THE COURT OF HISTORY

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Stare decisis is a fixture of the American legal system. But precedent's intrinsic durability has a darker side. In constitutional rulings both notorious and obscure, the Supreme Court has upheld measures now regarded as deeply repugnant to our national values. And because the practices that triggered those holdings are unlikely to recur,[1] the Justices may lack clear opportunities to correct their predecessors' ugliest mistakes. *Korematsu v. United States* (1944) is a prime example. Justly reviled for sacrificing constitutional rights to perceived military necessity, *Korematsu* long lingered as an institutional embarrassment of the first order. Yet until recently, the Court had never formally retired the decision, having never been called upon to do so.

In *Trump v. Hawaii* (2018), Justice Sotomayor drew upon that case's "sordid legacy" in accusing her colleagues of "redeploy[ing] the same dangerous logic underlying *Korematsu*."[2] Chief Justice Roberts, speaking for the Court, recoiled at this comparison. Whereas President Trump's suspension order was "well within executive authority," the race-based exclusion order upheld in *Korematsu* was both "objectively unlawful" and "morally repugnant."[3] Yet the dissent's invocation of *Korematsu* presented the Court an "opportunity to make express what is already obvious": that *Korematsu* "was gravely wrong the day it was decided" and "has been overruled in the court of history."[4]

The Court's belated renunciation of *Korematsu* was highly unorthodox in nature. Neither party requested that *Korematsu* be overruled; the Court sought no briefing—and heard no argument—on the precedent's continuing validity. The majority opinion in *Hawaii* 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. Instead, the Court spoke of *Korematsu*'s overruling as a fait accompli. And by attributing this feat to a metaphorical entity, the Court implied that external cultural forces—with no formal judicial input—can transform a previously sanctioned practice into one that is "obvious[ly]" unlawful.

Many observers regarded this development as a bizarre one-off, an improvised judicial erasure of a uniquely problematic precedent. But that perspective strikes me as shortsighted. The Court's disavowal of *Korematsu* likely carries generally applicable lessons about its proper relationship toward grossly outmoded decisions. In this project, I will take seriously the idea of a regularized "court of history," imagining how the Justices might summon its authority to repudiate precedents now viewed as obnoxious to the very idea of America. In this way, considerations of national ethos would be deployed not as an argumentative resource,[5] but as an adjudicative trump—one strong enough to displace the Court's well-established stare decisis norms.

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Which types of precedents might warrant such decisive condemnation? *Hawaii* linked *Korematsu*'s fate to the "morally repugnant" nature of the order it upheld. The Court likely meant to

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[1] *See generally* D. Carolina Núñez, *Dark Matter in the Law*, 62 B.C. L. REV. __ (forthcoming 2021).

[2] 138 S. Ct. 2392, 2448 (Sotomayor, dissenting).

[3] *Id.* at 2423 (majority op.).

[4] *Id.*

[5] *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 144, 162 (1982).

refer to a shared civic conception of moral repugnance, one grounded in the most elemental lived commitments of America's constitutional order.[6] Decisions validating various forms of invidious discrimination would seem to satisfy this standard. And insofar as the court of history abhors exercises of coercive power that would now be viewed as un-American, it could also be poised to "overrule" precedents allowing for restrictions that would upend present-day notions of what it means to live a free life. According to Justice Kavanaugh, for example, "[t]he court of history has rejected" governments' invocation of emergency powers "to override equal-treatment *and free-speech principles*."[7]

In identifying potential casualties of the court of history, I will aim to build out a vastly expanded constitutional anticanon. For my purposes, it is irrelevant whether a decision has attained near-universal familiarity or traditionally been employed as a negative archetype;[8] what matters is its sheer incompatibility with core assumptions of modernity. An astounding number of Supreme Court cases that have never been disavowed or superseded by constitutional amendment arguably fit this description. Here are several highlights (and *please* feel free to share others that come to mind!):

- *Racial Injustice*. The Court has upheld a curfew that applied only to persons of Japanese ancestry;[9] upheld race-based criteria for the admission,[10] expulsion,[11] and registration[12] of aliens; upheld a federal law entitling Native Americans to compensation if their property was stolen or harmed by a "white person";[13] upheld a municipality's decision to close all of its public pools rather than desegregate them;[14] held that literacy tests are presumptively constitutional;[15] permitted states to disqualify potential jurors on the basis of perceived character traits;[16] refused to remedy blatant race-based disenfranchisement;[17] and invoked the dormant-commerce principle to stymie a state's effort to integrate its common carriers.[18]

