" prevents them from participating in politics on an equal footing with fellow citizens relying on legally protected property rights.[93] If one group receives the head start of a superior education for a while and then further educational opportunities are equalized, the former group will have a persistent advantage in competing for jobs.

Benefits can be rivalrous cross-sectionally or temporally. When we apply for admission to school, we are competing cross-sectionally. But ultimately, we will be competing for jobs with people who went to school at different times from us. Similarly, although voting is obviously rivalrous in a cross-sectional sense—with one more vote for my side generally being equivalent to one less vote for yours—voting is also rivalrous temporally, as a new majority can seek

91. ELY, *supra* note 16, at 177.

92. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 389 (1978) (protecting equality in the ability to marry).

93. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 785–87 (1964); *see also* David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1826 (2013) (finding similar problems half a century later) [hereinafter Super, *New New Property*].

to override the decisions of an old one. An electoral system that produces clear majorities in one period and then shifts to producing muddled ones in the next will favor the dominant group in the first period even if the right to vote saw no cross-sectional discrimination in either period.

Conversely, changes in rules concerning non-rivalrous benefits are more likely to have legitimate rationales—such as changing tastes—and, because they typically do less harm to disfavored groups, may be less likely to have malicious motives.[94] This is particularly true where the non-rivalrous benefit is, in some sense, a luxury. Our society has grown sufficiently affluent such that a substantial share of government policies convey benefits that are real but not truly vital.[95] Changes in these policies typically do less harm and hence have a less compelling case for judicial scrutiny. Again, a municipality that stops purchasing new art for its museum could legitimately have decided that the public would benefit more if it shifted those funds to parks and recreational programs.[96]

Some rights can be non-rivalrous under some circumstances but rivalrous under others. John Locke's famous formulation of property rights only claims to apply so long as access to property is non-rivalrous[97]: once there is no longer enough, and as good, for others, the principle that mixing labor with land should yield property rights becomes much harder to defend. It will produce an elite, wealthy class while property-owning opportunities exist but then insulate its members from competition once it becomes more difficult to obtain land.[98]

Another distinction crucial to temporal equal protection is between changes whose primary impact is transitory and those affecting long-term interests. Stasis-reinforcing doctrines generally address major threats to individuals' capital;[99] they are relatively lenient about impairments of the

94. Of course, where other bases for enhanced scrutiny exist, temporal equal protection could call into question the termination of non-rivalrous rights. A public art museum that closes when forced to open its doors to all races will have used public funds to serve only whites.

95. CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: NON-DEFENSE DISCRETIONARY PROGRAMS 3 (2019) https://www.cbpp.org/sites/default/files/atoms/files/PolicyBasics-NDD.pdf [https://perma.cc/J45H-NTZ2] (finding that only thirteen percent of federal non-defense discretionary spending goes to programs targeting low-income populations).

96. Of course, if this shift occurred after the museum came under pressure to diversify its collection with works from African, African American, or Hispanic artists, it would be far more suspect.

97. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 19 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

98. *See* BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY 2–3 (1999) (arguing that liberal democracy depends on keeping open opportunities to acquire substantial capital); THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 6 (2014) (finding increasing concentrations of wealth over time absent strong public policies seeking to preserve opportunity).

99. *See* Mathews v. Eldridge, 424 U.S. 319, 340 (1976). *But see* First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 322 (1987) (finding a taking in a temporary but complete deprivation of property rights).

current return capital produces.[100] Separation of powers and federalism, too, impose tighter constraints on major policy changes—typically embodied in statutes—and impingements on state common law rights[101] than they do on more transitory policy changes implemented through regulations or other executive actions. And where those agencies can act, procedural due process constrains them more heavily where weightier interests are at stake.[102] Courts can block withdrawals of education that "strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions"[103] without immersing themselves in the details of how most public services are provided. This distinction seems far more important for preserving temporal equity than that between recognized "fundamental rights" and everything else. Discontinuing elections for drain commissioner or reducing the venues available for commercial speech does nothing to stratify society, unlike gutting the public schools or abruptly discontinuing a subsistence benefit program to leave former recipients desperate and dependent.[104]

Finally, temporal equal protection, like both cross-sectional equal protection[105] and other change-inhibiting doctrines,[106] should distinguish between impairments of rights and their complete elimination. Thus, for example, the elimination of municipal elections after a city's voters become predominately minority could raise serious concerns, but the assignment of a few modest additional duties to an existing unelected city manager likely would not.

3. Criteria from Other Change-Inhibiting Doctrines

Some of the norms common to other change-inhibiting doctrines reflect generalized suspicion of hasty policymaking. That would argue for greater scrutiny of policy changes generally. Sometimes, policymakers must act quickly

100. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394, 413–14 (1915) (finding no taking in land-use regulations that prevented use of brickyard).

101. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (prohibiting tribunals constituted outside of Article III from trying questions of state common law).

102. *Eldridge*, 424 U.S. at 335.

103. Plyler v. Doe, 457 U.S. 202, 234 (1982) (Blackmun, J., concurring).

104. *See* Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (concluding that those losing welfare benefits often will be too desperate to advocate for themselves effectively); BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY 189 (2004) (describing the deleterious effects of economic dependence on democratic participation). Of course, not all government benefits are crucial to individuals' survival. *See Eldridge*, 424 U.S. at 340–41 (finding terminations of disability benefits less devastating than those of means-tested subsistence aid).

105. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 25 n.60 (1973) (suggesting that a complete deprivation of education might receive more exacting scrutiny).

106. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) (finding an unconstitutional taking whenever a regulation destroys the entire value of property).

to respond to an entirely new kind of crisis, even if they make hasty errors. Changing existing rules can be similarly urgent but often will not be.

Others, however, reflect a far greater willingness to contemplate the machinery of the state being hijacked for private, self-interested, or malicious ends than cross-sectional equal protection has shown.[107] In particular, change-inhibiting doctrines openly and unabashedly address majoritarian abuses directed at people on the basis of their economic classes.[108] This is true both of substantive rules, such as the Takings and Contracts Clauses, and of the Constitution's structural provisions, which were deliberately designed to prevent numeric majorities from redistributing the wealth of the more affluent.[109]

Once one recognizes the possibility of one economic group harnessing the power of the state to pursue class warfare, however, the concept of equal protection obliges us to consider it being waged by other economic classes.[110] The Court's affirmative action jurisprudence emphatically rejects the notion that policies favoring one side of a social divide may be acceptable while those favoring the other are proscribed.[111] Recent experience has shown that economic elites can wield their dominance over mass communications to enact measures that sharply redistribute wealth to them from impoverished people.[112] James Madison, although famously concerned that the masses would redistribute from the wealthy,[113] also warned against allowing the elite to dominate political

107. *See infra* Section III.B.1.

108. This unwillingness to recognize class conflicts, and to understand the Constitution as seeking to manage them for the general good of society, is arguably an anachronism. *See* GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION 8–9 (2017) (arguing that the Framers deliberately designed the Constitution to manage class conflict constructively).

109. *See generally* THE FEDERALIST NO. 10 (James Madison) (describing the separation of powers as frustrating populist mob sentiments).

110. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (applying strict scrutiny to all race-based preferences, not just those favoring whites); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989) (rejecting argument that historical discrimination against African Americans justified government contract preferences favoring them).

111. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978).

112. For example, President Reagan in 1981–82 and Speaker Gingrich in 1995–97 paired large tax cuts disproportionately benefiting upper-income people with severe cuts in anti-poverty programs. David A. Super, *The Cruelty of Trump's Poverty Policy*, N.Y. TIMES (July 24, 2019), https://www.nytimes.com/2019/07/24/opinion/trump-poverty-policy.html [https://perma.cc/ZZ4S-875D (dark archive)]. President George W. Bush similarly enacted tax cuts skewed heavily to the affluent in 2001 and 2003 and then, when the deficit grew, sought to offset some of their costs with cuts primarily to low-income programs in the Deficit Reduction Act of 2005, Pub. L. No. 109–171, 120 Stat. 4 (codified as amended in scattered sections of 42 U.S.C.) (2006). Paul Krugman, *The Tax-Cut Con*, N.Y. TIMES MAG. (Sept. 14, 2003), https://www.nytimes.com/2003/09/14/magazine/the-tax-cut-con.html [https://perma.cc/MSW5-QPL9 (dark archive)].

113. THE FEDERALIST NO. 10, *supra* note 29, at 42 (James Madison).

debates[114] and victimize less-affluent people.[115] The current situation also would not surprise Alexander Hamilton, who anticipated that some classes would have disproportionate representation in the federal government.[116]

Temporal equal protection, like other stasis-reinforcing doctrines, should recognize government as allocating the means of acquiring further wealth. This function can be achieved in numerous ways, with the political process ordinarily trustworthy to make, and remake, the necessary normative choices. The allocation of productive resources, however, can ossify the social, economic, and political order if an elite wields state power to block or destabilize potential competitors. Here, choking off the means of political competition is one concern, but choking off access to economic opportunity is another. Because a key norm of temporal equal protection is to give everyone similar opportunities to climb the ladder to success, we should be particularly sensitive to policies that relate to social and economic mobility, even if in cross-sectional equal protection analysis these might be dismissed as mere "economic and social regulations."

B. *Adequacy of Justification*

Closely linked to the question of what circumstances should trigger enhanced scrutiny is what that scrutiny should entail. Where a distinction is temporal, the rationality of the new policy is one possible measure of justification for a change but not the only obvious one. Courts could demand that those defending a policy change that is subject to scrutiny demonstrate a substantial change in conditions, knowledge, or philosophy that could rationally motivate the policy change. Thus, for example, a public program might be withdrawn if the government experiences a major deterioration in its fiscal condition,[117] if research or public outcry suggests that the program is not working, or if the electorate moves broadly to a more libertarian, "small government" philosophy.

Of course, *something* always has changed. As easy as it is to conjure make-weight arguments in favor of classifications, that task may be even easier in support of policy changes. Temporal equal protection would mean little if it had to stand aside for every random, modest increase in the costs of a

114. THE FEDERALIST NO. 54, *supra* note 29, at 267 (James Madison).

115. THE FEDERALIST NO. 39, *supra* note 29, at 181 (James Madison).

116. THE FEDERALIST NO. 35, *supra* note 29, at 103 (Alexander Hamilton).

117. When Tombstone, Arizona, lost over ninety percent of its population after silver prices tumbled in the mid-1880s, it obviously could not continue to maintain the same level of public services. *See U.S. Census Bureau History: Gunfight at the O.K. Corral*, U.S. CENSUS BUREAU (Oct. 2016), https://www.census.gov/history/www/homepage_archive/2016/october_2016.html [https://perma.cc/V6WR-XV65].

government service, every half-baked, back-of-the-envelope study, and every selectively applied purported philosophical conversion.

To address this vulnerability, temporal equal protection should supplement the principle of rationality with that of generality. Claims that new conditions drove policy changes disadvantaging vulnerable groups or important rights will be far more credible if those same conditions simultaneously drove other policy changes affecting members of dominant groups.[118] A state's policy changing in response to critical reports about a program serving members of disfavored groups would be more plausible if the state commonly commissioned and acted upon similar studies of programs serving the dominant population and if its criticism of the program is relatively consistent.[119] And a philosophical change that leads to withdrawals of services from affluent, powerful communities is far more plausible than one that manifests itself only whimsically when politically disempowered people are involved.[120]

This latter point is crucial. If temporal equal protection were to become simply a new "one-way ratchet" that entrenched government interventions once enacted, ideological conservatives would hotly oppose it. Similarly, if it prevented the removal of unjustifiable burdens when they began to affect members of the dominant group, the electorate would regard it as mindlessly self-destructive. For example, the opioid epidemic, and its prevalence in white communities, is causing reconsideration of the harsh, insensitive way we have treated substance abusers for decades when the electorate viewed them as primarily members of racial and ethnic minority groups.[121] Particularly given the widespread reliance on images of drug abuse to stigmatize members of those groups,[122] the impetus for this change derives at least in part from race.[123]

118. Thus, for example, reductions in state aid to K-12 education at a time when public schools' white enrollment is declining might look more like a plausible response to a budget crisis, rather than temporal discrimination, if the state cut funding for its elite public universities, with overwhelmingly white student bodies, at the same time.

