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# Repugnant Precedents and the Court of History

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# REPUGNANT PRECEDENTS AND THE COURT OF HISTORY

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*Aged Supreme Court precedents continue to tolerate many practices that would shock modern sensibilities. Yet the Court lacks standard tools for phasing out decisions that offend our national character. The very cultural shifts that have reoriented our normative universe have also insulated most repugnant precedents from direct attack. And the familiar stare decisis factors cannot genuinely explain what ails societally outmoded decisions. Even for justices inclined to condemn these embarrassments in less clinical terms, it is unclear what qualifies courts to make universalist claims about contemporary American values.*

*The Court recently sidestepped these difficulties by insisting that one of its most reviled decisions had been "overruled in the court of history." In substituting rhetorical flair for analytical precision, however, the court-of-history trope threatens to destabilize the Court's doctrines of horizontal and vertical precedent. This Article urges greater normality in implementing perceptions of national ethos. It first defends the inquiry's legitimacy by recovering a longstanding judicial tradition of pronouncing specific practices abhorrent to modern cultural norms. It then underscores the project's stakes by identifying an assortment of precedents that trudge along as ethical outcasts. After highlighting several tangible and expressive harms that these decisions can still inflict, I propose that the Court integrate its ethical judgments into the existing stare decisis framework. And I challenge the Court's presumed incapacity to dislodge vestigial precedents. These relics may be difficult to pry loose, but we are not stuck with them forever.*

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## INTRODUCTION

For much of American history, visitors to the U.S. Capitol encountered a commemorative bust of Chief Justice Roger Taney.[1] But this increasingly stale symbol collided with the moral demands of modern life. In late 2022, Congress voted overwhelmingly to replace Taney's likeness with that of Justice Thurgood Marshall.[2] By swapping the author of *Dred Scott*[3] for a champion of racial equality, legislators would signal "what our country stands for" and

1. *See* Act of Jan. 29, 1874, ch. 20, 18 Stat. 6 (appropriating money for a bust of Chief Justice Taney); *Art & Artifacts: Roger B. Taney*, U.S. SENATE, https://www.senate.gov/art-artifacts/fine-art/sculpture/21_00018.htm [perma.cc/5F6T-LBF9].

2. The removal bill was passed by unanimous consent in the Senate and by voice vote in the House. *All Actions: S.5229—117th Congress (2021–22)*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/senate-bill/5229/all-actions [perma.cc/4RWD-CYYL].

3. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

"what it must never stand for again."[4] Taney's haunting visage—this bipartisan act revealed—was plainly "not representative of our Nation today."[5]

Judicial precedents, like well-placed sculptures, can signify what America does and does not stand for. It is not hard to identify Supreme Court decisions that have come to memorialize prevailing cultural values. For example, our society no longer debates whether interracial cohabitation should be criminalized,[6] whether women should be exempted from jury service,[7] whether foreign-language instructors should be imprisoned,[8] or whether chicken thieves should be sterilized.[9] Practices like these are worse than unlawful—they are un-American. In the normative universe we occupy, it is simply inconceivable that the justices might reverse course and deem them constitutional.

But precedent's intrinsic durability has a darker side. Supreme Court decisions—like timeworn statues—can linger long after their ethical foundations have crumbled.[10] According to the law on the books, children of any age may be conscripted into the military;[11] nonwhites may be forbidden to enter the country[12] or become naturalized citizens;[13] women "of lewd character" may be confined to residential ghettos;[14] American-flag merchandise may be criminalized;[15] and states may require able-bodied persons to perform uncompensated labor on public roads.[16] It might seem unthinkable that such abhorrent policies would be attempted today. But in a sense, that is precisely the problem: precedents become harder to dislodge as the practices they validate fail

4. 166 CONG. REC. H3663 (daily ed. July 22, 2020) (statement of Rep. Hoyer); *see also* 168 CONG. REC. H9817 (daily ed. Dec. 14, 2022) (statement of Rep. Lofgren) ("What and who we choose to honor in this building should represent our values."); SUSAN NEIMAN, LEARNING FROM THE GERMANS: RACE AND THE MEMORY OF EVIL 263 (2019) (explaining that monuments "are values made visible"—"[t]hey embody the ideals we choose to honor").

5. 168 CONG. REC. H9818 (daily ed. Dec. 14, 2022) (statement of Rep. Rodney Davis).

6. *See* McLaughlin v. Florida, 379 U.S. 184 (1964).

7. *See* Taylor v. Louisiana, 419 U.S. 522 (1975).

8. *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

9. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

10. *See* David Schraub, *Doctrinal Sunsets*, 93 S. CAL. L. REV. 431, 441, 482 (2020) (noting that judicial precedents "are meant to be 'sticky' by design" and "have binding effect unless and until they are overturned").

11. United States *ex rel.* Turner v. Williams, 302 U.S. 46, 48 (1937).

12. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889).

13. Terrace v. Thompson, 263 U.S. 197, 220 (1923).

14. L'Hote v. New Orleans, 177 U.S. 587, 595, 597 (1900).

15. Halter v. Nebraska, 205 U.S. 34, 43 (1907).

16. Butler v. Perry, 240 U.S. 328, 330 (1916). For a fuller catalogue of ethically outmoded precedents, see *infra* Part III.

to reemerge.[17] For this reason, constitutional doctrine is teeming with artifacts that are culturally unrecognizable.

This dynamic was made manifest in the Court's recent *Trump v. Hawaii*[18] decision. *Hawaii* upheld the Trump administration's stringent immigration restrictions from several predominantly Muslim-majority countries.[19] Yet this petitioned-for outcome packed a surprise: the Court's seeming repudiation of *Korematsu v. United States*.[20] Decades before, *Korematsu* had sunk into the anticanon of American constitutional law—a notorious example of sacrificing constitutional values to perceived military necessity.[21] Two modern Supreme Court nominees had even refused to acknowledge the case's precedential status.[22] But without a revival of race-based security measures, it was unclear how the justices could remove this lingering stain on the legal system.

An inter-Court exchange eventually brought *Korematsu* to the surface. Dissenting in *Hawaii*, Justice Sotomayor drew upon *Korematsu*'s "sordid legacy" in accusing her colleagues of "redeploy[ing] the same dangerous logic" underlying that decision.[23] Chief Justice Roberts, speaking for the Court, recoiled at this comparison. Far from distinguishing *Korematsu* solely on legalistic grounds, he denounced the exclusion order it upheld as "morally repugnant."[24] The Court closed with a verdict as sonorous as it was conclusory: that *Korematsu* was "gravely wrong the day it was decided" and had been "overruled in the court of history."[25] Indeed, the *Hawaii* majority was simply "mak[ing] express what [was] already obvious."[26]

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17. *See* D. Carolina Núñez, *Dark Matter in the Law*, 62 B.C. L. REV. 1555, 1597 (2021) (arguing that "informal norms . . . significantly weaken formal norms while simultaneously insulating those formal norms from modification or rescission").

18. 138 S. Ct. 2392 (2018).

19. *Hawaii*, 138 S. Ct. at 2423.

20. 323 U.S. 214 (1944).

21. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 396 (2011) (characterizing *Korematsu* as an "antiprecedent[]" that "has been rejected by our legal culture"). In *Korematsu*, a 6–3 majority upheld the wartime exclusion of all persons of Japanese ancestry from a designated area on the West Coast. 323 U.S. at 223–24.

22. *See Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 226 (2017) (statement of Hon. Neil M. Gorsuch) (denying that *Korematsu* qualified as "applicable precedent for the Court to consider"); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 241 (2005) (statement of Hon. John G. Roberts, Jr.) (claiming that *Korematsu* was "widely recognized as not having precedential value").

23. *Hawaii*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting).

24. *Id.* at 2423 (majority opinion).

25. *Id.*; *see also* Sanford Levinson, Korematsu, Hawaii, *and Pedagogy*, 74 ARK. L. REV. 269, 273 (2021) ("Nothing that could really be described as an argument accompanied this statement."); Margaret Hu, *Digital Internment*, 98 TEX. L. REV. ONLINE 174, 176 (2020) (noting that *Korematsu* was discarded "in a highly conclusory manner").

26. *Hawaii*, 138 S. Ct. at 2423.

This apparent break with precedent was highly unorthodox. By attributing *Korematsu*'s overruling to a metaphorical entity, the justices implied that external cultural forces—with no direct judicial input—can transform a previously sanctioned practice into one that is "obvious[ly]" unlawful. And in characterizing *Korematsu*'s downfall as a fait accompli, the *Hawaii* majority elided any discussion of the factors that ordinarily govern the stare decisis inquiry, such as a decision's practical workability, its consistency with earlier and later opinions, the quality of its reasoning, and the extent of relevant reliance interests.[27] The Court instead suggested that "morally repugnant" decisions deserve to be scrapped without the usual procedural courtesies. All of this was new: for the first time, the Court bypassed its stare decisis framework for the ostensible purpose of vindicating core national values.[28]

It is tempting to view this development as a peculiar one-off, an improvised erasure of a singularly problematic precedent.[29] But *Korematsu*'s formal passing should not be written off as a meaningless aberration. It is always worth studying novel mechanisms of doctrinal change with an eye toward disciplining their future use.[30] And, more to the point, the court of history represents one plausible response to an ongoing systemic difficulty—the problem of societally obsolete precedents. Indeed, the Court's decision to invoke that metaphor in such a prominent context greatly elevated its visibility in our legal culture.

In 2020, for example, Justice Kavanaugh asserted that "[t]he court of history" had repudiated not only *Korematsu* but also unspecified decisions giving short shrift to "free-speech principles" during wartime.[31] Lower courts have likewise begun employing the concept for its precedent-dashing potential.[32]

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27. *See* Knick v. Township of Scott, 139 S. Ct. 2162, 2178 (2019).

28. Given the Chief Justice's stated opposition to constitutionalizing "matter[s] of moral philosophy," Obergefell v. Hodges, 576 U.S. 644, 703 (2015) (Roberts, C.J., dissenting), it is unlikely that he intended the phrase "morally repugnant" to refer to anything more abstruse than *cultural* morality.

29. By its own admission, the Court pronounced on *Korematsu*'s fate only to ward off an accusation that it was repeating the mistakes of 1944. *See Hawaii*, 138 S. Ct. at 2423 (stating that "[t]he dissent's reference to *Korematsu*" triggered the Court's succeeding observations).

30. For insightful examinations of three such moves—ones whose unreasoned origins cried out for scholarly scrutiny—see generally Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016) (equal sovereignty of the states); Allison Orr Larsen, *Do Laws Have a Constitutional Shelf Life?*, 94 TEX. L. REV. 59 (2015) (loss of constitutionality due to changed factual circumstances); and William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738 (2013) ("great powers" limitation on the Necessary and Proper Clause).

31. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2615 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief).

32. *See* Clerveaux v. Searls, 397 F. Supp. 3d 299, 313 n.8 (W.D.N.Y. 2019) ("Even assuming that *Kaplan* . . . has not 'been overruled in the court of history' . . . ." (quoting *Hawaii*, 138 S. Ct. at 2423)); Tillman v. Goodpasture, 485 P.3d 656, 668 (Kan. 2021) (Stegall, J., concurring in part and dissenting in part) ("*Arche* deserves the same treatment the United States Supreme Court recently gave *Korematsu* . . . ."); Widdison v. State, 489 P.3d 158, 177 (Utah 2021) (Lee, J., concurring in the judgment) (insisting that "nobody would suggest" that race-based internment would have been constitutional "right up until the Court expressly overruled *Korematsu*").

And constitutional advocates have invoked the court of history routinely since *Hawaii*.[33] At a time when scholars and jurists are hotly debating precedent's proper role[34]—and when the Court's changed composition augurs significant doctrinal revision—it is essential to understand any technique that would sideline the stare decisis inquiry entirely.

Against that emerging backdrop, this Article assesses the precedential implications of decided shifts in our national character. The justices appear to believe that some practices are so contrary to modern cultural norms—so obnoxious to the very idea of America—that any decisions legitimating them cannot possibly retain ongoing force. This approach entails competing strands of institutional humility and immodesty. On the one hand, the Court is sensible enough to acknowledge that extrajudicial forces can deprive its rulings of any practical vitality.[35] This perspective envisions legal change as emanating from the lived commitments of the American people rather than the solitary edicts of an elite juristocracy. Yet the very act of deciphering our collective norms would seem to smack of amateur sociology, not conventional legal analysis. And the existence of any such norms can hardly be taken for granted

33. *See, e.g.*, Brief of Appellees at 80, N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295 (4th Cir. 2020) (No. 20-1092) ("[T]he Supreme Court's shameful decision in *Palmer v. Thompson* . . . 'has been overruled in the court of history.'" (quoting *Hawaii*, 138 S. Ct. at 2423)); Brief for Amicus Curiae Equally American Legal Defense & Education Fund at 4, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (No. 18-1334) ("Like *Korematsu*, the *Insular Cases* . . . 'ha[ve] been overruled in the court of history . . . .'" (alteration in original) (quoting *Hawaii*, 138 S. Ct. at 2423)); Jose Luis Vaello Madero's Motion for Summary Judgment at 23, United States v. Vaello Madero, 356 F. Supp. 3d 208 (D.P.R. 2019) (No. 17-2133) (citing *Hawaii* in arguing that "[t]his Court is not bound to follow outdated Supreme Court precedent"); *see also* Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 119 (2020) ("We cannot hold on to antiquated moral positions that have . . . been 'overruled in the court of history.'" (quoting *Hawaii*, 138 S. Ct. at 2423)).

34. *See* Michael Gentithes, Janus-*Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 88–89 (2020) (arguing that an emerging "weak" tradition of stare decisis poses "a grave danger" to the system of precedent); RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 107–39 (2017) (advocating a "second-best" theory of stare decisis that seeks to soften the bite of interpretive pluralism); Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 919 (2021) (comparing the "binding" and "permission" models of precedent prominently identified with Justices Kagan and Thomas, respectively).

35. For an exploration of the sociolegal dynamics by which judicial decisions are imbued with moral outrage, see generally Robert L. Tsai, *Supreme Court Precedent and the Politics of Repudiation*, *in* LAW'S INFAMY: UNDERSTANDING THE CANON OF BAD LAW 96 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2021). As I demonstrate in Part III, however, precedents may come to contravene societal values even absent intentional efforts to transform their social meaning.

in an increasingly fractured society.[36] Why should judges be trusted to make sweeping claims about America's true character?[37]

As it happens, courts at all levels have been doing so for centuries.[38] Rather than close their eyes to acts of cultural settlement—or filter their observations through rigidly legalistic modalities—courts have branded a litany of arrangements as antithetical to current American values. And there can be no doubt that perceptions of intolerability are a powerful driver of legal change.[39] It would be surprising if courts played *no* role in propagating the most basic norms undergirding our shared legal environment. Indeed, it was the sheer normality of this task that enabled the Roberts Court to stamp *Korematsu* as societally immoral. This longstanding (if underappreciated) practice reveals just how engaged a regularized court of history might be.

But should the justices "implement the lessons of history"[40]—however defined—by evading the usual rules of stare decisis and Article III adjudication? The Court routinely warns lower courts to adhere to its precedents until they are explicitly overruled.[41] If that command need not apply to a subset of cases supposedly disavowed by the "court of history," it will lose much of its utility as an ironclad rule. What is true of vertical stare decisis is also true of horizontal precedent: the framework may crumble if the justices treat it as inoperative

36. *See* Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 678 (2013) (arguing that "there is usually more than one way to characterize . . . national ethos"); JAMES M. BANNER, JR., THE EVER-CHANGING PAST: WHY ALL HISTORY IS REVISIONIST HISTORY 234 (2021) ("No Supreme Court of History exists to decide what constitutes the authoritative One Way in which each subject is to be viewed."); Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 758 (2011) ("[C]onsensus constitutionalism often misconceives the American people as fundamentally united when ideological divisions in fact pervade society."); Paul Horwitz, *Fame, Infamy, and Canonicity in American Constitutional Law*, *in* LAW'S INFAMY, *supra* note 35, at 213, 234 (arguing that increasing cultural pluralism "makes it harder to rely on shared values, a shared tradition, [and] a shared ethos"); Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1134 (2013) ("The category of ethos has fuzzy boundaries, if it has boundaries at all.").

37. *See* Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 287, 320 (2021) (lamenting courts' increasing use of the "exclusionary" and "universalizing" rhetoric of contemporary authoritarian populism); Daniel A. Farber, Book Review, 67 MINN. L. REV. 1328, 1332 (1983) (deriding the prospect of a Supreme Court that functioned as "a sort of super Un-American Activities Committee, scouring the country for threats to the American Way").

38. *See infra* Sections II.A–B.

39. For example, they have reshaped constitutional orthodoxies, solidified America's departure from barbaric common-law principles, rendered acts of statutory interpretation more culturally palatable, inspired executive nonenforcement, and circumscribed the realistic bounds of legislative choice. For further discussion of what I term "aversive ethos," see *infra* Section II.B.

40. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 871 (2017).

41. *E.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest upon reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

whenever our deepest values are implicated. And it is unclear why the prohibition on issuing advisory opinions—one with constitutional roots[42]—would not apply to the uprooting of even grossly outmoded decisions.

Yet despite these systemic hazards, the prospect of dispatching precedents like *Korematsu* carries obvious appeal. Some vestigial decisions do little more than blacken the Court's reputation, prolong doctrinal incoherence, and embolden malefactors. As recent years have demonstrated, shame and forbearance cannot be relied on to forestall governmental behavior that would once have been unimaginable.[43] And decisions rooted in the zeitgeists of earlier eras may linger as chronic insults to historically marginalized groups. These ongoing dignitary harms can be a compelling reason for the Court to seek any available opportunity to disavow its ugliest mistakes.

The court of history is one possible way to circumvent what one might call the "*Korematsu* problem": when the very societal change that erodes a precedent's respectability impedes its correction through ordinary means.[44] If the Court merely channels the judgments of a figurative tribunal, after all, it presumably need not obey accepted standards for achieving doctrinal change. Yet for all its creativity, the court-of-history workaround is not a stable or satisfying solution. A better approach would be to unbundle the court of history's constituent elements and accommodate them within existing conventions of precedent.

Part I of this Article unpacks the court-of-history concept as a method of phasing out decisions that conflict with prevailing societal values. This technique sidesteps virtually every procedure the justices have established to mediate between stability and error correction. To date, moreover, the justices have not attempted to define the triggering conditions for such summary repudiation. Part I clarifies what it would mean to outsource the overruling of precedents that have been overtaken by cultural transformation. One cannot treat the court of history as a juridical tool, rather than merely a rhetorical trope, without sanctioning sizeable carve-outs from the Court's stare decisis norms.

Part II contextualizes *Hawaii*'s depiction of *Korematsu*—an act of disidentification that transcends the rigors of the legal craft. That move resembles a type of constitutional argument popularized by Professor Philip Bobbitt: so-

42. Carney v. Adams, 141 S. Ct. 493, 498 (2020).

43. *See* Deborah Pearlstein, *The Executive Branch Anticanon*, 89 FORDHAM L. REV. 597, 601 (2020) ("[R]ecent practice suggests that at least some of what one might have considered [to] 'go without saying' . . . may actually need to be said."); Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 190 (2018) ("No one else in recent memory has approached the degree of [President Trump's] disregard of political norms and constitutional conventions.").

44. *See* Eric L. Muller, Korematsu, Hirabayashi, *and the Second Monster*, 98 TEX. L. REV. 735, 739–40 (2020) ("[T]he government never again uprooted and relocated a racial group, so no case 'on all fours' ever materialized."); Núñez, *supra* note 17, at 1558 ("Never again has Congress categorically barred individuals from entry based on race or national origin.").

called "ethical" argument, which draws on considerations of national ethos.[45] Upon inspection, overt ethical claims are not nearly as scarce as scholars have believed.[46] This Article is the first to recount the pervasiveness of explicit judicial assertions about America's way of life—ones that may be entirely ungrounded in written law. I distinguish between *affirmative* and *aversive* ethical claims, which characterize certain arrangements as either culturally indispensable or culturally intolerable. The growing textualization of American legal practice has hardly deterred judges from proffering universalist truths about American society. Although this tool is surely subject to abuse, it should not—and cannot—be entirely banished from the legal system.

Part III explores how far this practice might reverberate. Under *Hawaii*, aversive ethical claims stand ready to dismantle—*without written explanation*—any precedents that rest on obsolete normative premises. In identifying dozens of potential casualties of the court of history, I venture beyond common understandings of the judicial anticanon. For my purposes, it is irrelevant whether a decision has attained near-universal recognition as a negative archetype;[47] what matters is its apparent inconsistency with core assumptions of modern American life. I refer to such cases as "repugnant precedents." Here, I mean to capture a sense of *societal* repugnance, of which collective moral repugnance is but a subset.[48]

Part IV highlights several ongoing harms—as well as latent risks—that repugnant precedents can pose to our constitutional system. It then urges the Court to integrate its tradition of ethical condemnation into the existing stare decisis framework instead of using heroic metaphors to conceal contestable analytic choices. Repugnant precedents differ widely in terms of the quality of their reasoning, the degree to which they have engendered doctrinal and real-world reliance, and the strength of the governmental interests they implicate. Yet a convention of peremptory overruling would gloss over any factors that might suggest caution in annulling them. My proposal would have the added

45. *See infra* notes 76–80 and accompanying text.

46. For examples of the conventional wisdom, see LACKLAND H. BLOOM JR., METHODS OF INTERPRETATION: HOW THE SUPREME COURT READS THE CONSTITUTION 396 (2009) (stating that "[t]he Court rarely relies explicitly on ethical argument"); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 127 (1982) ("[T]he distrust of ethical arguments . . . keeps such approaches out of appellate opinions."); and André LeDuc, *Striding Out of Babel: Originalism, Its Critics, and the Promise of Our American Constitution*, 26 WM. & MARY BILL RTS. J. 101, 145 (2017) ("Ethical argument is not often deployed by the Court."). *See also* David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 732 (2021) (stating that "ethical arguments typically claim a grounding in tradition" rather than in contemporary societal norms).