- *Sex Discrimination*. The Court has upheld a federal immigration law distinguishing between natural fathers and mothers with respect to family reunification,[19] and upheld a federal law requiring only males to register for the draft.[20]

- *Sexual-Orientation Discrimination*. The Court has upheld a federal law that excluded homosexuals from entering the United States.[21]

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[6] *See* Kerry v. Din, 576 U.S. 86, 96 (2015) (plurality) (asserting that "modern moral judgment rejects" the female-subordinating practice of coverture); United States v. Dege, 364 U.S. 51, 53 (1960) (declining to interpret a federal statute in a way that would "impl[y] a view of American womanhood offensive to the ethos of our society").

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

[8] *See generally* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

[9] *See* Hirabayashi v. United States, 320 U.S. 81, 105 (1943).

[10] *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

[11] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 707–11 (1893).

[12] *See id.* at 714.

[13] *See* United States v. Perryman, 100 U.S. 235, 237 (1880).

[14] *See* Palmer v. Thompson, 403 U.S. 217, 228 (1971).

[15] *See* Guinn v. United States, 238 U.S. 347, 366 (1915); Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 52–53 (1959).

[16] *See* Gibson v. Mississippi, 162 U.S. 565, 589 (1896); Franklin v. South Carolina, 218 U.S. 161, 167–68 (1910); Carter v. Jury Comm'n of Greene Cty., 396 U.S. 320, 335–37 (1970).

[17] *See* Giles v. Harris, 189 U.S. 475, 488 (1903).

[18] *See* Hall v. DeCuir, 95 U.S. 485, 488–90 (1878).

[19] *See* Fiallo v. Bell, 430 U.S. 787, 797–99 (1977).

[20] *See* Rostker v. Goldberg, 453 U.S. 57, 83 (1981).

[21] *See* Boutilier v. INS, 387 U.S. 118, 123–24 (1967).

- *Bodily Integrity*. The Court has upheld a state law requiring the sterilization of inmates with certain hereditary disabilities,[22] and rejected a challenge to corporal punishment in public schools.[23]

- *Compulsions*. The Court has upheld a state law requiring all able-bodied persons to perform uncompensated labor on public roads,[24] and held that persons who enter into private contracts to serve on vessels may be imprisoned if they do not uphold their end of the bargain.[25]

- *Sexual Liberty*. The Court has asserted that fornication may be criminalized,[26] and has strongly suggested (as would seem to follow ineluctably) that adultery may be criminalized.[27]

- *Voting Rights*. The Court has asserted that unmarried persons may be denied the right to vote.[28]

- *Expression*. The Court has upheld a state law criminalizing the use of the American flag on articles of merchandise;[29] held that Congress may exclude from the mails material that it deems injurious to the public morals;[30] held that judges may issue contempt orders to restrain commentary on ongoing proceedings;[31] allowed prosecutions for political speech deemed to have subversive tendencies;[32] upheld an ordinance requiring a permit to speak in a public park as part of a comprehensive regulation of municipal property;[33] and held that aliens may be deported for their previous membership in groups that were lawful at the time, even if those groups' aims were unknown to them.[34]

- *The Police Power*. The Court has held that states and localities may, in exercising the police power, criminalize the purchase and sale[35]—and even the personal possession[36]—of alcohol; criminalize the operation of billiard halls, bowling alleys, and other places of public amusement;[37] prohibit the sale of bread loaves not conforming to exact sizes and weights;[38] require "wom[e]n of lewd character" to reside (and not merely work) within specified areas;[39] entirely exclude from their territorial limits persons regarded as "moral pestilence[s]" or otherwise dangerous;[40] criminalize contracts conveying an option to purchase any commodity in the future;[41] and require spousal approval for the disposition of advance wages.[42]

- *Grandfathering*. The Court has accorded residual effect to earlier arrangements that offend our most

