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Every legal order that aspires to be called just is held together not only by principles of justice but also by archetypes of morally reprehensible outcomes, villains as well as heroes. Chief Justice Roger Taney, who believed himself to be a hero solving the great moral question of slavery in the *Dred Scott v.Sanford* case, is today detested for trying to impose a racist, slaveholding vision of the Constitution upon America. Likewise, the knowledge that he might wind up on the wrong side of history in part explains the anguished quality of Justice Felix Frankfurter's dissent in the coerced flag-salute case, *West Virginia State Board of Education v. Barnette*, for he had not only lost the argument over what a postwar liberal order should look like but also saw the consensus represented in his earlier opinion on the issue collapse as his colleagues abandoned him for Robert Jackson's rights-centered vision of justice.

But what exactly renders a particular legal outcome, which surely begins as a good-faith effort to do the right thing, a despised precedent over time? Some judicial rulings are infamous because they are one day cast aside with great fanfare, as *Bowers v. Hardwick* was by Justice Anthony Kennedy in *Lawrence v. Texas* or the *Dred Scott* case was through consistent denunciation by abolitionists and a dramatic defeat for the Slave Power during the Civil War. But other precedents are treated disdainfully through a more nuanced process of shunning or erosion, so that they remain formally alive but shamble about, a vestige of their former selves—*Korematsu v. United States*, *Roe v. Wade*, and *Miranda v. Arizona* might fall into this category.

This is true even though there may have been Herculean efforts by judges to rescue some aspect of each of these decisions. Whether renounced openly or surreptitiously, each of these precedents has been deeply marked by public condemnation.

This chapter investigates the politics of repudiation—the sociolegal dynamics by which losers to a contest over the meaning of the U.S. Constitution seek to castigate and delegitimate a controversial outcome. It will ask what actions can spur the sense of moral outrage with a judicial ruling, as well as what components are necessary to transform a precedent into an exemplar of public regret. The politics of repudiation begins with the notion that every judicial ruling is a first draft, a sketch of legal and political values. Judges' words are only fragments, composed by a single collection of influential individuals reading a legal text for a particular moment in time. What a judicial ruling means in the social world depends on what it becomes. Along these lines, the command to obey that is intrinsic to every ruling is satisfied through compliance by those who are immediate parties to the controversy; no one else is obliged to endorse the constitutional vision sketched by judges who presided over that dispute. The republican and federalist design features of our constitutional order therefore join with the cultural processes on which every legal system depends to foster a wide range of actions to either entrench or contest a particular vision of law.

What matters more than the ideas contained in a judicial opinion, then, is what average citizens and elites do with that legal decision once it reenters the stream of democratic discourse and, if they disagree with it, what steps they take to inscribe a very different narrative about that decision in the public imagination. Much of this work of public repudiation is done through unglamorous politics: activism of civic groups and church organizations that educates citizens and the enactment of local policies, state laws, and other texts through which the people turn a

legal ruling into an object of obloquy. National party dynamics can play a significant role by sharpening and broadening the politics of repudiation. For instance, by making opposition to *Roe* a central tenet of the party platform and political identity, the Republican Party helped make *Roe* reviled among a generation of conservative lawyers who now hold a majority of seats on the United States Supreme Court. These efforts have put detractors on the cusp of codifying a final victory should the Court overrule that decision.

Interventions by elites at key moments can harness institutional advantages. Along these lines, consider the efforts by government lawyers to describe the first flag salute case, *Minersville School District v. Gobitis,* as a tragic error fostering a wave of violence against Jehovah's Witnesses, or Congress's enactment of a reparations bill for Japanese Americans interned during World War II. These actions illustrate that, insofar as the politics of repudiation entail reshaping legal culture, having ideologically friendly allies in well-placed positions is critical for turning an adverse ruling to an infamous decision.

Introduction

Disputes in the courts come and go, but the rule of law is supposed to stay. Decisions in cases, which represent the rule of law in action, are to be treated by jurists as links on a chain. Once in a while, a link becomes tarnished or weakened and must be repaired or replaced.

But what makes a precedent no longer worthy of respect—infamous, even—and therefore something that must be rejected? If one simply takes at face value how judges talk among themselves about the binding nature of the cases they decide, then it is strictly a matter of jurisprudence. A decision settles a controversy through the establishment and usage of a legal rule that represents, in the words of Oliver Wendell Holmes, "what is then understood to be

convenient."[1] That rule is invoked as a matter of routine in the resolution of concrete disagreements between competing claimants and later gets adjusted when new information shows the rule to be impractical in some important way. If a rule's utility has become severely compromised—say, because a philosophical or empirical assumption has been revealed to be erroneous or application of the rule actually works manifest injustice—judges might substitute a new rule entirely and scrap the old one.

This is more or less the picture painted by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[2] when the plurality of Justices O'Connor, Souter, and Kennedy struggled to explain why they have decided to stick with *Roe v. Wade* even though they might have decided the constitutional question differently as a matter of first impression. They said that the decision whether to abide by stare decisis is "customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overrule a prior decision . . . and to gauge the respective costs of reaffirming and overruling a prior case."[3] After weighing the salient factors, the plurality deemed it worthwhile to reaffirm "the essence" of *Roe* because of the intrinsic importance of the right and the reliance interests of rights-bearing citizens, while completely revamping the doctrinal rule meant to safeguard those values.

This description of precedent largely from the internal perspective was originally rendered at the height of legal realism by men like Oliver Wendell Holmes, Benjamin Cardozo, and Louis Brandeis. At that time, the striking portrayal of judicial interpretation as a creative enterprise was intended to liberate the judge from the formalistic methods of the past and awaken him to his own power to shape the law.[4] As an ideal, this vision has largely remained intact as an exemplar of the judicial function. Even so, where it misleads greatly is in conveying the impression that the jurist operates at the center of a legal and political universe that he himself

can exclusively control: He dictates what methods to use; he decides when to peer out into the world to see what has happened beyond the halls of justice that might have some bearing on a case; and he alone calculates which empirical details and "felt necessities of the time" and "prevalent moral and political theories" to endorse.[5] This is a thrilling image: what judges assemble, they alone can carefully disassemble.

But to anyone who pays close attention to these kinds of things, this judge-centered account is foolishly and dangerously incomplete. It rests, first and foremost, on the untenable assumption that a national interpretive community exists. Yet this is incompatible with the mechanics of the Constitution's original design and deeply ahistorical from the vantage point of the law's political development. In truth, there is no single interpretive community, but legion. These communities overlap with one another and are loosely bound by a handful of common texts, but they are characterized by different understandings of those texts, often divergent missions, and thus disparate warrants for political action.[6]

These overlapping communities aren't coordinated, but they take cues from one another and borrow legal ideas as they see fit while rejecting others. Some of these jurisdictions and figures enjoy formal recognition and authority, such as states and judges, whereas others enjoy only the interpretive status they can exert informally, working as groups bound by mutual interest or affinity. Any gathering of Americans that expresses "love of order and of formalities," as Tocqueville observed, can make practical meaning of the Constitution for their own lives.[7]

When it comes to the role of precedent over constitutional matters, the internal perspective leaves us with the false impression that a case represents merely a static rule rather than a political lesson imbued with social meaning. The judge-centered vision of precedent reaches the limits of its explanatory power precisely at the moment it is unable to adequately

explain *how* certain precedents come to be perceived as failures—especially when the time between a legal rule's creation and its demise is extremely short. Because a legal rule is closely associated with the case in which it was originally created, the discrediting of one tends to discredit the other.

It turns out that all the *Casey* plurality describes is the final step in a complex process by which a precedent becomes embraced or discarded over time. In other words, it identifies only the public reasons judges give when they are willing to acknowledge their prior art to be a failure, and nothing more. This partial view of the common law, too, is bound up with the Supreme Court's own incessant need to create and re-create the conditions of its own adjudicative power. The Court's instinct toward self-preservation treats it as dangerous to acknowledge external competitors for interpretive authority except under the conditions that will be most conducive to the preservation of its own prerogative. So, by the time that a majority of justices is willing to acknowledge that an earlier case is deeply flawed, even reviled, most of the work from the politics of repudiation has actually been done elsewhere.