47. *See* Greene, *supra* note 21, at 381, 384 (explaining that the modern anticanon encompasses just four cases—ones that "remain alive within [our] constitutional discourse" as exemplifying "what we are not").

48. Moral revulsion will often underlie a practice's drift toward unthinkability in a particular culture. But other policies may lack support merely because they fall outside of that culture's political imagination—as would a nationwide ban on toasters or refrigerators in the United States. Precedents can thus be ethically outmoded without being odious.

benefit of clarifying the scope of doctrinal repudiation, a quality sorely missing in *Hawaii*.[49]

In arguing for greater transparency, however, I resist a highly procedural-ized model of overruling—one in which the Court cannot revisit its precedents without inviting the legal community's participation. These standard institutional processes are a poor fit for decisions now widely regarded as morally irredeemable. Finally, I draw on the Court's prior practice to show that merely analogous (rather than directly applicable) precedents can be successfully repudiated without conjuring fictive judicial proceedings or violating Article III. Primitive precedents may be difficult to pry loose, but we are not stuck with them forever.

## I. PRECEDENT IN THE COURT OF HISTORY

Many Supreme Court decisions, having outlasted the political and moral climates that produced them, authorize governments to act in ways that would now be unthinkable. A legally operative court of history represents one possible method of casting off the Court's most archaic handiwork. But what, exactly, would its verdicts entail?

The circumstances of *Korematsu*'s demise illustrate the court of history's two distinguishing attributes. First, its judgments are regarded as preexisting facts rather than outcomes chosen by the justices themselves. At least until *Hawaii*, the Court's treatment of precedent had presumed institutional formalism. The justices had never deemed one of their decisions to have been neutralized by its adverse cultural connotation. Indeed, stare decisis doctrine recognizes no separate category of precedents whose overruling can be accomplished extrajudicially.[50] But *Korematsu*'s rejection was attributed to a metaphorical entity (the "court of history"),[51] rather than to the Court's present or past decisionmaking. The Court assigned no significance to the fact that later cases had arguably undercut *Korematsu*'s foundations. It did not even portray itself as the agent responsible for *Korematsu*'s eventual reversal.

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49. To put it bluntly, it is entirely unclear which aspect of *Korematsu* the Court understood itself to be renouncing. Jamal Greene, *Is* Korematsu *Good Law?*, 128 YALE L.J.F. 629, 630 (2019) (characterizing *Korematsu*'s overruling as "empty" and "underdetermined"); *id.* at 632–33 ("Overruling *Korematsu*—or any anticanonical case—is like a state disavowing 'the Nazis.' ").

50. *See* KOZEL, *supra* note 34, at 147 (noting that precedents may be modified "only by working through the formal channels that govern the operations of the Court as an institution"). Here, I bracket such possibilities as displacement through constitutional amendment, congressional legislation pursuant to Section 5 of the Fourteenth Amendment, and legislative override in the context of statutory interpretation.

51. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018). This pronouncement echoed Chief Justice Roberts's decidedly nonformalist assertion that "*Dred Scott*'s holding was overruled on the battlefields of the Civil War." Obergefell v. Hodges, 576 U.S. 644, 696 (2015) (Roberts, C.J., dissenting); *see also* CONG. GLOBE, 41st Cong., 2d Sess. 1513 (1870) (statement of Sen. Nye) (insisting that *Dred Scott* "has been repealed by the mightiest uprising which the world has ever witnessed").

And second, because they are extradoctrinal in nature, overrulings in the court of history need not be justified—or even explained—by the justices who announce them. This mode of legal change unsettles the Court's horizontal stare decisis framework. To be sure, few would contend that today's fluid and contested overruling guidelines regularly curb the justices' appetite to repudiate unwanted precedents.[52] Yet it is axiomatic that overruling should occur only "for articulable reasons."[53] Stare decisis is, if nothing else, deliberation-forcing. It ensures that the justices have reasoned grounds for exercising their largely unchecked power to revamp existing law. Even so, *Hawaii* made no effort to explain why any of the conventional stare decisis factors were satisfied. The justices simply delivered the perceived verdict of history: that *Korematsu* was "gravely wrong the day it was decided" and that the practice it upheld had become "objectively unlawful."[54] The law changed, but we do not know when, why, or by whom.

Regular invocation of the court of history could also destabilize one of the judiciary's most deeply ingrained norms: vertical stare decisis. The Court routinely commands lower courts to adhere to its precedents until they are explicitly overruled.[55] This supposedly "inflexible"[56] rule would appear to encompass even decisions now viewed as morally grotesque. *Hawaii*, however, can be understood as relaxing this vision of strict hierarchical control. By deeming it "obvious[]"[57] that *Korematsu* had been abrogated at some unspecified past moment by unseen forces, the justices signaled that a lower court's prior adherence to *Korematsu* would have been legally mistaken—and even offensive. Indeed, since *Hawaii*, some judges have indicated an unwillingness to take formal appearances at face value.[58] These actors would reconcile the Court's disparate instructions by inferring a court-of-history exception to the authority of vertical precedent.

*Hawaii*'s citation of an abstract adjudication also sparked disagreement about *Korematsu*'s present status. For some commentators, invocation of the

52. *See* William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 334 ("Modern stare decisis doctrine . . . introduces elements of the arbitrary discretion it was once meant to constrain."); Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 132 (concluding that "stare decisis is a norm far more often touted than followed").

53. Vasquez v. Hillery, 474 U.S. 254, 266 (1986); *see also* Deborah Hellman, *An Epistemic Defense of Precedent*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 63, 70 (Christopher J. Peters ed., 2013).

54. *Hawaii*, 138 S. Ct. at 2423. In passing, *Hawaii* did describe the order upheld in *Korematsu* as "morally repugnant." *Id.* But perceptions of intolerability were not cited as a justification for overcoming stare decisis; if anything, they were a catalyst for *disregarding* the Court's ordinary processes.

55. *See* Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016) (per curiam).

56. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712 (2013); *see also* Ramos v. Louisiana, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part) (describing vertical stare decisis as "absolute").

57. *Hawaii*, 138 S. Ct. at 2423.

58. *See supra* note 32 and accompanying text.

court of history was a fully effective method of negating *Korematsu*.[59] But others have asserted that such an irregular method of repudiation must technically be regarded as dicta[60]—a charge consistent with the Chief Justice's insistence that *Korematsu* "ha[d] nothing to do with this case."[61] Criticism of this sort may make little practical difference when a precedent is almost universally despised (and thus in little danger of being revived). But for other decisions, the odor of dicta may stymie the Court's efforts to equate cultural change with doctrinal change merely by invoking the court of history.

Finally, the court-of-history technique also evades certain procedural steps that typically precede a decision to overrule. Though not without notable exceptions, the justices generally abstain from overruling unless a party has requested that drastic step.[62] And the Court almost always retains its precedents "unless [it] receives briefing and argument" on whether to abandon them.[63] This practice serves a disciplining function—ensuring that the Court "evaluates the traditional *stare decisis* factors"[64]—in addition to notifying stakeholders of potential disruption. But the Court did not wait for a litigant to place *Korematsu*'s fate on its agenda; nor did it receive merits briefing or hear argument on that question. The justices' unwarned disavowal of *Korematsu* suggests a very different sensibility—that a precedent can be so devoid of redeeming qualities as to render any adversary defense unseemly.

Two terms later, the Court would revert to form in phasing out a decision that sanctioned an unsavory practice. Its opinion in *Ramos v. Louisiana*[65] departed from an earlier case (*Apodaca v. Oregon*[66]) that had permitted states to convict criminal defendants of serious offenses by using nonunanimous jury verdicts.[67] The *Ramos* majority denounced that policy's "racist origins,"[68] deeming it one of many "trappings of the Jim Crow era" designed to subjugate

59. *See* Aziz Z. Huq, *Article II and Antidiscrimination Norms*, 118 MICH. L. REV. 47, 76 (2019) ("[I]t is very hard to read this language as dicta: its tone and content plainly mean to convey a decisive statement about the law."); Muller, *supra* note 44, at 744 ("The *Korematsu* decision now stands overruled.").

60. *See* Greene, *supra* note 49, at 629; Simard, *supra* note 33, at 109 n.186; Amanda L. Tyler, *Courts and the Executive in Wartime: A Comparative Study of the American and British Approaches to the Internment of Citizens During World War II and Their Lessons for Today*, 107 CALIF. L. REV. 789, 848 (2019); Wis. Legislature v. Palm, 942 N.W.2d 900, 924 n.7 (Wis. 2020) (Bradley, J., concurring).

61. *Hawaii*, 138 S. Ct. at 2423.

62. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1415 n.4 (2020) (Kavanaugh, J., concurring in part).

63. *Id.*

64. Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2347 n.5 (2020) (plurality opinion).

65. 140 S. Ct. 1390.

66. 406 U.S. 404 (1972).

67. *Apodaca*, 406 U.S. at 411.

68. *Ramos*, 140 S. Ct. at 1405.

African Americans.[69] Yet the court of history was assigned no credit for *Apodaca*'s downfall. Instead, sitting justices took responsibility for the result—and only after applying the well-known stare decisis factors.[70] Two concurrences reinforced this customary approach by arguing that a precedent's toleration of racist practices counsels strongly in favor of its overruling.[71]

Together, *Hawaii* and *Ramos* blur the Supreme Court's relationship toward precedents upholding "morally repugnant" practices. Have those decisions already been overruled by the tribunal of history? Or do they remain binding until the Court formally renounces them—presumably after employing the usual tools of stare decisis? *Hawaii* made no effort to rationalize its departure from stare decisis principles, and *Ramos* was silent on why a precedent validating a carry-over from Jim Crow did not likewise deserve summary repudiation. The Court's omission of any working definition of moral repugnance exacerbates this methodological tension. Because American political culture is riven with moral disagreement, stare decisis would be greatly weakened if its framework applied only to decisions that five justices presently deem morally satisfactory.

And the court of history's writ may run further still: in a recent opinion, Justice Kavanaugh claimed that "[t]he court of history has rejected" unnamed precedents in which the Court allowed governments "to override equal-treatment *and free-speech principles*"[72] during wartime. But the decisions to which Kavanaugh seemingly referred—several World War I–era cases upholding prosecutions for political expression—have never been formally overruled.[73] So at least some justices may refuse to heed any precedent that upends present-day notions of what it means to live a free life. Perhaps some decisions are so antithetical to modern cultural values that they ought not be dignified with a "sober appraisal"[74] of the benefits and drawbacks of overruling them.

How could any system of precedent rest on such opaque triggering conditions? Stare decisis, after all, is meant to eliminate "arbitrary discretion"[75] from the resolution of recurrent legal controversies. This difficulty is hardly

69. *Id.* at 1394.

70. *See id.* at 1405 ("In this case, each factor points in the same direction."); Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2081 (2021) ("Race, the *Ramos* majority insisted, also shaped its consideration of *Apodaca*'s precedential value.").

71. *See Ramos*, 140 S. Ct. at 1408 (Sotomayor, J., concurring in part) ("[T]he racially biased origins of the[se] laws uniquely matter here."); *id.* at 1418 (Kavanaugh, J., concurring in part) (asserting that a law's "Jim Crow origins and racially discriminatory effects . . . should count heavily in favor of overruling").

72. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2615 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (emphasis added).

73. *See infra* note 237 and accompanying text.

74. Citizens United v. FEC, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (quoting Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944)).

75. Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

theoretical, given that courts have been opining on the content of America's national character for over two centuries. The next Part excavates this weighty tradition, one that provides crucial perspective on how perceptions of intolerability can inform the stare decisis inquiry—or whether they should be used to circumvent it entirely.

## II. THE LAW OF NATIONAL CHARACTER

In his 1982 book *Constitutional Fate*, Professor Philip Bobbitt articulated an influential typology of constitutional arguments. To his list of recognized modalities was appended a new argument type, which Bobbitt labeled "ethical."[76] In broad terms, the ethical modality was said to "rel[y] on a characterization of American institutions and the role within them of the American people."[77] It is the "*ethos*[] of the American polity"[78]—the "sort of people we are"[79]—that informs constitutional decisionmaking under this rubric.

Although Bobbitt ultimately advanced a somewhat strained and legalistic conception of ethos,[80] its potential need not be so limited. According to Professor Robert Post, for example, ethical claims may bypass even the Constitution itself, giving voice to "the deepest contemporary purposes of the people."[81] Yet defending ethical argument and demonstrating its use have proven to be very different tasks. Bobbitt himself candidly remarked that "it is not easy to find" overt ethos-based reasoning in constitutional law.[82] Later commentators have generally agreed with this assessment.[83]

Sections II.A and B recover a longstanding judicial practice of channeling our national character—what America's way of life entails, and which measures would be unthinkable in modern society. I refer to these cognate

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76. BOBBITT, *supra* note 46, at 125 ("[A]s a type of constitutional argument, ethical argument has not been established.").

77. *Id.* at 94.

78. *Id.*

79. *Id.* at 95.

80. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 137 (1991) (insisting that ethical arguments "must link up with some legal commitment in the Constitution"); Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 416 (1999) (explaining that "Bobbitt defines ethical reasoning in such a way that it is honed by legal training"). Bobbitt specifically located our "fundamental constitutional ethos" in the notion of limited governmental powers. BOBBITT, *supra* note 46, at 118.

81. Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 18 (1990); *see also* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 186 (2011) (defining "constitutional ethos" as "the stories we tell each other about who we are, where we have come from, and what we stand for"); Gerald Torres, *Social Movements and the Ethical Construction of Law*, 37 CAP. U. L. REV. 535, 539 (2009) (stating that ethically grounded conclusions "need not be explained by legal argument").

82. BOBBITT, *supra* note 46, at 125.

83. *See* sources cited *supra* note 46.

concepts as *affirmative* and *aversive* ethos.[84] Courts at all levels have not shied away from making both types of claims in explicit, unadulterated form. I am less interested in whether each specific assertion is true—or represents a genuinely held commitment—than that such rhetoric is a recurring feature of our judicial culture. *Hawaii* is far from unique in decrying a specified practice as abhorrent to contemporary mores. With this fuller evidence in view, the Court's condemnation of *Korematsu* as "morally repugnant"[85] begins to look entirely commonplace. And it becomes all the more important to identify appropriate tools for mediating the clash between precedential stability and societal transformation.

Section II.C. then explores how aversive ethical claims interact with standard tools of legal reasoning. No defense of ethical argument can sidestep the specter of subjectivity, a frequent target of Bobbitt's critics.[86] These critics overlook several significant constraints on discerning societal repugnance. But they are correct that aversive ethos cannot be discovered using only ritually accepted forms of analysis. That is because cultural intolerability is not a legal concept. It is a background condition that sustains the American legal system while standing apart from its sanctioned rules of interpretation.[87] This limitation, however, should not preclude courts from channeling aversive ethical principles on suitable occasions. Professor Charles Black put it best: that judges might come to know a social fact "obvious to everybody else" is "pretty far down the list of things to protest against."[88]

### A. *Affirmative Ethos*

Who are we, as a people? What does our nation stand for? Nebulous as these concepts might seem, judges have not shrunk from asserting the existence of shared cultural norms. According to the Supreme Court, for example,

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84. Affirmative and aversive ethical claims will often represent two sides of the same coin. For example, to assert that collegiate sports "have become part of the fabric of America," Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring), is to imply that an outright prohibition of those activities would be unacceptable under present conditions.

85. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

86. *See* Walter Benn Michaels, *The Fate of the Constitution*, 61 TEX. L. REV. 765, 770 (1982) (book review) ("[O]ne doesn't exactly know what the American ethos is."); Martin H. Redish, *Judicial Review and Constitutional Ethics*, 82 MICH. L. REV. 665, 671 (1984) (book review) (characterizing ethical judgments as "highly subjective"); William W. Van Alstyne, *The Fate of Constitutional Ipse Dixits*, 33 J. LEGAL EDUC. 712, 715 (1983) (book review) (claiming that the "technique of discovering constitutional 'ethics' just seems to be hopelessly arbitrary").

87. *See* Greene, *supra* note 21, at 436 (observing that "recognition of a case as anticanonical is not internal to legal reasoning").

88. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427–28 (1960); *see also id.* at 426 (decrying "self-induced blindness" on "matters of common notoriety"); United States v. Zubaydah, 142 S. Ct. 959, 985 (2022) (Gorsuch, J., dissenting) ("There comes a point where we should not be ignorant as judges of what we know to be true as citizens.").

public schools serve to instill "fundamental social attitudes"[89] and preserve "the values on which our society rests."[90] The Court's alienage-discrimination cases—as well as the very process of naturalization—presume that citizens are more likely to appreciate "the values of [our] political community."[91] The Court has dutifully interpreted federal statutes prohibiting certain actions taken for "immoral" purposes, drawing upon notions of a collective national morality.[92] And in an assortment of contexts, the justices have alluded generally to the concept of shared national values.[93]

To be sure, description of these values sometimes occurs at a high level of generality.[94] A cynic might dismiss such assertions as empty expressions of patriotism or virtue. But affirmative ethical claims are often more refined, enabling closer study of their influence on judicial decisionmaking. One or more justices have stated that diversity,[95] hospitality,[96] and tolerance[97] are crucial to

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89. Ambach v. Norwick, 441 U.S. 68, 79 n.9 (1979).

90. *Id.* at 76.

91. Foley v. Connelie, 435 U.S. 291, 302 (1978) (Blackmun, J., concurring in the result); *see also* Sugarman v. Dougall, 413 U.S. 634, 660 (1973) (Rehnquist, J., dissenting) (same, for "our social and political mores").

92. *See, e.g.*, Caminetti v. United States, 242 U.S. 470, 485 (1917) (prohibition on interstate transportation of any woman for an "immoral purpose"); United States v. Bitty, 208 U.S. 393, 398 (1908) (prohibition on importing any alien woman for an "immoral purpose").

93. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2320 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) ("what it means to be an American"); Snyder v. Phelps, 562 U.S. 443, 461 (2011) ("As a Nation we have chosen . . . ."); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 30 (2004) (Rehnquist, C.J., concurring in the judgment) ("our national culture"); Virginia v. Black, 538 U.S. 343, 391 (2003) (Thomas, J., dissenting) ("our culture"); Dickerson v. United States, 530 U.S. 428, 443 (2000) ("our national culture"); Washington v. Glucksberg, 521 U.S. 702, 764 (1997) (Souter, J., concurring in the judgment) ("our values as a people"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 868 (1992) ("the character of [our] Nation"), *overruled by Dobbs*, 142 S. Ct. 2228; Patterson v. McLean Credit Union, 491 U.S. 164, 174 (1989) ("the prevailing sense of justice in this country"); Oliver v. United States, 466 U.S. 170, 178 (1984) ("our societal understanding"); Bob Jones Univ. v. United States, 461 U.S. 574, 592 (1983) ("deeply and widely accepted views"); U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 557 (1973) ("a judgment made by this country"); *In re* Griffiths, 413 U.S. 717, 732 (1973) (Burger, C.J., dissenting) ("our way of life"); Palmer v. Thompson, 403 U.S. 217, 233 (1971) (Douglas, J., dissenting) ("our way of life"); German All. Ins. Co. v. Lewis, 233 U.S. 389, 412 (1914) ("[t]he universal sense of [our] people").

94. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (citing "our American ideal of fairness"); Korematsu v. United States, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting) (describing Americans as "a free people").

95. *See, e.g.*, Schneiderman v. United States, 320 U.S. 118, 120 (1943) ("[W]e are a heterogeneous people."); Hurtado v. California, 110 U.S. 516, 531 (1884) ("[Americans are] a people gathered . . . from many nations and of many tongues.").

96. *E.g.*, *Foley*, 435 U.S. at 294 ("As a Nation we exhibit extraordinary hospitality to those who come to our country . . . .").

97. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2446 (2018) (Sotomayor, J., dissenting) (referring to "our Nation's deep commitment to religious plurality and tolerance"); Hannegan v. Esquire, Inc., 327 U.S. 146, 157 (1946) ("Under our system of government there is an accommodation for the widest varieties of tastes and ideas.").

our national identity. They have also characterized due process as "go[ing] to the very ethos of the scheme of our society";[98] individual dignity as "one of the most fundamental aspects of our national ethic";[99] the right to work as "go[ing] to the very heart of our way of life";[100] uninhibited political expression as "ingrained in our culture";[101] academic freedom as one of "our Nation's deep commitment[s]";[102] state legislative prayer as "part of the fabric of our society";[103] and social-media websites as "integral to the fabric of our modern society and culture."[104]

Lower courts have been just as prolific in identifying essential features of modern American life. These assertions often emanate from specific constitutional values, whose normative force is enhanced by their perceived cultural indispensability.[105] Yet courts have also insisted that certain public and private arrangements are central to America's identity. Among them are civil marriage,[106] pet ownership,[107] public parks,[108] automobile use,[109] hospitals,[110]

98. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

99. Gonzales v. United States, 364 U.S. 59, 74 (1960) (Warren, C.J., dissenting).

100. Linehan v. Waterfront Comm'n of N.Y. Harbor, 347 U.S. 439, 441 (1954) (Douglas, J., dissenting).

101. Citizens United v. FEC, 558 U.S. 310, 364 (2010).

102. United States v. Am. Libr. Ass'n, 539 U.S. 194, 226 (2003) (Stevens, J., dissenting).

103. Marsh v. Chambers, 463 U.S. 783, 792 (1983).

104. Packingham v. North Carolina, 137 S. Ct. 1730, 1738 (2017).

105. *See, e.g.*, State v. Lunder, 80 N.E.3d 1213, 1216 (Ohio Ct. App. 2017) (describing privacy as "essential to the American way of life"); Ent. Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051, 1071 (N.D. Ill. 2005) (describing free speech as "a principle that is at the core of . . . our national ethos"); McFarland v. Jefferson Cnty. Pub. Schs., 330 F. Supp. 2d 834, 852 (W.D. Ky. 2004) (describing racially integrated education as "an important national ethic"); Marria v. Broaddus, No. 97 Civ.8297, 2003 WL 21782633, at *1 n.2 (S.D.N.Y. July 31, 2003) (describing equal treatment as "fundamental to . . . the ethos of our country"); Sipple v. Des Moines Reg. & Trib. Co., 147 Cal. Rptr. 59, 63 (Ct. App. 1978) (describing freedom of the press as "basic to . . . our way of life"); United States v. Dioguardi, 147 F. Supp. 421, 422 (S.D.N.Y. 1956) (describing fairness in criminal proceedings as "an attribute of . . . our national character").

106. Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014) ("one of the cornerstones of our way of life").

107. Uccello v. Laudenslayer, 118 Cal. Rptr. 741, 748 (Ct. App. 1975) ("an important part of our way of life").

108. *See* Barkawi v. Borough of Haledon, No. A-7455-97T5, 1999 WL 33601519, at *2 (N.J. Super. Ct. App. Div. June 21, 1999) (quoting a lower court's assertion that public parks are "intrinsic to our national spirit").

109. Mosko v. Dunbar, 309 P.2d 581, 586 (Colo. 1957) ("a definite and well-established part of our way of life").

110. Flagiello v. Pa. Hosp., 208 A.2d 193, 198 (Pa. 1965) ("an integral part of the American way of life").

higher education,[111] collective bargaining,[112] and political parties.[113] Any effort to eliminate these staples of modern life would likely be greeted not just with cold legal analysis, but with the type of ethical outrage documented in the next Section.

### B. *Aversive Ethos*

Just as courts have sought to identify the normative building blocks of contemporary America, they have cataloged a slew of practices believed to be repugnant to our national character. The premise of what I call an "aversive" ethical claim is that particular arrangements—however impressive their historical lineage—would simply be intolerable in modern society. Imagine, for example, if a state prohibited indoor plumbing, forbade interfaith marriages, or criminalized the playing of musical instruments. These laws would be roundly rebuked as inimical to our national values. "[A]s Americans, we like to think of our country as being far beyond" such senseless cruelties and deprivations.[114]

Aversive ethical claims are not products of legal interpretation; they instead purport to describe prevailing societal values. Yet courts have not treated these openly normative pronouncements as alien to the judicial role. They have readily marked specific practices for ethical opprobrium, disidentifying the United States from concepts deemed to have no place in modern life. At his Supreme Court confirmation hearing, for example, then-Judge Kavanaugh labeled *Buck v. Bell* a "disgrace."[115] Kavanaugh faced no backlash for opining on the cultural acceptability of eugenic sterilization. In doing so, he was merely articulating a basic moral precept of the American legal system—one that constrains all present-day uses of governmental power.

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111. City of St. Louis v. State Tax Comm'n, 524 S.W.2d 839, 845 (Mo. 1975) ("essential to the preservation of our way of life").

112. Stollar v. Cont'l Can Co., 23 Pa. D. & C.2d 463, 467 (Ct. C.P. 1960) ("a fundamental principle in our American way of life").

113. Voltaggio v. Caputo, 210 F. Supp. 337, 339 (D.N.J. 1962) ("importan[t] . . . in our American way of life").

114. ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 152 (2020) (specifically referencing "the guillotines of medieval Europe"); *see also* Thomas P. Crocker, *Dystopian Constitutionalism*, 18 U. PA. J. CONST. L. 593, 607, 609 (2015) (claiming that "what we refuse to do" as a nation may reveal "deeply held values thought constitutive of the polity's identity"). Given that aversive ethical claims seek to capture what the United States is *not*, such formulations may be meaningful even if "[p]eople are splintered" over which affirmative principles "could plausibly be taken to define America." Gary Lawson, *What Is "United" About the United States?*, 101 B.U. L. REV. 1793, 1803 (2021) (book review).

115. *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 222 (2018) [hereinafter *Kavanaugh Hearing*] (statement of Hon. Brett M. Kavanaugh); *see also* Patel v. Tex. Dep't of Licensing & Regul., 469 S.W.3d 69, 94 (Tex. 2015) (Willett, J., concurring) (labeling *Buck*'s key passage "heartless" and "ignominious"); State v. Roberson, 935 N.W.2d 813, 829 (Wis. 2019) (Bradley, J., concurring) (describing *Buck* as "evil" and "[d]eplorable").

This Section deals in assertions of *universality*. Aversive ethical claims presume the impossibility of good-faith disagreement on each issue. Here, ethos does not function as one modality among many, as might the statement that "free speech plays an important role in contemporary life." Rather, an assertion of intolerability usually forecloses the possibility of a contrary legal outcome within the claim's ambit. A judge who publicly assails a long-abandoned practice would be especially likely to find that practice unconstitutional, at least within the limits of interpretive discretion. In this way, courts leave little doubt that cultural norms play a profound role in shaping their legal reasoning.[116]

As Part III shows, dozens of surviving precedents may be vulnerable to the sort of ethical repudiation witnessed in *Hawaii*. This Section's examination of aversive ethos—in tandem with Part III's reassessment of the conventional anticanon—illustrates the importance of incorporating ethical considerations into theories of horizontal stare decisis.

* * *

Although space limitations preclude a full accounting of aversive ethical claims in judicial opinions, their pervasive and deeply rooted character should become apparent. Norms of equal treatment have prominently generated such assertions. For instance, the Court has described state-sanctioned racial discrimination as not just unconstitutional, but grossly un-American. The justices have not hesitated to decry chattel slavery as an "odious practice."[117] They have also discerned a "societ[al] consensus" that the Jim Crow era was "a profound wrong of tragic dimension"[118]—and accordingly deemed that history "shameful,"[119] "embarrassing,"[120] and contrary to what "an advanced civilization demands."[121] Similarly, Justice O'Connor has characterized the Court's decision precluding race-based peremptory challenges as "a statement about what this Nation stands for."[122]

Antiquated conceptions of spousal relations have been openly disavowed, as well. Modern decisions have described the common-law rule of coverture—

116. *See* Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 501 (2003) (deeming "quite chimerical" any quest for methodological grounding that is "unaffected by ambient cultural norms").

117. City of Memphis v. Greene, 451 U.S. 100, 128 (1981).

118. Patterson v. McLean Credit Union, 491 U.S. 164, 188 (1989).

119. *See* Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 566 (2015) (Alito, J., dissenting); Johnson v. California, 543 U.S. 499, 521 (2005) (Stevens, J., dissenting); United States v. Fordice, 505 U.S. 717, 748 (1992) (Thomas, J., concurring); Batson v. Kentucky, 476 U.S. 79, 102 (1986) (Marshall, J., concurring).

120. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136 (1994).

121. Cooper v. Aaron, 358 U.S. 1, 25 (1958) (Frankfurter, J., concurring).

122. Brown v. North Carolina, 479 U.S. 940, 942 (1986) (O'Connor, J., concurring).

under which a wife's separate legal personality was merged into her husband's—as both immoral[123] and "repugnant to our present understanding of marriage."[124] In holding that spouses were competent to testify on each other's behalf in federal court, the Court rejected the common-law restriction as "altogether fanciful" in light of "modern thought."[125] In later discarding the privilege against adverse spousal testimony, the justices scorned the privilege's underpinnings as "archaic notions [that] have been cast aside."[126] And in holding that spouses were legally capable of conspiring with one another to commit federal crimes, the Court spurned "medieval views regarding the legal status of wom[e]n."[127] The contrary position—which cast wives as ongoing subordinates in an agency relationship—entailed "a view of American womanhood offensive to the ethos of our society."[128] Lower courts have embraced this ethical register in renouncing coverture and its legal corollaries.[129]

More specifically, the Court has also repudiated oppressive gender stereotypes that once trapped women in economic subservience. Given society's judgment that women are "[n]o longer . . . destined solely for the home and the rearing of the family,"[130] the idea that law should impede women's economic and political opportunities has been denounced as "untenable."[131] Such "outdated misconceptions"[132] about women's capabilities, according to the Court, have "wreaked injustice"[133] throughout innumerable spheres of public life. Lower courts have echoed these sentiments, deeming gendered economic roles "as remote as the Pleistocene"[134] and incompatible with "the ethos or

123. *See* Kerry v. Din, 576 U.S. 86, 96 (2015) (plurality opinion) ("[M]odern moral judgment rejects the premises of such a legal order.").

124. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 898 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *see also* United States v. Yazell, 382 U.S. 341, 343 (1966) (stating that coverture has largely been "relegated to history's legal museum").

125. Funk v. United States, 290 U.S. 371, 381 (1933).

126. Trammel v. United States, 445 U.S. 40, 52 (1980).

127. United States v. Dege, 364 U.S. 51, 52 (1960).

128. *Id.* at 53.

129. *See, e.g.*, Price v. Price, 732 S.W.2d 316, 317 (Tex. 1987) ("[I]n this, the last quarter of the twentieth century, such views seem preposterous . . . ."); Mims v. Mims, 286 S.E.2d 779, 785 (N.C. 1982) (remarking that "[t]hese notions no longer accurately represent the society in which we live"); Gates v. Foley, 247 So. 2d 40, 44 (Fla. 1971) ("Medieval concepts which have no justification in our present society should be rejected."); Follansbee v. Benzenberg, 265 P.2d 183, 189 (Cal. Dist. Ct. App. 1954) ("This hollow, debasing, and degrading philosophy . . . has spent its course."); Coss v. Coss, 207 S.W. 127, 128 (Tex. Civ. App. 1918) (deeming a rule against interspousal litigation "intolerable" and "a blot upon the civilization of our age").

130. Stanton v. Stanton, 421 U.S. 7, 14 (1975).

131. *See* Taylor v. Louisiana, 419 U.S. 522, 534–35, 535 n.17 (1975).

132. Craig v. Boren, 429 U.S. 190, 198–99 (1976).

133. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994).

134. Coleman v. State, 377 A.2d 553, 554 (Md. Ct. Spec. App. 1977).

zeitgeist of this time."[135] Similar ethical condemnation has befallen other forms of unequal treatment in a variety of contexts.[136]

Courts, too, have bridled at practices that would stifle individual liberty. For example, the Supreme Court has labeled the institution of debtors' prisons "a relic of ancient barbarism" that "has descended with the stream of time."[137] Courts have also recoiled at certain types of freestanding compulsions—obligations to conform to governmental dictates merely by virtue of one's existence.[138] And they have decried specific practices that seek to coerce uniformity of belief[139] or disrupt family autonomy.[140]

Courts have also characterized as un-American practices that inflict needless suffering or intrude on bodily integrity. Extreme investigative methods are a prime example. The justices have condemned the use of stomach-pumping as an evidence-gathering technique, insisting that it "shocks the conscience"[141] and exceeds the "decencies of civilized conduct."[142] One lower court has similarly claimed that prolonged interrogation "grossly offends

135. *Id.* at 556; *see also* Women's Liberation Union of R.I., Inc. v. Israel, 379 F. Supp. 44, 50 (D.R.I. 1974) ("It would be male chauvinistic blindness not to recognize . . . the vast changes in social mores and attitudes which have occurred since 1948.").

136. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018) (stating that "[o]ur society has come to the recognition that gay persons . . . cannot be treated as social outcasts"); Cessna v. Montgomery, 329 N.E.2d 861, 865 (Ill. App. Ct. 1975) (insisting that it would be "unthinkable" for governments to regard nonmarital children as societal outcasts), *rev'd on other grounds*, 344 N.E.2d 447 (Ill. 1976); Funches v. State, 87 So. 487, 488 (Miss. 1921) (denouncing the "barbarous practice of trying the accused upon his color, creed, or caste"); Am. Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3, 90 F. 608, 615 (C.C.N.D. Ohio 1898) (stating that "[f]oreigners are no longer treated as outlaws or barbarians by any civilized nation").

137. Edwards v. Kearzey, 96 U.S. 595, 602 (1878); *see also* Kiamesha Concord, Inc. v. Pullman, 275 N.Y.S.2d 86, 88 (Sup. Ct. 1966) ("Imprisonment for debt is not an American way of life.").

138. *See* Foley v. Connelie, 435 U.S. 291, 300 n.9 (1978) (claiming that requiring all private persons to carry identification cards would be "intolerable"); Marbury v. Brooks, 20 U.S. (7 Wheat.) 556, 575–76 (1822) (stating that the former English practice of the hue and cry—which entailed punishing private citizens who failed to pursue known criminals—would now be "too harsh for man"); Hommel v. Hommel, 22 N.Y.S.2d 977, 980 (Dom. Rel. Ct. 1940) (insisting that compulsory industrial service would clash with "the American way of life").

139. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463 (2018) ("Compelling individuals to mouth support for views they find objectionable . . . would be universally condemned."); Wieman v. Updegraff, 344 U.S. 183, 193 (1952) (Black, J., concurring) (denouncing test oaths as "unspeakably odious to a free people").

140. *See* Parham v. J.R., 442 U.S. 584, 603 (1979) ("The statist notion that governmental power should supersede parental authority in *all* cases . . . is repugnant to American tradition."); Gilbert v. Barkes, 987 S.W.2d 772, 776 (Ky. 1999) (describing the cause of action for breach of promise to marry as a "barbarous remedy" and an "anachronism that has out-lived its usefulness" (quoting Harter F. Wright, *The Action for Breach of the Marriage Promise*, 10 VA. L. REV. 361, 382 (1924))).

141. Rochin v. California, 342 U.S. 165, 172 (1952).

142. *See id.* at 173.

against the most sacred principles of our American way of life."[143] Ancient adjudicative procedures have also been described as intolerably cruel. For instance, although criminal defendants were once pressed to death for exceeding their allotment of peremptory challenges, "[s]uch inhumanity is now deservedly repudiated by the civilized world."[144] Likewise, the practice of starving juries into reaching unanimity has been called a "barbarous relic of ancient days."[145] And various criminal punishments have been deemed "inconsistent with our national ethos,"[146] "alien to our civilization,"[147] and "disgusting to the rational sensibilities of the people of this country."[148]

In addition, courts have denounced arrangements that implement a theocratic worldview. The justices have observed that any effort to reinstitute compulsory religious holidays—"superstitious observances of the dark ages"—would "present a strange anomaly" in the United States.[149] The concept of blasphemy prosecutions has also been depicted as wildly out of step with modern American values.[150] And the same is true of laws that suspend ordinary features of life in deference to the Christian Sabbath. The prospect of denying recovery to employees injured on Sunday has been called "abhorrent to our enlightened civilization";[151] of forbidding the issuance of search warrants on Sunday, a relic of "the dark ages";[152] and of outlawing all commerce on Sunday, an affront to "the facts of life."[153]

Perceptions of national character have also been invoked to constrain the basic architecture of judicial proceedings. Courts have asserted that eliminating the presumption of innocence would endanger "the American way of life,"[154] and that blocking the media from attending criminal trials would be "inimicably hostile to our way of life."[155] The practices of excluding supposedly immoral witnesses[156] and forbidding defendants from representing

143. Claflin v. State, 119 P.2d 540, 543 (Kan. 1941).

144. Boon v. State, 1 Ga. 618, 631 (1846).

145. Buck v. Chesapeake Ins. Co., 4 F. Cas. 545, 545 (C.C.D. Md. 1829) (No. 2,078).

146. Wood v. Ryan, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, C.J., dissenting from denial of rehearing en banc) (death by guillotine).

147. *In re* Hernández Enríquez, 15 P.R. Offic. Trans. 623, 642 (1984) (pillorying).

148. Robbins v. State, 8 Ohio St. 131, 169 (1857) (such practices as being drawn and quartered or "dragged to the place of execution").

149. Richardson v. Goddard, 64 U.S. (23 How.) 28, 42 (1860).

150. *See In re* Nawadiuko, 961 N.Y.S.2d 359, 2012 WL 4840800, at *6 (Civ. Ct. 2012) (unpublished table decision) ("[A] prosecution for blasphemy is extremely unlikely in this day and age . . . .").

151. Gross v. Miller, 61 N.W. 385, 386 (Iowa 1894).

152. Laub v. State, 292 P. 891, 893 (Okla. Crim. App. 1930) (Chappell, J., dissenting).

153. City of Ashland v. Heck's, Inc., 407 S.W.2d 421, 424–25 (Ky. 1966).

154. State v. Holmes, 338 N.W.2d 104, 107 (S.D. 1983).

155. United States v. Traficant (*In re* Application of WFMJ Broad. Co.), 566 F. Supp. 1036, 1043 (N.D. Ohio 1983).

156. *See* United States v. Bedonie, 913 F.2d 782, 800 (10th Cir. 1990) (deeming this concept "reminiscent of another era").

themselves[157] have come under similar reprobation. The Supreme Court has described as "primitive" the practice of allowing jurors to rely on firsthand knowledge.[158] And requiring *acquitted* criminal defendants to post security to assure their good behavior has been deemed "an anachronism" that is irreconcilable with "any modern and enlightened view of individual civil rights."[159]

Finally, courts have characterized various types of economic regulations and practices as wholly unsuited to the present day. Ancient systems of property transmission are one noteworthy example. With no hereditary peerage to prop up, the United States conspicuously rejected primogeniture—an "odious"[160] institution that functioned to "lock up estates in families."[161] The common law's toleration of employers' physical brutality toward employees is now said to dwell in "the dustbin of history."[162] It has also been claimed that Americans "would revolt" at the prospect of creditors seizing the dead bodies of their debtors.[163] And courts have ridiculed the idea of flatly prohibiting the charging of interest on loans. Despite its former prevalence, such a policy has been deemed "untenable in our time"[164] in light of "the habits and customs of the people."[165]

### C. *Finding Ethos*

There are easy examples—*of course* it would be un-American to starve juries into reaching unanimous verdicts or to flog political dissidents into submission. But how, exactly, do judges identify which arrangements would be anathema to contemporary values? Almost by definition, current judgments of intolerability are not inscribed in any authoritative text. The Constitution surely shapes cultural intuitions about such concepts as liberty, equality, fairness, and decency,[166] but its famously opaque wording cannot supply a full digest of collective values to be affirmed anew by each generation.

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157. *See* Dorman v. Wainwright, 798 F.2d 1358, 1365 (11th Cir. 1986) (maintaining that a right to self-representation follows from "the cultural character of the American people").

158. Interstate Com. Comm'n v. Louisville & Nashville R.R. Co., 227 U.S. 88, 93 (1913).

159. Commonwealth v. Franklin, 92 A.2d 272, 292 (Pa. Super. Ct. 1952).

160. Warner v. Brinton, 29 F. Cas. 234, 235 (C.C.E.D. Pa. 1835) (No. 17,179).

161. Bank of Hamilton v. Dudley's Lessee, 27 U.S. (2 Pet.) 492, 503 (1829); *see also* Provident Life & Tr. Co. v. Fletcher, 258 F. 583, 586 (2d Cir. 1919) (asserting that the perpetuation of family estates is "unsuited to our national spirit").

162. Anderson v. State, 487 A.2d 294, 297 (Md. Ct. Spec. App. 1985).

163. Griffith v. Charlotte, Columbia & Augusta R.R. Co., 23 S.C. 25, 40 (1885).

164. City of Milwaukee v. Firemen's Relief Ass'n of the City of Milwaukee, 165 N.W.2d 384, 392 (Wis. 1969).

165. S. Ry. Co. v. Query, 21 F.2d 333, 342 (E.D.S.C. 1927).

166. *See* Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 167 (1987) (arguing that a nation's constitution embodies its "ethos or fundamental nature as a people").

The codified prohibitions of various jurisdictions may sometimes be probative in this respect.[167] Yet because written law endures indefinitely until it is changed, seemingly objective indicia like state codes and constitutions will often fail to keep pace with prevalent cultural values.[168] Moreover, one should not assume that ethical norms are reflected in *any* source of positive law. A society's aversive ethos may be so strongly internalized that any effort at formalization would be viewed as a waste of resources. And it would be unrealistic to expect all repugnant uses of governmental power to be expressly proscribed. No constitution could (or should) be so prolix, and no group of drafters could enumerate all possible methods of using state power intolerably. We can safely assume that many policies would be received with horror even if no legal actor or private citizen had ever specifically contemplated them.

One might instead draw an analogy to the classical concept of desuetude, by which legal provisions could be deemed abrogated after a sustained period of nonuse.[169] There is a deep connection here, insofar as desuetude operated upon practices that were "outmoded or rooted in values that no longer deserve[d] support."[170] But the comparison goes only so far. Desuetude presumed the existence of an enactment whose wholesale nonenforcement warranted inferences about changed cultural values. Ethical norms, however, may arise in the absence of outworn legislation (or any law at all). Evidence of aversive ethos may be far more intangible and diffuse than would have been required to trigger invalidity through desuetude.

The irreducibly atextual nature of aversive ethos should give any serious analyst pause. Claims about our national character may be overly personalized or aspirational[171]—and thus unreliable indices of the norms they purport to

167. *See* Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1035 (2016) (observing that all fifty states have prohibited imprisonment for contractual debt).

168. *See* Joel S. Johnson, *Dealing with Dead Crimes*, 111 GEO. L.J. 95, 95 (2022) ("Our criminal codes are replete with 'dead crimes'—i.e., crimes that are openly violated, have long gone unenforced, and no longer reflect majoritarian views."); Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 173 (2012) ("Legislation is not always the most reliable evidence of contemporary values. Sometimes it is not reliable at all."). For an especially discordant example, see ALA. CONST. art. XIV, § 256 (amended 2022) (purporting, up until November 2022, to require "[s]eparate schools . . . for white and colored children").