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[22] *See* Buck v. Bell, 274 U.S. 200, 207 (1927).
[23] *See* Ingraham v. Wright, 430 U.S. 651, 683 (1977).
[24] *See* Butler v. Perry, 240 U.S. 328, 332–33 (1916).
[25] *See* Robertson v. Baldwin, 165 U.S. 275, 288 (1897).
[26] *See, e.g.*, Davis v. Beason, 133 U.S. 333, 343 (1890); Eisenstadt v. Baird, 405 U.S. 438, 449 (1972).
[27] *See* S. Surety Co. v. Oklahoma, 241 U.S. 582, 586 (1916); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 n.15 (1973).
[28] *See* Murphy v. Ramsey, 114 U.S. 15, 43 (1885).
[29] *See* Halter v. Nebraska, 205 U.S. 34, 45–46 (1907).
[30] *See, e.g.*, *Ex parte* Jackson, 96 U.S. 727, 736 (1878); Public Clearing House v. Coyne, 194 U.S. 497, 507–08 (1904).
[31] *See* Patterson v. Colorado, 205 U.S. 454, 462–63 (1907).
[32] *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919); Debs v. United States, 249 U.S. 211, 215 (1919); Frohwerk v. United States, 249 U.S. 204, 206–07 (1919); Abrams v. United States, 250 U.S. 616, 619 (1919).
[33] *See* Davis v. Massachusetts, 167 U.S. 43, 47–48 (1897).
[34] *See* Galvan v. Press, 347 U.S. 522, 531–32 (1954).
[35] *See, e.g.*, Bartemeyer v. Iowa, 85 U.S. 129, 133 (1873); Crowley v. Christensen, 137 U.S. 86, 91 (1890).
[36] *See* Crane v. Campbell, 245 U.S. 304, 307–08 (1917).
[37] *See* Murphy v. California, 225 U.S. 623, 629–30 (1912).
[38] *See* Schmidinger v. City of Chicago, 226 U.S. 578, 587–88 (1913).
[39] *See* L'Hote v. New Orleans, 177 U.S. 587, 597 (1900).
[40] *See, e.g.*, City of New York v. Miln, 36 U.S. 102, 142 (1837); Japanese Immigrant Case, 189 U.S. 86, 97 (1903).
[41] *See* Booth v. Illinois, 184 U.S. 425, 429–31 (1902).
[42] *See* Mutual Loan Co. v. Martell, 222 U.S. 225, 233–34 (1911).

basic national values. These decisions have enabled slave merchants to recover the full value of buyers' promissory notes for sales predating the Thirteenth Amendment;[43] forbidden the enforcement of contracts entered into by persons who were enslaved at the time;[44] applied a state's former coverture law in determining a federal agency's obligations under a loan contract;[45] and invoked the Expatriation Act of 1907—under which American women who married foreigners lost their citizenship—as evidence that an asserted right was not "deeply rooted in this Nation's history and tradition."[46]

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The above examples are hardly a monolith. They vary greatly with respect to their future capacity to inflict tangible and expressive harms. Some are more odious than others, and some may well have been decided "correctly" under premodern doctrinal frameworks and factual assumptions. But each decision stands for a proposition that—I think people would overwhelmingly agree—has no place in today's America.

I expect to argue that the court-of-history technique can be a normatively desirable one. Such summary repudiation may be the only way to eliminate vestigial precedents that do little more than blacken the Court's reputation, prolong doctrinal incoherence, and embolden bad actors. If recent years have taught us anything, it is that shame and forbearance cannot be relied on to forestall self-serving or tragically misguided measures that are ostensibly lawful. And it should not be lost that the difference between a formally renounced precedent and a living, breathing one may be a stroke of historical dumb luck (such as a single aberrant enforcement decision). Had circumstances been slightly different, the above list of timeworn precedents could have been even more compelling. Finally, court-of-history moments—in which the Justices come together to make a clean break from past benightedness—could help bolster the Court's stature in the eyes of a polarized public.

One might worry that channeling the court of history will inspire the Justices to issue advisory opinions. But the practice of reasoned explanation almost always foreordains the outcomes of at least some hypothetical disputes. In fact, the Justices' articulation of legal principles often entails a stark retreat from the central premises of past decisions presenting materially different facts.[47] So *Hawaii*'s treatment of *Korematsu* cannot have been improper simply because the Trump administration did not literally engage in race-based exclusion. True, the case-or-controversy requirement must place some limits on the Justices' ability to discard outmoded precedents. I am not urging the Court to issue a freestanding order implementing the varied lessons of history. But I think the Justices have been far too cautious in this respect. Several of the cases included above have survived only because the Court opted to distinguish (rather than renounce) them, pointlessly punting on their continuing force. Plausible opportunities will arise again, and they should be seized when they do.

To my mind, the more serious objection is that the court-of-history device could be used to evade the constraints of precedent—and even of ordinary legal reasoning—by inflating the contestable moral judgments of unelected jurists. What, exactly, does our national ethos consist of? Which precedents are not just wrong, but *offensively* wrong? Why are courts reliable barometers of un-Americanness? And won't this just lead to *Lochner* without even the façade of legalism?