Missing in this account, therefore, is any realization that legal decisions are part of broader, more unruly institutional and social dynamics that lie beyond the capacity of judges to govern. And it's those processes of exaltation and dethronement that require far more effort to uncover. We have to read between the lines to detect the things that judges refuse to admit for fear of blurring the lines between law and the rest of the social world: the structure of electoral politics, popular and sometimes deviant culture, patterns of grassroots mobilization, and alternative modes of self-organization. We also have to look elsewhere for evidence as to how elites and ordinary citizens can leverage their proximity and influence to demonstrate to judges that their view of the world is fundamentally wrong or that circumstances have changed

drastically, or that the consequences of a ruling have been disastrous.

The Contours of Infamy

There is another, more holistic way of thinking about how a precedent can become "infamous"—that is to say, irrelevant to decision making and vulnerable to repudiation—beyond the simple explanation that judges suddenly come to their senses one day. It starts with the recognition of interpretive pluralism as a basic fact about our system of government, along with the necessity of social assent: every decision requires active acceptance by key actors and acquiescence from everyone else for it to be enforced. Even more helpful is when legal principles take hold of the people's imaginations. This brute fact that an act of interpretation depends on social acceptance is rooted in judicial weakness, which the Constitution's framers appreciated as a matter of original design.[8] Interpretation is the judiciary's primary power, but it remains a practice that must be constantly justified and policed. Indeed, the point can also be generalized: every judicial utterance requires social support for it to become, in a practical sense, law.

Several inferences flow from the realization that the best evidence of a legal text's survival rate can be found in others' responses: Nonlegal actors can exert a significant impact on subsequent judicial outcomes; they can also shape the legal rationales and political values that judges endorse, as well as the terminology judges employ to present the stakes of a controversy. When things go well for the work of judges, a case can be canonized through politics.[9] When things don't go so well, politics can not only deny a precedent canonical status but also lead to its designation as part of the anticanon: a collection of despised rulings and unfortunate events that serve as negative lessons for a polity.

In fact, every judicial decision is best understood as having a life cycle, one in which the

legal text passes through different stages of existence and is exposed to a variety of influences from other social actors: (1) composition; (2) reaction; (3) adaptation; and (4) dissolution.[10] First, there is the initial stage of composition, which is itself a moment in time when a judge or a panel of judges creates a legal rule and amasses a set of political principles and empirical assessments. Second, after publication, a judicial ruling passes more broadly into the cultural and political realms, where partisans have the opportunity to embrace, internalize, resist, or reshape the ideas, assumptions, and rationales associated with the decision. Assuming a precedent has survived its initial encounter with postcomposition reaction, it will then enter a phase where jurists will adapt a legal rule to new information as well as political reactions. During both the period of reaction and adjustment, opponents of a precedent try to maximize judicial and political denunciations of a particular legal outcome. Negative citations to a case or discussions by judges, activists, or high-profile elected officials create the appearance of intense and broad social disagreement, as well as momentum for change. These signals are necessary to attract attention to a legal decision as well as create the impression of widespread disapproval.

To the extent that adjustments to precedent are made by judges in a manner that is culturally responsive and doctrinally sensible, these adaptations can prolong the life of a legal ruling. To the extent that incompatible values, concepts, priorities, or criticisms become closely associated with a case, desired canonization may be thwarted and the precedent may be heading down the path toward ignominy. If a consensus in favor of a decision can't be sustained, we enter the final phase, where decisionmakers openly discuss whether to dissolve the approach inaugurated by a decision, disavow the ruling, and try again.

There is no preordained length of time associated with any particular phase of meaning-making activity. Some healthy precedents survive for a long time and remain in a period of

adaptation. Others, such as *Roe*, which had already weathered an onslaught of antiabortion politics in the mid-1990s through clever and timely adaptation, seems once again on the verge of dissolution today with a Supreme Court that is openly hostile to reproductive liberties.

For some precedents, it is too early to tell what might come next, but there are reasons both cultural and institutional to think that it will survive for some time. The *District of Columbia v. Heller* decision on the Second Amendment, for instance, seems to be in a crucial period of reaction and adaptation, where an initially strong assertion of the right to individual gun ownership by the Court has given way to proregulatory realities, including the density of urban populations and persistent concern about mass shootings; a steady stream of gun crimes, suicides, and accidents; and technological advancements that make gun massacres far too easy to accomplish. At the same time, outright repudiation of the Supreme Court's gun-rights decision is unlikely to occur for the foreseeable future. Given a robust culture of gun ownership and the current makeup of the Court, it would take enormous efforts to go from a regulatory regime to a confiscatory one, or from an individualistic conception of gun rights to a collective right, that might culminate in the renunciation of *Heller*.

Party Politics as Engine of Doctrinal Subversion

It is impossible to find a more stunning instance of the power of public denunciation to erode a precedent than *Dred Scott*'s demise. Well before battlefield victories destroyed the claim of the planter class to absolute dominion over the African slave, and the Reconstruction Amendments inscribed new, postwar rights of national citizenship, other fateful public actions had been taken to deny crucial social support for the Supreme Court's strident rejection of black equality. Indeed, the inability of the *Dred Scott* ruling in 1857 to settle the slavery question definitively

fueled not only political anxiety on the part of slaveholders but also more aggressive efforts by abolitionists to unsettle the slaveholders' preferred conceptual connections between whiteness and ownership, with its concomitant destruction of the dignity of labor. Once martial conflict was joined, liberating the slaves overtook restoring the Union as the principal goal of the war. Eventually, a guarantee of rights to freed persons and enhanced congressional powers emerged as the Republican Party's paramount war legacy.[11]

Abraham Lincoln's own criticism of *Dred Scott* underscored that a judicial utterance represented only the first stage of a much longer process by which a case that involves a contest over fundamental values becomes "settled doctrine." He pointed to several factors that might lead a precedent to be rejected by the public:

> If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and has been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be . . . factious, nay, even revolutionary, to not acquiesce to it as a precedent. But when as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country.[12]

Notice that among the reasons Lincoln gave for refusing respect to a judicial ruling are that it departs from "public expectation," or is incongruous with tradition, or is based on erroneous "historical facts," or fails to represent a institutional consensus. Some of his concern

had to do with the solidity of agreement among the justices at the moment of decision, as well as whether there has been consistent enforcement of a principle over time. But far more of Lincoln's considerations entailed reasons why a legal ruling's "claims to the public confidence" might fall short once it enters the phases of popular reaction and adaptation.

Between judicial elaboration and political legitimation, then, are the many opportunities for citizens outraged by a ruling to engage the politics of repudiation. Lincoln provided a roadmap used so diligently by others. Opposition to *Dred Scott* linked militant abolitionists such as John Brown to centrists such as John Bingham, the principal author of the Fourteenth Amendment. These prominent figures warmed to the task at hand, arguing that Chief Justice Roger B. Taney's stridently proslavery opinion was steeped in bias, departed from natural rights theory, and made mincemeat of the careful wording of the Constitution when it came to slavery—an institution the Framers themselves refused to mention by name in the nation's charter.

And it wasn't merely Northern objections to the principles and assumptions contained in *Dred Scott* that denied that judicial exposition a strong claim to "public confidence." The fragility of the regime represented by *Dred Scott* was further confirmed by the flurry of secessionist activity on the part of slaveholding states in the Deep South at the mere election of a Northern Republican in Lincoln. The planter class may have agreed with every word of Taney's opinion, but they didn't believe for a moment the Court could enforce the ruling in the face of rising antislavery sentiment. Before Lincoln had even taken the oath of office, "fire-eaters" from the Deep South had decided to consolidate what remained of their resources and energy to embark on a new nationalist experiment founded explicitly on slavery. To save *Dred Scott*, the planter class would risk war and destruction to create an entirely new normative universe

dedicated to the proposition that the African slave was forever unequal.[13]

The dramatic choice of exit over voice by the slaveholding states—with political loyalty irreparably split by December 1860—left the Republican Party with exclusive control over the fate of the federal government's objectives and, after the Confederacy's surrender, the capacity to dictate the terms of the rebel states' readmission to the Union.[14] When the time came, partisan control of the apparatus of governance increased the odds that *Dred Scott*'s vision of constitutional order could be dismantled once and for all. Not even President Andrew Johnson, seen by the defeated South after Lincoln's assassination as the last "hope of a white man's government," could derail a Republican Party that found a way to unify over the goals of emancipation and citizenship for formerly enslaved people.[15]

This party-led process eventually drove the decimation of many of the cultural premises of *Dred Scott*—particularly the assumption that African slaves were "beings of an inferior order" and "altogether unfit to associate with the white race either in social or political relations."[16] The erosion of these sentiments occurred through black soldiers' participation in efforts to preserve the Union, nascent experiments in black landownership and popular sovereignty, political realignments, and a sweeping moral judgment ultimately rendered against those who tried to re-create nearly the same conditions of black subjugation in the immediate postwar years.