169. *See* John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 565 (2014) ("Desuetude is the idea that if a law is left unenforced for a long time despite numerous enforcement opportunities, it may lose all legal force because a negative custom has grown up against it."). Despite having taken root in several legal traditions over the centuries, desuetude "currently enjoys recognition in the courts of West Virginia and nowhere else." Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006).

170. Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 59.

171. *See* Andrew Jensen Kerr, Response, *The Use of Cultural Authority in Constitutional Argument*, 74 VAND. L. REV. EN BANC 215, 233 (2021) ("[O]ur ethos . . . reflects a sense of optimism that we all possess about the arc of constitutional coverage."); *see also* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (insisting, in the midst of Jim Crow, that racial classifications were

describe. It is all too easy to conclude that one's moral vision has won out, distorting the perceived benefits of continued dialogue. And those who attempt to channel our collective values may wrongly diminish non-elite or historically marginalized perspectives.[172] Judges—an overwhelmingly privileged and insular class—are especially likely to experience these forms of occlusion.[173] Millions of Americans will always have reason to fear that the Supreme Court's ethos is not *their* ethos. Then again, many aversive ethical claims will be wholly uncontroversial. The difficulty of deriving a full suite of ethical norms should not preclude courts from identifying obvious corollaries of contemporary life[174]—even ones not rooted "in unshakable legal sources."[175]

There is also an important distinction between ethos as motivation and ethos as written justification. Convictions about the type of nation we have become undoubtedly alter the course of doctrine in ways that cannot be directly observed.[176] But concrete ethical claims—especially aversive ones—tend not to appear in majority opinions until after social contestation has largely drawn to a close.[177] I have found few examples of Supreme Court majorities questionably insisting upon the intolerability of specific measures. In practice, the justices appear to be far more constrained in pronouncing certain policies beyond the pale than in reasoning from the multifarious resources of text, purpose, precedent, and history. All told, aversive ethical claims are unlikely

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"contrary to our traditions"); Korematsu v. United States, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting) (characterizing a measure upheld by a majority of the justices as "utterly revolting among a free people").

172. *See* Maggie Blackhawk, *On Power and the Law:* McGirt v. Oklahoma, 2020 SUP. CT. REV. 367, 400 ("[D]ynamics within the dominant ideology work to erase the history of Native people and deny their ongoing existence."); K-Sue Park, *This Land Is Not Our Land*, 87 U. CHI. L. REV. 1977, 1985 (2020) (book review) ("Failing to include long-ignored perspectives . . . risks generating more 'universal' perspectives that continue to suppress the same voices even as they purport to stand in for 'all.' ").

173. *See* John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 369 (1999) (observing that judges "are likely to bring to their work the perceptions of an upper middle class, educated, largely male, and largely white elite"); WILLIAM M. WIECEK, THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, at 444 (2006) ("Lawyers and judges tended to assume that *their* values—roughly, Lockean liberalism—were the values of the American people.").

174. *See* Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 168 (2018) ("Previous generations may have done very unjust things, and later interpreters should not hesitate to recognize them as unjust."); H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 37 (2008) (arguing that courts "can and sometimes must" speak "the Republic's norms").

175. Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1918 (1994).

176. Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 724 n.99 (2007) (citing Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1324 (2006)).

177. Professor Suzanne Goldberg has documented this phenomenon in the context of equality claims. *See* Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1957, 1963 (2006) (identifying a "judicial impulse for norm avoidance where the status of a social group is in flux").

to shape doctrine unless the relevant values are overwhelmingly shared, enticing even methodological formalists to affirm consensus cultural truths. The absence of clear abuses should be relevant in assessing the ethical modality's basic legitimacy as an ingredient in judicial decisionmaking.

By "consensus," moreover, I do not have in mind literal unanimity. A nation as vast and polarized as ours could not possibly achieve complete agreement on any proposition. Recent polls have shown that 17 percent of Americans consider interracial marriage to be "morally wrong,"[178] 17 percent approve of the internment of Japanese Americans during World War II,[179] 18 percent would deny Muslim citizens the right to vote,[180] and 24 percent disapprove of President Truman's executive order desegregating the military.[181] Such sobering figures indicate that universalist ethical claims retain an element of aspiration. A court deploying this technique necessarily marginalizes dissenting views by proceeding as if those perspectives no longer deserve to be taken seriously.[182]

Thankfully, courts need not perform this value-laden task alone. Judges can take helpful cues from other actors and institutions—ones with greater democratic pedigrees—for whom speaking in an ethical idiom may be a much more familiar exercise. This evidentiary burden is greatly simplified when political mobilization results in sustained repudiation across institutions. For decades, *Korematsu* was widely assailed by Congress, the Executive, lower-court judges, and Supreme Court nominees.[183] Its condemnation in the "court of history"—a locution first employed by a congressional commission[184]—was therefore relatively easy to discern. Even without such powerful indicia of infamy, courts can consult a variety of external signals in deciding whether certain practices are, as suspected, relics of prior eras.[185]

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178. THE ECONOMIST/YOUGOV POLL: MARCH 10–13, 2018, at 92 (2018), https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/y3tke5cxwy/econTabReport.pdf [perma.cc/9XTU-4X4W].

179. THE ECONOMIST/YOUGOV POLL: JANUARY 24–26, 2021, at 4 (2021) [hereinafter 2021 POLL], https://docs.cdn.yougov.com/zj7p8sya8r/econToplines.pdf [perma.cc/5CAJ-VSFE].

180. THE ECONOMIST/YOUGOV POLL: JUNE 10–12, 2018, at 94 (2018), https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/0kj6rhpqso/econTabReport.pdf [perma.cc/9XTU-4X4W].

181. 2021 POLL, *supra* note 179, at 4.

182. *See* Post, *supra* note 81, at 30 ("[I]n the absence of consensus the frank ambition of responsive interpretation to 'speak for' the character of the nation . . . will necessarily constitute a hegemonic imposition upon others."); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 976 (2008) (arguing that some values "are properly regarded by courts as unreasonable and inadmissible").

183. *See* Muller, *supra* note 44, at 740–41; Greene, *supra* note 21, at 399–402.

184. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 238 (1982) (concluding that *Korematsu* "lies overruled in the court of history").

185. *See* Tsai, *supra* note 35, at 116 ("[J]urists have looked far and wide for evidence of fundamental values . . . ."); *see also, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (citing condemnatory statements from Congress and the Executive in concluding that attacks upon the Sedition Act of 1798 had "carried the day in the court of history"); *In re* Kemmler, 136

But these statements cannot demonstrate their own reliability. In the political arena, ethical claimants often seek to guide and persuade rather than simply describe. In this regard, consider President Biden's denunciation of President Trump's controversial immigration restrictions as "a moral blight" and "a stain on our national conscience."[186] Governmental actors may also have strategic or self-serving reasons for articulating particular conceptions of our national character when they do. In apologizing for the Chinese Exclusion Act at the height of World War II,[187] for instance, President Franklin Roosevelt undoubtedly sought to further America's military objectives.[188] These qualifications should not preclude judges from citing political actors' ethical claims, which may be highly probative of societal norms. But the likelihood of nonempirical motives calls for close scrutiny of the context in which these statements were made.

Nor should ethical claims that once rang true be uncritically accepted in modern times. For example, after the Trump presidency, it seems unlikely that the era of national-origin restrictions in immigration law is widely viewed as a "cruel and enduring wrong."[189] Active political contestation can thus deprive ethical claims of their descriptive accuracy. In some situations—imagine high-profile calls to repeal the Thirteenth Amendment—normative reinforcement might well be an appropriate judicial response. Whether to confront emerging social movements in this way would require delicate judgments about which cultural norms are morally negotiable and which must be fortified at all costs.

Perceptions of intolerability may also experience gradual drift, simply outliving their zeitgeists. Diagnoses of dominant norms sometimes devolve into embarrassing artifacts of earlier eras—as the Court's own experience shows.[190] Those norms may also boomerang back, restoring once-supplanted

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U.S. 436, 444 (1890) (taking notice of an 1885 comment from New York's governor that execution via hanging is a "barbarous" vestige of "the dark ages"); STEVEN W. BENDER, MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY 20–22 (2015) (cataloging several states' formal apologies for having perpetrated eugenic sterilization); GEORGE BROWN TINDALL, THE EMERGENCE OF THE NEW SOUTH, 1913–1945, at 213 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1967) (quoting the governor of Alabama's 1919 description of his state's convict-leasing system as "a relic of barbarism"); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 249 (2009) (quoting Thomas Jefferson's description of the Alien Friends Act of 1798 as "a most detestable thing . . . worthy of the 8th or 9th century"); President William J. Clinton, Remarks in Apology to African-Americans on the Tuskegee Experiment, 1 PUB. PAPERS 607, 608 (May 16, 1997) (impugning the Tuskegee Syphilis Study as "deeply, profoundly, morally wrong").

186. Proclamation No. 10141, 86 Fed. Reg. 7005 (Jan. 20, 2021).

187. *See* 89 CONG. REC. 8200 (1943) (statement of President Franklin Roosevelt) (branding the Act an "anachronism[]" and a "historic mistake").

188. *See* ERIKA LEE, THE MAKING OF ASIAN AMERICA: A HISTORY 256 (2015).

189. President Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill, Liberty Island, New York, 2 PUB. PAPERS 1037 (Oct. 3, 1965).

190. *See* United States v. Thind, 261 U.S. 204, 215 (1923) ("[T]he great body of our people instinctively . . . reject the thought of [racial] assimilation."); Muller v. Oregon, 208 U.S. 412, 421 (1908) (deeming the supposed inferiority of "woman's physical structure" a "matter[] of general knowledge"); Champion v. Ames (Lottery Case), 188 U.S. 321, 358 (1903) (describing lotteries

visions. Military conscription, for example, was successfully resisted as "abominable" and "despoti[c]" during the War of 1812.[191] The Court unanimously affirmed its constitutionality a century later, describing military service as the "supreme and noble duty" of a citizen.[192] In our own century, however, conscription proposals would likely be assailed as an unjustifiable assault on individual freedom.[193] To avoid packing the court of history, judges inclined to invoke past ethical claims should remain sensitive to shifts in cultural attitudes. They should also carefully consider whether any newly crystallized consensus is stable enough to undergird ethical pronouncements. History is not unidirectional, and apparent settlements may instead represent the crest of a sine curve.

Moreover, there is no reason why the predicates of ethical condemnation should mimic constitutional law's stated triggers for heightened review. This point is clearest with respect to "economic" regulations, which have long been subject to the weak medicine of rational-basis review.[194] Under current doctrine, this form of scrutiny would apply even to regulations that could greatly disrupt modern life. (Imagine, for example, a prohibition on the use of credit cards or the operation of restaurants.) Interpreters should resist allowing formal legal categories to cloud their perceptions of fundamental cultural values and arrangements. Here, perhaps it is the categories that mislead.

Finally, conceptions of aversive ethos may be tightly linked to the severity of any resulting sanctions. Americans are sharply divided over the propriety of many common behaviors, such as cursing, eating meat, and working on Sunday. Even so, society may overwhelmingly agree that such conduct should not be grounds for imprisonment or loss of citizenship. An ethical claim's validity cannot be properly assessed without attending to the precise level of generality at which it is framed.

Notwithstanding these complications, perceptions of national character will surely continue to exert a powerful pull on judicial decisionmaking. Direct expression of societal values can perform a crucial explanatory function, after all: the law will lose something vital if it becomes unable to distinguish between the presently unlawful and the deeply unjust or archaic.[195] It stands

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as "offensive to the entire people of the nation"); *see also* G. Edward White, *Determining Notoriety in Supreme Court Decisions*, 39 PEPP. L. REV. 197, 223 (2011) (explaining that "many features of American society once taken as beyond dispute have subsequently been revealed as historically contingent").

191. Daniel Webster, Speech on the Conscription Bill (Dec. 9, 1814), *in* 14 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 55, 62 (1903).

192. Selective Draft Law Cases, 245 U.S. 366, 390 (1918).

193. A decade ago, after all, the theoretical possibility of a broccoli-purchase mandate generated abiding legal and political outrage. *See* Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 100–13 (2013).

194. Armour v. City of Indianapolis, 566 U.S. 673, 680–81 (2012).

195. *See* David A. Strauss, *The Living Constitution and Moral Progress: A Comment on Professor Young's Boden Lecture*, 102 MARQ. L. REV. 979, 983 (2019) ("[P]art of the reason that [Jim

to reason, then, that grossly outmoded precedents should be prime targets for modern reassessment. The next Part documents a multitude of Supreme Court decisions that may well have outlived their cultural shelf lives. Whether we should still care—and how today's Court should address these curious remnants—are questions taken up in Part IV.

## III. REPUGNANT PRECEDENTS

American constitutional law is alive to the lessons of its dead past. A quartet of the Supreme Court's most reviled decisions—known as the "anticanon"[196]—have come to serve as potent symbols of who and what we are *not* as a people. These cases are so toxic that they are usually invoked only as negative exemplars, archetypes of "ethical propositions" that all serious thinkers "must be prepared to refute."[197] And they are so notorious that the mere utterance of their names, like a dreadful spell, reliably conjures a cluster of aversive associations among legally trained audiences.

As Professor Jamal Greene has shown, however, the anticanon's members are not uniquely poorly reasoned or morally benighted. The anticanon comprises only those decisions whose vilification has proved politically and rhetorically beneficial for disparate coalitions of legal elites.[198] My examination of ethical repudiation further exposes this select grouping as wildly underinclusive. By focusing its fire on materials with built-in cultural resonance, the legal community has overlooked a host of precedents that may be similarly incompatible with core assumptions of modernity.[199] I aim to identify these precedents below, arranging them under the general headings of liberty and equality. With a much fuller slate of decisions in view, *Hawaii*'s terse retraction of *Korematsu* seems less like a freak encounter than a foreshock of future disavowals.

### A. *Definition and Scope*

I identify two types of repugnant precedents, corresponding to two senses in which judicial opinions can conflict with prevailing cultural values. First, a

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Crow] was legally wrong is that it was morally evil."); Torres, *supra* note 81, at 544 (asserting that, although *Dred Scott* "was wrong as a technical matter of law," "we would also want to say it was wrong because on some fundamental level it violated the ethical relationship of free citizens to one another").

196. *See* Greene, *supra* note 21, at 380 (asserting that "the American anticanon" consists of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Lochner v. New York*, 198 U.S. 45 (1905); and *Korematsu v. United States*, 323 U.S. 214 (1944)).

197. *See* Greene, *supra* note 21, at 380–81.

198. *See generally id.* at 404–66. To some extent, the above four precedents undoubtedly created their own luck.

199. *See* Justin Collings, *After Law's Infamy: Judicial Self-Legitimation in the Aftermath of Judicial Evil*, *in* LAW'S INFAMY, *supra* note 35, at 13, 15 ("Most monstrous precedents are quietly buried or simply ignored."); *id.* at 42 (contending that the construction of an anticanon has "entailed the systematic forgetting of scores of equally unsavory cases").

decision may validate a particular practice that has largely disappeared from public life due to its inconsistency with modern norms. Litigants typically have no occasion to challenge these precedents directly; they persist through sheer inertia, serving as fodder for aversive ethical claims.[200] And second, a case's holding may have been explicitly premised on an outworn normative vision, even if the practice it authorized still occurs. It is the nature of these precedents' *reasoning* that has become alien to our legal culture.[201] Such ethical underpinnings need not be viewed as any less outrageous simply because their doctrinal outgrowths have been normalized over time. These two categories—repugnant results and repugnant reasoning—account for the cases included in Sections III.B–C below.

Importantly, my definition of repugnance does not speak to situations in which the Court would assume a role of ethical leadership. When the justices intervene in an ongoing cultural conflict—as with respect to school desegregation and same-sex marriage—they attempt to shape our national character rather than simply channel it.[202] Much of modern Eighth Amendment doctrine can also be explained in such aspirational terms. Ethical norms against cruelty deprive the justices of any occasion to review classical methods of torture, such as crucifixion and burning at the stake.[203] But most punishments that have recently been held to violate the Eighth Amendment are not fairly subject to aversive ethical claims. Rather, the Court often exercises its "independent judgment" about a practice's normative acceptability,[204] even when formal indicia suggest a nation "deeply divided."[205] This is a far cry from asserting a universalist cultural truth.

As for the scope of this Part's examples: I have limited my study to the U.S. Supreme Court's constitutional precedents. I do not deny that nonconstitutional decisions—including cases interpreting federal statutes and common-law privileges—may clash with bedrock societal values. But these types of precedents can be undone at any time through ordinary lawmaking. This distinction is significant, given that ethical shifts tend to forestall the very

200. Ironically, both widespread public support and a complete lack of public support can insulate judicial precedents from direct attack. For the former proposition, see Barrett, *supra* note 56, at 1736.

201. I do not question the continued use of ethically unobjectionable principles that once helped produce outcomes now regarded as revolting. *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 615 (1842) (enslaved person at issue) (declaring that "where the end is required, the means are given"); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1875) ("Our province is to decide what the law is, not to declare what it should be."); Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1059 (2014) (explaining that the Southern Manifesto "[drew] upon the fundamental modalities of constitutional interpretation").

202. *See* Post, *supra* note 81, at 30 (describing the Court's decision in *Brown v. Board of Education* as "a courageous gamble" that was "intensely controversial and came close to failing").

203. *See In re* Kemmler, 136 U.S. 436, 446 (1890) (citing these historical paradigms).

204. *See* United States v. Briggs, 141 S. Ct. 467, 473 (2020) (collecting examples).

205. Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 154 (2005).

types of measures needed to challenge archaic constitutional decisions head-on.[206] I also exclude cases whose propositional content has been squarely superseded by a constitutional amendment or later Supreme Court decision—regardless of whether the earlier case was mentioned by name.

I do, however, include precedents whose reasoning has been strongly undercut by later legal or factual developments. The justices insist that such cases remain binding until the Court specifically displaces them.[207] And research databases continue to code them as good law.[208] These points accord with the Court's actual practice: as Jack Boeglin and I have shown, the repudiation of a prior analytical approach—without more—does not dictate whether affected cases will eventually be overruled or confined to their facts.[209] And the justices have repeatedly declined opportunities to renounce prior applications of now-discredited principles, holding out the possibility of narrow reaffirmation.[210] Under my model, then, the later articulation of a stringent level of scrutiny is not enough to supplant a clear-cut statement pronouncing a practice constitutional. There is a crucial distinction between "rais[ing] the overruling axe"[211] and administering the final blow.

Next, I have declined to draw sharp distinctions between holdings and dicta. The precise dividing line can be difficult to discern in practice,[212] and

206. That said, I have chosen to include several Indian-law decisions that can be understood as constitutional in nature despite being susceptible to congressional reversal. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1795 (2019) ("[I]f we define federal Indian law as the law of national power and rights developed in the context of Native Nations and Native peoples, much of constitutional law actually *is* federal Indian law.").

207. *See supra* note 41 and accompanying text; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (characterizing doctrinal obsolescence as a justification for overruling rather than evidence of an already-accomplished overruling), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

208. Indeed, only two precedents featured in Sections III.B–C (*United States v. Macintosh* and *Breedlove v. Suttles*) have been assigned red flags by Westlaw—and for reasons unrelated to their inclusion below. *See infra* notes 223, 286.

209. *See* Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865, 875–77 (2019).

210. *See* Kerry v. Din, 576 U.S. 86, 96 (2015) (plurality opinion) (observing that "[m]odern equal-protection doctrine casts substantial doubt on the . . . asymmetric treatment of women citizens in the immigration context"); Romer v. Evans, 517 U.S. 620, 634 (1996) (deeming it "most doubtful" that a practice previously upheld by the Court—the disenfranchisement of certain groups "because of their status"—would now survive strict scrutiny); *see also infra* notes 416–420 and accompanying text.

211. Republic Steel Corp. v. Maddox, 379 U.S. 650, 667 (1965) (Black, J., dissenting).

212. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2005 (1994) (claiming that "the distinction is almost entirely malleable" in contemporary practice); Lawrence B. Solum, *Disaggregating* Chevron, 82 OHIO ST. L.J. 249, 294 (2021) ("[T]here is no consensus about the criteria for the holding–dictum distinction.").

lower courts generally adhere to their hierarchical superiors' legal utterances—even ones that were not strictly necessary.[213] Only rarely do lower courts contravene the Supreme Court's explicit assurances that certain practices do not violate the Constitution.[214] And equally importantly, such clear assertions provide cover for governments to act in ways that would otherwise transgress modern ethical norms.[215] Omitting these examples would wrongly minimize the harms that could realistically emanate from vestigial constitutional precedents.

Finally, my chosen list of cases could be critiqued as both underinclusive and overinclusive. Given the Court's centuries-long constitutional output, I have likely overlooked numerous doctrinal propositions that sit uneasily with the realities of modern life. And I do not claim that each of these precedents clearly contravenes the best understanding of our national character, circa 2023. The cases cited below are ones that—in my view—could plausibly be argued to have validated an ethically outmoded practice or relied on an ethically outmoded premise. Erring on the side of inclusion helps clarify the stakes of proposing a role for ethical obsolescence in the stare decisis inquiry. And it underscores the implications of allowing the very applicability of precedent to turn on the concept of cultural repugnance. The possibility of good-faith disagreement in this context calls into question any precedential practice, like the court of history, that suppresses reasoned discourse.

Opting for breadth, however, means that I lack the space to justify my selections. I do not pretend to have fully explained why each precedent could be viewed as a normative orphan, although the reasons will usually be plain. My aim is to show that the category of repugnant precedents is far from a null set—not to secure agreement on the precise content of that set.

### B. *Liberty*

The Supreme Court's precedents continue to tolerate various freestanding compulsions that are entirely absent from modern life. For example, the justices have held that states and localities possess "inherent power" to compel

213. *See* David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2049 (2013) (concluding that "lower courts very rarely invoke the holding–dictum distinction to reach decisions at odds with higher court dicta"); Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 103 (2013) (explaining that "[m]any lower courts have explicitly stated that Supreme Court dictum is different").