119. Recent Republican efforts to cut Medicaid for low-income people in the name of reducing overall medical costs would be more plausible as a reaction to the program's shortcomings if the same legislation did not expand tax preferences for high-cost private health care plans. *See, e.g.*, Tony Nitti, *GOP Health Care Bill Will Result in a Huge Tax Cut for the Rich, 24 Million Without Insurance*, FORBES (Mar. 13, 2017), https://www.forbes.com/sites/anthonynitti/2017/03/13/gop-health-care-bill-will-result-in-a-huge-tax-cut-for-the-rich-24-million-without-insurance/ [https://perma.cc/GXR8-C6LS].

120. Thus, expanding subsidies to agribusiness while reducing food aid to low-income people would seem a strange way to manifest a commitment to small government and non-intervention in markets.

121. Indeed, we have frequently seen this pattern in the regulation of psychoactive substances when the racial composition of users changes. *See* German Lopez, *When a Drug Epidemic's Victims Are White*, VOX (Apr. 4, 2017, 8:00 AM), https://www.vox.com/identities/2017/4/4/15098746/opioid-heroin-epidemic-race [https://perma.cc/ECF4-5EX5].

122. *See* MICHAEL B. KATZ, THE PRICE OF CITIZENSHIP 107 (2001).

123. *See* Mary Crossley, *Opioids and Converging Interests*, 49 SETON HALL L. REV. 1019, 1026–29 (2019).

Similarly, when the Great Depression brought mass unemployment to the middle-class, social insurance programs that had been dismissed as socialist became bulwarks of freedom.[124] We finally moved against predatory lenders when they ran out of victims in poor and minority communities and started cheating large numbers of middle-class whites, triggering the Great Recession.[125] Yet locking in existing policies until whites have somehow suffered comparable harms to those experienced by people of color would be to reject the idea of democratic progress.

Temporal equal protection should allow a consistent philosophical change toward a public health response to substance abuse; it should not, however, allow changing these laws only when and to the extent that they affect whites. If, for example, draconian laws still apply to drugs that have yet to penetrate the white community, or if the federal government were to allow states waivers of its laws and received applications only from states with many white addicts, that would be difficult to assign to a philosophical change. Just as temporal concerns have played a role in remedies for violations of cross-sectional equal protection, so too cross-sectional analysis is pertinent to remedies for violations of temporal equal protection.

Although the systematic treatment of justifications for changes is new to equal protection doctrine, it long has been the subject of vigorous debate in administrative law. Justice Breyer articulated a plausible standard for justification of policy changes in his dissent in *FCC v. Fox Television Stations*[126]:

> [T]he law require[s] an explanation for such a *change* because the earlier policy, representing a settled course of behavior, embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies best if the settled rule is adhered to. Thus, the agency must explain *why* it has come to the conclusion that it should now change direction. Why does it now reject the considerations that led it to adopt that initial policy? What has changed in the world that offers justification for the change? What other good reasons are there for departing from the earlier policy?[127]

Justice Breyer emphasized that he was not proposing a heightened standard of review:

> [T]he law requires application of the *same standard* of review to different circumstances, namely, circumstances characterized by the fact that *change* is at issue. It requires the agency to focus upon the fact of change

124. *See* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE 213–23 (1986).

125. *See* Alex Gano, *Disparate Impact and Mortgage Lending: A Beginner's Guide*, 88 U. COLO. L. REV. 1109, 1126–28 (2017).

126. 556 U.S. 502 (2009).

127. *Id.* at 550 (Breyer, J., dissenting) (citations omitted) (internal quotation marks omitted).

> where change is relevant, just as it must focus upon any other relevant circumstance. It requires the agency here to focus upon the reasons that led the agency to adopt the initial policy, and to explain why it now comes to a new judgment.[128]

And, of course, the legitimate justification must have been evident in the agency's deliberations, not the kind of post hoc rationalization by counsel commonly offered to defeat cross-sectional equal protection claims.[129]

The lack of funds to continue a prior policy might suffice as a justification if the financial shortfall is real and demonstrable. Failure to recognize such justifications would put declining governments in fiscal straightjackets. On the other hand, although its rate of growth has stagnated since about 2000—and, more broadly, since the early 1970s[130]—the U.S. economy (and those of most of its states) continues to grow and hence to have more resources available than it did in prior years. Fiscal decline that is the result of conscious decisions to reduce revenues is not the same thing as an inability to pay. Thus, for example, a state's failure to fund equal numbers of voting machines per voter in low- and high-income jurisdictions when it mandates new voting technology cannot plausibly be blamed on inadequate resources.

In addition, policy changes that exacerbate well-known problems, such as residential segregation,[131] should be entitled to a lesser presumption of legitimacy than novel impacts policymakers could not be expected to anticipate.

C. *State Action*

An increasingly important means of disadvantaging vulnerable groups is to withdraw state action altogether. One of the most shameful episodes in U.S. history since the abolition of slavery—the end of Reconstruction and the abandonment of the freed slaves—involved state inaction, not state action. To be sure, the revanchist governments that took over after Union soldiers left cooperated heavily with the Klan and major landowners to a degree that the courts could certainly have found state action.[132] Even without such evidence, however, the mere act of withdrawing the state's protective role was invidious:

128. *Id.*

129. *See* SEC v. Chenery Corp., 318 U.S. 80, 94 (1943). *See generally* Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359 (1998) (refusing to consider legality of new policy that NLRB did not explicitly adopt).

130. PIKETTY, *supra* note 98, at 94.

131. *See generally, e.g.*, Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977) (finding that "anti-sprawl" rules function like exclusionary zoning).

132. *See, e.g.*, United States v. Cruikshank, 82 U.S. 542, 553–54 (1875) (finding no constitutional violation when Louisiana's government stood by as a white mob massacred over 100 African Americans defending an elected local government); ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION 142–44 (2005) (describing entanglement between the mob and purported white officeholders).

knowing that the socially and economically dominant group would prevail easily if merely left alone meant that racist state officials had no need to take direct action against the freed slaves themselves.

Similar problems abound today. Efforts to rebuild communities of color devastated by Hurricane Katrina were clearly anemic, and many suspected that the race of the victims was key.[133] Similar concerns have been raised after recent hurricanes.[134] Except in the unlikely event of two comparable disasters occurring simultaneously, cross-sectional analysis is useless to show discrimination. But temporal equal protection can note that state responses were far more robust to prior disasters that struck areas with predominately white populations.

The essence of the Black Lives Matter movement's complaint is that the state turns its back on acts that it would have prosecuted had whites been the victims.[135] Rarely can advocates point to contemporaneous cases with white victims that were handled more aggressively. This severely undermines the prospects of a cross-sectional equal protection claim even if they could obtain standing. On the other hand, advocates might be able to show that prosecutors' caution appears to be of relatively recent origin and that the tenor of police training has shifted from caution to aggression.

More generally, a broad effort to privatize government functions and services[136] is occurring at the same time that much of the electorate is coming to view those services as disproportionately benefiting low-income people, specifically people of color.[137] This withdrawal of the public role often is difficult to justify on economic grounds[138] and reduces opportunities for those facing racial or other animus in the private sector. It also reduces the number of actors in the social and economic sphere bound by norms of equal treatment.[139]

133. *See* Super, *New New Property*, *supra* note 93, at 1824–25.

134. Jess Bidgood, *Poor, Displaced and Anxious in North Carolina as Floods Climb After Hurricane*, N.Y. TIMES (Oct. 13, 2016), https://www.nytimes.com/2016/10/14/us/poor-displaced-and-anxious-in-north-carolina-as-floods-climb-after-hurricane.html [https://perma.cc/WK3S-ENMW (dark archive)]; Rick Rojas, *Politicians with Puerto Rican Roots Challenge Trump in Push for Aid*, N.Y. TIMES (Oct. 9, 2017), https://www.nytimes.com/2017/10/09/nyregion/politicians-with-puerto-rican-roots-challenge-trump-in-push-for-aid.html [https://perma.cc/ERX3-VAPE (dark archive)].

135. *See What We Believe*, BLACK LIVES MATTER, https://blacklivesmatter.com/what-we-believe/ [https://perma.cc/TA3B-GAJJ]; *see also Platform*, MOVEMENT FOR BLACK LIVES, https://policy.m4bl.org/platform/ [https://perma.cc/8WMW-LZLU].

136. Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023, 1028 (2013).

137. MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTI-POVERTY POLICY 67–68 (1999).

138. David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393, 407–08 (2008).

139. *See, e.g.*, Manhattan Cmty. Access Corp. v. Halleck, No. 17-1702, slip op. at 16 (U.S. June 17, 2019) (declining to hold a private company contracted to provide a public service to constitutional protections); Jackson v. Metro. Edison Co., 419 U.S. 345, 358–59 (1974) (concluding a private utility provider was not a state actor for purposes of a Fourteenth Amendment claim).

Just as the Court scrutinizes withdrawals of aid more closely under the Due Process Clauses than it does denials of aid,[140] a temporal equal protection claim against the reduction or elimination of a public service should be regarded as state action even if the state had no duty to provide the service in the first place.

D. *Entrenchment*

One challenge in crafting a temporal equal protection doctrine that does not have an obvious analogue in cross-sectional equal protection analysis is the question of how long policies must be entrenched before giving rise to a claim. The mere passage of a law surely is not sufficient: many laws are repealed prior to taking effect, and others have quite tepid impacts, especially in their early stages. More broadly, many laws fairly rapidly prove to be bad ideas. The explosion of virtue that proponents imagined would result from Prohibition failed to materialize; an explosion of lawlessness did.[141] The Medicare Catastrophic Coverage Act of 1988 proved politically catastrophic and was quickly repealed after prospective beneficiaries rebelled against the required premiums.[142] Removal of rights and entitlements, even after some people have begun to enjoy them, is a normal part of the governing process. Popular constitutionalists recognize that great acts do not fundamentally change the nation until after some period of entrenchment.[143] Clearly temporal equal protection needs some similar concept of when a right or benefit has become sufficiently imbedded in our legal culture that its elimination deserves scrutiny.

Of course, if one limits one's attention to longstanding laws, one faces the opposite problem: laws that have outlived their usefulness or that have been bypassed by changes in society. We certainly cannot return to the nineteenth century's "vested rights" doctrine preventing the repeal of any rights-granting statute once enacted. Whatever the needs of the fledgling aviation industry, by the end the Civil Aeronautics Board had lost its way.[144] Few mourned when the

140. Am. Mfrs. Mut. Ins. v. Sullivan, 526 U.S. 40, 61 (1999).

141. Lawrence M. Friedman, *The Legal System, in* 61 UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION 71–72 (Peter H. Schuck & James Q. Wilson eds., 2008).

142. David A. Super, *From the Greenhouse to the Poorhouse: Carbon-Emissions Control and the Rules of Legislative Joinder*, 158 U. PA. L. REV. 1093, 1178 (2010); *see also* Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683 (repealed 1989).

143. BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS 12–13 (2005); WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 165 (2010).

144. Irvin Molotsky, *C.A.B. Dies After 46 Years; Arlines Declared 'On Own'*, N.Y. TIMES (Jan. 1, 1985), https://www.nytimes.com/1985/01/01/us/cab-dies-after-46-years-airlines-declared-on-own.html [https://perma.cc/W4VE-LCXA (dark archive)].

National School Lunch Program largely supplanted previous haphazard commodity distribution efforts.[145]

Part of the answer, again paralleling other stasis-preserving doctrines, is to seek to identify reliance interests. Some laws are designed to encourage reliance—the Affordable Care Act's explicit goal was to eliminate uninsuredness among U.S. citizens—while others are clearly not designed or funded to meet more than a fraction of the demands placed on them.[146] Also, different laws become known to and relied upon by large segments of the public at different speeds. Conversely, as laws outlive their usefulness, fewer and fewer may rely upon them or those reliance interests that the laws do create may be more easily covered by replacement policies.