To be sure, *Dred Scott* would continue to be invoked during Reconstruction by forces opposed to civil rights for freed persons. No precedent ever truly dies but, through the processes of infamy, is instead relegated to the anticanon, where unrecognized or subordinate interpretive communities can still seek to keep its precepts alive. Governor Benjamin Perry of South Carolina, for instance, invoked the decision at a citizen convention to argue against the extension of suffrage to formerly enslaved people.[17] But there was nowhere close to national support for

Taney's claims that black people were incapable of citizenship or political rights. Enemies of equality would have to move to different terrain, both inside and outside of the courts, if they wished to keep black citizens in an inferior social or economic condition.

Today, *Dred Scott* is reviled by the mainstream community for articulating principles beyond the constitutional pale, and it is certainly taught in universities and law schools as a flagrant example of overweening confidence and poor historical judgment. But the precedent remains on life support in other quarters, remembered by underground worlds populated by neo-Confederates, self-described "Aryans," and "alt-right" provocateurs online. They continue to valorize the infamous ruling, adding it to others such as *Plessy v. Ferguson* or *Bowers v. Hardwick* for expressing traditionalist principles or or sentiments that have become verboten.

Prevailing in a military action and codifying the war's legacy through constitutional amendment aren't the only ways to engage the politics of repudiation. In fact, most of the time, social actors can deny legitimacy to judicial decisions on a smaller scale and work through political parties to create social conditions that will be congenial to dissolution of a legal regime. American politics has largely been dominated by two major parties at any given moment, and within such a bipolar system, a single political party can effectively harness anger at a Supreme Court decision. Grassroots activists work hand-in-glove with party elites to codify rejection of a ruling in the party's platform, back candidates who run on the issue by denouncing core features of a case, enact laws to codify opposing values, and then secure the election or appointment of judges with compatible views who will chip away at despised rulings. This strategy takes time, an enormous investment of resources, and years of planning and execution.

In recent years, the GOP's party platform has called for constitutional amendments to protect the right to life and to allow states to define marriage—reactions to *Roe v. Wade* and

Obergefell v. Hodges. The Democratic Party, by contrast, has endorsed constitutional amendments that would wipe out *Buckley v. Valeo* and *Citizens United v. FEC*—decisions that treat campaign donations and expenditures as speech and protect corporate spending in campaigns.[18] Gains from such activity go beyond judicial renunciation of precedent; short-term partisan and mobilization effects are valuable even if overruling a case seems out of reach.

When electorally focused efforts to discredit a ruling are successful, the precedent can become notorious in the public imagination, improving the odds that judges will adapt to an intense political reaction by creating formal exceptions that insert opposition ideas within the original juridic framework, heightening ideological tension within the law and leading to inconsistent outcomes. If polarizing the issue has increased the numbers of civic leaders committed to the cause, with sufficient party discipline, it will then lead to the restocking of the judiciary, which will be receptive to these more negative entreaties.[19] A stunning example of this phenomenon is the number of appointees to the federal judiciary during President Donald Trump's first three years who have refused to say that *Brown* was properly decided.[20] This is powerful evidence that the case has come to represent a conception of equality or type of judicial activism disfavored among some grassroots conservatives.

Something similar happened in the aftermath of *Roe v. Wade*. Harnessing the righteous fury of evangelicals and then hoping to broaden disgust for what they believed to be the destruction of vulnerable human lives, members of the modern Republican Party caused major jurisprudential disruptions that led to the dramatic weakening of *Roe*'s intended framework. For a period of time, this see-saw quality of the Court's decision-making led to confusion over legal principles and methods. That sense of doctrinal haphazardness created new political possibilities and emboldened opponents by giving them fresh lines of attack.

One day, mention of a state's belief that life begins at conception was evidence supporting an inference of legislative intent to interfere with a woman's reproductive rights. The next day, such language, even contained in a preamble of a bill, was brushed off as innocuous sentiment.[21] Increasingly, majoritarian rhetoric from the political ecosystem such as "fetal life," "unborn child," "informed consent," and "maternal regret" entered judicial discourse and began to vanquish pro-rights rhetoric focused on "potential life," "privacy," "personal autonomy and bodily integrity," and "medical decision."[22]

Since *Casey*'s rejection of the trimester framework in favor of the elastic "undue burden" test in 1992—the most visible manifestation of the judiciary's accommodation of political outrage—the Court's abortion case law has settled into a general toleration of a wide range of state and local restrictions under the federal Constitution, except for the occasional extreme law that endangers the life or health of a woman. This hasn't satisfied those who have tried so very hard to give *Roe* a bad name, but the jurisprudential changes have largely accommodated negative political reaction to *Roe*—to the point that 89 percent of U.S. counties have no clinics that provide abortions.[23]

This raises the possibility that a precedent can become simultaneously valorized in the abstract but effectively marginalized through public sentiment such that it can lead to a separation of principle from practice. *Roe* remains important as a symbol, signifying the importance of individual rights to the modern political order and marking the advancement of women's role in public life. But in reality, the right to terminate one's pregnancy safely simply cannot be meaningfully exercised for large swaths of the community, particularly women who are less wealthy and those who happen to be born in restrictionist parts of the country. Linda Greenhouse and Reva Siegel put the point this way: "[I]t is now *Casey* more than *Roe* that

defines the reach of the abortion right. Yet *Roe* continues to exert a powerful pull on the nation's politics . . . conveying wildly different meanings to different audiences."[24]

For true believers, *Roe* has not yet been made immortalized in infamy, for the project feels incomplete without a formal public renunciation. Nothing less than the reunification of symbol and practice can guarantee the right to life. The Court's management of competing legal interests, which has already redirected most abortion politics back to the states, doesn't satiate the politics of repudiation conducted by prolife forces but merely reminds *Roe*'s opponents of what is tantalizingly within reach.

The Politics of Repudiation: Elite or Popular?

A persistent question is this: Just how popular must the politics of repudiation be for it to succeed? One way to answer is by identifying and addressing obstacles to efforts to erode legal precedent from the outside. First, although a judge's authority to interpret the law rests largely on the power to persuade others, a culture of judicial independence nevertheless stands between the doctrinal target of citizens' ire and those who would see that case undone. Thus, the politics of repudiation carry a risk that tactics seen by Americans as too overtly antagonistic can be construed as attacks on the judiciary itself. If that happens, the reaction may trigger a broad defense of judicial review that causes institutionalists to ally themselves with those invested in preserving substantive outcomes—including outcomes perceived to be unjust.

This suggests that, while it can be useful to secure grassroots rejection of a troubling ruling, there may be a limit to any approach that depends exclusively on rallying majoritarian sentiment. Conversely, it also means that more sophisticated strategies—i.e., investing more resources to convert or replace influential elites, or that rely on a mix of elite and popular

methods—are more likely to yield dividends.

In fact, it may be less critical to reach any particular numerical threshold of converts than it is to destabilize the social conditions surrounding a constitutional matter. For a freshly inked decision, the goal is to keep conditions in such a tremulous state that a new ruling simply cannot take hold of the public's imagination cleanly—to hold off the day that a decision acquires durable support for as long as possible. For a disfavored ruling that has been on the books for some time, the task is that much harder: to create the impression that a long-settled question is once again contestable. The destabilization of a judicial outcome, in turn, paves the way for others to exert influence over the political precepts and cultural beliefs at stake. Elites dedicated to overthrowing a legal regime are then able to operate in this space.

A second factor that can limit the effectiveness of repudiation is that it must overcome acceptance of precedent by key elites and stasis within bureaucracies. Such acceptance can come from unthinking obedience to those with power, out of substantive agreement with an outcome or method, or path dependence for other reasons such as efficiency. Cases and legal rules are associated with the communities and bureaucracies that come to depend upon them. In that sense, judicial rulings can even create constituencies that didn't exist before. This means that the race to deny legitimacy to a decision commences at the moment of publication and must be a multiprong effort to prevent the codification of associated principles and the entrenchment of power associated with a ruling. When the goal is to overturn an established case, enormous energy must be expended to unsettle existing expectations and provoke elites to rethink their reliance interests.