These are serious questions, but ones that should not doom the practice entirely. The Justices have been pronouncing on our national character and values since the Founding, and they will surely

[43] *See, e.g.*, White v. Hart, 80 U.S. 646, 654 (1872); Osborn v. Nicholson, 80 U.S. 654, 661–63 (1872).
[44] *See* Hall v. United States, 92 U.S. 27, 30–31 (1875).
[45] *See* United States v. Yazell, 382 U.S. 341, 352–53 (1966).
[46] *See* Kerry v. Din, 576 U.S. 86, 96 (2015) (plurality).
[47] *See* Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865, 923–24 & n.239 (2019).

continue to do so. Although many of their observations now seem laughably archaic, others have rightly commemorated our society's rejection of grave injustices. Notably, these utterances usually emanate from interpretations of *constitutional* norms and traditions, rather than from freestanding moral inquiries. And other actors can reduce the Court's epistemic burden in identifying fact patterns whose reoccurrence would now be intolerable. (Consider *Korematsu* and *Buck v. Bell*, whose underlying programs eventually prompted formal apologies and monetary compensation.)

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I plan to conclude the paper with two broader reflections. First, it is doubtful that only the Court's legal rulings should suffer condemnation in the court of history. Those decisions, after all, merely ratified antecedent breaches of our deepest values and expectations; they did not originate them. At a minimum, the Court's reprobation could also extend to unreviewed statutes[48] and executive actions[49] at the federal and state levels. Legislative, executive, and judicial actors throughout the country could also usefully contribute to this conversation—one that would help clarify which types of historical practices should not be invoked as evidence of the Constitution's meaning.

Second, and perhaps more controversially, overrulings in the court of history are but one manifestation of the irresistible pull of national ethos in constitutional decisionmaking. In her recent confirmation hearings, then-Judge Barrett refused to evaluate the correctness of any precedents other than a small group of well-recognized "superprecedents"—decisions whose overruling would be "unthinkable" because of the "structural foundational principles" they established. But one could readily identify scores upon scores of "ethical" superprecedents—ones whose repudiation would be equally inconceivable in light of the on-the-ground freedoms that Americans have come to enjoy. For example, we no longer seriously debate whether contraception,[50] same-sex intimacy,[51] or foreign-language instruction[52] should be criminalized; whether crossing state lines should be a taxable event;[53] whether the private possession of obscene material warrants incarceration;[54] whether peonage should be a valid method of insulating employers from monetary loss;[55] whether torture-induced confessions should be admissible;[56] or whether political ballots should denote candidates' ethnicities.[57] Precedents like these are ones that all judicial nominees and constitutional theorists should be pressured into accepting, because they are every bit as enduring as the better-known examples of paper money, Social Security, and integrated schooling. And I think it would trivialize these value-laden realities to accommodate them solely through the dry, legalistic concept of reliance interests.

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[48] *See* N.Y. Times v. Sullivan, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in Court, the attack upon its validity has carried the day in the court of history."); Illinois v. Krull, 480 U.S. 340, 362–63 (1987) (O'Connor, J., dissenting) (claiming that "history's court has vindicated" James Otis's attack on "the ancient Act of Parliament authorizing indiscriminate general searches"); Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) ("[T]he Alien Friends Act . . . is one of the most notorious laws in our country's history."); Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1785–86 (2019) (Thomas, J., concurring) (observing that "[e]ugenic arguments" and "[t]he perceived superiority of the white race" precipitated the Immigration Act of 1924).

[49] *See* United States v. U.S. Dist. Ct., 407 U.S. 297, 329 (1972) (Douglas, J., concurring) (denouncing the "hysteria which surrounded . . . the Palmer Raids"); Ziglar v. Abbasi, 137 S. Ct. 1843, 1884 (2017) (Breyer, J., dissenting) ("History tells us of far too many instances where the Executive . . . Branch took actions during time of war that, on later examination, turned out unnecessarily and unreasonably to have deprived American citizens of basic constitutional rights.").

[50] *See* Griswold v. Connecticut, 382 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

[51] *See* Lawrence v. Texas, 539 U.S. 558 (2003).

[52] *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

[53] *See* Crandall v. Nevada, 73 U.S. 35 (1868).

[54] *See* Stanley v. Georgia, 394 U.S. 557 (1969).

[55] *See* Bailey v. Alabama, 219 U.S. 219 (1911).

[56] *See* Brown v. Mississippi, 297 U.S. 278 (1936).

[57] *See* Anderson v. Martin, 375 U.S. 399 (1964).