A related problem is how to respond to gradual erosions of rights. Consider a police force that cuts back its patrols in a community three percent per year after the community's composition starts to shift away from the dominant group. Eventually that community will be essentially unprotected, but no single year's reduction will be demonstrably catastrophic. Viewed over a decade or two, this would be a clear withdrawal of police services, but in the meantime those resources have gradually been reallocated elsewhere, perhaps building reliance interests. Consistent with temporal equal protection's stasis-reinforcing character, a court may be disinclined to do more than enjoin the latest reduction and any further cutbacks, leaving much of the damage in place. This certainly is a weakness, and one that some are likely to exploit, just as gradual accretions of regulatory burdens may destroy much of a property's value without triggering the Takings Clause. This possibility does not eliminate the value of temporal equal protection: to evade scrutiny in this way, the dominant group must repeat its slights again and again, facing political criticism each time, and will fail if it either does too much—showing its hand—or loses its commitment to the project along the way. In this way, temporal equal protection complements other, structural stasis-preserving doctrines.

E. *The Paradox of Equal Protection*

Many important rights contain important paradoxes. The potential tensions between the Free Exercise and Establishment Clauses are well-known: as the state plays a larger role in our lives, it will have such control over spaces that it will determine whether religious activity occurs there—with either result at least superficially raising concerns. We have resolved that pragmatically,

145. *See, e.g.*, JANET POPPENDIECK, FREE FOR ALL: FIXING SCHOOL FOOD IN AMERICA 48–53 (2010) (describing how that change improved the accessibility and nutritional quality of school meals).

146. For example, the Legal Services Corporation Act has never come close to guaranteeing access to civil representation to any category of low-income people, no matter how meritorious their cases may be. *See* Katja Cerovsek & Kathleen Kerr, Comment, *Opening the Doors to Justice: Overcoming the Problem of Inadequate Representation for the Indigent*, 17 GEO. J. LEGAL ETHICS 697, 697–98 (2004).

understanding that devoting law enforcement resources to combatting religiously motivated hate crimes is not the establishment of religion but rather the defense of the secular values of safety and freedom. Similarly, if freedom of speech extends to the point of entitling someone to shout down all opposing voices, its communicative values would be destroyed. And if we read the Due Process Clause as demanding such intricate procedures that no decision is ever reached, we will not have fair resolutions of disputes over life, liberty, or property.

Equal protection, both cross-sectional and temporal, has its own paradoxes. Understanding the paradox of each form of equal protection sheds light on the other.

For cross-sectional equal protection, the paradox is that perfect equality can lock in the results of past discrimination. Thus, insisting on color-blind college admissions policies after decades in which whites, but not African Americans or Hispanic Americans, were educated is likely to preserve a strong advantage for the children of better-educated white parents. Gender-blind hiring policies may start to bring a few women into previously all-male enclaves, but entrenched "old boys'" networks may make success much harder for those women than it is for men hired at the same time. In essence, although it is equality-diminishing to treat members of marginalized groups as inherently unequal, it is also equality-diminishing to ignore the differences that result from social and political discrimination.

Temporal equal protection analysis makes the problem clear. Judged over an extended period, the sequence of discrimination favoring the dominant group followed by purported legal equality still awards the vast majority of benefits to those in the dominant group. Put another way, allowing race preferences when they favor whites but insisting on color-blindness when affirmative action would favor people of color is an obvious deprivation of temporal equal protection—all the more so when the nominally color-blind criteria tend to favor the beneficiaries of prior discrimination.

But temporal equal protection contains its own paradox, too. If we inhibit important policy changes too aggressively, we will frustrate newly ascendant majorities formed by historically marginalized people, alone or in coalition with others. Here, theory developed for cross-sectional equal protection provides insight. If one understands the purpose of equal protection to be blocking the formation of dominant and subordinate groups,[147] then one should react very differently to policy changes instituted by those who had been systematically excluded from power than from a relatively constant dominant group adjusting

147. *See, e.g.*, Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157–59 (1976) (arguing that equal protection should be viewed as "group-disadvantaging" conduct and "status-harm").

policy as conditions change to preserve its own prerogatives. Just as cross-sectional equal protection can be counterproductive when it ignores real differences imposed by social, political, or economic forces, so too temporal equal protection could be counterproductive when it ignores real political change.

The focus of temporal equal protection, then, should be on policy changes in response to demographic changes or legal or political changes that make cross-sectional discrimination infeasible. The former is widely recognized as hypocrisy. The latter reflects a common suspicion of the good faith of parties forced to change their ways after having been found liable for wrongdoing.

III. CONSTITUTIONAL PRINCIPLES LIMITING POLICY CHANGE

Constitutional doctrines can roughly be sorted into three groups: those that force change, those that prevent change, and those that may be applied either to force or to prevent change. Ours is a deeply conservative Constitution, with many more change-inhibiting doctrines than change-promoting ones.[148] Nonetheless, because the *Lochner* era partially discredited the use of constitutional law to inhibit change, and because the Civil Rights Era gave legitimacy and prestige to the application of constitutional law to force change, the popular understanding of constitutional law tends to be the reverse.[149] Thus, in the typical equal protection case, plaintiffs challenge a longstanding policy as discriminatory on a cross-sectional basis and, if they win, may have to litigate how quickly the new, non-discriminatory regime must be implemented.[150]

But an important class of constitutional rules have nearly the opposite structure: obstructing or striking down changes to longstanding policies more favorable to particular communities.[151] As much as change dominates the headlines and our political discourse, our legal system broadly assumes temporal stability in both law and social order. These rules treat continuity in legal rules as the norm, with change an aberration requiring special adjustments. Temporal equal protection would fit neatly into this group.

Although overriding legislative line drawing and overriding legislative efforts to change policy are both anti-majoritarian, the latter is less disruptive

148. Relatively few constitutional doctrines are explicitly limited to forcing change. *See, e.g.*, U.S. CONST. amend. XXII (limiting terms of the President); *id.* art. I, § 8, cl. 12 (requiring appropriations for the army to be renewed every two years).

149. In addition, over the last century, constitutional dissonance has been as likely to come from developments in constitutional thinking that move it out of sync with current practices as from new practices that depart from settled constitutional rules.

150. *See, e.g.*, Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430, 442 (1968) (requiring board to integrate schools "promptly"); Cooper v. Aaron, 358 U.S. 1, 16 (1958) (denying Little Rock additional time to integrate despite rampant violence).

151. Larry Alexander's dismissal of "very limited freezing principles" is typical of legal scholarship's neglect of these rules' significance. Alexander, *supra* note 8, at 399.

to democratic governance for several reasons. In particular, it leaves in place policies entirely designed by the elected branches and their appointees rather than imposing judge-made rules. It also commonly limits only the *method* of achieving the policy goal rather than disallowing effort to achieve that goal at all.

This substantially more moderate anti-majoritarian impact of inhibiting legislative change has allowed change-inhibiting doctrines to develop much more fully than those, principally cross-sectional equal protection, that inhibit line drawing. Each of these doctrines has the same function as temporal equal protection: preventing the elected branches from changing policies. Understanding the principles they rely upon to justify that intrusion and how far they are prepared to go in obstructing democratic change is therefore instructive. In assessing the potential strengths and weaknesses of recognizing temporal equal protection, these doctrines provide far more realistic examples than does cross-sectional equal protection, which relies on strikingly different methods.

This part analyzes important themes in doctrines impeding potentially oppressive legal change and seeks to apply them to understand how a robust temporal equal protection doctrine might be designed and justified against the kinds of criticisms that have restrained its cross-sectional counterpart. Section III.A briefly reviews the most important stasis-reinforcing doctrines. Section III.B seeks to extract key themes from that diverse collection.

A. *Existing Stasis-Reinforcing Doctrines*

Cross-sectional equal protection requires courts to perform a highly unusual function: prohibiting the political branches from drawing lines. To be sure, rules of uniform treatment have long governed innkeepers and common carriers. True also, the original Constitution had uniformity requirements for naturalization rules, bankruptcy, and certain taxes,[152] and some state constitutions contain generality requirements[153] or prohibitions on special and local legislation.[154] In general, however, courts have recognized line drawing as a quintessential legislative and administrative function to be intruded upon only hesitantly.[155]

By contrast, temporal equal protection asks courts to take on a much more familiar role: impeding problematic legal change. When courts do so, they generally need not substitute their own preferences for those of the political branch but merely continue one regime that previously won political support

152. U.S. CONST. art. I, § 8, cls. 1, 4.

153. *E.g.*, KAN. CONST. art. II, § 17.

154. *E.g.*, N.J. CONST. art. VII, cl. 9.

155. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 238 (1981); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955).

rather than allow another to supersede it. A wide array of constitutional and non-constitutional doctrines routinely assign courts that role, often with relatively little controversy. Temporal equal protection therefore demands not so much that courts engage in a new type of intrusion on majoritarian politics but rather that they do what they already are doing in service of a new purpose. Indeed, given the relatively onerous demands cross-sectional analysis places on the courts, it is surprising that it has so thoroughly dominated equal protection discourse.

This section surveys some of the more important doctrines inhibiting majoritarian legal change. Section III.A.1 considers the anti-majoritarian role of rules, most of them content-neutral, that obstruct policy change generally. Section III.A.2 assesses rules that disallow particular methods of withdrawing beneficial legal treatment. In some situations, barring those methods of change effectively prevents change altogether; in others, policy change may proceed but only in ways that avoid specific kinds of impositions on individuals. These rules, like temporal equal protection, are indifferent to the creation of beneficial legal rules but, once enacted, proscribe their removal by a majority at the disproportionate expense of a minority. Section III.A.3 then notes that constitutional law, even in doctrinal areas that nominally do not address legal change, has in fact skewed against changes in legal rules. Section III.B then gathers together common themes from this discussion.

1. Governmental Structure

Although the structures by which law may be changed are predominately content-neutral, they nonetheless impede legal change. Even where a majority of the current electorate favors change, these structures may prevent that change from occurring. This occurs in four ways. First, some rules require supermajorities to change but not to continue policy. They may require this of the supermajority explicitly or may do so by testing majority support in several different ways. A bare majority of the electorate is unlikely to measure up as such under either of these methods. The result, in effect, is to obstruct changes not supported by some sort of supermajority. Second, some rules require proof of majority support at multiple times, requiring a majority to prevail in several successive elections. Again, although a small but stable majority might be able to achieve this, more likely this would require some sort of supermajority to prevail in all of the necessary contests. Third, some rules require approvals for new (but not continued) policies by entities that are not directly controlled by majorities. And fourth, many rules reinforce the existing legal regime merely by increasing the amount of work required to achieve change. Some of these burdens are deliberate efforts to dampen change; others create burdens as byproducts of other functions.

By applying these constraints to the making of new policy but not the continuation of old, all of these rules tend to inhibit legal change. They increase the likelihood that people in the future will experience the same legal burdens and benefits as those that went before them even if a majority has come to prefer otherwise.

a. *Separation of Powers*

The Framers recognized, with approval, that the requirements of bicameralism and presentment would interfere with rapid changes in law.[156] Madison conceded in *Federalist No. 10* that dangerous factions may at times command majority support but believed the federal government is designed to prevent them from making dangerous changes in the law.[157] By requiring the assent of two bodies selected in different ways and following different processes, he anticipated in *Federalist No. 52* the failure of proposals for change that could prevail in one approach or the other.[158] In *Federalist Nos. 62* and *63*, he foresaw the Senate as a guardian of the status quo.[159] Similarly, Hamilton in *Federalist No. 73* embraced the presidential veto as a guard "against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority" of Congress.[160] In *Federalist No. 78*, he anticipated that courts would "disregard" laws that differed from the "superior" law of the Constitution.[161] More broadly, however, the Framers saw the Constitution as entrenching the current legal regime against "the mischiefs of . . . inconstancy and mutability in the laws"[162] and the "poison[ing of] the blessings of liberty" that "mutable policy" brings.[163] Even if some good, public-serving laws were lost in the process, that is the price that we should gladly pay to block pernicious legal change.[164] Gridlock is not a bug; it is a feature.

As anticipated, our separation of powers has, indeed, strongly inhibited legal change by entrenching current legal rules unless advocates of change can navigate multiple institutional chokepoints or "vetogates," each requiring them to demonstrate majority support measured in a different, non-overlapping

156. THE FEDERALIST NO. 51, *supra* note 29, at 252–54 (James Madison).

157. THE FEDERALIST NO. 10, *supra* note 29, at 43–45 (James Madison). *See generally* THE FEDERALIST NO. 3 (John Jay) (arguing that a national government will be less likely than individual states to make decisions damaging to the country as a whole).