214. For one especially prominent exception, see Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 968–71 (2016) (analyzing lower courts' circumvention of *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.), *overruled by Obergefell v. Hodges*, 576 U.S. 644 (2015), which summarily affirmed a state court's refusal to recognize a constitutional right to same-sex marriage).

215. *See* Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1784–85 (1998).

able-bodied residents to "labor for a reasonable time on public roads . . . without direct compensation."[216] In light of "ancient usage"[217]—a lengthy history of requiring unpaid road and bridge work dating back to Roman times—this criminalization of inactivity was held to be neither a form of involuntary servitude nor a deprivation of liberty without due process.[218] The Court has also asserted that private persons may be required to serve as part of a posse comitatus to aid in the enforcement of federal laws.[219] And the justices have stated that the federal government "has a right to . . . demand[] the services of its citizens"—"any or all" of them—by calling upon them to fill vacant federal offices, whether in the nation's capital or elsewhere.[220]

These cases paved the way for the Court's recognition of an ultimate duty owed to the state: to bear arms in its defense. Over a century ago, the Court held that Congress's Article I power to "raise and support Armies"[221] entails the authority to coerce unwilling persons to fight and die in military conflicts.[222] Nor have the justices identified any constitutional limits on which citizens are liable to be conscripted. Quite the opposite: they have asserted that Congress may "compel the armed service of *any citizen* in the land"[223]—including even *children*,[224] and regardless of one's religious or moral convictions.[225] The Court has also confirmed that states and localities may compel their citizens to engage in regular military training in order "to develop fitness" for potential service in their state militia or the U.S. military.[226] As a corollary to these positions, the justices have held that public universities may

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216. Butler v. Perry, 240 U.S. 328, 330 (1916).

217. *Id.*

218. *Id.* at 331–33.

219. *See In re* Quarles, 158 U.S. 532, 535 (1895). Posse comitatus participation—at least at the state level—historically entailed an obligation "to obey" an officer's command "under pain of fine and imprisonment." South v. Maryland, 59 U.S. (18 How.) 396, 402 (1856).

220. Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 43–44 (1868); *see also* Edwards v. United States, 103 U.S. 471, 476 (1880) (citing the common-law rule that "[t]he public has a right to the services of all the citizens, and may demand them in all civil departments as well as in the military").

221. U.S. CONST. art. I, § 8, cl. 12.

222. Selective Draft Law Cases, 245 U.S. 366, 377–78 (1918).

223. United States v. Macintosh, 283 U.S. 605, 624 (1931) (emphasis added), *overruled on other grounds by* Girouard v. United States, 328 U.S. 61 (1946).

224. United States v. Williams, 302 U.S. 46, 48 (1937) (explaining that "Congress may require military service of adults and minors alike," and may "draft [minors] upon such terms as it may deem expedient").

225. *See Macintosh*, 283 U.S. at 623.

226. Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 260 (1934). This pronouncement was oddly disconnected from historical reality, given that state militia service lost its compulsory character in the early nineteenth century. *See* DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 491 (2007) (explaining that "[t]he militia gradually ceased to function because most male citizens resented it as an imposition," whereafter "[state] politicians dared not attempt to coerce service").

require all of their able-bodied students—even ones with religious objections—to complete a course in military training and instruction.[227] And under existing doctrine, states may refuse law licenses to persons whose religious or conscientious scruples render them unable to bear arms in time of war.[228]

The justices have also declared that the failure to pay one's commercial debts may give rise to imprisonment.[229] As the Court explained it, "[c]onfinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it."[230] In fact, a federal statute presupposes that states remain free to lock up persons who fail to satisfy their private commercial obligations.[231] If any state ventured to revive the "monstrosit[y]"[232] of debtors' prisons, then, it would ostensibly do so with the Court's preexisting permission.

First Amendment doctrine, too, contains numerous relics that are difficult to square with modern values. The Court has held that states may criminalize depictions of the American flag on articles of merchandise;[233] that judges may issue contempt orders to restrain public commentary on their legal rulings in cases that technically remain pending;[234] that states may entirely prohibit Greek-letter societies in public universities in order to reduce student distraction;[235] and that localities may forbid "mak[ing] any public address" on public property without prior mayoral approval, as long as such restrictions also regulate nonexpressive uses of the property.[236] Nor has the Court officially broken with its numerous 1919–20 precedents upholding the criminalization of speech critical of America's military efforts.[237] And under a 1921

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227. *See Hamilton*, 293 U.S. at 264.

228. *See In re* Summers, 325 U.S. 561, 572–73 (1945).

229. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 200–01 (1819).

230. *Id.*; *see also* Mason v. Haile, 25 U.S. (12 Wheat.) 370, 378 (1827) (explaining that the available remedies for private debt "must be regulated by the views of policy and expediency entertained by the State legislatures").

231. *See* 28 U.S.C. § 2007(a) ("A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished."). Anti-peonage cases are not to the contrary: in the Thirteenth Amendment context, the Court has made clear that governments may not criminalize the failure to perform "*personal service* [for another] in liquidation of a debt." Bailey v. Alabama, 219 U.S. 219, 238, 244 (1911) (emphasis added).

232. Ostendorf v. State, 128 P. 143, 146 (Okla. Crim. App. 1912).

233. Halter v. Nebraska, 205 U.S. 34, 37–38 n.1, 43 (1907).

234. *See* Patterson v. Colorado *ex rel.* Att'y Gen., 205 U.S. 454, 462–63 (1907) (reasoning that judges are not "subject to the same criticism as other people" while cases are still active).

235. Waugh v. Bd. of Trs. of the Univ. of Miss., 237 U.S. 589, 596–97 (1915).

236. Davis v. Massachusetts, 167 U.S. 43, 44, 47 (1897); *see also* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (plurality opinion) (stating that "[w]e have no occasion to determine whether . . . the *Davis* case was rightly decided," since the ordinance at issue there "was not directed solely at the exercise of the right of speech and assembly").

237. *See* Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Stilson v. United States, 250 U.S. 583 (1919); Abrams v. United States, 250 U.S. 616 (1919); Schaefer v. United States, 251 U.S. 466

decision, any publication containing this type of criticism may be entirely excluded from the U.S. mail.[238]

Moreover, the justices have deemed the First Amendment entirely inapplicable when Congress regulates the cross-border movement of noncitizens and articles of commerce. The Court has held that Congress may admit aliens "upon such conditions as it may see fit to prescribe"[239]—including to halt the propagation of political views deemed "undesirable."[240] This rationale would justify Congress's exploitation of the immigration power to exact partisan conformity. The Court has also insisted that Congress enjoys "plenary" authority to restrict foreign commercial imports—a power subject to "different rules of constitutional law" than domestic regulations.[241] Such a principle would seem to authorize manifold restrictions on the flow of expressive content (including foreign-produced books, movies, and music).[242]

The justices have also sustained numerous measures that are increasingly out of step with modern cultural norms concerning sexual autonomy. Most drastically, in *Buck v. Bell*, the Court upheld a state law providing for the sterilization of persons deemed to be afflicted with certain hereditary disabilities.[243] The justices have repeatedly declared that married individuals may be imprisoned for engaging in consensual, unpaid sexual relations with persons

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(1920); Pierce v. United States, 252 U.S. 239 (1920); Gilbert v. Minnesota, 254 U.S. 325 (1920). These World War I–era holdings remain formally untouched by modern doctrine's enhanced solicitude for expressive freedoms. *See* Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 740 (1996) (plurality opinion) (citing *Schenck* for the proposition that speech may be regulated "in cases of extraordinary need"); Brandenburg v. Ohio, 395 U.S. 444, 451–52 (1969) (Douglas, J., concurring) (acknowledging that *Brandenburg*'s guidance technically extends only to "days of peace").

238. United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 414–16 (1921).

239. United States *ex rel.* Turner v. Williams, 194 U.S. 279, 290 (1904).

240. *Id.* at 294; *see also* Galvan v. Press, 347 U.S. 522, 531 (1954) (reiterating that the substantive criteria for admission and exclusion are "entrusted exclusively to Congress," rather than subjected to constitutional control).

241. United States v. 12 200-Foot Reels of Super 8MM. Film, 413 U.S. 123, 125–26 (1973); *see also* Weber v. Freed, 239 U.S. 325, 328–29 (1915) (upholding a federal statute criminalizing the importation of videos of boxing matches).

242. *See* Authors League of Am., Inc. v. Oman, 790 F.2d 220, 224 (2d Cir. 1986) (recognizing that Congress may forbid the importation of books printed overseas in order to protect the American publishing industry).

243. 274 U.S. 200, 207 (1927). The Court has never disavowed its earlier acceptance of eugenic sterilization as a tool for promoting social welfare. In *Skinner v. Oklahoma*, for example, the Court merely distinguished *Buck* in the course of invalidating a state's sterilization law on equal-protection grounds. *See* 316 U.S. 535, 542 (1942). As *Skinner* recognized, the violation could be remedied by "*enlarging* . . . the class of criminals who might be sterilized." *Id.* at 543 (emphasis added). And Supreme Court majorities have acknowledged *Buck*'s holding—without questioning it—on three further occasions. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 369 n.6 (2001); Roe v. Wade, 410 U.S. 113, 154 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); McLaughlin v. Florida, 379 U.S. 184, 194 (1964).

other than their spouses.[244] The Court has held that Congress may use its Commerce Clause authority to outlaw practices that it deems harmful to public morals, including the facilitation of private, unpaid sexual activity between consenting adults.[245] And the Court has tolerated two regulations that excluded certain sexually active persons from key facets of society: an ordinance requiring all "wom[e]n notoriously abandoned to lewdness" to reside only within specified city blocks,[246] and a state law requiring places of public amusement to admit all ticket holders over a certain age—except "person[s] of lewd or immoral character."[247]

Finally, surviving precedents tolerate several restrictions on economic liberty whose modern implementation would likely seem cruel or arbitrary. The justices have held that persons who enter into private contracts to serve on vessels may be imprisoned if they quit their employment.[248] The Court has ruled that, by virtue of the police power, states may imprison any of their residents who choose to labor on Sunday.[249] The justices have also held that municipalities may entirely prohibit the operation of billiard halls on account of the "idleness" they foster.[250] The Court, moreover, has permitted states and localities to place sharp limits on the items that can be transacted for at arm's length. Under these decisions, governments may prohibit not just the manufacture, purchase, and sale of all forms of alcohol, but also its private possession (whether in the home or elsewhere).[251] The justices have similarly upheld a state law criminalizing the making of contracts conveying an option to purchase any commodity, a measure designed to suppress the "pernicious evil" of

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244. *See McLaughlin*, 379 U.S. at 196 (asserting that "a valid state interest" justifies laws protecting the institution of marriage, including by prohibiting "promiscuous conduct" outside of marriage); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 & n.15 (1973) (confirming that adultery is a type of "conduct involving consenting adults" that states may regulate).

245. *See* Hoke v. United States, 227 U.S. 308, 322–23 (1913); *see also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964) (confirming that Congress may use its Commerce power to prohibit perceived "moral and social wrong[s]").

246. L'Hote v. New Orleans, 177 U.S. 587, 588, 596–97 (1900) (describing this attempt to "confine their domicile, their lives, to certain territorial limits" as a paradigmatic use of the police power).

247. W. Turf Ass'n v. Greenberg, 204 U.S. 359, 362, 364 (1907).

248. Robertson v. Baldwin, 165 U.S. 275, 287–88 (1897). In denying that this arrangement amounted to a form of involuntary servitude, the Court cited centuries-old maritime and commercial codes, reasoning that sailors' contracts "have from time immemorial been treated as exceptional." *Id.* at 282.

249. Hennington v. Georgia, 163 U.S. 299, 318 (1896); *id.* at 305 (reasoning that "the entire civilized world" had come to recognize that a requirement of one day's rest per seven was "essential to the physical and moral well-being of society" (quoting *Ex parte* Newman, 9 Cal. 502, 520 (1858))).

250. Murphy v. California, 225 U.S. 623, 629 (1912). *Murphy* also signaled that bowling alleys could be outlawed, given "the known and demoralizing tendency of such places." *Id.* at 630.

251. Crane v. Campbell, 245 U.S. 304, 307–08 (1917). These restrictions may even extend to certain non-intoxicating beverages in order to help suppress the trade of alcoholic ones. *See* Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 204 (1912).

"gambling."[252] And under existing doctrine, states and localities may prohibit the sale of bread loaves not conforming to exact sizes and weights.[253] As a result, persons conducting bake sales may be imprisoned for vending otherwise-lawful edibles that the government deems too large or small.

### C. *Equality*

Existing doctrine also prolongs numerous propositions that likely clash with modern norms of equal treatment. The categories of race and ancestry furnish several examples. Despite judging *Korematsu* to have been "overruled in the court of history," the Court left untouched its immediate doctrinal precursor: *Hirabayashi v. United States*.[254] *Hirabayashi* upheld a wartime curfew that applied only to persons of Japanese ancestry, reasoning that "it is not for any court to sit in review" of the military's tactical judgments.[255] The Court found it plausible that persons with certain "ethnic affiliations" might pose a greater danger "than those of a different ancestry."[256] Because the *Hawaii* majority paid no heed to *Hirabayashi*,[257] it ostensibly remains lawful to issue a variety of security-related restrictions singling out ethnic minorities.

The Court's immigration and naturalization jurisprudence, too, licenses outright racism. The Court has held that Congress enjoys plenary authority to restrict immigration from any class of persons—including "foreigners of a different race."[258] Nonwhite immigrants, the justices feared, might refuse to "assimilate with us" after arriving in the United States.[259] Under current law, Congress may also deport all aliens of a particular race,[260] create a "system of registration and identification" applicable only to aliens of a particular race,[261] and require nonwhite aliens to prove their entitlement to remain in the United States by the testimony of "white witness[es]."[262] And the Court has likewise held that Congress may withhold the privilege of naturalization from all members of specified races.[263]

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252. Booth v. Illinois, 184 U.S. 425, 430–31 (1902).

253. Schmidinger v. City of Chicago, 226 U.S. 578, 587–88 (1913); *see also* State v. Hudson House, Inc., 371 P.2d 675, 685–86 (Or. 1962) (allowing a prosecution for baking commercial bread in pans that exceeded the lawful size).

254. 320 U.S. 81 (1943); *see also* Muller, *supra* note 44, at 735 (noting that *Hirabayashi* "did the doctrinal work necessary to support the military's actions" in *Korematsu*).

255. *Hirabayashi*, 320 U.S. at 93, 102.

256. *Id.* at 101.

257. *See* Muller, supra note 44, at 736 (explaining that *Hirabayashi*'s holding remains "unassailed").

258. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 603–06 (1889).

259. *Id.*

260. *See* Fong Yue Ting v. United States, 149 U.S. 698, 711, 724 (1893).

261. *Id.* at 714.

262. *Id.* at 729–30.

263. *See* Terrace v. Thompson, 263 U.S. 197, 220 (1923).

To this day, the Court's precedents also countenance multiple Jim Crow–era tools of racial subordination. Even though literacy tests have been statutorily "banned nationwide"[264] for decades, the Court has upheld their use as "ha[ving] some relation to standards designed to promote intelligent use of the ballot."[265] The Court has held that jury service may be conditioned on perceived character traits, including moral uprightness,[266] even if a litigant can marshal "overwhelming proof" that such a system has functioned to exclude African Americans from the jury rolls.[267] And the Court has detected no equal-protection problem with a municipality's decision to close all of its public pools rather than comply with a judicial order to desegregate them.[268]

In addition, the peculiar doctrine that the Constitution applies only "in part" to certain U.S. territories[269] stemmed from racist convictions that certain nonwhite populations were unworthy of full civic membership. In the most prominent of the so-called *Insular Cases*, the Court invoked the specter of "alien races" as a rationale for according lesser constitutional rights to residents of America's newest possessions.[270] Justice White's concurrence likewise bristled at the idea of conferring full citizenship on members of "an uncivilized race"—people who would be "absolutely unfit to receive it."[271] The constitutional rights of persons living in Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands thus remain beholden to the legalized bigotry of another era.

Numerous unrepudiated Supreme Court decisions have also been premised on abhorrent perceptions of Native Americans' racial and cultural inferiority. In the seminal case of *Johnson v. M'Intosh*, the Court characterized tribal

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264. Shelby County v. Holder, 570 U.S. 529, 551 (2013).

265. Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 51 (1959); *see also* City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (referencing "the facial constitutionality of [literacy] tests under *Lassiter*").

266. *See* Carter v. Jury Comm'n of Greene Cnty., 396 U.S. 320, 323 (1970) (upholding a limitation on jury service to persons "generally reputed to be honest and intelligent men and [who] are esteemed in the community for their integrity, good character, and sound judgment" (quoting ALA. CODE. tit. 30, § 21 (1958 & Supp. 1967))); Franklin v. South Carolina, 218 U.S. 161, 167 (1910) (same, for persons "of good moral character" and "of sound judgment") (quoting Act of Feb. 7, 1902, No. 578, 1902 S.C. Acts 1066)); Gibson v. Mississippi, 162 U.S. 565, 588 (1896) (same, for persons "of good intelligence, sound judgment and fair character" (quoting MISS. CODE ANN. § 2358 (1892))); Turner v. Fouche, 396 U.S. 346, 354 (1970) (rejecting a facial challenge to a county's limitation on grand-jury service to persons deemed "upright" and "intelligent" (quoting GA. CODE ANN. § 59-106 (Supp. 1968))).

267. *Carter*, 396 U.S. at 335; *see also* Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 55, 74 (2020) (observing that these provisions historically functioned to "maintain all-white or virtually all-white juries").

268. *See* Palmer v. Thompson, 403 U.S. 217, 224–26 (1971).

269. Boumediene v. Bush, 553 U.S. 723, 757 (2008).

270. Downes v. Bidwell, 182 U.S. 244, 287 (1901); *see also* United States v. Vaello Madero, 142 S. Ct. 1539, 1554 (2022) (Gorsuch, J., concurring) (describing the *Insular Cases* as "shameful" and resting on "ugly racial stereotypes").

271. *Downes*, 182 U.S. at 306 (White, J., concurring).

members as "fierce savages"[272] whose "character and religion . . . afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy."[273] This "genius," of course, gratified itself in the underhanded (and often forcible) expropriation of Native territory. To this day, tribes hold their remaining lands only at the sufferance of Congress—an artifact of "the coming of the white man."[274] In addition to embracing the logic of conquest, the Court has used grossly demeaning language in explaining why Congress may disregard treaty commitments to Native peoples[275] and fully regulate their internal affairs;[276] in concluding that Congress had not designated a particular Indian tribe "arbitrarily";[277] and in holding that tribes may not punish crimes committed by non-Indians without Congress's permission.[278]

Echoes of a darker past also persist in the field of women's rights. In recent years, the justices have generally rejected "overbroad generalizations about the way men and women are"[279] and spoken harshly of "laws limiting women's employment opportunities."[280] Notwithstanding tectonic societal and jurisprudential shifts favoring sex equality in the last half century, however, the U.S. Reports contain numerous vestiges of patriarchy.[281] The Court has expressly repudiated only two precedents that countenanced forms of sex discrimination: *Goesaert v. Cleary*, which upheld a law forbidding most women from tending bar;[282] and *Hoyt v. Florida*, which held that women could be exempted from jury service unless they volunteered.[283]

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272. 21 U.S. (8 Wheat.) 543, 590 (1823).

273. *M'Intosh*, 21 U.S. at 573.

274. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

275. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (referring to Indians as "ignorant and dependent" (quoting Beecher v. Wetherby, 95 U.S. 517, 525 (1877))).

276. United States v. Kagama, 118 U.S. 375, 382 (1886) (characterizing Indians as "pupils" and "wards of the nation"); *id.* at 384 (citing their purported "weakness and helplessness").

277. United States v. Sandoval, 231 U.S. 28, 46 (1913); *id.* at 39, 41, 43 (describing the Pueblo Indians as "a simple, uninformed and inferior people," "intellectually and morally inferior," and "ignorant and wild").

278. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210–11 (1978) (affirmatively quoting an earlier description of Indians as "aliens and strangers . . . [of] a different race" (quoting *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883))); *see also* Maggie Blackhawk, *On Power & Indian Country*, *in* WOMEN & LAW 39, 47 (Farrah Bara et al. eds., 2020) ("*Oliphant* . . . presumed that people of one race could never govern people of another race fairly.").

279. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1689 (2017).

280. Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 729 (2003).

281. *See* Jill Elaine Hasday, *Women's Exclusion from the Constitutional Canon*, 2013 U. ILL. L. REV. 1715, 1717 (arguing that "[t]he Court's constitutional jurisprudence on women contains many precedents that appear to be prime candidates for anticanonical status").

282. 335 U.S. 464 (1948). In *Craig v. Boren*, 429 U.S. 190, 210 n.23 (1976), the Court explicitly stated that *Goesaert* "is disapproved."

283. 368 U.S. 57 (1961). In *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975), the Court stated that "we cannot follow" *Hoyt*'s holding. The Court later confirmed that *Hoyt* had been "overrul[ed] in effect." Payne v. Tennessee, 501 U.S. 808, 828 n.1 (1991).