But then we encounter a third obstacle to the politics of repudiation—popular culture—which establishes at any historical moment the outer boundaries of possibility for the processes

of infamy. Popular culture serves other functions, too, such as providing raw material for legal and political arguments. But in its demarcating function, popular culture can—if support for a practice is widely shared and deemed important enough—constrain politics. It does so by raising the costs for opposing or suppressing that culture. At some point, resistance may become cost prohibitive and take other, narrower forms.

This helps us to understand why opponents of same-sex marriage on cultural grounds switched gears so quickly to take up arguments about religious exemption for dissidents. Yes, they could rally like-minded opponents of *Obergefell* to demand a constitutional amendment, but successfully navigating the arduous process is fanciful in the short run. Beyond the high formal hurdles, the fact is that a majority of Americans today supports same-sex marriage—far more than support for interracial marriage. When *Loving v. Virginia* was decided in 1967, only 20 percent of Americans accepted interracial marriage; plurality support for marrying across the racial line did not emerge until twenty-five years later.[25] By contrast, *Obergefell* can be considered a truly majoritarian outcome in that, by 2015, when the case was decided, most polls put support for gay marriage at between 55–60 percent—with majority support remaining stable since 2010. After *Obergefell*, support climbed to about 67 percent. In 2021, GOP support for same-sex marriage exceeded the 50 percent mark for the first time.[26] The numbers are even more stunning and demoralizing for traditionalists when the preference of the younger generation are examined: In 2017, 79 percent of Americans aged 18–29 endorsed the right of gay people to marry.

Given such a stunning collapse of general sentiment against same-sex marriage (in the neighborhood of 28–36 percent in opposition), being singularly committed to undermining that ruling would be costly and yield few results—and quite possibly dissipate political resources

needed for other initiatives. Instead, by moving to friendlier terrain such as the First Amendment, conservatives can harness popular support for individual rights to maintain, and even broaden, the spaces in public life where traditionalists can create disruptions in what seems to them to be a relentless egalitarian project. That would allow incremental, but important, conservative victories to be won and set up constant clashes between equality and liberty that are so crucial to maintaining momentum for political outrage.

Cultural dissidents can take heart in the fact that legal change isn't always unidirectional or permanent. What's more, for the first time in several generations, the Supreme Court is significantly more conservative compared to the rest of the country. When such a disjunction exists between a governing institution and the citizenry, the risk of rearguard rulings (where an institution renders an unpopular decision in the name of tradition or to protect an institution under siege) increases. But to convince the justices to repudiate *Obergefell* one day, traditionalists would have to convince large numbers of Americans that the experiment of same-sex marriage isn't working. The clarity of the legal rule in this context—immediate access to a valuable social good previously denied on the basis of sexual orientation—takes an alternative strategy off the table: introducing tensions and inconsistencies in a legal approach that leads to a fundamental rethinking of the original precedent.

Insofar as it is easier to harness popular belief in the values of dissent and pluralism, using the First Amendment to create alternative precedents can certainly aid the traditionalist cause. But if the objective is to introduce potent contradictions into gay-friendly jurisprudence, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* did not quite fit the bill beyond reinforcing the principle against religious animus. That decision failed to articulate a clear right on the part of traditionalists who engage in commerce to resist the demands of

equality or otherwise not be associated with same-sex marriages.[27] There remains, too, general risks with the approach, as some jurists' commitment to federalism will limit how motivated they might be to create large exceptions to local public accommodations laws. Rulings that wind up expanding a state's ability to enforce equality over objecting individuals will force traditionalists to make even more difficult choices about whether to continue participating robustly in the public sphere or else live in greater "nomian insularity"—without necessarily casting same-sex marriage into doubt.[28]

All of this acutely suggests that a motivated set of factions in society need not secure decisive, or even majority, support to undermine a legal precedent. Instead, the necessary ingredients for success seem to be: (1) fomenting cultural dispute over fundamental values, with an eye toward fostering ideological cohesion among jurists; (2) augmenting an existing voting bloc by installing sympathetic partisans or converting skeptical figures to the cause; (3) inscribing alternative understandings of a contested constitutional provision or law into ordinances, statutes, or state constitutional law; and (4) inviting sympathetic jurists to revisit a reviled precedent and codify new understandings in doctrine, washing away the old case.[29]

It should be emphasized that the overarching project is to alter the cultural connotations of a precedent so that it is no longer believed to be compatible with the polity's collective sense of justice. Thus, the project of repudiation is not primarily a technocratic or jurisprudential enterprise but instead one of political morality. As a strategy, it succeeds to the extent that legality and authority can be stripped from past juridic statements and recharacterized in broader moral terms.

Perhaps the best evidence that a nationwide movement is unnecessary to render a case infamous can be found in the cautious dismantling of *Plessy v. Ferguson* and the tentative

emergence of *Brown v. Board of Education* in the mid-1950s. There, a motivated group in the form of the NAACP pursued a strategy of targeted local activism and lawsuits that introduced ideological and empirical contradictions into the jurisprudence that links judges to one another.

One win was built upon another, as newer decisions undercut older precedents and cried out for fresh synthesis. Public expectations of fair and equitable treatment in the domain of employment, voting, housing, and higher education then became inscribed in the law books. By securing the aid of patrons and supporters at critical junctures, they were able to incrementally destabilize the system of racial segregation judicially authorized by *Plessy* in the decades before the civil rights movement became a truly national phenomenon. These lawyers and activists were able to demonstrate that, contrary to the *Plessy* Court's incredulous statements that racial segregation didn't harm black citizens, in fact such measures interfered with access to critical social goods and opportunities.[30]

But it must be remembered that, despite careful work, the prospect of racially integrated schools remained extremely controversial in 1954. Even after *Brown* was decided, only a bare majority of Americans supported that outcome. The fragility of the consensus is obscured by the unanimity of *Brown* but hinted at by the justices' decision not to overrule *Plessy* explicitly but instead extend *Brown*'s logic into other social domains through a series of subsequent summary orders; ultimately the Court was forced to respond to local defiance by permitting a wide flexibility to lower court judges to craft the substantive remedies and time for defendants to comply with desegregation decrees.

Incisive observers of the Supreme Court have noticed two salient features of its work that can be exploited by those who wish to assail a judicial outcome. First, some individuals' opinions matter more than others during the adjudicative process. For instance, when a federal

constitutional provision or statute is under review, the justices will often ask for the views of the U.S. solicitor general, a repeat player who has colloquially been referred to as "the 10th Justice."[31] Securing the backing of elites within an administration on a key point of law, especially if the goal is to greatly narrow or demolish existing precedent, leads to intense behind-the-scenes lobbying by stakeholders. Since the solicitor general's office will consult other agencies affected by a matter in the federal courts before staking out a position, taking advantage of these other opportunities to sway well-placed figures can increase the odds of favorable position-taking by the federal government.

Second, while it's too crude to say that judges simply follow the election returns, it is certainly true that particular justices—including, lately, whoever occupies the role of chief justice—have been acutely sensitive to popular opinion. Justices Anthony Kennedy and Sandra Day O'Connor often cared about external reactions to an older decision. As the Supreme Court became more predictably conservative, John Roberts has occasionally exhibited such a trait, such as changing his mind on Obamacare and in the dispute over the 2020 Census. The positions he staked out in these controversies demonstrated his concern about the reputation of the Court—something that is threatened by a precedent that appears overly partisan or works manifest injustice.[32] Being on the right side of history, and appearing to stand in solidarity with the president or Congress rather than appearing institutionally isolated, are tendencies that can be exploited by advocates.

Appeals to these sentiments are accomplished through lobbying, the legal briefs filed by parties in the cases as well as from "friends of the court," and the articles and interviews that might penetrate the news cycle and become part of the coverage of the Court's work. To the extent one's objective is to convince the Court to declare a precedent infamous, the goals during

the period of adaptation are twofold: first, to shift the window of jurisprudential reasonableness away from the consensus once represented by an older decision; and second, to deliver a public rebuke that a precedent is now too tarnished to follow (i.e., its philosophical or empirical assumptions have been revealed to be false or that the case has caused unjustified suffering). When advocates are successful in this endeavor, they are in fact nudging a legal regime through the phase of adaptation and toward dissolution.