158. THE FEDERALIST NO. 52, *supra* note 29, at 259 (James Madison); *see also* THE FEDERALIST NO. 62, *supra* note 28, at 301 (James Madison).

159. *See* THE FEDERALIST NO. 63, *supra* note 29, at 307–08 (James Madison); *see also* THE FEDERALIST NO. 62, *supra* note 28, at 302 (James Madison) (noting that the Senate's size and tenure make it less likely to act based on sudden passions).

160. THE FEDERALIST NO. 73, *supra* note 29, at 358 (Alexander Hamilton).

161. *See* THE FEDERALIST NO. 78, *supra* note 29, at 380 (Alexander Hamilton).

162. THE FEDERALIST NO. 73, *supra* note 29, at 359 (Alexander Hamilton).

163. THE FEDERALIST NO. 62, *supra* note 29, at 304 (James Madison).

164. *See* THE FEDERALIST NO. 73, *supra* note 29, at 359 (Alexander Hamilton).

way.[165] The requirements of bicameralism and presentment prevent changes in existing law unless the change is broadly acceptable or the faction promoting it has won several successive elections.[166] The nonconstitutional requirement to obtain sixty votes in the Senate to achieve cloture on legislation, and the increasing willingness to force the majority to find sixty votes even on routine matters, further limits changes in policy.[167] Executive orders and other presidential policies, once issued, persist from administration to administration, with new presidents lacking the attention and staff to review and reverse all but a handful of their predecessors' decisions.[168] Many states have still further change-inhibiting legislative[169] and administrative[170] procedures.

The counterexamples are sparse and of relatively modest importance. The Constitution reverses this preference for the status quo in one significant

165. *See* Matthew McCubbins, Roger Noll & Barry Weingast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 16–19 (1994).

166. *See* NELSON W. POLSBY, HOW CONGRESS EVOLVES: SOCIAL BASES OF INSTITUTIONAL CHANGE 147–50 (2004).

167. That this form of countermajoritarianism has achieved quasi-constitutional status is demonstrated by the assurances of both Democratic and Republican majority leaders that their respective moves to eliminate the filibuster for appointments—not directly policy changes—would not affect the sixty-vote requirement for enacting new laws. *See, e.g.*, Kelsey Snell, *Senate Rewrites Rules to Speed Confirmations for Some Trump Nominees*, NPR (Apr. 3, 2019), https://www.npr.org/2019/04/03/709489797/senate-rewrites-rules-to-speed-confirmations-for-some-trump-nominees [https://perma.cc/6JBG-3TEL] (noting that Republicans' 2019 removal of filibusters for appointments does not change rules regarding legislation); *see also* Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html?noredirect=on [https://perma.cc/PS8G-6AEY (dark archive)] (noting that Democrats' 2013 removal of filibusters for appointments also did not affect rules regarding legislation).

168. *See* JOHN P. BURKE, PRESIDENTIAL POWER: THEORIES AND DILEMMAS 194–95 (2016) (suggesting that Presidents' power to affect change decreases notably during their first term); *see also* VICTORIA A. FARRAR-MYERS, SCRIPTED FOR CHANGE: THE INSTITUTIONALIZATION OF THE AMERICAN PRESIDENCY 165 (2007) (noting that institutional pressures, including staff and time constraints, typically restrict Presidents' actions while in office).

169. About half of the states have part-time legislatures; several have legislatures that meet only biennially. *See Full- and Part-Time Legislatures*, NAT'L CONF. ST. LEGISLATURES (June 14, 2017), http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx [https://perma.cc/94FQ-NAZX]. Many states prohibit legislation encompassing more than one subject, require clear statements of that subject in a bill's title, *e.g.*, GA. CONST. art. III, § 5, para. 3, and enforce strict deadlines for bills to progress through each chamber during a legislative session, *e.g.*, MD. CONST. art. III, § 27, pt. a. Some require various forms of public notice before bills may be considered, *e.g.*, CAL. CONST. art. IV, § 8, pt. b, and may require delaying their effective dates, *e.g.*, *id.* art. IV, § 8, pt. c, paras. 1–2.

170. For example, some states require public hearings or the approval of a joint committee of the legislature before agencies may promulgate rules. *See, e.g.*, GA. CODE ANN. § 50-13-4(a)(2) (2013) (requiring public hearings if requested by any government agency or at least twenty-five individuals); N.C. GEN. STAT. § 150B-21.2(e) (2017) (requiring state agencies to hold hearings on proposed rules in response to any timely request by the public); S.C. CODE ANN. § 1-23-110(A)(3) (2016) (mirroring Georgia's public hearing requirement); VA. CODE ANN. § 2.2-4005(C) (2017) (requiring agencies to submit biennial rules reports to a Joint Commission on Administrative Rules).

respect: requiring biennial appropriations for the armed forces.[171] Congress has also reversed the presumption of continuation occasionally by including "sunset dates" in legislation.[172] To date, however, this is a rarity and largely applied to appropriations acts and to statutes authorizing social programs.

In theory, Presidents are not bound by their predecessors' decisions (or even their own earlier choices) and can start with clean slates. In fact, they lack the decisional or political capacity to overturn more than a small fraction of the policies they inherit.[173] Rarely has a President arrived so determined to sweep away his predecessor's legacy as Donald Trump, yet many of his executive actions have been largely cosmetic,[174] others have merely launched policy development processes that likely will take years to arrive at uncertain destinations,[175] and some of those with immediate impact have been enjoined.[176] Presidents also inherit a bureaucracy staffed with those hired under the pre-existing policy assumptions and likely to resist changes that seem imprudent or rushed.[177] Thus, the formal and informal structures of government already impose substantial obstacles to elected officials' ability to implement rapid policy changes just as acceptance of temporal equal protection would.

b. *Stare Decisis*

The doctrine of stare decisis is deeply stasis-reinforcing, not just requiring a changed majority on the Court, but also requiring that a majority believe that the prior decision was so severely wrong that reversing it justifies enduring criticism for departing from the judicial role.[178] This presumption also likely discourages litigants from proposing changes in law and the Court from accepting many cases that ask it to consider doing so. More broadly, courts favor

171. *See* U.S. CONST. art. I, § 8, cl. 12.

172. *See, e.g.*, 7 U.S.C. § 2027(a)(1) (Supp. V 2017) (authorizing appropriations for the Supplemental Nutritional Assistance Program ("SNAP"), formerly food stamps, only through September 2018).

173. *See* BURKE, *supra* note 168, at 193–94, 231–32; *see also* FARRAR-MYERS, *supra* note 168, at 165–66.

174. *See, e.g.*, Exec. Order No. 13,765, 82 Fed. Reg. 8351 (Jan. 24, 2017) (encouraging agencies to weaken health care law in anticipation of ACA repeal without making any concrete policy changes).

175. *See, e.g.*, Exec. Order No. 13,781, 82 Fed. Reg. 13,959 (Mar. 16, 2017) (directing the development of proposed plans that would then go through multiple levels of review).

176. Hawaii v. Trump, 245 F. Supp. 3d 1227, 1237–39 (D. Haw.) (enjoining implementation of executive order restricting travel by citizens of predominately Muslim countries and curtailing refugee admissions) *aff'd in part and vacated in part*, 859 F.3d 741, *vacated as moot and remanded*, 138 S. Ct. 377 (2017).

177. *See* Jon Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 540–41 (2015) (describing career staff as the administrative equivalent of the judiciary, with secure tenure and a non-partisan commitment to the rule of law).

178. *Compare* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 695–701 (1978) (finding limits on § 1983 actions so indefensible as to justify overruling seventeen-year-old precedent), *with id.* at 714–17 (Rehnquist, J., dissenting) (decrying insufficient justification for disregarding stare decisis).

granting injunctions preserving the status quo and impose heavier burdens on those seeking to impose change through judicial orders.[179]

Although the Court lacks a formal mechanism for sunsetting its precedents, it has attempted to do so in a few cases with dubious results. In civil rights cases, it has suggested that longstanding bigotry will disappear and hence cause its precedents allowing remedial action to expire.[180] The Court's belief that it could limit its authorization of harsh racial discrimination to the duration of World War II may have contributed to its infamous decisions on the internment of Japanese Americans.[181] And its embrace of an ad hoc version of equal protection that it warned was not to be precedent contributed to the scorn with which *Bush v. Gore*[182] was received even among many conservatives.[183]

The Court can, of course, devise ways to honor precedent nominally while taking the law in an entirely new direction.[184] But the very fact of having a norm of continuation that receives public support across the political spectrum increases the costs to the Court of disturbing the status quo in more than modest ways.

c. *Federalism*

Although less clearly part of the original constitutional design to check majoritarian government,[185] federalism has increasingly provided another set of checks on majoritarian rule at the federal level as public functions have become more complex and state and local participation becomes more crucial. The uncooperative federalism that Heather Gerken and Jessica Bulman-Pozen have described prevents the majorities at the federal level from effectuating broad legal change throughout the country if those majorities cannot bring along, or eventually wear down, state and local governments responding to different

179. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 439 U.S. 1358, 1359 (1978) (denying application for a stay).

180. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2628–29 (2013) (finding the Court's decision upholding the Voting Rights Act's pre-clearance requirement had ceased to be effective with the passing of several decades); Grutter v. Bollinger, 539 U.S. 306, 341–42 (2003) (insisting that affirmative action programs' permissibility will "sunset"); Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 247–48 (1991) (emphasizing that desegregation orders were intended to end).

181. Korematsu v. United States, 323 U.S. 214, 223–24 (1944) (upholding internment), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018); Hirabayashi v. United States, 320 U.S. 81, 103–04 (1943) (upholding racial curfews).

182. 531 U.S. 98 (2000).

183. *See* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 180–81, 209, 217–18 (2001).

184. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 172–77 (1989) (limiting § 1981 to discrimination during the making, not the implementation, of a contract).

185. *But see generally* THE FEDERALIST NO. 39 (James Madison) (comparing and contrasting traits of federalism and nationalism in the Constitution).

electorates.[186] To be sure, state and local governments sometimes design new legal structures not sanctioned by their federal counterparts;[187] the simplest, and thus most common, means of dissent is to continue operating a program in the same manner notwithstanding federal edicts that they change.

Since the New Deal, the federal government has increasingly relied on states to administer its programs. Part of the reason is political, either to retain policy voices for the states on matters they long had managed or to reduce the visible footprint of federal authority. Part of the federal government's reliance on states, however, is fiscal: states often are willing to pay some of the costs of programs they are allowed to administer, and in any event state and local civil servants are far cheaper than federal ones.[188] The Supreme Court has gradually strengthened states' hands in these arrangements, both prohibiting the federal government from mandating their participation[189] and narrowing the scope of conditions that may be imposed on states wishing to participate.[190] With *National Federation of Independent Business v. Sebelius*,[191] the Court gave states sweeping new powers to block important federal initiatives.[192] In effect, the Court gave individual states a veto over changes in the Medicaid statute as applied to them, making them another vetogate through which many of the most important policy changes must pass.[193] To win both enactment at the federal level and implementation in the states requires substantial supermajority support because political predispositions in the states vary so much from one another.

d. *Administrative Law*

Although administrative agencies arose in part as a means of achieving policy change at a volume that Congress could not produce, administrative law has developed into a powerful force for inhibiting legal change.[194] Indeed, it has

186. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1265–71 (2009).

187. *See id*. at 1282 (discussing states' flouting of federal drug law in legalizing marijuana). *But see* U.S. CONST. art. I, § 10, cl. 3 (inhibiting this practice by requiring congressional approval of interstate compacts).

188. David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2567 (2005) [hereinafter Super, *Rethinking Fiscal Federalism*].

189. *See generally, e.g.*, Printz v. United States, 521 U.S. 898 (1997) (prohibiting the federal government from commandeering state officials).

190. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 209 (1987) (requiring conditions to be reasonably related to the purpose of the program).

191. 567 U.S. 519 (2012).

192. *Id*. at 575–85, 588.