A host of others remain formally alive, if in a state of suspended animation. The justices have never disavowed their decision upholding a federal statute providing for the automatic expatriation of women who took foreign husbands.[284] Nor has the Court turned its back on decades-old holdings permitting states to deny law licenses to women,[285] exempt women from capitation taxes,[286] prevent women from setting foot in establishments where alcohol is sold,[287] use the zoning process to ghettoize "lewd" women,[288] cap women's working hours,[289] forbid women from working before and after specified times of day,[290] prescribe a female-specific minimum wage,[291] and charge higher fees to businesses employing more than two women.[292]

Several cases *postdating* the Burger Court's landmark sex-equality decisions have also relied on increasingly stale justifications to uphold sex-based classifications. In 1974, for example, the Court upheld a state law granting all widows—but not widowers—a substantial tax exemption.[293] The justices viewed this disparate treatment as a permissible remedial measure, given that "the job market is inhospitable to the woman seeking any but the lowest paid jobs."[294] And in 1977, the Court upheld a federal law entitling women to greater old-age insurance benefits under the Social Security Act than men received.[295] Even though the provision at issue had been repealed in 1972, the Court found that it appropriately "compensate[d] for particular economic disabilities suffered by women."[296]

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284. Mackenzie v. Hare, 239 U.S. 299 (1915). The Court later rejected the constitutionality of nonelective expatriation, *see* Afroyim v. Rusk, 387 U.S. 253, 267 (1967), but gave no indication that *Mackenzie* would not be good law if *Afroyim* were overruled. For an analysis of how legal actors grappled with the expatriation law's residual effects following its repeal, see generally Daniel B. Rice, *The Riddle of Ruth Bryan Owen*, 29 YALE J.L. & HUMAN. 1 (2017).

285. *See In re* Lockwood, 154 U.S. 116, 118 (1894); Bradwell v. Illinois, 83 U.S. 130, 133, 139 (1873).

286. *See* Breedlove v. Suttles, 302 U.S. 277, 282 (1937), *overruled on other grounds by* Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).

287. *See* Cronin v. Adams, 192 U.S. 108, 113–15 (1904).

288. *See* L'Hote v. New Orleans, 177 U.S. 587, 596–97 (1900).

289. *See* Bosley v. McLaughlin, 236 U.S. 385, 392 (1915); Miller v. Wilson, 236 U.S. 373, 380 (1915); Hawley v. Walker, 232 U.S. 718, 718 (1914) (mem.); Riley v. Massachusetts, 232 U.S. 671, 680 (1914); Muller v. Oregon, 208 U.S. 412, 420–23 (1908).

290. *See* Radice v. New York, 264 U.S. 292, 294–95 (1924); Dominion Hotel, Inc. v. Arizona, 249 U.S. 265, 267–69 (1919).

291. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–99 (1937).

292. *See* Quong Wing v. Kirkendall, 223 U.S. 59, 62–63 (1912).

293. Kahn v. Shevin, 416 U.S. 351, 355–56 (1974).

294. *Id.* at 353; *see also id.* at 354 (asserting that women "will have fewer skills to offer" when their husbands' deaths force them to seek employment).

295. Califano v. Webster, 430 U.S. 313, 320 (1977) (per curiam).

296. *Id.* As Professor Rachel Bayefsky has noted, "[a] law can embody disrespectful stereotypes about women's roles . . . even if it grants women a financial advantage." Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1297 (2021).

The Court has also condoned sex stereotypes in the areas of immigration and citizenship. For example, the justices have upheld a federal statute that afforded favorable treatment to the mothers (rather than the fathers) of nonmarital children under the family-reunification provisions of immigration law.[297] In so deciding, the Court rested on Congress's plenary authority over immigration, insisting that any concerns about prolonging "overbroad and outdated stereotype[s]" should be "addressed to Congress rather than the courts."[298] Similarly, the Court has upheld a law creating greater burdens for nonmarital children born overseas who seek to acquire U.S. citizenship through their fathers (rather than their mothers) when only one parent is a U.S. citizen.[299] The justices reasoned that biological mothers are more likely to develop "a meaningful relationship" with their children—even, apparently, when a child's father is also present at birth.[300]

Seemingly outworn normative judgments also underlay statutes upheld in the military setting. The Court has sustained a law that provided female naval officers additional time in which to seek promotion before being mandatorily discharged.[301] The justices observed that male and female officers were not similarly situated in light of then-existing—but later-repealed[302]—"restrictions on women officers' participation in combat and in most sea duty."[303] Women's former exclusion from combat was also central to the Court's decision upholding the constitutionality of a male-only registration requirement for the military draft.[304]

Finally, existing doctrine permits the infliction of antique hardships on the basis of sexual orientation, alienage, and marital status. The Court has declared that Congress may forbid nonheterosexuals from entering the United States.[305] It has held that states may disable aliens from acquiring *any* interest in land—including a leasehold in residential or commercial property—unless

297. Fiallo v. Bell, 430 U.S. 787, 799–800 (1977).

298. *Id.* at 792, 799 n.9.

299. Nguyen v. Immigr. & Naturalization Serv., 533 U.S. 53, 73 (2001).

300. *Id.* at 65; *see also id.* at 87 (O'Connor, J., dissenting) ("There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms.").

301. Schlesinger v. Ballard, 419 U.S. 498, 510 (1975).

302. Claudette Roulo, *Defense Department Expands Women's Combat Role*, NAT'L GUARD (Jan. 24, 2013), https://www.nationalguard.mil/News/Article/574232/defense-department-expands-womens-combat-role [perma.cc/Z9K7-HBYS].

303. *Schlesinger*, 419 U.S. at 508.

304. Rostker v. Goldberg, 453 U.S. 57, 76–79 (1981).

305. Boutilier v. Immigr. & Naturalization Serv., 387 U.S. 118, 123–24 (1967) (explaining that Congress enjoys "plenary power" to "command[] that homosexuals not be allowed to enter").

the right to do so is conferred by treaty.[306] The justices have upheld an ordinance that precluded noncitizens from operating pool and billiard halls.[307] They have also announced that "[i]t would be quite competent for the sovereign power to declare that no one but a married person shall be entitled to vote."[308] And the Court has upheld a state law prohibiting the assignment of future wages without the written consent of an employee's spouse.[309]

## IV. IMPLEMENTING ETHOS

In many respects, the moral makeup of long-dead generations is virtually unrecognizable today. Yet through the medium of precedent, lapsed cultural values continue to enjoy legal authority in the present. This Part explores the complex relationship between doctrinal stasis and ethical change. In doing so, it first highlights the continuing harms that repugnant precedents can cause. It then proposes specific methods of implementing well-grounded conceptions of aversive ethos.[310] These recommendations may not satisfy proponents of strict judicial modesty. But they respect the Court's conventions of repudiation—unlike the court-of-history approach—and would facilitate far more satisfying "ethical" overrulings than would rigid adherence to the canonical stare decisis factors.

### A. *The Stakes of Stasis*

In the foregoing inventory of anachronistic precedents, some readers will perceive a call to action. But others will see a menagerie of slumbering monsters best left unprodded. It is not self-evident that the Court should take aim at its most culturally obsolete decisions. If Congress is not actually enacting racist immigration laws, and states are not actually imprisoning vendors of American flags, why bother dredging up ancient curiosities? Any proponent of eliminating archaic precedents must confront this seeming tension: if a decision is truly inimical to modern values, it is unlikely to be causing significant harm. Likewise, the more harm a decision is causing, the less likely it is to be ethically outmoded.

These generalizations will often hold true; and when they do, passivity may well be the better approach, all things considered. But a blanket attitude

306. Terrace v. Thompson, 263 U.S. 197, 223 (1923).

307. Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392, 397 (1927) (finding no reason to doubt that aliens, as a category, "are not as well qualified as citizens to engage in this business").

308. Murphy v. Ramsey, 114 U.S. 15, 43 (1885). Since *Murphy*, the constitutionality of status-based disenfranchisement has been characterized as "most doubtful," rather than doubtless. Romer v. Evans, 517 U.S. 620, 634 (1996).

309. Mut. Loan Co. v. Martell, 222 U.S. 225, 231, 233–34 (1911).

310. The recommendations advanced below are not meant to override the notes of caution sounded in Section II.C. I fully incorporate those concerns by reference here. For purposes of Part IV, I assume the existence of a sufficient ethical consensus—a condition that can hardly be taken for granted.

of noninterference risks devolving into complacency. Precedents can be worth phasing out even if they are not actively generating unsavory policies. This Section identifies a range of factors to consider in deciding whether formal repudiation would be the wisest course for any particular decision. For these purposes, I distinguish between ongoing harms and ongoing risks of harm. The latter grouping builds upon Justice Jackson's evocative warning that Supreme Court precedents can "lie[] about like a loaded weapon,"[311] supplying ready-made judicial sanction for tragic or misguided governmental actions.

### 1. Ongoing Harms

#### a. Property and Power

Supreme Court precedents premised on Native Americans' racial inferiority are directly responsible for the current distribution of property entitlements and regulatory authority. These decisions enabled the federal government to inflict incalculable harm on the continent's original inhabitants by wantonly expropriating their lands and sharply limiting their preexisting sovereignty.[312] The justices no longer refer to tribal members as uncivilized savages, to be sure. But several Indian-law doctrines predicated on such vile assumptions enjoy continued effect through the routine application of precedent.[313] The Court has never confronted whether these doctrines could be wholly justified apart from aged stereotypes that "look[] far more like propaganda than fact."[314]

Likewise, five U.S. territories are currently governed in a colonial fashion due to white-supremacist apprehensions at work in the century-old *Insular*

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

312. *See* Blackhawk, *supra* note 206, at 1799 ("The judiciary . . . has been devastating to Indian law."); Sherally Munshi, *"The Courts of the Conqueror": Colonialism, the Constitution, and the Time of Redemption*, *in* LAW'S INFAMY, *supra* note 35, at 50, 59 (observing that judicially sanctioned doctrines of colonialism were "catastrophic for Indians" and "dispossess[ed] millions of the lands on which they had lived for centuries").

313. *See* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA, at xxv (2005) (arguing that doctrinally submerged perceptions of inferiority have operated "to justify the denial to Indians of important rights of property, self-government, and cultural survival" in the present); Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 542 (2017) (noting that the "racialized and demeaning" features of early Indian law "have yet to be completely expunged"); *see also supra* notes 274–280 and accompanying text. The modern Court has also breathed new life into statutory policies designed to destroy the independent existence of Native communities. *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 6 (1995) (observing that recent cases had "give[n] present effect to the discredited policy of allotment and assimilation").

314. Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 560–61 (2021).

*Cases*. Those decisions authorize Congress to hold indefinitely as "unincorporated" territories[315] any possessions deemed unready to be governed "according to Anglo-Saxon principles."[316] The resulting political subordination has blocked territorial residents from addressing grave economic woes through consent-based tools of self-governance.[317] And current law's dual-tiered system of constitutional protection has enabled Congress to disqualify these residents—most of whom are American citizens—from receiving much-needed forms of federal financial assistance.[318]

### b. Expressive Degradation

The persistence of unjust precedents can inflict ongoing dignitary harms. Much like archaic state constitutional provisions[319] or racially restrictive covenants that remain formally unexpunged,[320] such cases—whether through their reasoning or their results—send exclusionary signals to historically marginalized members of society. These decisions espouse a civic vision of whiteness as "our race,"[321] of nonheterosexuals as "sexual deviate[s],"[322] and of indigenous peoples as "semi-barbarous."[323] As Professor Jasmine Harris has remarked, *Buck v. Bell* in particular "broadcast a lasting message to those with disfavored bodies . . . that their societal value lies not in their lives, but in their

315. *See* Balzac v. Porto Rico, 258 U.S. 298, 305 (1922).

316. Downes v. Bidwell, 182 U.S. 244, 287 (1901).

317. *See* José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 461 (1986) (book review) (explaining that the Puerto Rican people may approach Congress "only as supplicants," and that the federal government enjoys "virtually unlimited discretion" either to address or neglect the island's needs); Guy-Uriel Charles & Luis Fuentes-Rohwer, *No Voice, No Exit, but Loyalty? Puerto Rico and Constitutional Obligation*, 26 MICH. J. RACE & L. (SPECIAL ISSUE) 133, 134 (2021) ("Puerto Rico is on an economic death spiral, and the only thing it can do is wait for the federal government to provide a solution.").

318. *See* U.S. HOUSE OF REPS. COMM. ON WAYS & MEANS, *Appendix A: Social Welfare Programs in the Territories*, *in* GREEN BOOK (2018), https://greenbook-waysandmeans.house.gov/2018-green-book/appendix-a-social-welfare-programs-in-the-territories [perma.cc/8LPL-CAHF]; United States v. Vaello Madero, 142 S. Ct. 1539, 1544 (2022) (holding that Congress need not "extend Supplemental Security Income to residents of Puerto Rico to the same extent as to residents of the States").

319. Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 WIS. L. REV. 1063, 1084 (contending that "the mere persistence" of obsolete state constitutional provisions "may cause expressive harms"); Allan W. Vestal, *Removing State Constitution Badges of Inferiority*, 22 LEWIS & CLARK L. REV. 1151, 1198 (2018) (arguing that certain "archaic" state constitutional provisions are "needlessly divisive and gratuitously disrespectful of our fellow citizens").

320. RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 230 (2013) ("[I]n the[ir] secondary life as signals, covenants did much damage.").

321. Quong Wing v. Kirkendall, 223 U.S. 59, 63 (1912).

322. Boutilier v. Immigr. & Naturalization Serv., 387 U.S. 118, 119 (1967).

323. Beecher v. Wetherby, 95 U.S. 517, 526 (1877).

deaths."[324] It was to guard against further expressive degradation that President Ford formally rescinded the executive order implicated in *Korematsu* decades after its final victims were released from confinement.[325]

Importantly, these harms are experienced personally and elude easy measurement. The Court cannot safely assume that century-old holdings reinforcing antiquated gender roles will not inflict fresh wounds on account of their formal survival. Nor are the justices in any position to discount the pain felt by territorial residents who learn that the Supreme Court ostensibly regards them as members of "alien races."[326] Cases that seem obscure to most practicing lawyers likely linger as hurtful reminders within communities still struggling for justice, power, and recognition. Very real dignitary benefits could result from clarifying that these odious relics no longer express official truths about our political life.

### c. Doctrinal Incoherence

Among current justices, it is uncontroversial that precedents whose underpinnings have "eroded over time" may qualify for overruling.[327] This tenet reveals a shared aversion to doctrinal contradiction. The persistence of warring premises dilutes the law's integrity, risks practical and pedagogical confusion, and undercuts the perceived capacity of principle to shape legal outcomes. It should come as no surprise when culturally archaic precedents also turn out to be "mere survivor[s] of obsolete constitutional thinking."[328] A desire to straighten out existing doctrine—independent of any ethical umbrage—may thus counsel repudiation of some of the precedents featured in Part III. Courts have already identified several acute tensions attributable to the formal persistence of these decisions.[329]

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324. Jasmine E. Harris, *Why* Buck v. Bell *Still Matters*, BILL OF HEALTH (Oct. 14, 2020), https://blog.petrieflom.law.harvard.edu/2020/10/14/why-buck-v-bell-still-matters [perma.cc/4Y43-74QZ].

325. Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 20, 1976) [hereinafter Ford Proclamation] ("Because there was no formal statement of its termination, however, there is concern among many Japanese-Americans that there may yet be some life in that obsolete document.").

326. Downes v. Bidwell, 182 U.S. 244, 287 (1901).

327. Kimble v. Marvel Ent., LLC, 576 U.S. 446, 458 (2015).

328. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

329. *See, e.g.*, *In re* Griffiths, 413 U.S. 717, 721 (1973) (explaining that "the doctrinal foundations of [*Ohio ex rel. Clarke v. Deckebach*]" have been "undermined"); Faruki v. Rogers, 349 F. Supp. 723, 728 (D.D.C. 1972) ("[T]he approval the Supreme Court had once given to state laws restricting aliens' power to own land . . . was based on obsolete premises."); People v. Barrett, 281 P.3d 753, 779 (Cal. 2012) (Liu, J., concurring and dissenting) (asserting that "the doctrinal underpinnings of *Buck v. Bell* have been eroded"); State v. Derrickson, 81 A.2d 312, 315 (N.H. 1951) (describing *Davis v. Massachusetts* as having been "eroded by . . . recent decisions").

### 2. Ongoing Risks

#### a. Domestic Repetition

As a nation, we are not on a constant upward trajectory. "Memory is short, political leaders change, and history may repeat itself."[330] Perhaps the most acute danger posed by repugnant precedents is that governmental actors will convert artifacts of legal history into tools of ongoing oppression. This concern should not be overstated—ethical shifts do real deterrent work, conditioning most elected officials not to stray from America's deepest unwritten commitments. But politicians also play an active role in shaping and reshaping those commitments. As our political marketplace continues to coarsen, policies that had become unthinkable may regain traction in public discourse.[331] Even cherished norms can erode—especially if persons seeking to undermine them can claim a grounding in positive law. In this way, surviving Supreme Court precedents may enable malefactors to redraw ethical boundaries by downplaying those boundaries' very existence.[332] And it takes only a single nonconformist actor to make these risks a reality.

The legacy of *Korematsu* is instructive. Few precedents have been so roundly vilified in modern times. Even so, then-candidate Trump supported his proposed ban on Muslim immigration by citing the example of Japanese internment, claiming that "[w]hat I'm doing is no different than FDR."[333] Although the more apt analogy would have been to the law upheld in *Chae Chan Ping*,[334] this remark reveals the potential of repugnant precedents to ease ethical backsliding. Such decisions may also stir dormant demons during times of crisis. Shortly after 9/11, a member of the U.S. Commission on Civil Rights warned that another terrorist attack by nonwhites would produce "a return to

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330. Noriega v. Governor, 22 P.R. Offic. Trans. 613, 646 (1988) (Garcia, J., concurring); *see also* Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF. L. REV. 283, 309 (2008) (critiquing teleological historical narratives that "assume[] that we are on an upward trajectory"); Ernest A. Young, *Dying Constitutionalism and the Fourteenth Amendment*, 102 MARQ. L. REV. 949, 952 (2019) ("Progress can and does happen, but it is by no means inevitable, and sometimes constitutional law goes to hell in a handbasket.").

331. *See* BALKIN, *supra* note 81, at 218 (explaining that "[p]olitical agency can produce changes in constitutional common sense").

332. This possibility may represent an extrajudicial application of Professor Richard Re's theory of "precedent as permission"—that is, its tendency to establish the presumptive lawfulness of particular courses of action. *See generally* Re, *supra* note 34.

333. Meghan Keneally, *Donald Trump Cites These FDR Policies to Defend Muslim Ban*, ABC NEWS (Dec. 8, 2015, 1:01 PM), https://abcnews.go.com/Politics/donald-trump-cites-fdr-policies-defend-muslim-ban/story?id=35648128 [perma.cc/77W9-Q6XR]; *see also* ERIC K. YAMAMOTO, IN THE SHADOW OF *KOREMATSU*: DEMOCRATIC LIBERTIES AND NATIONAL SECURITY 61 (2018) (recounting a Trump surrogate's invocation of *Korematsu* as precedent for a Muslim registry).

334. *See* Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889).

*Korematsu*"—"you can forget civil rights in this country."[335] And an attorney in the White House Counsel's office privately suggested that race-based profiling at airports might be valid under *Korematsu*.[336] Even today, *Hirabayashi* could be invoked to facilitate the "mass targeting . . . of undesirables."[337]

In short, it is never safe to assume that governmental actors will refrain from wielding authorities that existing law confers on them. This risk may be especially pronounced in the American legal system, whose apex court has admonished lower tribunals to follow its precedents until explicitly instructed otherwise.[338] In situations governed by the decisions examined in Part III, courts have often applied them faithfully—if under protest.[339] And lower courts' detached descriptions of existing doctrine suggest that some judges might choose to apply, rather than distinguish, even the Court's most ignominious holdings.[340]

Remedial realities may further heighten this sense of permission. Under qualified-immunity doctrine, actors contemplating the implementation of a repugnant precedent have little to fear from suits for money damages. It is

335. Lynette Clemetson, *Civil Rights Commissioner Under Fire for Comments on Arabs*, N.Y. TIMES (Jul. 23, 2002), https://www.nytimes.com/2002/07/23/us/traces-terror-arab-americans-civil-rights-commissioner-under-fire-for-comments.html [perma.cc/L9AS-KWBL].

336. Email from Helgard C. Walker, White House Assoc. Couns., to Alberto R. Gonzales, White House Couns., et al. (Jan. 17, 2002, 10:12 AM), https://s3.documentcloud.org/documents/4834174/387988906-Booker-Confidential-Kavanaugh-Hearing.pdf [perma.cc/4285-JD9G].

337. Robert L. Tsai, *A Proper Burial*, 74 ARK. L. REV. 307, 316–17 (2021).

338. *See* Muller, *supra* note 44, at 755 ("[W]e do not have a doctrine of silent overruling by inference.").

339. *See* Shames v. Nebraska, 323 F. Supp. 1321, 1335 (D. Neb. 1971) (citing *Terrace v. Thompson* in upholding a state's "absolute bar of ownership of land by nonresident aliens" more than three miles outside the limits of any city or town); Oldroyd v. Kugler, 327 F. Supp. 176, 179 (D.N.J. 1970) ("*Halter v. Nebraska* is still the fundamental law of the land in the type of issue before us." (citation omitted)), *rev'd on other grounds*, 461 F.2d 535 (3d Cir. 1972); Hanauer v. Elkins, 141 A.2d 903, 907 (Md. 1958) ("Unless and until the *Hamilton* case is overruled, we think it is controlling . . . ."); State v. Fowler, 83 A.2d 67, 69–71 (R.I. 1951) (holding that, "[s]o long as the *Davis* case stands without being specifically overruled by the [S]upreme [C]ourt itself, . . . the ordinance in question here is valid").