In *Brown*, the U.S. Department of Justice (DOJ) filed a brief in December 1952 signaling that the federal government had decided to back the forces of racial equality. DOJ lawyers made clear the administration's commitment to "equal treatment before the law," as well as its view that segregated public schools "undermine[d] the foundations of a society dedicated to freedom, justice, and equality." Importantly, they described racial equality as a Cold War imperative—"the present world struggle between freedom and tyranny." Dwight Eisenhower's administration fleshed out this argument even further, telling the justices that racial discrimination impeded presidential policies in two ways: by serving as "a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations," and by "jeopardiz[ing] the effective maintenance of our moral leadership of . . . free and democratic nations of the world."

The Department of Justice offered more than one option to the justices in grappling with problematic case law. It was not essential to overrule *Plessy* in order to conclude that the Fourteenth Amendment barred racially separate public schools because "the *Plessy* case plainly does not preclude a district court from finding . . . that segregation can, and in the particular instance does, produce unequal and inferior treatment." In other words, that ruling "did not purport to lay down an inexorable rule of law . . . that segregation could *never* create inequality." Creating some daylight between the older precedent and the specific facts in the current

controversies opened the door to the possibility of different alliances within the Court itself to reach pro-equality outcomes—a crucial move given that public opinion on the matter was so equivocal.

Government lawyers then confirmed the department's preferred position that "racial segregation imposed or supported by laws is per se unconstitutional." Because "'separate but equal' is a contradiction in terms," they welcomed the possibility of the justices overruling *Plessy* should they wish to do so. "This judicial contraction of the constitutional rights secured by the [Fourteenth] Amendment is irreconcilable with the body of decisions which preceded and followed *Plessy v. Ferguson*," the DOJ insisted, "and is not justified by the considerations adduced to support it." In other words, the logic and facts of intervening cases like *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents* had already cast doubt on the continuing vitality of *Plessy*. Finally, they appealed to changed circumstances as a reason to repudiate the Court's prior case law: "Whatever the merits in 1896 of a judgment as the wisdom or reasonableness of the rule of 'separate but equal,' it should now be discarded as a negation of rights secured by the Constitution."[33]

Such an intervention by DOJ, with its implicit promise of institutional cooperation and its roadmap of public reasons for repudiation, proved critical to accelerating *Plessy*'s passage through the phase of adaptation straight into dissolution.[34] Government lawyers signaled that the executive branch had many sound reasons for wanting to broadly enforce the principle of racial equality, that they would expend resources to do so, and that going out on a limb to take down *Plessy* would not undermine the Court's own agenda. This welcome message not only eased justices' concerns about the scope of the anticipated backlash among certain states and localities but also responded to their understandable desire for allies before undertaking a major reform

project.

But the episode also tells us something else that is important about the processes of infamy: It is not enough for those who disagree with a legal ruling to convince a bunch of prominent people to denounce it; those in power must be able to imagine an alternative world in which a different legal regime can do a better job of ensuring justice. Judges aren't likely to knock down even a rotting building unless they are assured people are willing to dwell in a new structure.

Although calling attention to social ills is an important function of all social movements, activism becomes most valuable to the project of dislodging older precedents when mobilization produces legislation. In many areas of constitutional rights, judges have either explicitly formulated doctrines that take into account relevant extrajudicial developments or have taken it upon themselves to do so without binding themselves to such a practice in the long term. Even in the latter scenario, the meaning of constitutional terms such as "liberty," "equal protection of the laws," "due process," and "cruel and unusual punishment" have been shaped by favorable developments that occur outside a judge's direct sphere of influence. The fact that jurists have looked far and wide for evidence of fundamental values, even sporadically, creates incentives for political actors to attempt to influence federal judges by inscribing new values and methods into state laws, ordinances, and even agency policies and rules.[35]

Social movements—whether regional or national in character—have the best shot at convincing multiple jurisdictions to safeguard individual rights through legislative reform and spreading the news about fundamental principles. Members do so by creating pressure for change, electing friendly politicians, and presenting templates of ready-made bills that can expand rights in the desired fashion.

Take, for instance, *Lawrence v. Texas*, in which the Supreme Court finally rid itself of the 1986 precedent *Bowers v. Hardwick*. The *Bowers* Court had upheld a Georgia law that criminalized consensual sodomy against a privacy-based challenge. Justice Byron White's opinion had characterized Harwick's claim as an effort to vindicate a right to engage in same-sex sodomy. Scouring history, White found no "fundamental right [for] homosexuals to engage in acts of consensual sodomy." Chief Justice Warren Burger, concurring in the result, would have gone even further to say that "condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards."[36]

Justice Anthony Kennedy's opinion in *Lawrence* nearly two decades later reveals the political spaces where activism can later affect judicial interpretation. Much of his analysis covered why the original case had misconstrued the constitutional inquiry as well as the historical record. Yet a surprising amount of the opinion was also dedicated to sorting through changed social and political circumstances. As evidence of how "the deficiencies in *Bowers* became even more apparent in the years following its announcement," he pointed to the decriminalization of homosexual conduct on the part of the states, as well as a trend of not enforcing those laws that remained on the books. He also cited *Casey* and *Romer v. Evans* as evidence of "serious erosion" of *Bowers* in addition to scholarly criticism of that decision and its rejection by many state courts and international tribunals as additional proof of its weak social foundations. These rulings would not have been possible without large-scale political activism and targeted interest-group litigation.

Kennedy's comments toward the end of his opinion indicated something else: a conviction that a judge's own attitudes ought to shift as public sentiment changes and new social facts emerge. He tried to put the point in historical terms even though many self-described

originalists reject his form of socially adaptive jurisprudence. Invoking the Constitution's Framers, Kennedy said, "They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." In both method and analysis, this approach simultaneously represents a plea for raw materials and a license to engage in extrajudicial efforts to reshape constitutional meaning.

Political Elites: Shaping a New Narrative of Power and Justice

Before his untimely death, Yale law professor Robert Cover famously explained in the pages of the *Harvard Law Review* that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning." Cover located the process of interpretation within nationalist traditions and the more varied imagined communities that are affected by that drive to create coherent legal meaning. In this "normative world" fashioned by lawgivers and law enforcers, every prescription is "supplied with history and destiny, beginning and end, explanation and purpose." Cover detected two competing tendencies in the law that he labeled "jurisgenerative"—the imperative to create authoritative legal meaning—and "jurispathic"—the desire to kill off alternative story lines and legal worlds in the name of clarity and hierarchy.[37]

Seen in this light, canonical precedents teach a society's denizens what is right and good about the world, whereas infamous decisions sow doubt about the political community's true nature and encourage evil. Such pollutants must be dealt with eventually—destroyed in whole or in part— to restore a sense of order and reassure people about society's commitment to justice.

But Cover diagnosed only part of this dynamic, and he offered only a vague sense of the dynamics in play. Because the law can't exist apart from the human beings and institutions that interpret and apply the law, it's those finer motivations to secure power or prerogative, enhance one's reputation, gain bureaucratic advantage, or accomplish some agenda that feed the law's tendencies to simultaneously create and destroy legal meaning. Thus, the finer aspects of the politics of repudiation lay beyond Cover's grasp.

An exquisite illustration of these more nuanced motivations can be found in the sudden jurisprudential abandonment of the democratic nomos created by the first Pledge of Allegiance case involving school-age Jehovah's Witnesses. In that episode can be found the elements of institutional self-interest and world-making that drive legal narratives. In 1940, Justice Felix Frankfurter authored *Minersville School District v. Gobitis*, an 8–1 ruling that rejected the children's religious objection to a compulsory flag salute (with only then–Associate Justice Harlan Stone dissenting). A mere three years later, in 1943, Justice Robert Jackson's opinion in *West Virginia School Board v. Barnette* overruled *Gobitis* and held that the children's refusal to salute the flag was constitutionally protected as a form of symbolic dissent.[38]

Cover's writings are instructive, for the two men's visions of democratic life were utterly incompatible. It's almost as if one was the Bizarro World version of the other, and the admiration you felt for one ruling would be matched by contempt for the other. One vision had to die so that the other might live. But which would triumph?

Justice Frankfurter, who had first crack at sketching what a postwar order might look like, insisted that individual rights had to be submerged to the needs of a nation at war. "National cohesion" as a "great common end" was in his view "an interest inferior to none in the hierarchy of legal values." Throughout, Justice Frankfurter pounded the themes of collective security and

individual sacrifice. By contrast, Jackson's victorious vision insisted that individual rights need not be sacrificed at the altar of national unity—even in a time of war. "Authority here is to be controlled by public opinion," he said, "not public opinion by authority." Far from undermining national cohesion, Jackson argued, "[a]ssurance that rights are secure tends to diminish fear and jealousy of strong government, and, by making us feel safe to live under it, makes for its better support."