193. *See id.*

194. Although much of administrative law is nominally statutory rather than constitutional, as Eskridge and Ferejohn have noted, the Administrative Procedure Act has become firmly entrenched as a "super-statute" with quasi-constitutional status in our polity. ESKRIDGE JR. & FEREJOHN, *supra* note 143, at 77.

developed its own separation of powers, with political appointees, career civil servants, and civil society standing in for, respectively, the President, the judiciary, and Congress.[195] This system can prevent a new majority from enacting policy changes. By making expertise a central criterion for agencies' decisionmaking, administrative law effectively prevents actions that do not have both majoritarian support and some credibility in the expert community.[196] And because expertise must be proven, and may be disputed, this requirement of administrative law increases the friction in the policymaking process, reducing the number of changes that may be attempted as well as the number that succeed.

The administrative process imposes a temporal constraint on majoritarianism as well. If elections were immediate or continuous, elected officials would be fully accountable for the actions of their appointees. But because the appointees can operate at will for four years, either departing from their leader's campaign promises or disregarding changes in public mood, administrative actions often reflect public sentiment some years before. Career civil servants, who may have been hired decades earlier, as well as life-tenured judges ruling on challenges to rules, represent even more of a "time capsule" of prior political preferences. With approval from several such persons commonly required,[197] the effect is to limit policy changes to ones that have enjoyed majority or near-majority support for an extended period.

The courts' interpretations of the Administrative Procedure Act and related statutes also have the effect of entrenching existing policy against majoritarian desires for change that have arisen since the policy was enacted. Complying with the requirement of giving notice and seeking public comment on changes slows action down, potentially past the point that the new majority disintegrates. This is a form of supermajoritarianism, requiring majorities both at the time of initiating the policy change and some time later at the time of

195. Jon Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 229 (2016).

196. In some environments, particularly independent agencies, majority support may not be needed at all. *Id*. at 284–85. More commonly, however, majoritarian officials determine which initiatives to advance.

197. Thus, for example, a change in regulations may require a policy analyst to write a notice of proposed rulemaking; clearance from several layers of supervisors and the agency's legal counsel; a research specialist to prepare a cost-benefit analysis; sign-offs from civil rights, small business, and compliance experts; a budget analyst assessing any fiscal impact; review by at least one division of the Office of Management and Budget; consultation with other federal agencies; and then a repeat of the entire process after the policy analyst reviews all comments that the public submitted. At that point, adversely affected parties will sue in a district court they expect to be sympathetic to their concerns, with attorneys from the agency's general counsel's office and the Department of Justice having to defend the new regulation. If the plaintiffs picked their district wisely, they are likely to win, causing additional delay while the case proceeds to a circuit court. Should the President change at any point in this process, the entire effort may be aborted.

completing it. Indeed, the ready availability of judicial review means that, at least for important policies, the majority for change must be sustained for some years after the policy is approved to defend it in court. Given the frequency with which agencies fail to justify their actions to the standards courts impose, some significant number of policy changes that are indisputably within the powers of the agency will need a supportive administration several times: when they are initially proposed and finalized, when they are challenged in court, and when they are again proposed and finalized after having been found procedurally inadequate.

In response to these limits and lags in agencies' democratic responsiveness, administrative law has increased the friction of the policy-changing process to help constrain the vast power of the modern state. As the current President is discovering, perhaps to his irritation, officials must go through extensive processes of both internal and external review before changing policies. This is just as true when moving from an unregulated condition to the imposition of new constraints on private behavior as when eliminating such constraints—and the expectations of those who may have relied on the regulations.[198] The burden of rulemaking also strains the resources of government to the point that a new majority may have to prioritize among its proposed changes, leaving in place many policies it rejects because the responsible agencies lack the staff time to prepare the notice of proposed rulemaking (including the numerous forms of analysis now required to be included in or with such notices[199]), analyze and respond to the public comments, and prepare a final rule—or other officials in the clearance chain lack the time to read and approve the proposed and final rules. This effectively entrenches many medium- and lower-priority policies that no longer enjoy majority support until their opponents have won enough successive elections to get around to changing them.

The Court added to that burden when it required that any action to change existing policy explain why officials are rejecting the evidence and rationales that their predecessors had relied upon to enact that policy.[200] Although the Court has cautioned that this does not mean that officials must show superior reasons supporting the new policy,[201] new officials must still go through the same process to change a policy that their predecessors undertook to create it.[202]

198. The Administrative Procedure Act ever so slightly favors deregulation in allowing rules that lift burdens to become effective more rapidly than those imposing burdens, 5 U.S.C. § 553(e) (2012), but otherwise imposes the same requirements for making and terminating regulations, *id.* § 553(d).

199. *See, e.g.*, Exec. Order No. 13,083, 3 C.F.R. 321 (1999), *reprinted in* 5 U.S.C. § 601 (Supp. IV 1998); Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 (2012); Exec. Order No. 12,857, 3 C.F.R. 623 (1994), *reprinted in* 2 U.S.C. § 900 (2000).

200. Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41–44 (1983).

201. FCC v. Fox Television Stations, 556 U.S. 502, 513–15 (2009).

202. *Id*.

Courts also favor continuity in the remedial orders they issue in administrative law cases. Even after finding a rule or order improperly promulgated, courts increasingly are remanding the matters to the issuing agencies for further proceedings without vacating the problematic enactment.[203] Some of this may reflect a view that defective regulation is better than none at all, but it also recognizes the disruptions and potential unfairness of changing legal regimes that have developed significant reliance interests.

e. *Procedural Due Process*

Although formally just a constraint on *how* rights are withdrawn rather than *whether* they are, in fact, procedural due process also makes many *substantive* policy changes cost-prohibitive for the administrative state. As such, it serves to entrench existing policies against the preferences of a changed political majority.

Procedural due process only inhibits change, however, where the contemplated denials would require some individualized assessments. Thus, for example, if the state becomes convinced that many members of a particular profession are inept and untrustworthy, it could shut that profession down completely. If the profession and its sympathizers have sufficient influence to make that extreme route infeasible, the state may have to allow all practitioners to continue if it lacks the resources to build cases against individual incompetents, conduct the requisite hearings, and defend the inevitable appeals. By contrast, if the state wishes to reduce or abolish a particular entitlement uniformly, minimal process is required.[204] Groups with substantial political power are likely to be able to prevent wholesale deprivations of their entitlements, and procedural due process effectively prevents widespread individual cullings; marginalized groups, on the other hand, derive less protection from procedural due process because it may be possible to eliminate their rights altogether. Much of the rhetoric surrounding both President Reagan's cuts to low-income programs[205] and the 1996 welfare law,[206] for example, claimed that many unworthy recipients were mixed in with the "truly needy" and that sorting out who was whom within the existing structure was infeasible.[207]

203. Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 279–81 (2005).

204. *See* Atkins v. Parker, 472 U.S. 115, 128–29 (1985); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).

205. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97–35, 95 Stat. 357.

206. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105.

207. Robert Pear, *Reagan's Social Impact; News Analysis*, N.Y. TIMES (Aug. 25, 1982), https:/www.nytimes.com/1982/08/25/us/Reagan-s-social-impact-news-analysis.html [https:/perma.cc/8CNV-PYBD (dark archive)].

f. *Judicially Designed Rules of Construction*

Reaching beyond the constitutional and statutory limitations on legal change, courts have enunciated several rules that favor continuation of the existing order and impose heavy, supermajoritarian burdens on those seeking change. Although courts occasionally frame these doctrines as extensions of constitutional principles or interpretations of statutes, for the most part they represent courts' sense that our legal order favors continuity.

For example, courts have created a presumption against repeal of statutes by implication;[208] instead, they presume that new statutes should be read in *pare materia* with older ones.[209] This principle gains even more force when combined with the often contrafactual assumption that the legislature is aware of the current state of the law.[210] When courts follow this approach, they privilege old, sometimes obscure, statutes over the most recent expression of majority sentiment.[211] To be sure, the best practice is to do a thorough canvass of the existing state of the law before legislating, but the pressures of time, limited staff, and human frailty will often preclude that.[212] An interpretive regime under which some substantial fraction of duly passed statutes fails to have full effect will require proponents of the change to achieve sufficiently supermajoritarian support to enact it twice.

Similarly, courts construe statutes to displace the common law to the most limited degree possible.[213] Thus, legislators must draft statutes disturbing the existing legal order more clearly than other legislation or expect it to have less impact.[214] Here again, because drafting errors and unforeseen circumstances are practically inevitable, this means that legislatures often will have to enact two or more statutes to impose a change in the legal order where only a single statute might suffice, with more generous judicial construction, in addressing a new problem.

As a group, these rules do not have a clear pro- or anti-regulatory bias: the rule against repeals by implication tends to preserve regulation, but the rule

208. Branch v. Smith, 538 U.S. 254, 273 (2003).

209. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 550 (1974) (harmonizing legislation assisting Native Americans with civil rights laws prohibiting employment discrimination).

210. *Compare, e.g.*, Smith v. Wade, 461 U.S. 30, 38–45 (1983) (interpreting the Civil Rights Act of 1871 § 1, 42 U.S.C. § 1983, in light of tort cases of that era), *with id*. at 92–93 (O'Connor, J., dissenting) (finding it improbable that Congress had a clear understanding of the relevant common law given the significant split in authority that existed).

211. To be sure, another maxim favors more recent enactments over older ones. As the Legal Realists pointed out, many canons of statutory construction have at least partial opposites, with courts sometimes selecting among them ad hoc.

212. Only ten states have full-time legislatures with substantial, professionally paid staffs. *Full- and Part-Time Legislatures*, *supra* note 169.

213. Shaw v. R.R. Co., 101 U.S. 557, 565 (1879).

214. *Id.*

strictly construing statutes in derogation of the common law does the opposite. But both tend to increase the burdens on those that would seek to change current law, causing some with clear majority support to fail.

g. *Exceptional Supermajoritarianism*

Article V establishes a strict, highly supermajoritarian procedure for changing some of our most important legal rules. Even where a solid majority desires change—as, for example, was clearly the case with the Equal Rights Amendment in the 1970s[215] and may be true of term limits today[216]—Article V preserves the minority's right to preserve the existing constitutional regime.

In two important respects, Article V rejects majoritarianism altogether. It prohibits amendments that would deny each state equal representation in the Senate or that would curtail the slave trade prior to 1808. In both these respects, the Framers concluded that states' expectations of the continuation of their current legal status—as having equal status in the new Republic and as being able to increase their access to cheap involuntary labor to fuel their economic growth—were too fundamental even for a supermajority to abridge.

Bruce Ackerman,[217] William Eskridge, and John Ferejohn[218] have made a compelling case that the twentieth century saw a new form of constitutional change arise outside of Article V.[219] Although their formulations of this popular constitutionalism differ, they each involve a time-consuming process in which proponents of constitutional change must navigate the routine supermajoritarian mechanisms several times.[220] The proponents must, among other things, win several successive national elections and so entrench their proposed constitutional commitments that most of their opponents abandon the fight.

Even the crass realist account of constitutional change that focuses on the Supreme Court's makeup requires a faction seeking change to win several successive presidential elections and—with the Senate's new willingness to

215. *See* Bridget L. Murphy, *The Equal Rights Amendment Revisited*, 94 NOTRE DAME L. REV. 937, 940–41 (2018).

216. *See* Tal Axelrod, *GOP Senators Propose Congressional Term Limits*, HILL (May 14, 2019), https://thehill.com/homenews/senate/443746-gop-senators-propose-congressional-term-limits [https://perma.cc/GM5S-UKTP].

217. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1742–47 (2007).

218. ESKRIDGE JR. & JOHN FEREJOHN, *supra* note 143, at 25–26.

219. For an example of how these doctrines might work in real time, see David A. Super, *The Modernization of American Public Law: Health Care Reform and Popular Constitutionalism*, 66 STAN. L. REV. 873, 873–79 (2014) (finding a potential constitutional moment in the ongoing struggle over health care reform).