340. *See* Correa v. Thornburgh, 901 F.2d 1166, 1173 (2d Cir. 1990) (stating that "Congress can bar aliens from entering the United States for discriminatory and arbitrary reasons"); Trujillo-Hernandez v. Farrell, 503 F.2d 954, 955 (5th Cir. 1974) (deeming congressional naturalization restrictions "nonjusticiable" rather than subject to a norm of equal treatment); Doe *ex rel.* Tarlow v. District of Columbia, 920 F. Supp. 2d 112, 119 (D.D.C. 2013) ("[T]he Supreme Court has never reconsidered its holding . . . that the public interest may sometimes justify involuntary sterilization."); State v. Limon, 83 P.3d 229, 236 (Kan. Ct. App. 2004) (characterizing the sex-based classification upheld in *Cronin v. Adams* as "valid" because its "purpose was to protect the morals of women"), *rev'd on other grounds*, 122 P.3d 22 (Kan. 2005).

difficult to see how a practice's unconstitutionality could be "clearly established"[341] if the Supreme Court has explicitly declared that it passes constitutional muster.[342] And it would likely take multiple years for a legal challenge to wend its way through the judicial process before any adverse ruling by the Court. These dynamics should not be ignored in predicting whether politicians will ever exercise powers that ostensibly attach to their offices.

### b. Foreign Imitation

As Professor James Whitman has written, "[t]he American impact on the rest of the world is not limited to what makes Americans proudest about their country. It has also included aspects of the American past that we might prefer to forget."[343] The fact that the U.S. Supreme Court has condoned certain primitive practices—without later recantation—may embolden foreign governments to engage in those practices *today*. We should not underestimate illiberal regimes' readiness to emulate the most shameful features of our legal inheritance. As Whitman has hauntingly shown, Nazi thinkers drew upon America's experience with racialized citizenship, eugenic sterilization, Indian removal, and anti-miscegenation in crafting the legal apparatus of National Socialism.[344] Such borrowing has also spurred racial segregation in South Africa[345] and programs of global imperialism.[346] Even today, autocratic governments routinely "cloth[e] their authoritarian moves in the guise of liberal democracy."[347]

The danger here is not just that foreign governments will be directly inspired by unjust Supreme Court decisions, although that does appear to have occurred.[348] It is that the Court's moral authority will provide them cover to

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341. Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (quoting White v. Pauly, 137 S. Ct. 548, 551 (2017)).

342. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 321 (1992) (Scalia, J., concurring in part and concurring in the judgment) (arguing that "reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance").

343. JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW 16 (2017).

344. *See generally* WHITMAN, *supra* note 343.

345. Hermann Giliomee, *The Making of the Apartheid Plan, 1929–1948*, 29 J. S. AFR. STUD. 373, 377 (2003) ("In introducing the apartheid legislation, the Nationalist leadership made it clear that their point of reference was the American South.").

346. *See* CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY, at xv (2020) ("The U.S.-sponsored expulsion of the 1830s became something of a model for colonial empires around the world.").

347. ROSALIND DIXON & DAVID LANDAU, ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY 17 (2021).

348. *See* D.E. v. British Columbia, 2003 BCSC 1013, para. 29 (Can.) ("In the opinion of the Alberta Institute of Law Research and Reform (1988), *Buck v. Bell* unquestionably influenced the enactment of the Alberta and British Columbia sterilization legislation."); Munshi, *supra* note 312, at 63 (contending that *Johnson v. M'Intosh* "provided the legal foundation for Indigenous dispossession . . . in other parts of the white settler world").

implement grossly immoral practices.[349] Even granting that American actors will not repeat these mistakes, overseas audiences may fail to appreciate that domestic cultural transformations have stripped certain precedents of any respectability. In this way, the mere fact of doctrinal stasis can become an adjunct to global injustice.

### c. Judicial Reliance

Even if elected officials stay their hands, archaic precedents remain citable by domestic courts. Here, I am not concerned with judges' reliance on these decisions for uncontroversial principles—as in quoting *Korematsu*'s formulation of strict scrutiny[350] or citing an antebellum slave case to explicate a familiar legal doctrine.[351] The relevant risk is that the very propositions now deemed repugnant will prove generative in related contexts, further expanding their reach and quietly reinforcing their status as precedent.

Take the Court's decision in *Butler v. Perry*, which authorizes state and local governments to conscript their residents into performing uncompensated road work.[352] This long-abandoned practice is a "relic of those times" when unpaved thoroughfares needed to be made passable "for buggies, wagons, and horse-drawn vehicles."[353] But lower courts, observing that *Butler* remains good law, have invoked it to sustain other types of compulsions. *Butler* has been cited for the proposition that patients in state-operated mental hospitals may be compelled to perform the "civic duty" of working without pay while confined there.[354] And it has been relied on to demonstrate that children may be required to labor in their school cafeterias "without compensation and against their wills."[355] In this way, repugnant precedents can continue to alter legal outcomes even if their underlying values no longer exert any direct influence.[356]

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349. *See* ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 11 (2016) ("[A]t the Nuremberg trials that followed World War II, Nazis who had carried out 375,000 forced eugenic sterilizations cited *Buck v. Bell* in defense of their actions.").

350. Mark R. Killenbeck, *Sober Second Thought?* Korematsu *Reconsidered*, 74 ARK. L. REV. 151, 156 (2021).

351. Simard, *supra* note 33, at 106 (arguing that "typical citation practices ignore and obscure the brutality" of American slavery).

352. 240 U.S. 328, 332–33 (1916).

353. Lawrence v. State, 161 So. 260, 261 (Ala. Ct. App. 1935).

354. Bayh v. Sonnenburg, 573 N.E.2d 398, 410–11 (Ind. 1991).

355. Bobilin v. Bd. of Educ., 403 F. Supp. 1095, 1102–04 (D. Haw. 1975).

356. For other examples, see Stern Amusement Co. v. City of Middletown, No. CA79-04-0031, 1980 WL 352931, at *3 (Ohio Ct. App. Dec. 31, 1980) (citing *Murphy v. California* in upholding a prohibition on pinball machines in commercial establishments); Cavalier Vending Corp. v. State Bd. of Pharmacy, 79 S.E.2d 636, 640 (Va. 1954) (citing *L'Hote v. New Orleans* in upholding a restriction on the sale of condoms); Adriel I. Cepeda Derieux & Neal C. Weare, *After* Aurelius*: What Future for the* Insular Cases*?*, 130 YALE L.J.F. 284, 286 (2020) ("[L]ower courts continue to rely on the *Insular Cases* to deprive residents of U.S. territories of rights and

### B. *Acknowledging Departures*

The justices face many difficult choices in deciding how (or even whether) to phase out repugnant decisions. But one point ought not be controversial: when the Court abandons its prior work, it should come clean about doing so. Too often, doctrinal principles and specific holdings are fully superseded only by implication. This tendency sidelines the Court's stare decisis framework, which cannot begin to operate if the fact of a departure goes unmentioned.[357] Implicit repudiation is even less transparent than channeling the court of history, which at least signals that a precedent is being disavowed. Here, I am not critiquing the Court's failure to resolve palpable tension between newly announced premises and earlier holdings, many of which may be obscure. My modest claim is that the Court should acknowledge when it breaks from any proposition whose correctness has become logically impossible. Shortcomings on this score often represent missed opportunities to articulate a rationale for dispensing with grossly outmoded precedents.

Two examples will help illustrate the point. Starting in the late nineteenth century, the Court repeatedly held that Congress could exclude from the postal system any material that it deemed "injurious . . . to the public morals"[358] or otherwise "objectionable . . . upon the ground of public policy."[359] This principle endowed Congress with a startling censorial authority over much of the nation's economic and political life. But when the Court later renounced this stance, subjecting mailability rules to the First Amendment, it made no mention of its prior institutional practice. Instead, the justices proceeded as if a *dissent* issued during the earlier regime accurately summarized existing law.[360]

Or consider *Williams v. Mississippi*[361] (decided in 1898), one of the Court's most ruinous decisions. *Williams* upheld a state constitutional provision that limited the franchise to persons able to "give a reasonable interpretation" of any portion of the state's constitution.[362] The Court recognized—but deemed irrelevant—that this clause was intended "to obstruct the exercise

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constitutional safeguards they almost surely enjoy."). After all, "attorneys may cite as good law any case that has not been explicitly overruled." Mark A. Graber, *Overruling* McCulloch*?*, 72 ARK. L. REV. 79, 123 (2019).

357. Here, I presume—as I have argued elsewhere—that stare decisis procedures should apply when a decisional principle is repudiated, and not merely when such repudiation is accompanied by the rejection of a specific factual holding. *See* Rice & Boeglin, *supra* note 209, at 921–22.

358. *In re* Rapier, 143 U.S. 110, 133 (1892).

359. Pub. Clearing House v. Coyne, 194 U.S. 497, 507 (1904); *see also* United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 411 (1921) (explaining that Congress enjoys "practically plenary power" over the federal mail system).

360. *See* Blount v. Rizzi, 400 U.S. 410, 416 (1971) (citing Justice Holmes's dissent in *Milwaukee Social Democratic Publishing Co.* for the proposition that content-based mailability restrictions presumptively "violate the First Amendment").

361. 170 U.S. 213 (1898).

362. *Williams*, 170 U.S. at 221–22.

of suffrage by the negro race."[363] The justices sharply reversed course in *Louisiana v. United States* (a 1965 decision), holding all such "interpretation" clauses facially unconstitutional.[364] Yet *Louisiana* did not even flag the existence of directly contrary precedent. Nor is this the only time the Court has failed to reckon with its responsibility for condoning gross injustices.[365] Court-of-history reform will be incomplete unless doctrinal reversals are reliably accompanied by conscious recognition of such clear-cut changes.

### C. *Regularizing the Court of History*

By adopting the pretense that external forces had not only foreordained *Korematsu*'s overruling but already effectuated the deed, *Hawaii* subtly destabilized two pillars of Supreme Court decisionmaking: the norms surrounding horizontal and vertical precedent. There is a better way to harmonize decisional law with modern realities. This Section first argues that ethical shifts should be accommodated within a paradigm of reason-giving, rather than bare invocation of the court of history. It then contends that openly normative utterances can play an important role within the established stare decisis framework. Lastly, this Section explains why the Court's standard overruling procedures—which presume the existence of adversarial stakeholders—may be poorly calibrated to eliminating certain repugnant precedents.

#### 1. Preserving Stare Decisis

As illustrated in Part I, the court-of-history conceit undercuts the justices' control over their past decisions' present bindingness. The Court has repeatedly chided lower courts for failing to follow precedents that have not been squarely displaced.[366] But in *Hawaii*, *Korematsu*'s invalidity—its present doctrinal nothingness—was said to be "obvious."[367] In this way, the Court has effectively invited myriad legal actors to channel the precedent-gutting verdicts of a figurative tribunal, and to proceed with only the murkiest conception of the court of history's triggering conditions. And the doctrine of horizontal stare decisis seeks to ensure that precedents will not undergo drastic revision

363. *Id.* at 222 (quoting Ratcliff v. Beale, 74 Miss. 247, 266 (1896)).

364. 380 U.S. 145, 153 (1965).

365. For four additional rulings that are logically irreconcilable with later decisions—but that have never been formally repudiated—see Hall v. DeCuir, 95 U.S. 485, 489–90 (1878) (holding that a state law requiring that common carriers be racially integrated violated the dormant-commerce principle); Cumming v. Richmond Cnty. Bd. of Educ., 175 U.S. 528, 544–45 (1899) (refusing to enjoin the use of public funds to "maintain[] a high school for white children without providing a similar school for colored children"); Giles v. Harris, 189 U.S. 475, 487–88 (1903) (holding that relief from a state-backed scheme to disenfranchise Black citizens could emanate only from the state itself); and Gong Lum v. Rice, 275 U.S. 78, 87 (1927) (upholding a state's segregation of white and "colored" schoolchildren, deemed to include persons of Chinese descent).

366. *See supra* note 41 and accompanying text.

367. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

without sufficient justification.[368] Yet *Hawaii* offered no reasoned explanation for the change it announced. However clear history's verdict on *Korematsu*, the justices abdicated the task of translating that sonorous judgment into the stuff of judicial decisionmaking.

The court-of-history approach also places undue weight on perceptions of our deepest national values. By rendering those beliefs *peremptory*—trumps of all other interests and all procedural values—the justices may overlook considerations that counsel against summary repudiation. Consider the examples of military conscription and compulsory military instruction in public universities. Although efforts to revive such measures would likely be met with widespread fury among the affected populations, that is not an adequate reason to short-circuit the Court's established processes for testing the vitality of precedent. Surely the Court should sometimes inquire about the government's interest in retaining once-common tools. Moreover, some injustices may be too deeply embedded in modern life for the Court to disregard the immense reliance interests they have generated.[369] And the court-of-history model would preclude the prospect of retheorizing repugnant precedents. On reflection, it might prove possible to justify some of those decisions' outcomes for reasons that were not apparent generations ago.[370] The stare decisis framework ensures that such countervailing concerns will not be ignored entirely—and that the justices' assessments are laid bare, rather than concealed with heroic metaphors.

In addition, the standard framework is a superior tool for clarifying the scope of doctrinal repudiation. Precedents can contain multitudes[371]—especially if they have become objects of bipartisan reproach. *Korematsu*'s renunciation has been greeted so ambivalently because it is unclear what, precisely, the case's "overruling" entailed.[372] The court-of-history approach arguably encourages such dissembling by enabling the costless projection of virtue

368. *See supra* note 53 and accompanying text.

369. *See* Bethany R. Berger, *Savage Equalities*, 94 WASH. L. REV. 583, 644 (2019) ("Fully restoring the sovereignty and property stripped from Native peoples is impossible—it is politically unfeasible and would result in injustice to many."); James T. Campbell, Aurelius*'s Article III Revisionism: Reimagining Judicial Engagement with the* Insular Cases *and "The Law of the Territories*,*"* 131 YALE L.J. 2542, 2559 (2022) ("[C]eremoniously overruling the *Insular Cases* on vague and open-ended terms may invite new, more pernicious harms for Americans in U.S. territories.").

370. Randy J. Kozel, *Retheorizing Precedent*, 70 DUKE L.J. 1025, 1033 (2021) (observing that the justices sometimes identify "one or more alternative rationales" for precedents whose original reasoning is perceived to be "deeply and irredeemably flawed").

371. *See* Greene, *supra* note 49, at 630 ("[T]he propositions a case stands for are often varied and contested."); *see also* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 693–94 (2006) (noting that the Marshall Court's Indian-law decisions, though legally foundational, contain morally reprehensible elements); Munshi, *supra* note 312, at 69 ("[T]he legal architecture announced . . . in *Chae Chan Ping* remains settled at the foundations of immigration law.").

372. *See* Greene, *supra* note 49, at 636–37; Munshi, *supra* note 312, at 77 ("[R]edemptive rituals often mask ongoing conflict and dissent.").

through untheorized disavowals. As *Hawaii* showed, it may be tempting simply to deem a precedent "overruled" when one is accused of replicating its logic. Whatever its defects, the justificatory structure of stare decisis facilitates agreement on the extent of proposed change, yielding a clearer understanding of what any departure from the status quo entails.

The court-of-history technique could also play havoc with constitutional law's tiers of scrutiny. As discussed above,[373] we should not expect the content of aversive ethical claims to align perfectly with the types of legal classifications most closely correlated with invalidity. For instance, it would seem absurd for today's lawmakers to outlaw pool halls and bowling alleys on moral grounds (an authority recognized in *Murphy v. California*). Yet this form of economic regulation would be analyzed under the lenient standard of rational-basis review.[374] Overruling *Murphy* would thus be a momentous development, whether brought about by the court of history or the justices themselves. Only the latter of those approaches would enable the Court to grapple with the systemic consequences of foreclosing a form of low-scrutiny regulation.

Lastly, a regularized court of history could require unmanageable and unrealistic historical inquiries. If precedents automatically expire whenever a contrary ethical consensus emerges, decisions can be drained of their authority if they are shown to have become ethically outmoded *at any former time*.[375] This could—and should—become familiar terrain on which lawyers and judges argue. But it is far from obvious that courts should be charged with pronouncing on earlier generations' freestanding ethical aversions. Many cultural norms remain largely unwritten and undiscussed precisely because their violation would be unthinkable. For this reason, today's "matters of common notoriety"[376] may be far more accessible than those of ages past. Carried to its logical end, then, the court-of-history technique could require up-or-down determinations about phenomena that elude lawyerly historical retrieval.

### 2. "Ethical" Overruling

Decommissioning the court of history need not deprive us of its core insight: that some precedents have become inimical to our national character. The question, then, is how to implement this lesson within a framework that seemingly resists such lofty considerations.[377] This is not the place to critique

373. *See supra* note 194 and accompanying text.

374. *See* Armour v. City of Indianapolis, 566 U.S. 673, 680–81 (2012).

375. Unless, that is, a previously annulled precedent could somehow spring back to life if public opinion rebounded drastically on the relevant proposition.

376. Black, *supra* note 88, at 426.

377. *See* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019) (foregrounding four stare decisis factors: "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision"); Johnson v. United States, 576 U.S. 591, 605 (2015) (explaining that "unworkable" precedents may be overruled); Planned

the Court's recent renderings of when overruling may be justified; I take those accounts as a starting point, evaluating only their interaction with perceptions of aversive ethos. In my view, ethical judgments should not be routed exclusively through the familiar stare decisis factors. Doing so would overlook why some precedents are so grating—much like impeaching Andrew Johnson for illegally firing his Secretary of War, rather than for thwarting the development of a multiracial democracy.[378]

Consider first whether a decision's factual underpinnings have collapsed.[379] It would be possible to critique almost any repugnant precedent in such clinical terms. We now know that eugenic sterilization was based on shoddy scientific foundations; that our national honor can outlast the American flag's commodification; that same-sex attraction is not a symptom of mental illness; that women are capable of working long hours; and that debtors' prisons are ineffective at making creditors whole. But such factual insights fail to capture why these decisions seem intolerable today: they embody values that are alien to our way of life. This is why the Court's official account of *Plessy*'s repudiation is so unsatisfying.[380] I do not mean to say that bogus factual predicates are irrelevant to modern normative judgments. Karen Korematsu, after all, rightly chalked up her father's conviction to "a baseless perception of disloyalty grounded in racial stereotypes."[381] But something important will be lost if ethical transformations must be recast as empirical discoveries.

Other stare decisis factors perform little better in this respect. Virtually any anachronistic decision could be described as a doctrinal outlier or retrospectively critiqued as "badly reasoned."[382] But these failings are not what make repugnant precedents repugnant. *Patterson v. Colorado*'s[383] chief sin is

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Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (identifying factual change as a justification for overruling), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

378. A preliminary clarification is in order: the discussion below applies only to content that the Court would accord precedential effect. Whatever the influence of Supreme Court dicta in lower courts and the political branches, the holding–dictum distinction may do important work at the level of horizontal stare decisis.

379. *See Casey*, 505 U.S. at 855; Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 285 (1999).

380. *Compare Casey*, 505 U.S. at 863 (stating that *Plessy*'s reasoning "was so clearly at odds with the facts apparent to the Court in 1954" as to warrant its reexamination), *with* KOZEL, *supra* note 34, at 111 ("The dispositive change from *Plessy* to *Brown* . . . was not empirical reality. It was the opinions and values through which reality is perceived and understood."). As Professor Allison Larsen has argued, "we must guard against the understandable temptation to see everything as a question of fact." Larsen, *supra* note 30, at 100.

381. Karen Korematsu, *How the Supreme Court Replaced One Injustice with Another*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/opinion/supreme-court-travel-ban-korematsu-japanese-internment.html [perma.cc/X44Q-63CA].

382. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

383. 205 U.S. 454 (1907).

not that it is "a remnant of abandoned doctrine,"[384] but that stifling public commentary on judicial proceedings would flout a basic assumption of modern American life. Likewise, *L'Hote v. New Orleans*[385] may well have been shoddily reasoned. But its most salient flaw is a moral one: it would be ludicrous to enclose sexually active women within specified territorial limits. As this example shows, characterizing a decision as "wrong the day it was decided"[386] may erase the significance of hard-won societal advances.[387]

All decisionmaking occurs within a particular normative universe. Precedents have ethical foundations, as well as doctrinal and factual ones. If a judicial decision has become ethically intolerable, then it should be presumptively reversible *for that reason* (as well as others that warrant mention under standard practice). Ethical obsolescence should not serve as an unspoken motivation for activating a distinct set of value-free justifications.[388]

Lower courts' anticipatory rejection of *Cronin v. Adams*[389] illustrates how the Court might engage in "ethical" overruling.[390] *Cronin*, decided in 1904, had allowed state and local governments to forbid women from entering establishments that sold alcohol.[391] In refusing to apply *Cronin* in 1974, a federal district court cited "the vast changes in social mores and attitudes" since the turn of the century.[392] *Cronin* had become a "discordant anachronism[]" whose continued application would perpetuate "the Victorian ideas of the past."[393] On appeal, the First Circuit agreed that *Cronin* had been neutralized by "cultural evolution."[394] The Supreme Court could offer similarly frank assessments in overruling precedents that trudge along as ethical outcasts.

Fortunately, no drastic revision of stare decisis is required in order to accommodate shifts in our national character. This consideration is absent from routine formulations of the doctrine, to be sure.[395] But the Court once confirmed that precedents are vulnerable to reversal if they are "inconsistent with

384. *Casey*, 505 U.S. at 855.

385. 177 U.S. 587 (1900).

386. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

387. *See* Jamal Greene, *(Anti)Canonizing Courts*, DÆDALUS, Summer 2014, at 157, 159 (positing that "[anticanonical] decisions were wrong because successive generations worked hard to make them wrong").

388. *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 100 (2018) (contending that the Court's "mundane" stare decisis factors "may obscure the central consideration" warranting repudiation).

389. 192 U.S. 108 (1904).

390. Each example discussed below was issued before the Court began admonishing lower courts never to disregard applicable Supreme Court precedent. *See supra* note 41 and accompanying text.

391. *Cronin*, 192 U.S. at 113–15.