This turnabout was shocking not only for its swiftness but also for its completeness. But how to explain it? The historical record shows that the switch cannot be attributed solely to judges changing their mind. External developments played a significant part in the dissolution of the consensus backing *Gobitis*. But unlike legal advances won by gay-rights activists in later years, the Jehovah's Witnesses had no dependable social movement they could rely on. Instead, their own persistent suffering gained the attention of elites who helped convince the justices that no sane, freedom-loving American would want to live in the normative world the justices had devised in 1940.[39] For one thing, two new additions to the Court in the intervening years—Jackson and Wiley Rutledge—were both outspoken in their disgust for the portrait of democracy articulated in *Gobitis* before their appointment to the Court. Jackson expressed "astonishment and chagrin" at Frankfurter's efforts to wrap the coercion of religious dissidents in patriotic themes, while Rutledge in a graduation speech contended "that it is [in] the regimentation of children in the Fascist and Communist salutes that the very freedom for which Jehovah's Witnesses strive has been destroyed."[40] For another, Harlan Fiske Stone, who was the lone holdout in *Gobitis*, was elevated to chief justice by President Franklin Roosevelt. All three men shared the conviction that respect for individual rights, particularly in a time of ascending fascism, must be an essential component of any democratic vision.

Perhaps most crucially, DOJ lawyers powerfully reshaped the public narrative surrounding the meaning of *Gobitis* and the coerced flag salute. They characterized the salute as oppressive and divisive and denounced the Court's precedent as unwise, counterproductive, and incompatible with the Roosevelt administration's support for religious liberty, "one of the four great freedoms for which this nation is now fighting!" In this way, government lawyers harnessed the justices' own vital desire for consensus within their own institution and an alliance with other branches of government to convince them to renounce an earlier decision.

During that era, rules limited the department's participation to cases in which the United States was a party. But although DOJ did not enter a formal appearance in *Barnette*, two lawyers from the civil rights division, Victor Rotnem and F. G. Folsom, published an article that laid the blame for a spate of atrocities visited upon Jehovah's Witnesses squarely at the feet of the Supreme Court. They first described a wave of terror against this religious minority as "intense animosity in every state of the Union," which called out for a national response. "This ugly picture of the two years following the *Gobitis* decision is an eloquent argument in support of the minority" view expressed by Stone, they wrote. Meanwhile, Attorney General Francis Biddle took to the airwaves and denounced the "swiftly increasing cases of mob violence in connection with Jehovah's Witnesses." He vowed that "we shall not tolerate such Nazi methods."[41]

High officials within the administration didn't just argue that *Gobitis* was counterproductive; they also insisted that the justices should reverse it immediately to present a united front with the Roosevelt administration. In their essay published in a political science journal, Rotnem and Folsom argued that taking this step would help restore public order and also predicted that an about-face would "profoundly enhance respect for the flag." Jackson agreed, and he said as much in *Barnette* after eviscerating *Gobitis*: "To believe that patriotism will not

flourish if patriotic ceremonies are voluntary and spontaneous, instead of a compulsory routine, is to make an unflattering estimate of the appeal of our institutions to free minds."

Jackson's original draft of *Barnette* cited both the DOJ essay and the administration's timely labors to stem vigilante violence, but during the writing process those references were edited out. While the collaborative adjudicative process prompted the justices to obscure the evidence of out-of-court influences on the law's development, there can be little doubt that political appointees and civil servants had a large hand in casting *Gobitis* in dark terms as the source of manifest injustice and pressuring the Court to realign itself with an administration publicly committed to helping religious minorities around the world.

The Fall of *Korematsu* as Feigned Dissolution

We come, finally, to a most troubling possibility: that precedent can be overruled to aggrandize interpretive authority and obscure democratic pathologies. If the Stone Court's realignment with FDR's "Four Freedoms" initiative underscored a genuine desire on the part of judges to be surrounded by allies, then the rise and fall of *Korematsu v. United States*—which ratified America's wartime internment policies—in the public imagination revealed the always-present risk that judges may present themselves as heroes when their actual decisions neither encourage sound decision-making nor ameliorate unequal suffering.

What the Roberts Court did by overruling *Korematsu* during its consideration of the Trump administration's Muslim travel ban is the mirror image of what the Rehnquist Court accomplished in *Casey*, where the justices upheld *Roe* but then hollowed out its doctrinal potency. In *Trump v. Hawaii*, Chief Justice Roberts overruled *Korematsu* with a flourish, but upon closer inspection, this formality didn't much alter the status quo. The move thus raised a

problem we might call "feigned dissolution," where decision makers overrule a precedent because of the negative connotations it has acquired, without disassembling its component philosophies or methods. Yet this sets a trap for the unwary, who might get tripped up by hidden legal rules not mentioned; or, as in this case, allow government actors to continue treating political minorities more harshly than those who belong to the majority, despite the impression that such activity would not be permitted in the future.

The life span of *Korematsu*, the 1944 Supreme Court ruling that approved the wartime exclusion and internment of some 110,000 Japanese Americans, thus involved several intriguing patterns. Almost out of a sense of regret, justices subsequently began citing that decision for the proposition that race-based laws are subject to strict scrutiny, even though the *Korematsu* Court originally failed to rigorously enforce that formula in the internment cases.[42]

But the bulk of the heavy lifting to discredit *Korematsu* and convert it into an anticanonical work came from outside the courts. These legal liberals, outraged by the decision, pursued a two-prong strategy of litigation and legislation to undermine its factual and legal underpinnings within a broader narrative about America's enduring political values.

Nearly four decades after that legal opinion had become final and internees had scattered throughout the United States, lawyers pursued a *coram nobis* action that led a federal district court judge to gut the factual predicate for the Roosevelt administration's original claim that Japanese Americans represented a national security threat. Ruling in favor of the internees, Judge Marilyn Hall Patel could only correct the record in the older case; as a mere trial judge she had no formal authority to overrule *Korematsu*. But the findings she made absolutely destroyed the factual basis for the government's earlier assertion that internment of all people of Japanese ancestry on the West Coast was justified by military necessity. Although General John DeWitt

insisted that Japanese people were signaling to ships from the shore, the Department of Justice suppressed naval intelligence showing that this national security claim was false. All that was left after this inflammatory allegation was stricken, Judge Patel concluded, were "unsubstantiated facts, distortions, and . . . views [that] were seriously infected by racism."[43]

These yeoman efforts to relitigate the issues and facts related to internment accompanied a round of political activism directed at the president and Congress. In 1980, President Jimmy Carter established a presidential commission to investigate the policies of exclusion and detention. The commission's report in December 1982 found "not a single documented act of espionage, sabotage, or fifth column activity committed by an American citizen of Japanese ancestry or by a resident Japanese alien on the West Coast."[44] The commission concluded that people of Japanese ancestry were rounded up along the West Coast (but not Hawaii) and detained in camps because of "race prejudice, war hysteria and a failure of political leadership" rather than military necessity. In 1988, relying on the commission's report, Congress enacted a reparations bill, which was signed by President Ronald Reagan. Beyond the $ 1.6 billion disbursed to surviving internees, the reparations bill acknowledged "the fundamental injustice of the evacuation," apologized for causing "significant human suffering" for interning them "without adequate security reasons" and for "fundamental violations of the basic civil liberties and constitutional rights of these individuals." Taken together, these sentences represent a powerful congressional disavowal of *Korematsu*.[45]

Activism throughout the 1980s didn't immediately cause the Supreme Court to renounce *Korematsu*, but it did have a tremendous impact on elite legal culture, eroding the social foundations of that precedent. Lawyers became loathe to cite the case given its negative connotations, beyond doing so for the simple proposition that a race-based law is supposed to

trigger stringent review from judges. This reticence has been compounded by withering criticism from academics, who from the start had called the case bad law—even "very bad law."[46]

Particularly noteworthy was the "confession of error" published by Neal Katyal in 2011 as acting solicitor general, expressing regret for the office's role in suppressing the so-called Ringle Report. That memo had indicated that "only a small percentage of Japanese Americans posed a potential security threat, and that the most dangerous were already known or in custody," but this document was never turned over to the internee's lawyers or revealed to the courts. Katyal also apologized for the past solicitor general's decision to tell the justices that "it was impossible to segregate loyal Japanese Americans from disloyal ones" and to rely on "gross generalizations about Japanese Americans, such as that they were disloyal and motivated by 'racial solidarity.'"[47] The import of his apology was unmistakable: the *Korematsu* decision was corrupted by elites who violated ethical standards when they hid unfavorable evidence and misled the courts and the American people. Lawyers helped perpetuate injustice by repeating unfounded racial stereotypes, which judges then repeated as their own justifications for treating a vulnerable population harshly.