220. ACKERMAN, *supra* note 143, at 7–11; ESKRIDGE JR. & FEREJOHN, *supra* note 143, at 25–26.

refuse even to consider nominees of the opposing party[221]—to prevail in several congressional elections at the same time. As Presidents increasingly appoint relatively young justices, and justices refuse to step down under Presidents of the party with which they most disagree, the number of elections that must be won to reshape the Court has increased. Individual justices may surprise on particular issues, but to achieve broad change in the constitutional regime, far, far more than fleeting majority preferences are required. Some have argued that the Supreme Court functions as a living time capsule, privileging political attitudes from the past over those of the current political environment.[222]

The effect then is both to favor continuation of prior individual policies and to entrench whole regimes because of the effort required to address each policy even when a supermajority favors change. This means that a great many important statutes remain in force despite being enacted by legislatures chosen through far more limited suffrage than we now deem democratically necessary. Even those laws that have changed often had to be negotiated with defenders of the old order who could extract concessions out of proportion to their numbers because of the difficulty of changing law. Thus, these stasis-reinforcing doctrines systematically privilege the preferences of those that held power through deprivations of basic democratic rights. Obviously wiping old laws off the books en masse would create chaos that serves nobody's interests, but our system's entrenchment of the status quo should not be understood to be either value-neutral or even consistent with majoritarian democracy; it is serving other purposes that are deemed more important.

2. Doctrines Limiting the Means of Changing Policy

Although most substantive constitutional principles constrain the content of public policy, a handful specifically constrain the act of changing rules.[223] They do not affect what the law and the allocation of rights may be. Instead, they limit how the government may implement a given rule. When the methods these principles proscribe are the only practically or politically feasible means of changing policy, they have the effect of locking in prior policies without regard to the current majority's wishes.

221. *See, e.g.*, Carl Hulse, *Democrats, with Garland on Mind, Mobilize for Supreme Court Fight*, N.Y. TIMES (Jan. 24, 2017), https://www.nytimes.com/2017/01/24/us/politics/donald-trump-supreme-court-democrats.html [https://perma.cc/W2H5-62E8 (dark archive)].

222. Thus, for example, the Court included at least one moderate Republican until 2010, decades after the Reagan Revolution marginalized them in national and most state politics. Adam Liptak, *Conservatives in Charge, the Supreme Court Moved Right*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html [https://perma.cc/7WFA-HPVB (dark archive)].

223. U.S. CONST. amend. V; *id.* art. 1, § 10. Of course, the *procedural* provisions of the Constitution, many discussed in the previous section, also limit how changes may be selected. *See, e.g.*, *id*. art. V.

a. *The Takings Clause*

The Court has, for the most part, avoided declaring that the government must establish rules recognizing any particular kind of property rights,[224] but once it does so it may not change those rules to eliminate protected property rights. Although much of the controversy surrounding takings in recent years has concerned the definition of a "public purpose" for which government may invoke its eminent domain powers,[225] the core of the Takings Clause is a prohibition on forcing a minority to finance public functions. As such, it is strongly countermajoritarian: the electorate will routinely prefer impositions on a few wealthy individuals to paying for services with broad-based taxes. In contrast to the Court's reluctance to recognize poverty as a suspect classification in its cross-sectional equal protection jurisprudence,[226] the protected class here is very much defined by its wealth. Takings law avoids the definitional problems that the Court cited as a barrier to considering wealth in cross-sectional equal protection: the protected class consists of those against whom the state is acting.

In addition, takings jurisprudence has escaped the principle that greater powers encompass lesser ones. This principle has proven a formidable barrier to asserting other constitutional protections of individual rights. When the state would be free to impose a more drastic loss, the Court generally has had little sympathy for those challenging lesser harms.[227] Yet the Court's exaction cases involved permits that the state would have been free to deny outright, with the Court nonetheless striking down the lesser burden of conditionally granting those permits.[228] In essence, the Court has found that the manner of exercising power, as well as the sheer scope of the intervention, merits constitutional scrutiny. Notably, takings law also embraces a temporal perspective, even proscribing transitory uncompensated impositions on property rights.[229]

224. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538–39 (1985) (declaring that the definition of property rights for due process purposes is a matter of state law).

225. *See* Kelo v. City of New London, 545 U.S. 469, 469–75 (2005) (allowing taking of homes in healthy neighborhood to facilitate private company's expansion); Berman v. Parker, 348 U.S. 26, 32–33 (1954) (allowing taking of well-maintained building in impoverished neighborhood for urban renewal).

226. *See generally, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (noting that the Court has never recognized poverty as a classification entitled to heightened scrutiny).

227. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 201–02 (1991) (upholding more stringent accounting burdens on abortion providers because Congress was free to cut off all funding to those agencies); Bowen v. Gilliard, 483 U.S. 587, 604–05 (1987) (upholding rule denying welfare to family based on legally unavailable child support because Congress need not have program at all); Adler v. Bd. of Educ. of N.Y., 342 U.S. 485, 492 (1952) (upholding limits on public employees' political expression because the state was not obliged to continue employing those workers).

228. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 374–75 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 825 (1987).

229. First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 304–05 (1987).

Even after the Court came to recognize many administrative dispensations as property for purposes of the Due Process Clauses, it has continued to refuse to treat them as property for takings purposes.[230]

b. *The Contracts Clause*

Similarly, while the government is free to prohibit the formation of new contracts, it is constrained on how it may interfere with existing ones.[231] Here again, the election of a new majority that believes that certain kinds of previously legal contracts are pernicious does not allow that majority to rid itself of those contracts. Although the Contracts Clause also limits the state's ability to rewrite existing private contracts, a key aspect of it is the prohibition on the state using sovereign powers to lighten the burden of its own contracts with private entities. The purpose here is similar to that of the Takings Clause: to prevent the state from shifting the burden of its activities onto a narrow set of private parties (here, those that have contracted with the state). The Court has broadened this protection of contractual rights to situations where the private parties do not face any clear financial loss.[232]

The Contracts Clause also inhibits the state from substituting regulatory distributions between private parties for public expenditures financed by taxation. Here again, the concern is with making a small group of politically weak people—those whose contractual rights are being impaired—shoulder the burden of financing a public agenda. The Court has allowed some departures from this principle in emergency conditions,[233] but has rejected what it regarded as efforts to exploit emergencies to shift major public burdens onto a private minority with contractual impairments.[234]

Contracts concluded by one administration therefore will bind and constrain its successor.[235] They thus become an alternative form of legislation and one that is likely harder to change.

As in the case of takings, the Contracts Clause's protected class is an economic one: those with sufficient wealth to have contractual rights the state wishes to disrupt. Definitions here, too, pose little problem because the class is defined by the actions the state takes against it.

230. Super, *New New Property*, *supra* note 93, at 1868–69.

231. U.S. CONST. art. I, § 10.

232. *See, e.g.*, U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 25 (1977) (enforcing bond covenants prohibiting rail transit cost subsidization without evidence of financial harm to bondholders).

233. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 398–402 (1934) (permitting temporary mortgage foreclosure moratorium at the depths of the Great Depression).

234. *See* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 555–58 (1935) (striking down five-year mortgage moratorium).

235. Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 895–97 (2011).

c. *Bills of Attainder, Ex Post Facto Laws, and Limits on Retroactive Legislation*

Although the constitutional prohibitions on bills of attainder and ex post facto laws[236] only nominally constrain the timing and generality of legislation rather than its content, their effect is to further entrench the existing legal regime. These rules make existing policy irrevocable as it is applied to current events to the extent that it benefits non-governmental actors.[237] Where a process is ongoing and political or equitable considerations prevent treating later participants differently from earlier ones, and if Congress—slowed by bicameralism, presentment, and a crushing workload that exceeds its current capacity—cannot legislate before the first participant acts, the legislature may have little choice but to continue the old regime for all involved.

The Court also has applied presumptions against retroactive legislation—as well as specific constitutional prohibitions on certain kinds of laws—to prevent current majorities from attempting to extend their temporal reach backwards.[238]

Even in the realm of civil litigation, the Court's qualified immunity doctrine has entrenched existing legal regimes against changes—even those the Court itself has undertaken. Officials misusing their positions to oppress those under their power are only civilly liable if it was objectively clear at the time they acted that the law proscribed their actions.[239] Thus, superseded or rejected legal rules continue to operate until a new regime not only comes onto the scene but makes itself sufficiently obvious.

The Court's rules discouraging retroactive legislation reinforce stasis even more strongly. Unless Congress not only sets an effective date but also specifies that it wants its enactment to apply retroactively,[240] the Court will reject retroactive effect even at the cost of frustrating much of the congressional purpose.[241] Here again, this constraint interacts with other change-inhibiting rules: if the administrative agency charged with implementing a statute fails to promulgate rules on time, or does so in a manner courts find defective, the old

236. U.S. CONST. art. I, § 9, cl. 3.

237. By contrast, policies imposing burdens on private actors may be retroactively changed by Congress, may be subject to presidential commutations or administrative waivers, and may be excused by courts in equity (e.g., by finding compliance nunc pro tunc).

238. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855–56 (1990) (Scalia, J., concurring) ("[R]etrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact" (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1398 (2d ed. 1851))).

239. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

240. Landgraf v. USI Film Products, 511 U.S. 244, 244–45 (1994).

241. *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208–09 (1988).

regime is preserved for the period affected even if all affected parties had notice of the change and of its intended effective date.[242]

Notably, justification plays little role in these rules' application. The ban on bills of attainder and ex post facto laws is absolute, not waivable even for strong policy purposes.[243] And the requirement that Congress explicitly provides for retroactive effect does not vary depending on the strength of the congressional purpose or the reason action could not be taken in advance of the preferred deadline.

d. *Reliance Interests*

Although the extent to which judicial enforcement might be available is unclear,[244] deeply entrenched norms hold that the state may not disturb certain kinds of clearly delineated reliance interests even if the current majority finds them improvident. For example, once income has been taxed, it may not be taxed again by the same tax system.[245] This is true even if the recipient had the opportunity to pay taxes at a dramatically reduced rate. Thus, various tax cuts championed by President Reagan, Speaker Gingrich, and Speaker Ryan have been designed specifically to increase revenues in early years by allowing prepayment of taxes at bargain rates (with those revenues being used to offset other tax cuts of a more conventional decline).[246] Even the harshest critics of these tax cuts have not seriously argued that that income could be subjected to further taxation to reclaim the government's revenue losses. These tax measures thus confer the equivalent of a property status—having income that is regarded as having been taxed—on the affluent taxpayers in question. The result is to lock in the tax status of income beyond the effective power of future legislators to change.

3. Facially Neutral Doctrines Entrenching Tradition

The entire enterprise of judicial review is fundamentally anti-majoritarian. And because the Court will rarely attempt to rewrite a statute or regulation that it finds wanting,[247] the result of judicial criticism is that the elected branches commonly must surmount the supermajoritarian requirements of their various

242. *See, e.g.*, *id.* at 207.

243. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16–18 (1976). *But see id.* at 14–20 (finding no impermissible retroactivity in statute increasing employers' obligations to former employees).

244. *See, e.g.*, United States v. Carlton, 512 U.S. 26, 33–34 (1994) (finding insufficient reliance interests to disturb amendment to code).

245. Jeffrey L. Kwall, *The Uncertain Case Against the Double Corporate Taxation of Corporate Income*, 68 N.C. L. REV. 613, 614–15 (1990).

246. Super, *Rethinking Fiscal Federalism*, *supra* note 188, at 2624–25.

247. *But see* Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius, 567 U.S. 519, 519 (2012) (prohibiting enforcement of part of the Medicaid statute without striking down any of its specific provisions).

vetogates multiple times to enact the substantively unobjectionable part of an initiative. Beyond that, however, the Court has interpreted several constitutional principles in ways that inhibit policy changes more than they restrain entrenched policies that arguably have similar impacts. More generally, the Court's increasing emphasis on originalism tends to skew its interpretations in favor of policy stasis.

a. *Stasis-Reinforcing Interpretations of Facially Neutral Rules*

Although the First Amendment is facially neutral between new and old violations of its edicts, the Court's application of it has relied heavily upon tradition. The Court is far more likely to find a violation of the Establishment Clause when Congress or a state adopts a new policy favoring a particular religion[248] than when they continue existing preferences.[249] Thus, the Court has treated the status quo as creating vested rights in both champions and opponents of state favoritism for religion.

The Court also has protected the continuation of existing means of expression[250] far more energetically than it has comparably important but new opportunities for expression.[251] And it has privileged expression through longstanding media[252] over that through new forms of communication that lack comparable arguments from tradition.[253] Although the Court has been willing to upend longstanding restrictions on expression, it has built a regime that strongly skews in favor of the status quo.