392. Women's Liberation Union of R.I., Inc. v. Israel, 379 F. Supp. 44, 50 (D.R.I. 1974).

393. *Id.*

394. Women's Liberation Union of R.I. v. Israel, 512 F.2d 106, 109 (1st Cir. 1975).

395. *See* sources cited *supra* note 377; *see also* FALLON, *supra* note 388, at 100.

the prevailing sense of justice in this country" or incompatible with "our society's deep commitment[s]."[396] It would be remarkable if such a malleable framework could not account for a factor so central to whether past practice deserves continued respect. The acknowledged distinction between legitimate and illegitimate reliance interests[397] can also be applied to the ethical arena, blunting any impulse to retain deeply anachronistic decisions. And the first principles of stare decisis may provide powerful justification for values-based overruling. It is difficult to see how "the actual and perceived integrity of the judicial process"[398] would be advanced by preserving precedents now regarded only with contempt.

Plainly, viewing ethical obsolescence as a justification for overruling would enable the justices to discard certain precedents that they disfavor on the merits. Professor Randy Kozel has urged the Court to move in precisely the opposite direction. To prevent doctrinal fluctuation in response to the justices' shifting methodological commitments, Kozel would recognize just two primary reasons for overruling: procedural unworkability and faulty factual premises.[399] Kozel's framework does contain a carve-out for decisions that have "caus[ed] extraordinary harm."[400] But he makes clear that this exception should be invoked only in the rarest of situations.[401]

The persistence of culturally repugnant precedents—and not just a few—casts doubt on such strong resistance to merits-sensitive stare decisis. A closer alignment of America's aversive ethos with its decisional law could eventually produce dozens of case-related casualties. But that would not be because anyone's preferred interpretive philosophy had gained ascendancy at the Court. It would instead result from an overlapping consensus that certain uses of state power would be unthinkable in modern times. If anything, the image of the Court making a clean break from past benightedness seems more likely to enhance the justices' stature than to threaten it. Nor is it obvious why the gradual disappearance of obsolete precedents would prove destabilizing.[402] Rather,

396. Patterson v. McLean Credit Union, 491 U.S. 164, 174 (1989); *cf.* Dickerson v. United States, 530 U.S. 428, 443 (2000) (retaining a precedent deemed to have "become part of our national culture").

397. *E.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2098 (2018) (citing United States v. Ross, 456 U.S. 798, 824 (1982)); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (explaining that only "reasonabl[e]" reliance interests weigh against repudiation), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Re, *supra* note 34, at 940 (denying the cognizability of "repulsive" reliance interests, including those of segregationists, which "cannot possibly 'count'").

398. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

399. KOZEL, *supra* note 34, at 128.

400. *Id.* at 14.

401. *Id.* at 123 (describing the carve-out as "sharply limit[ed]").

402. *See* Harlan Grant Cohen, *"Undead" Wartime Cases: Stare Decisis and the Lessons of History*, 84 TUL. L. REV. 957, 992 (2010); Corinna Barrett Lain, *Mostly Settled, but Right for Now*, 33 CONST. COMMENT. 355, 372 (2018) ("Reliance interests dissipate as society passes a precedent by.").

*adherence* to archaic propositions would more predictably cause disruption, insofar as expectations have formed around their absence from public life.[403] And ethically distasteful decisions hardly warrant continued respect due to their "accumulated practical wisdom."[404] In short, an optimal stare decisis framework would permit the overruling of precedents that are inimical to modern values—whether or not they have produced devastating consequences.

Recognizing an additional type of justification for overruling may seem misguided to those who worry that today's Court is changing too much, too quickly. But it is unlikely that this feature of my proposal would accelerate the pace of doctrinal revision. If the justices are convinced that a precedent contravenes core societal values, the lack of a tailor-made explanatory category will not stop them from renouncing it.[405] What my recommendation would do is increase the overall transparency of stare decisis choices. This should be a welcome development for observers who believe that the Court too often withholds salient information about its treatment of precedent.[406]

### 3. Procedural Options

In phasing out repugnant precedents, moreover, the justices should not relentlessly insist on the standard procedural features usually treated as a prerequisite to overruling.[407] The mere initiation of these procedures can sometimes inflict needless expressive harm. Whether adversarial presentation and party-driven repudiation are advisable will thus depend on the nature of the precedent at issue.

When governments cease engaging in practices formerly deemed constitutional, their nonexistent acts cannot be challenged, and the Court cannot grant certiorari for the avowed purpose of revisiting its earlier decisions. For

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403. For example, the Court's decision in *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927), authorized governments to preclude noncitizens from operating pool and billiard halls. *See supra* note 307 and accompanying text. But pool and billiard halls are currently a $638 million industry. *Pool & Billiard Halls Industry in the US—Market Research Report*, IBISWORLD (Nov. 30, 2021), https://www.ibisworld.com/united-states/market-research-reports/pool-billiard-halls-industry [perma.cc/HSM7-J75A]; *cf.* Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Rule of Law*, 149 U. PA. L. REV. 1361, 1382 (2001) (observing that a statute may "undermine[] settled expectations and widely understood public values more than it gives voice to them"); Daniel B. Rice, *Nonenforcement by Accretion: The Logan Act and the Take Care Clause*, 55 HARV. J. ON LEGIS. 443, 522 (2018) (explaining that the Logan Act's centuries-long dormancy has engendered "a bipartisan truce concerning the legal ramifications of conferring with foreign governments").

404. DAVID A. STRAUSS, THE LIVING CONSTITUTION 96 (2010).

405. *See* Lain, *supra* note 402, at 366 ("[I]f the Justices are determined to overrule precedent, that's what they're going to do.").

406. *See* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 4–5 (2010) ("[U]ltimately the legitimacy of judicial review turns on public scrutiny of what the Justices are doing and the ability for dialogic engagement with their constitutional decisions.").

407. *See supra* notes 62–64 and accompanying text.

the same reason, only rarely will a party explicitly urge the Court to overrule a culturally outmoded precedent. Without this prodding, the Court will not "receive[] briefing and argument on the *stare decisis* question"[408] unless it initiates that process itself after discerning a precedent's vulnerability. What's more, the Court's ordinary stare decisis procedures are unsuited to the reconsideration of morally odious precedents. For example, it would be profoundly jarring for the Court to appoint an amicus curiae to fill any informational gaps concerning racially discriminatory curfews, eugenic-sterilization laws, or bans on the entry of nonheterosexual immigrants. Such invitations would rightly be perceived as dignifying irredeemable artifacts of bygone prejudices. No reliance interests need be accommodated in these situations, and no stakeholders warned of impending disruption.

By contrast, precedents that are societally outmoded but not morally repugnant should presumptively receive full briefing and argument before being overruled.[409] The reasons are plentiful: as mentioned above, the reversal of "economic" precedents could create methodological reverberations that the Court should consciously account for. Greater circumspection also seems warranted when a practice's constitutionality has been acknowledged long after its initial validation by the Court.[410] And extra-record factfinding would be a poor substitute for adversary presentation if there are any doubts about a practice's continued prevalence.[411] More generally, the very perception that certain practices are anathema to our way of life may cause the Court to overlook plausible arguments for preserving those governance tools.

* * *

The foregoing argument for reconceiving the court of history is only a partial solution to the problem of repugnant precedents. Any blueprint for phasing out these decisions must also identify plausible opportunities for doing so while respecting the built-in constraints of the judicial role. The next Section takes up that challenge.

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408. Ramos v. Louisiana, 140 S. Ct. 1390, 1415 n.4 (2020) (Kavanaugh, J., concurring in part).

409. This distinction may sometimes prove elusive, and it will not always track the general categories of liberty and equality. But for purposes of capturing the procedural benefits of stare decisis, there is a crucial difference between, say, *Korematsu* and *Booth v. Illinois*, 184 U.S. 425 (1902), which upheld the criminalization of options contracts.

410. This is true, for example, of military conscription, mandatory road work, and the imprisonment of sailors who breach their private contracts. *See* United States v. Kozminski, 487 U.S. 931, 944 (1988).

411. *See* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1291 (2012) (identifying various "troubling effects that accompany a robust practice of in-house judicial fact finding" in the digital age).

### D. *Seizing Opportunities*

As Justice Gorsuch recently remarked, "blind obedience to *stare decisis* would leave this Court still abiding grotesque errors like *Dred Scott v. Sandford*, *Plessy v. Ferguson*, and *Korematsu v. United States*."[412] Far more than just a comment on the Court's substantive standards for overruling, this statement suggests that the justices should sometimes undertake search-and-destroy missions. Understandably so: it would seem improper to adopt a neutral posture toward precedents that prolong the most regrettable features of our past.[413] In a 2010 book, for example, Justice Breyer opined that "it is hard to conceive of any future Court referring to [*Korematsu*] favorably or relying on it."[414] *Hawaii*'s invocation of the court of history likely emerged from a shared conviction that *Korematsu*'s formal demise would send an important message about the type of country we have become. Indeed, Justice Sotomayor stated that this development was "long overdue."[415]

But the justices are not always so keen to commemorate fundamental cultural shifts. Many of the precedents cataloged in Part III have endured only because the Court passed up credible opportunities to repudiate them. Consider *Halter v. Nebraska*, which allows states to criminalize commercial depictions of the American flag.[416] The Court's far more recent flag-burning decisions struck a pose of modesty, merely distinguishing (rather than disavowing) *Halter*,[417] notwithstanding the absurdity of enforcing such a prohibition in modern times. And just five years ago, the Court refrained from

412. Gamble v. United States, 139 S. Ct. 1960, 2005–06 (2019) (footnotes omitted) (Gorsuch, J., dissenting).

413. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992) (referring to "the terrible price that would have been paid if the Court had not overruled [*Plessy*] as it did"), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1150 (2008) ("[F]or the Supreme Court to fail to renounce a sufficiently reviled decision could itself have devastating consequences for its perceived legitimacy.").

414. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 193 (2010).

415. Trump v. Hawaii, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., dissenting); *see also* United States v. Vaello Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring) (describing the *Insular Cases*' overruling as "long overdue").

416. 205 U.S. 34, 37 n.1, 43 (1907).

417. *See* United States v. Eichman, 496 U.S. 310, 315 n.4 (1990) ("We . . . have no occasion to pass on the validity of laws regulating commercial exploitation of the image of the United States flag."); Texas v. Johnson, 491 U.S. 397, 415 n.10 (1989) ("Our decision in *Halter v. Nebraska*, addressing the validity of a state law prohibiting certain commercial uses of the flag, is not to the contrary." (citation omitted)).

reconsidering *Fiallo v. Bell*[418]—which gave new life to moribund sex stereotypes—by noting that doing so was technically unnecessary.[419] Other examples could be multiplied.[420] Strict minimalism hardly seems a virtue when the very forces that render a precedent out of step with contemporary life will often preclude litigants from challenging it head-on. Justice Kavanaugh made this very point about *Korematsu* at his confirmation hearing.[421] And Professor Cass Sunstein, minimalism's chief academic proponent, concedes that such an approach is inadvisable when "the interest at stake ought to be judged off-limits to politics."[422] What one might call "overruling avoidance"[423] is particularly misguided when a party actively relied on an outmoded precedent below, only to abandon that reliance at the Supreme Court level.[424]

Importantly, the Court has long exercised the authority to repudiate precedents that are factually or analytically *comparable*, rather than directly on point. Consider the fate of *Goesaert v. Cleary*, which upheld a prohibition on most women serving as bartenders.[425] *Goesaert* was expressly "disapproved" in a case involving a sex-based distinction concerning the *recipients* of alcohol.[426] Similarly, a decision upholding a prohibition on interracial sex[427] was conclusively rejected in a case implicating mere *cohabitation* by unmarried

418. 430 U.S. 787 (1977).

419. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1693–94 (2017) (stressing that, unlike *Fiallo*, "[t]his case . . . involves no entry preference for aliens" but instead concerned a claim of derivative citizenship).

420. *See, e.g.*, Nat'l Coal. for Men v. Selective Serv. Sys., 141 S. Ct. 1815 (2021) (mem.) (denying a petition for certiorari that urged the Court to overrule *Rostker v. Goldberg*); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020) ("[W]e need not consider the request by some of the parties that we overrule the much-criticized 'Insular Cases' and their progeny."); *Morales-Santana*, 137 S. Ct. at 1693 (merely denying that "*Nguyen v. INS* . . . controls this case"); Sugarman v. Dougall, 413 U.S. 634, 645 (1973) (concluding that *Ohio ex rel. Clarke v. Deckebach* was "not to be considered as controlling here"); Hitai v. Immigr. & Naturalization Serv., 382 U.S. 816 (1965) (mem.) (denying certiorari in a case that directly implicated *Chae Chan Ping v. United States*); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953) ("We put to one side the problems presented by the *Davis* [*v. Massachusetts*] case and its offspring.").

421. *See Kavanaugh Hearing*, *supra* note 115, at 437 (statement of Hon. Brett M. Kavanaugh) (observing that, even though "there was not a specific case that arose" placing *Korematsu*'s validity squarely at issue, "it was important for the Supreme Court to nonetheless recognize that . . . *Korematsu* was no longer good law and to note that").

422. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 56 (1999).

423. Daniel Epps & William Baude, *Triple Bank Shot*, DIVIDED ARGUMENT, at 41:11 (June 18, 2021), https://dividedargument.com/episodes/triple-bank-shot-b6kTU7P_/transcript [perma.cc/ECQ2-VL4E] (seemingly coining the term).

424. *See* Derieux & Weare, *supra* note 356, at 295 ("At the Supreme Court, however, most parties [in *Aurelius*] shifted their strategies, focusing less on the *Insular Cases*.").

425. 335 U.S. 464, 467 (1948).

426. Craig v. Boren, 429 U.S. 190, 210 n.23 (1976).

427. Pace v. Alabama, 106 U.S. 583, 585 (1883).

men and women of different races.[428] The Court overruled a precedent upholding the criminalization of certain generically defined sex acts[429] in a case involving a ban on only "homosexual" intimacy.[430] And the Court has clarified that a precedent upholding the disfranchisement of persons advocating polygamy was rendered "no longer good law" by a decision invalidating a state's criminal-syndicalism statute.[431] Most famously, the justices insist—not wholly accurately—that *Brown v. Board of Education* overruled *Plessy v. Ferguson*,[432] notwithstanding the vast factual expanse between railcars and elementary schools.

As the Court's own practice thus demonstrates, precedents can be scrapped successfully even if their associated legal provisions are relevantly dissimilar. For this reason, *Hawaii*'s treatment of *Korematsu* cannot have been dicta simply because the Trump administration did not literally subject an entire racial group to internal exile. The contextual echoes between past and present will sometimes render a precedent germane, meaning that its applicability is a question that fairly arises within the Court's decisional process.[433] When this happens, two options are available. The Court can simply disclaim reliance on the earlier precedent, citing relevant factual distinctions. This option preserves the case's vitality within its existing scope, however narrow. Alternatively, the Court can "reach out" and repudiate the precedent—what one might call a *discretionary overruling*. Option two cuts against the Court's usual practice of avoiding unnecessary constitutional holdings.[434] But it will sometimes be justified in order to dislodge antiquated decisions whose survival may threaten greater systemic harms than would an isolated lack of restraint.[435]

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428. McLaughlin v. Florida, 379 U.S. 184, 188 (1964) (confirming that *Pace* could no longer be cited "as controlling authority").

429. Bowers v. Hardwick, 478 U.S. 186, 188 n.1, 196 (1986).

430. Lawrence v. Texas, 539 U.S. 558, 564, 578 (2003); *id.* at 582 (O'Connor, J., concurring in the judgment) ("This case raises a different issue than *Bowers* . . . .").

431. Romer v. Evans, 517 U.S. 620, 634 (1996) (citing Davis v. Beason, 133 U.S. 333 (1890) and Brandenburg v. Ohio, 395 U.S. 444 (1969)).

432. For three assertions to this effect, see Doe v. United States, 141 S. Ct. 1498, 1500 (2021) (Thomas, J., dissenting from the denial of certiorari); Ramos v. Louisiana, 140 S. Ct. 1390, 1412 (2020) (Kavanaugh, J., concurring in part); and Citizens United v. FEC, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring).

433. *See e.g.*, *Lawrence*, 539 U.S. at 575 ("The central holding of *Bowers* has been brought in question by this case, and it should be addressed.").

434. *See* Randy J. Kozel, *Stare Decisis as Authority and Aspiration*, 96 NOTRE DAME L. REV. 1971, 1977 (2021) ("The Justices regularly decline invitations to revisit their constitutional precedents when reconsideration is unnecessary to the disposition of the case before them.").

435. *See* Derieux & Weare, *supra* note 356, at 301 ("[M]inimalism may often be appropriate or even prudent. But there is nothing normal about the *Insular Cases*."); Siegel, *supra* note 176, at 706 ("Whether a case calls for restraint or decisive action or something in between seems less a theoretical question and more a matter of tact, context, and judgment."). I thank Richard Re for helping to frame my analysis in this paragraph.

Importantly, Article III does not require the Court to continue sustaining moribund precedents through aimless acts of distinguishing and obfuscation. I am not proposing that the justices issue advisory opinions by declaring their legal views outside of "a genuine, live dispute between adverse parties."[436] Rather, I consider what the Court may say about its past decisions *when* the case-or-controversy requirement is satisfied. This implicates the familiar distinction between holding and dictum, not any constitutional check on reason-giving. When the Court's own precedent is at issue, the overriding question is whether the legal community will treat any putative overruling as authoritative. Accordingly, whether a self-styled repudiation is actually dictum seems less an internal property of the opinion's text and more a function of relevant social practices. History suggests that those practices leave significant room for effective overrulings absent conditions of strict necessity.

*Korematsu*'s fate notwithstanding, the justices are often far too hesitant to reexamine precedents embodying values that are deeply out of step with modern American life. What is needed is not a bold rethinking of the judicial role, but a shift in the justices' disposition to engage in this task. Dramatic societal change need not preclude the Court from uprooting its most antiquated pronouncements. Otherwise, for example, the chronic absence of eugenic-sterilization laws would inhibit the justices from forswearing future reliance on *Buck v. Bell*[437]—and directing all other legal actors to do the same. As President Ford understood, unforced acts of abrogation can "make clear our commitment[s]" as a nation by denying that "there may yet be some life" in odious legal authorities.[438]

When petitions for certiorari do invite the Court to reconsider increasingly stale precedents, the justices should embrace those opportunities to adjudicate the issues on a complete and fully vetted record. The Court did just that by granting certiorari in *Lawrence v. Texas*.[439] By definition, a full-fledged circuit split cannot arise if lower courts adhere to clearly applicable Supreme Court precedent. Such was the case in *Lawrence*; the Texas Court of Criminal Appeals had dutifully applied *Bowers v. Hardwick*, which upheld the constitutionality of a state's prohibition on nonvaginal intercourse.[440] An aberrant enforcement decision gave the justices an occasion to revisit *Bowers*—an opportunity whose rarity and importance were underscored by "social developments" since 1986.[441] Had the Court denied certiorari in *Lawrence*, *Bowers*

436. Carney v. Adams, 141 S. Ct. 493, 498 (2020).

437. 274 U.S. 200 (1927).

438. Ford Proclamation, *supra* note 325.

439. 539 U.S. 558 (2003). I take no position on whether an ethical commitment against prosecuting same-sex intimacy had developed by the time the Court granted certiorari in *Lawrence*, though the point is at least arguable. *See generally* Sunstein, *supra* note 170.

440. 478 U.S. 186 (1986); *see* Lawrence v. State, 41 S.W.3d 349, 354–55, 360–61 (Tex. Ct. App. 2001). The Court characterized this reliance as entirely "proper," "*Bowers* then being authoritative." Lawrence v. Texas, 539 U.S. 558, 563 (2003).

441. Petition for a Writ of Certiorari at 9, *Lawrence*, 539 U.S. 558 (No. 02-102).

would have continued "demean[ing] the lives of homosexual persons"[442] for at least several more years, and perhaps indefinitely.

Even without direct invitations by litigants, the Court should seek out occasions to excise precedents that are little more than cankers on constitutional doctrine. At a minimum, the justices—whether individually or collectively—could overtly question the status of culturally obsolete precedents. The very awareness raised by these statements could help generate momentum for full-scale repudiation and ideas for how best to achieve it. Such stark signals from the Court might also discourage the executive branch from relying on authorities now viewed as morally egregious. As was true of *Korematsu*, the government's conspicuous refusal to cite seemingly advantageous precedents can help crystallize emerging norms and instill further confidence in the Court's perceptions of aversive ethos.[443] And forceful articulation of widely shared commitments—with or without full precedential backing—can be a powerful tool for implanting those norms throughout the federal and state judiciaries.

## CONCLUSION

Written law does not always embody current values. It may instead be an embarrassing artifact of bygone beliefs. As this Article has shown, the Supreme Court's constitutional precedents continue to abide numerous restraints and impositions that our country abandoned long ago. Yet culturally obsolete precedents are, for that reason, exceedingly unlikely to be challenged head-on. Nor can the Court's familiar stare decisis factors fully explain what ails grossly outmoded decisions. Some precedents are not simply illogical, empirically wanting, or doctrinally passé—they are un-American.

The "court of history" device is a potential solution to both problems. But the justices need not resort to exotic tropes to channel national norms or phase out precedents perceived as intolerable. A posture of reasoned decisionmaking also carries important systemic advantages. By avoiding court-of-history rhetoric, the Court can fend off needless erosion of its horizontal and vertical stare decisis frameworks. It can subject ethical pronouncements to the analytical scrutiny they deserve. And it can carefully consider whether perceived societal advances should be cemented at all costs. In casting aside mockeries of our national character, the Court need not sacrifice its own institutional characteristics.

442. *Lawrence*, 539 U.S. at 575.

443. *See* Pearlstein, *supra* note 43, at 615 (observing that "neither Justice Department litigators nor OLC lawyers invoked [*Korematsu*]" in the years following the 9/11 attacks); Michael Kagan, *Is the Chinese Exclusion Case Still Good Law? (The President Is Trying to Find Out)*, 1 NEV. L.J.F. 80, 91 (2017) (noting that "many government lawyers appear to be reluctant to cite" *Chae Chan Ping*).