Katyal's statements confirmed the crucial role that institutions can play within the politics of repudiation. They reflected the historical judgment of elites as to who they want Americans to be as a people and what rules they think we should all live by. Such judgments are always forward-looking, and this one was no different. The internment-era ruling now seemed jarringly out of place in a modern democracy characterized by pluralism and respect for equality and dignity. There are downstream institutional effects as well that can lock in the whiff of infamy surrounding a case: once such a confession of bad behavior is made, it becomes harder for successors to withdraw such a statement or for others to cite an infamous precedent without

incurring denunciations.

Ironically, even before this burst of activism in the 1980s, *Korematsu* had already become doctrinally irrelevant to most disputes involving war making or racial equality. The world had already changed from one where wars were declared to one with a nearly constant state of emergencies often based purely on unilateral presidential action. Other precedents had overtaken *Korematsu*, so one could rely on any number of emergency-based decisions and safely ignore the wartime precedent. In another sense, the civil rights movement of the 1960s had also somewhat undercut the need to repudiate *Korematsu*, by underwriting the principle of racial equality robustly in a democratic fashion. This development made it less urgent to renounce the racially stereotypical forms of analysis that ran throughout Justice Hugo Black's opinion.

In that light, the Supreme Court actually confronted both fewer opportunities to revisit the internment decision and less of a need to do so—that is to say, until a president came along who was willing to invoke (and perhaps manufacture) an emergency to rationalize the unequal treatment of some travelers on the basis of religion or country of origin. President Trump's executive order fulfilling his long-promised Muslim travel ban finally raised many of the analogous concerns at stake in the internment dispute.[48] Yet the law's development in the aftermath of internment allowed advocates on both sides of the travel ban dispute to talk past one another. On the one hand, lawyers for the challengers to the ban took every opportunity to tar the president's travel ban with the negative connotations of *Korematsu*. So did several organizations and individuals who filed briefs in the Court. Some of the children of people detained in the wartime camps filed briefs contending that the president's policy "repeated" all of the mistakes of Roosevelt's internment policies: weak on national security justifications, harmful to political minorities, and infected by racial bias.

On the other hand, while Trump publicly cited the internment of Japanese Americans as precedent for a Muslim ban during the 2016 campaign, the government attorneys wisely shied away from *Korematsu* during litigation. Instead, lawyers preferred to rely on other cases that gave a president broad latitude to exclude individuals for national security reasons.[49]

In the end, the resolution in *Trump v. Hawaii* warns us that the politics of repudiation has its limits. In that decision, which approved Trump's ban by a 5–4 margin, the moral judgment mounting against *Korematsu* was finally acknowledged by Chief Justice Roberts. As he put it, *Korematsu* was "gravely wrong the day it was decided, [and] has been overruled in the court of history." For emphasis, Roberts added: "[T]o be clear [*Korematsu*] has no place in law under the Constitution." This is a welcome statement that should make it more difficult for others to claim that race-based roundups are compatible with civil liberties. The majority had taken umbrage at the comparison to *Korematsu*, and lawyers henceforth would be disarmed from citing that case for such nefarious programs.

And yet, the legal landscape is a little more complicated than that. There is an earlier wartime decision that approved a race-based curfew against people of Japanese ancestry captioned *Hirabayashi v. United States*, and Chief Justice Roberts made no move against that precedent; in fact, he didn't even mention it. His unwillingness to criticize or uproot that case left unclear what the government can do to its own citizens in a time of crisis, short of race-based detention. It's possible that less coercive race-based methods would be constitutional, especially in an emergency.[50]

Moreover, the exceedingly deferential review afforded the president's assertion that visitors from certain Muslim-majority countries represented a real threat, coupled with a refusal to parse the ample evidence of anti-Muslim bigotry on the part of the president and his close

aides, suggest that an infamous wartime decision has simply been replaced by another dangerous precedent. Indeed, there is evidence that, afterward, President Trump saw the ruling not merely as a victory on one particular point of policy but rather as an invitation to act expansively and unilaterally in the nation's interest across multiple fronts.

Time will tell whether *Trump v. Hawaii* is perceived by the people as a legitimate ruling or instead one that, as Justice Sonia Sotomayor contends in her scathing dissent, "def[ies] our most sacred legal commitments" and employs "the same dangerous logic underlying *Korematsu*" to "sanction a discriminatory policy."[51] For that judgment of moral disapproval to take hold, however, sizeable numbers of Americans would have to reject the ruling as a thinly veiled ratification of religious animus and therefore as a major departure from our tradition; see it as partisan or biased or otherwise unjust; and discover ways of codifying a sense of outrage with what the Court has done. If such sentiments spread far enough, elites can capitalize on the outcry to take down President Trump's legacy and relegate it to the dustbin of history just like so many other infamous precedents.[52]

Whatever happens, the historical pattern of precedents that have unraveled over time teaches us that interpretation isn't merely an act of reading legal text; it's also a matter of synthesizing political and moral judgments. Constitutional meaning is intelligibly made only by reference to existing bodies of knowledge, and its claim to wisdom and justice ultimately depends on social acceptance by the many interpretive communities affected. And when the gap between judicial reading and communal understanding grows too wide, something will have to give.

Notes

<<AU: We are missing the publication information for the books because we are now following Chicago style for the notes throughout the volume. Please include the info in parentheses where appropriate.//Reply: >>

1 Oliver Wendell Holmes, *The Common Law*, ed. Mark DeWolfe Howe (Cambridge, MA: Belknap Press, 1963), 6.

2 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

3 Relevant questions include "whether the rule has proved to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the costs of repudiation; whether related principles of law have so far develop as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification." Ibid.

4 Whether there really was ever a crowning era of formalism or antiformalism is merely a recurring trope in political discourse and is a different question. See Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton, NJ: Princeton University Press, 2009); Brian Leiter, "Legal Formalism and Legal Realism: What Is the Issue?," *Legal Theory* 16, no. 2: 111–33.

5 Holmes. See also Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1929).

6 See generally Nan Goodman and Simon Stern, eds., *Law and the Humanities in Nineteenth-Century America* (Milton Park, UK: Routledge, 2017); Robert L. Tsai, *America's Forgotten Constitutions: Defiant Visions of Power and Community* (Cambridge, MA: Harvard

University Press, 2014); Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Cambridge, MA: Harvard University Press, 1997); Kathryn Abrams, "Law's Republicanism," *Yale Law Journal* 97 (1988): 1591–1608.

7 Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve (1835; New York: Gryphon, 1992), Book I, ch. 16, 254–25.

8 Alexander Hamilton famously expressed the view in *Federalist No. 78* that the judiciary "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of society . . . and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

9 Jamal Greene, "The Anticanon," *Harvard Law Review* 125 (2011): 379–475; J. M. Balkin and Sanford Levinson, "The Canons of Constitutional Law," *Harvard Law Review* 111 (1998): 964–1022; Richard A. Primus, "Canon, Anti-Canon, and Judicial Dissent," *Duke Law Journal* 48 (1998): 243–303.

10 See generally Robert L. Tsai, *Eloquence and Reason: Creating a First Amendment Culture* (New Haven, CT: Yale University Press, 2008), 80–82.

11 Dred Scott v. Sandford, 60 U.S. 393 (1857).

12 Roy P. Basler et al., eds., *The Collected Works of Abraham Lincoln (1953–55)*, 401, quoted in Don E. Fehrenbacher, *The* Dred Scott *Case: Its Significance in American Law & Politics* (New York, NY: Oxford University Press, 1978), 442–43. See also Mark A. Graber, Dred Scott *and the Problem of Democratic Evil* (New York, NY: Cambridge University Press, 2008).

13 For an account of regime theory that emphasizes inputs and outcomes rather than discourse and beliefs, see Mark J. Richards and Herbert M. Kritzer, "Jurisprudential Regimes in

Supreme Court Decision Making," *American Political Science Review* 96 (2002): 305–20.