Similarly, although some prominent descriptions of procedural due process speak in atemporal utilitarian terms,[254] the Court often has framed the requirements of procedural due process in terms of preserving longstanding

248. *See, e.g.*, Larson v. Valente, 456 U.S. 228, 244–47 (1982) (striking down registration requirement for religious groups soliciting donations); Sherbert v. Verner, 374 U.S. 398, 398 (1963) (disallowing discrimination against persons observing a Saturday Sabbath in a relatively new social welfare program).

249. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 668–70 (1984) (upholding nativity display because those have long been accepted); Marsh v. Chambers, 463 U.S. 783, 783–84 (1983) (upholding state-paid legislative chaplains based on their long history in this country).

250. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 501–02 (1946) (allowing literature distribution in downtown area notwithstanding its private ownership).

251. *See, e.g.*, Lee v. Int'l Soc'y for Krishna Consciousness, 505 U.S. 830, 830–31 (1992) (per curiam) (denying right to distribute information in airports).

252. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2218–22 (2015) (limiting municipal regulation of signage); R.A.V. v. City of St. Paul, 505 U.S. 377, 377–78 (1992) (striking down ordinance against placing hate-inspiring objects on public or private property).

253. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 726–28 (1978) (upholding prohibition of nonobscene material over broadcast media).

254. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (establishing a three-part balancing test).

practices and rules.[255] And even when applying its utilitarian formula, the Court at times will disregard a balance that it finds pointing in one way to preserve historical settlements of issues.[256] Thus, new procedural rules are far more likely to be struck down than those entrenched in the status quo.[257] The same is often true in criminal procedure. Longstanding practices are likely to be sustained, even with paltry justification.[258] New kinds of intrusions are more likely to receive intensive analysis.[259]

Takings jurisprudence also is deeply stasis reinforcing. The Court has allowed the state to regulate property aggressively, even destroying the lion's share of its value, if the restrictions are similar to those entrenched in longstanding common law[260] or legislation.[261]

b. *Originalist Constitutional and Statutory Construction*

The process of considering the original public meaning of constitutional and statutory provisions[262] is deeply stasis reinforcing. It forces advocates of change to demonstrate supermajoritarian support anew, even if the purpose or language of the prior statute would justify adapting its application to deal with a new problem. It also tends to privilege stasis by forcing constitutional or statutory drafters to write with exceptional clarity, and foresight, to avoid having their enactments read minimally. Thus, originalists commonly will seize on one concept of a provision to discredit arguments that it served others as

255. *See, e.g.*, Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (describing due process as protecting "principle[s] of justice . . . rooted in the traditions and conscience of our people"); Twining v. New Jersey, 211 U.S. 78, 101 (1908) (finding that due process prohibits "change in ancient procedure" that impairs fundamental principles).

256. *See, e.g.*, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 18–19 (1981) (finding historical reluctance to require appointive counsel where incarceration was not threatened overrode results of balancing).

257. *See, e.g.*, *id.* To be sure, in the modern administrative state, all procedures are relatively new.

258. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 318–20 (2001) (upholding arrest of motorist for minor offense not punishable by jail time).

259. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 27–28, 34–35 (2001) (finding use of thermal imaging an unlawful search).

260. *Compare, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 396–97 (1926) (upholding zoning that destroyed three-quarters of property's value because zoning addresses incompatible land uses in a manner broadly analogous to nuisance), *with* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 419–20 (1982) (finding a taking in requirement that landlords accept cable television boxes and wires on their property because the intrusion was similar to a common law trespass).

261. Block v. Hirsh, 256 U.S. 135, 155–57 (1921).

262. *See generally* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) (explaining that, under originalism, constitutional and statutory provisions are interpreted by considering both the original intent of the authors as well as the original meaning a reasonable English speaker would have attributed at the time).

well.[263] In constitutional adjudication, this tends to confine the body of enforceable rights to those well-established in history and presumably largely reflected in the status quo.[264] The result is to buttress even "uncommonly silly" laws.[265]

B. *Unifying Themes in Stasis-Reinforcing Doctrines*

Several important themes unite the stasis-reinforcing doctrines described in the last section. These can provide important guidance about the contours of temporal equal protection because they show what the courts already are, and are not, prepared to do to deny current majorities the right to change current law. These themes differ markedly from some of the long-accepted limitations on cross-sectional equal protection's interference with majorities' ability to enact classifications. Section III.B.1 identifies several norms that unite many of these doctrines. Section III.B.2 considers the analytical methods on which courts rely in weighing invocations of these doctrines. Finally, Section III.B.3 contrasts these doctrines theoretical justifications with those that have dominated debates about the countermajoritarian difficulty with cross-sectional equal protection.

1. Normative Themes

Existing doctrines that promote stasis share many of the same values. For convenience, these may be grouped into six categories, some of which are related: preventing state power from being used for economic exploitation, preventing the cost of government from being shifted to a few individuals rather than the general tax base, blocking harsh measures motivated by hatred, preventing the government from acting hastily, preserving reliance interests in settled social arrangements, and minimizing the costs of transitions.

a. *Preventing Oppression*

A primary purpose of inhibiting policy change is to prevent the majority from solving its perceived problems through exploitation of an overpowered minority. This is obviously the point of the Takings and Contracts Clauses. Far less admirably, it was also the point of the Constitution's provisions requiring free states' cooperation in apprehending fugitive slaves and prohibiting restrictions on the slave trade prior to 1808. More subtly, it also underlies procedural due process and requirements of public notice and an opportunity to comment prior to the issuance of most administrative rules: those wishing to

263. *See, e.g.*, Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 101, 165 (2011).

264. Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

265. *Id.* at 605 (Thomas, J., dissenting).

wield state power to redistribute others' wealth must first bear both the burden, in staff time and delay, of a proceeding and risk public embarrassment if they cannot justify their actions.[266] Madison and others also believed that the separation of powers, and the arduous process of enacting legislation, would derail populist efforts at redistribution.[267]

Crucially, most of these doctrines do not depend upon showing an intent to oppress. They exist in part because of a recognition that state machinery often is captured for oppressive purposes, but these doctrines do not assume that oppressive intent can be recognized in particular cases. They also do not attempt to define which minorities are most likely to be oppressed. Instead, they restrict the types of policy changes that seem best-suited to oppressive uses against whomever is politically vulnerable at a given time.

Limiting important public policies to those initially in position to benefit reduces the costs of those policies at the expense of those that could benefit later. This allows a dominant group to redistribute wealth to its members without concern that those policies will later redistribute away from them.

b. *Avoiding Disproportionate Burdens*

Closely related, these rules seek to avoid shifting the costs of government that benefit the public at large to a few individuals. This is certainly the core rationale for the Takings and Contracts Clauses.[268] It also means that when the elected legislature or administration fails to finish the work of lawmaking by the desired date, the costs of that failure may not be shifted onto those subject to the new rules with retroactive legislation. Procedural due process, too, limits the State's ability to support itself through exploitative or unfounded actions against individuals.[269]

266. *But see* Heckler v. Campbell, 461 U.S. 458, 467 (1983) (first citing FPC v. Texaco Inc., 337 U.S. 33, 41–44 (1964); and then citing United States v. Storer Broad. Co., 351 U.S. 192, 205 (1956)) (allowing administrative agencies to create rules foreclosing issues in hearings); Weinberger v. Salfi, 422 U.S. 749, 784–85 (1975) (allowing legislatures to conclusively presume facts and deny individuals the chance to show otherwise in an administrative hearing context).

267. *See generally, e.g.*, THE FEDERALIST NO 51 (James Madison) .

268. *Cf.* Brown v. Legal Found. of Wash., 538 U.S. 216, 237, 239–40 (2003) (quoting Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 861–62 (9th Cir. 2001)) (emphasizing that interest on lawyers' trust accounts had no practical value to clients in upholding their transfer to fund legal services for low-income people).

269. *See* Gibson v. Berryhill, 411 U.S. 564, 578–79 (1973) (quoting KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 12.04, at 250 (1972)) (prohibiting officials responsible for municipal budgets from imposing fines); Barry v. Bowen, 825 F.2d 1324, 1327, 1330–31 (9th Cir. 1987) (finding no substantial justification in government's defense of system that more closely scrutinized adjudicators with higher rates of allowing disability claims), *overruled on other grounds by* Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1462 (9th Cir. 1992), *and* Lu v. United States, 921 F.3d 850, 862 (9th Cir. 2019).

The federal government's sources of funding have changed dramatically since its founding, but the Framers' opposition to placing the burden of resolving its fiscal problems on a relatively small number of people clearly remains relevant. And this works without any substantive rules about what constitutes sufficiently broad sharing of burdens.

Here again, applying burdensome policies only when members of disfavored groups are subject to them makes a politically marginalized group bear society's general costs. Conversely, denying newly advancing groups the benefit of positive policies artificially lowers their cost, again at the cost of a disfavored fraction of the population rather than society as a whole.

c. *Frustrating Malicious Legal Change*

These doctrines also seek to defeat malicious changes in legal rules. Bills of attainder—legislatively declaring someone guilty of a crime based on their previous conduct—are the most obvious example of this, but procedural due process more generally limits officials' ability to act vengefully against those under their power. Administrative law's reason-giving requirements are not absolute protection against well-crafted pretexts, but they can trip up those whose hatred has overpowered their capacity for reason. The Takings Clause similarly deprives officials of the ability to ruin their enemies under the guise of a laudable public purpose.[270] The Free Exercise Clause scrutinizes new restrictions more closely in part because of the long history of entrenched religious groups oppressing newcomers.

Here again, these doctrines do not promise absolute immunity from malign legislation. They do, however, reflect the Framers' belief that the machinery of the state is constantly at risk of being commandeered for personal and factional agendas contrary to the public interest and oppressive to some. Partially depleting the arsenal available to those usurpers is a valuable, if incomplete, response. Extending equal protection scrutiny to temporal inequalities would further that agenda.

d. *Requiring More Careful Consideration of Policy Changes*

Stasis-preserving doctrines also seek to prevent hasty, ill-considered actions. The requirement of state reasons found in procedural due process,[271] in

270. *But see* ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 877 (1974) (describing changes in highway routes to destroy political enemies or spare friends).

271. *See, e.g.*, Dilda v. Quern, 612 F.2d 1055, 1057 (7th Cir. 1980) (first citing Vargas v. Trainor, 508 F.2d 485, 489 (7th Cir. 1974); and then citing Banks v. Trainor, 525 F.2d 837, 842 (7th Cir. 1975)) (describing content required in notices terminating assistance to low-income families).

notice-and-comment rulemaking,[272] and in arbitrary-and-capricious review[273] will be difficult for an excited mob to meet. Hasty legislators will forget to provide the plain statement required to override the common law[274] or to include amendments to existing statutes that potentially conflict with their bills.[275] The Framers repeatedly emphasized that bicameralism—which requires approval in a Senate with terms staggered over a six-year period—and other explicit and implicit requirements of supermajorities empower a cautious minority not swept up in a passing frenzy. Article V's time-consuming process for amending the Constitution is the ultimate example of a deliberation-forcing rule and has indeed resulted in several proposals failing when their appeal ebbed.

By focusing on the process of reasoned decisionmaking, rather than the merits of the policies themselves, courts enforcing these rules can avoid substituting their policy judgment for that of the elected branches yet still improve the quality of decisionmaking. The great bulk of the impact here is deterrence: awareness that courts could intervene if policymakers fail to give adequate reasons or attempt to bypass a step in the process where reasons are required. Even zealous advocates of change recognize the need to slow down enough to articulate reasons. And the process of articulating reasons commonly forces advocates to recognize that some extreme aspects of their proposals are indefensible and must be dropped.

Applying equal protection scrutiny temporally would compel policymakers to craft nondiscriminatory explanations for the shifts. The history of superficially plausible excuses for cross-sectional discrimination certainly suggests that those bent on discrimination can do so, but having to do so might cause delays and divisions within the dominant coalition, causing some discriminatory initiatives to fall short.

e. *Recognizing Reliance Interests*

Almost all of these doctrines seek to protect settled social and economic expectations. The Takings and Contracts Clauses ensure that those that have ordered their affairs on the assumption that they have certain property or

272. 5 U.S.C. § 553(c) (2012).

273. *See, e.g.*, Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983) (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)) (requiring agency to explain why it is departing from its prior analysis of the scientific evidence before changing policy).

274. *See, e.g.*, Oswin v. Shaw, 609 A.2d 415, 425 (N.J. 1992) (requiring statutes in derogation of the common law to be narrowly construed), *superseded by* Act of May 19, 1998, ch. 21, sec. 11, § 8, 1998 N.J. Laws 144, 160–62 (codified as amended at N.J. REV. STAT. § 39:6A-8 (2013)), *as recognized in* Davidson v. Slater, 914 A.2d 282, 289–91 (N.J. 2007).

275. *See, e.g.*, Branch v. Smith, 538 U.S. 254, 273 (2003) (finding inconsistencies between sections of federal elections statutes).

contractual rights will not have their plans upended. The prohibition on some forms of retroactive legislation and strong presumptions against others reflects the expectation that people will learn, and order their affairs around, the law. The prohibition on legislation or even constitutional amendments interfering with the slave trade for two decades honored perceived reliance interests by slaveholders who anticipated a steady stream of involuntary labor to support their investment in farmland.

Even where the Court will not fully protect reliance interests, it often seeks to discourage changes that are likely to disrupt those interests, such as building one's plans around common law rules or prior legislation. Notice-and-comment procedures, and the typically drawn-out process of legislating with bicameralism and presentment, provide an opportunity to make policymakers aware of reliance interests. Explicit and implicit supermajority requirements, and procedural due process, give those with reliance interests various officials whom they can effectively ask for relief.

The Court has repeatedly declined to recognize a broad principle of protecting generic reliance interests created by either Congress[276] or executive officials.[277] These doctrines, however, suggest that reliance interests merit respect in many contexts, if not across the board.

Temporal equal protection can play a particularly important role in protecting reliance interests. Many people may work hard to put themselves in position to benefit from current policies. Families may sacrifice to buy a home in a community with well-funded schools or encourage their children to work for good grades required to qualify for admission to state universities. Subsequently foreclosing the opportunities that families worked hard to access will be deeply demoralizing.

f. *Minimizing Transition Costs*

Finally, and relatedly, some of these doctrines seek to minimize the costs of transitions from one legal regime to another. Rules prohibiting some kinds of retroactive legislation and establishing rules of construction to discourage others avoid the most wrenching, disruptive turnarounds. Notice-and-comment rulemaking provides warning of changes as well as the opportunity to request accommodations during the transition; the time required for traversing bicameralism and presentment and to negotiate arrangements with state and

276. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 611 (1960) (allowing Congress to revoke Social Security eligibility after it already had been earned).

277. *See, e.g.*, Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 426–27, 430 (1990) (rejecting reliance claim by former federal worker misadvised about his eligibility for benefits by government benefits specialist); Schweiker v. Hansen, 450 U.S. 785, 786, 788, 790 (1981) (refusing to afford retroactive treatment to eventual application of claimant discouraged from applying by Social Security representative).

local governments, as well as the advance notice rules in state constitutions, can perform similar functions. The need to formulate reasons, and aversion to losing an entire rulemaking if a reviewing court finds its disregard of reliance interests arbitrary and capricious, likely pushes agencies to be less radical in the changes they make through rulemaking.[278]

This fits well with the Framers' oft-repeated belief that fluidity in the laws was contrary to the public interest, regardless of the content of the old and new rules.[279] The legal ideology of their period offered little room for changes in private law. It also militated against changing public law rules thought to reflect an enduring natural order of the world. Many no doubt accepted this view sincerely; for others, the necessity of couching changes in the common law as interpretations of prior doctrine or corrections of discrete errors kept them modest enough to keep transition costs moderate.

If application of temporal equal protection discourages policymakers from making discriminatory policy changes, a side benefit will be reduced transition costs.

2. Analytic Methods

The methods of these stasis-entrenching rules have much in common with one another while differing notably from those on which cross-sectional equal protection has relied. First, purpose or intent to violate these rules often is irrelevant. The reason a bill could not achieve cloture in the Senate is immaterial; it cannot change law. Whether states were wise to decline the Affordable Care Act's Medicaid expansion—under which the federal government paid all costs for three years and at least ninety percent thereafter—does not matter.[280] Agencies' failures to provide adequate reasons often result from inadvertence, but they still suffice to have their actions struck down.[281]

Second, in marked contrast to cross-sectional equal protection analysis's insensitivity to classifications involving wealth or income, these temporal doctrines quite explicitly operate against economic-based harms. Takings and Contract Clause jurisprudence in particular will entertain the notion of economic classes capturing the machinery of government to oppress other classes. Although the Court substantially broadened standing during the 1960s

278. *See also* Eder v. Beal, 609 F.2d 695, 697, 699–701 (3d Cir. 1979) (requiring advance notice to recipients so that they may reorder their affairs before discontinuing a Medicaid service).

279. *See supra* text accompanying notes 162–164.

280. *See* Mark Hall, *Do States Regret Expanding Medicaid?*, BROOKINGS, https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2018/03/26/do-states-regret-expanding-medicaid/ [https://perma.cc/VRH8-P5JX].

281. *See* SEC v. Chenery Corp., 318 U.S. 80, 93–95 (1943) (prohibiting agencies from raising arguments on review that they neglected to include as the original rationale for an administrative determination).

and 1970s,[282] economic loss remains important to obtaining judicial review in administrative law.[283]

Third, these doctrines, unlike cross-sectional equal protection, do not shy away from asking the courts to engage in complex economic analysis. They can rely on formalistic rules to simplify the questions presented, but those rules generally do not purport to address all cases. For example, although physical intrusions are treated as takings per se,[284] *Pennsylvania Coal Co. v. Mahon*[285] requires courts to make the very kind of subjective determination—about how much regulation is "too much"—that modern cross-sectional equal protection doctrine is designed to preclude.[286] The Court has cabined these doctrines by applying them only to serious impositions, but that approach, too, requires subjective judgments.[287]

Fourth, these doctrines are not limited to extreme situations. They do not license judicial intervention over trifles, but neither do they require existential threats to democracy or attacks on the most marginalized members of society. In our legal culture, they have been integrated into our understanding of how our government works rather than being regarded as anomalous affronts to democratic government.

Finally, and relatedly, they involve comparing two legal regimes that both have considerable legitimacy: one established by the current leadership and one that either was selected by its predecessors or that has been present for an extended time.[288] By contrast, successful cross-sectional equal protection challenges often lead to contentious questions of remedy, with the legitimacy of any judicial resolution contested.

All of this suggests that change-inhibiting doctrines have allowed courts to engage in far more realistic analyses of the problems presented to them than change-forcing doctrines.[289] They cast courts into roles still different from, but

282. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686 (1973) (citing Sierra Club v. Morton, 405 U.S. 727, 734 (1972)) (allowing standing based on aesthetic interests).

283. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102–03, 105, 109 (1998) (rejecting standing where site of environmental harm could not be predicted); Lujan v. Defs. of Wildlife, 504 U.S. 555, 562–64 (1992) (requiring relatively certain and immediate harms for standing).

284. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

285. 260 U.S. 393 (1922).

286. *Id.* at 413; *see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36–37 (1973) (declining to assess the degree of deprivation suffered by lower-income school districts). *But see* Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989) (finding the same school finance system inconsistent with the Texas Constitution).

287. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136 (1978) (quoting *Pa. Coal Co.*, 260 U.S. at 413).

288. Procedural limitations on governmental action leave in place the prior order—which may be earlier legislation or regulations, the common law, or an unregulated environment. Enforcement of the Takings and Contracts Clauses typically leave the prior arrangement of rights undisturbed.

289. *See supra* Section I.C.

more harmonious with, officials in the other branches and hence permit a greater degree of intervention.

3. Theoretical Justifications

The theoretical rationales for these diverse doctrines predictably vary, yet most fall into a few classes.

Many seek to inhibit policies with concentrated costs and widely distributed benefits.[290] These sorts of policies hold the greatest risk of oppression. Thus, the extensive procedures required to make policy give the potential victims of oppressive policies multiple opportunities to frustrate the benefiting majority. If the would-be oppressors try to evade scrutiny with opaque language, they may run afoul of interpretive presumptions of continuity. And if the oppression is too intense, the Takings, Contract, and Due Process Clauses may derail it.

The opposite type of policy, with widely distributed costs and concentrated benefits, raises more of a risk of corruption, which the Court generally has said does not, by itself, warrant close constitutional scrutiny.[291] Administrative law, however, and some aspects of legislative procedure, require some delays and transparency to inhibit corrupt changes. But the Court seems to believe that the chance the political process will resolve collective action problems to root out corruption likely are greater than that it will overcome both self-interest and collective action problems to alleviate profitable burdens it has imposed on isolated members of society.[292]

Change-forcing doctrines in general, and cross-sectional equal protection in particular, operate on similar bases but require much more extreme versions to intervene. For oppression, cross-sectional equal protection requires either severe oppression (deprivation of fundamental rights or complete irrationality)

290. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 53–54 (1965) (explaining how minorities with concentrated interests often can overwhelm majorities with more diffuse concerns).

291. This sort of apparent corruption briefly caught the Court's attention when it indicated in *Morey v. Doud*, that a class of one presumptively violated the Equal Protection Clause. 354 U.S. 457, 464, 467–69 (1957), *overruled by* New Orleans v. Dukes, 427 U.S. 297, 306 (1976). The Court soon abandoned this constitutionalization of good government. *See Dukes*, 427 U.S. at 306. The concept of "givings," and some state constitutional prohibitions on direct subsidies for businesses, *e.g.*, UTAH CONST. art. VI, § 29, similarly seek to constitutionalize the pursuit of corruption. *See* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 616 (2001). Neither has proven terribly effective. Justice Kennedy's concurrence in *Kelo v. City of New London* suggested that actions with highly concentrated costs and highly concentrated benefits—taking property from one person and giving it to another—would be presumptively unconstitutional under the Takings Clause. 545 U.S. 469, 493 (2005) (Kennedy, J., concurring). The potential for combining corruption and oppression in such policies could make them all the more pernicious.

292. The ordinary legislation the Court has shielded from all but the most tepid cross-sectional equal protection scrutiny has relatively diffuse benefits and diffuse costs.

to intervene in an individual case or a highly predictable pattern of oppression (a discrete and insular minority) to act where less onerous burdens are imposed. Change inhibition relies on a theory of how the political process may operate badly; change compulsion relies on a theory of how the political process wholly breaks down.

Temporal equal protection has much in common with other change-inhibiting doctrines but also fits well with the theoretical justifications that long have been understood to justify cross-sectional equal protection.

CONCLUSION

Between emancipation and the 1950s, the fundamental civil rights challenge facing this country changed only incrementally. Cross-sectional equal protection did indispensable work in disrupting the entrenched Jim Crow regime.

Today, the civil rights challenges are quite different. Policy change is nearly constant. Although we still have some crude people manufacturing ever-more degrading epithets—and sometimes getting away with it[293]—the far more common problem is sophisticated people designing policies that harm groups disproportionately composed of people of color—the urban, the poor, the undocumented, people who look "suspicious" to whites—while insisting that their intentions are pure. And attempts to roll back the gains of the "Civil Rights Revolution" have become increasingly aggressive.

A different tool is needed to preserve these gains and to allow marginalized communities to seize new opportunities that come to them more or less accidentally through demographic changes. Temporal equal protection is the natural answer to that need. As difficult as carefully designed voter suppression efforts may be to address under cross-sectional equal protection, demonstrating that voting rights have been narrowed is quite straightforward. Tightening immigration laws as fewer Europeans seek to come to this country are all but impossible to attack under current cross-sectional equal protection doctrine,[294] but look quite different under temporal scrutiny. Permissive rules for siting environmental hazards near low-income neighborhoods or on Native American reservations that become more sensitive when affluent white communities are imperiled may well reflect cross-sectional discrimination, but they are likely far easier to prove in temporal terms.

In many of these cases, cross-sectional strict scrutiny's "fatal in fact" review is neither necessary nor appropriate. Requiring a cogent statement of reasons that do not dissolve under intelligent examination would suffice to

293. *See generally* Jessica Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 507, 523 (2018).

294. *See* Matthews v. Diaz, 426 U.S. 67, 83–86 (1976) (deferring to Congress on immigration matters notwithstanding the Court's recognition of alienage as a suspect classification).

expose the pernicious nature of many of these policy shifts. That is no silver bullet, and it will do relatively little to achieve affirmative progress. But preserving even what vulnerable people have is well worth doing.