14 See Albert O. Hirschman, *Exit, Voice, Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970).

15 Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York, NY: Harper Perennial, 2014), 192; Bruce Ackerman, *We the People: Transformations*, vol. 2 (Cambridge, MA: Belknap Press, 1991).

16 Dred Scott v. Sanford, 60 U.S. 393, 407 (1857).

17 Foner, 195.

18 Roe v. Wade, 410 U.S. 113 (1973); Obergefell v. Hodges, 576 U.S. 644 (2015); Buckley v. Valeo, 424 U.S. 1 (1976); Citizens United v. FEC, 558 U.S. 310 (2010).

19 Jack Balkin and Sandy Levinson call this process "partisan entrenchment." Jack M. Balkin and Sanford Levinson, "The Processes of Constitutional Change: From Partisan Entrenchment to the National Security State," *Fordham Law Review* 75 (2006): 489–535. While redirecting party politics is probably the most efficient way to destabilize a judicial ruling, it's not the only way to do so. Moreover, while the party-centric model has significant explanatory power, anything that can claim to represent constitutional principle must satisfy other conditions that measure the breadth and depth of support for legal change beyond partisan interest.

20 "Trump Judicial Nominees and 'Brown v. Board of Education,'" NPR, May 19, 2019 ("more than 20 Trump judicial nominees have declined to affirm a Supreme Court decision desegregating public schools"). This shift is noticeable given that past conservative judicial nominees, including John Roberts, Samuel Alito, and Brett Kavanaugh, have had no trouble expressing support for *Brown*.

21 Cf. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), with Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

22 Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113, 166 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 857, 885 (1992) (O'Connor, Kennedy, and Souter, J.J.); Gonzalez v. Carhart, 550 U.S. 124, 134, 159–60 (2007). For more on this transformation of justifications in favor of abortion regulation, see Reva B. Siegel, "Dignity and the Politics of Protection: Abortion Restrictions Under *Casey*/*Carhart*," *Yale Law Journal* 117 (2008): 1694–1800; Courtney Megan Cahill, "Abortion and Disgust," *Harvard Civil Rights–Civil Liberties Law Review* 48 (2013): 409–56.

23 State Facts About Abortion: Louisiana, www.guttmacher.org/fact-sheet/state-facts-about-abortion-louisiana. For useful accounts of abortion politics, see Mary Ziegler, *After* Roe*: The Lost History of the Abortion Debate* (Cambridge, MA: Harvard University Press, 2015); Robert Post and Reva B. Siegel, "Roe *Rage: Democratic Constitutionalism and Backlash*," *Harvard Civil Rights–Civil Liberties Law Review* 42 (2007): 373–433; Austin Sarat, "Abortion in the Courts: Uncertain Boundaries of Law and Politics," in Allan Sindler, *American Politics and Public Policy* (1982).

24 Linda Greenhouse and Reva B. Siegel, "The Unfinished Story of *Roe v. Wade*," *Reproductive Rights and Justice Stories*, ed. Melissa Murry et al. (Eagan, MN: Foundation Press, 2019).

25 Joseph Carroll, "Most Americans Approve of Interracial Marriages," *Gallup*, Aug. 16, 2007.

26 Sarah Polus, "Poll: Majority of Republicans Support Same-Sex Marriage for the First Time," *The Hill*, March 23, 2021.

27 Masterpiece Cakeshop v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2017).

28 Robert Cover coined this phrase to delineate the forces that act upon a social group's view of the legal world when an authoritative decision is rendered that casts doubt upon its members' sense of what is right and good. See infra note 28.

29 Neal Devins, "Ideological Cohesion and Precedent (Or Why the Court Only Cares About Precedent When Most Justices Agree with Each Other)," *North Carolina Law Review* 86 (2008): 1399–1442.

30 Mark Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925–1950* (Chapel Hill, NC: University of North Carolina Press, 1987); Richard Kluger, *Simple Justice: The History of* Brown v. Board *of Education and Black America's Struggle for Equality* (New York, NY: Knopf, 1975).

31 Philip Elman and Norman Silber, "The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History," *Harvard Law Review* 100 (1987): 817–52; Mark Tushnet and Katya Lezin, "What Really Happened in *Brown v. Board of Education*," *Columbia Law Review* 91 (1991): 1867–1930.

32 See generally Lawrence Baum and Neal Devins, "Why the Supreme Court Cares about Elites, Not the American People," *Georgetown Law Journal* 98 (2010): 1515–81.

33 Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

34 Brief for the United States as Amicus Curiae, Brown v. Board of Education, 1952 WL 82045, Dec. 2, 1952. See generally Mary M. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton, NJ: Princeton University Press, 2000); Rogers M. Smith and Philip A. Klinkner, *The Unsteady March: The Rise and Decline of Racial Equality in America* (Chicago, IL: University of Chicago Press, 1999).

35 Eighth Amendment jurisprudence explicitly contemplates consideration of a broad consideration of legal trends and statutory developments to ascertain "evolving standards of decency." Trop v. Dulles, 356 U.S. 86 (1958).

36 Lawrence v. Texas, 539 U.S. 558 (2003); Bowers v. Hardwick, 478 U.S. 186 (1986); see generally Dale Carpenter, *Flagrant Conduct: The Story of* Lawrence v. Texas (New York, NY: W.W. Norton, 2012).

37 Robert M. Cover, "Foreword: Nomos and Narrative," *Harvard Law Review* 97 (1983): 4–68. See also James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, WI: University of Wisconsin Press, 1985); Austin Sarat, *Law, Violence, and the Possibility of Justice* (Princeton, NJ: Princeton University Press, 2002); Kathryn Abrams, "Contentious Citizenship: Undocumented Activism in the Not1More Deportation Campaign," *Berkeley La Raza Law Journal* 26 (2016): 46–69; Robert A. Ferguson, "The Judicial Opinion as Literary Genre," *Yale Journal of Law and the Humanities* 2 (1990): 201–19.

38 Minersville School District v. Gobitis, 310 U.S. 586 (1940); West Virginia School Board v. Barnette, 319 U.S. 624 (1943).

39 Robert L. Tsai, "Reconsidering *Gobitis*: An Exercise of Presidential Leadership," *Washington University Law Review* 86 (2008): 363–443; Mark Graber, "Counter-Stories: Maintaining and Expanding Civil Liberties in Wartime," in *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. Mark Tushnet (Durham, NC: Duke Univerity Press, 2005); Austin Sarat, *Speech and Silence in American Law* (New York, NY: Cambridge University Press, 2010); see generally Kevin J. MacMahon, *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to* Brown (Chicago, IL: University of Chicago Press, 2004).

40 Harold L. Ickes, *The Secret Diary of Harold L. Ickes, The Lowering Clouds, 1939–1941* (New York, NY: Simon & Schuster, 1954), 199; "Judge Rutledge Raps Flag-Salute Rule in Schools," *Evening Star* (Washington, DC), June 10, 1940, 19, in John M. Ferren, *Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge* (Chapel Hill, NC: University of North Carolina, 2004), 188.

41 Victor W. Rotnem and F.G. Folsom, "Recent Restrictions Upon Religious Liberty," *American Political Science Review* 36 (1942): 1053–68.

42 See, e.g., Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 214 (1995); Loving v. Virginia, 388 U.S. 1, 11 (1967).

43 Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

44 Personal Justice Denied, Report of the Commission on Wartime Relocation and Internment of Civilians, Dec. 1982, 3, 18.

45 An Act to Implement Recommendations of the Commission on Wartime Relocation and Internment of Civilians, Public Law No. 100-383, 100th Cong., Aug. 10, 1988.

46 See, e.g., Bruce Ackerman, "The Emergency Constitution," *Yale Law Journal* 113 (2004): 1029–91, 1043; David Cole, "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," *Michigan Law Review* 101 (2003): 2565–95, 2575; Eric L. Muller, "12/7 and 9/11: War, Liberties, and the Lessons of History," *West Virginia Law Review* 104 (2002): 571–92, 586; Eugene Rostow, "The Japanese American Cases—A Disaster," *Yale Law Journal* 54 (1945): 489–533, 532.

47 Neal Katyal, Acting Solicitor General, Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases, May 20, 2011.

48 For a rising concern about presidents who, in a time of corroding democratic norms, lie about

the nature or severity of an emergency, see Robert L. Tsai, "Manufactured Emergencies," *Yale Law Journal Forum* 129 (2020): 590-609.

49 Adam Liptak, "Travel Ban Case is Shadowed By One of Supreme Court's Darkest Moments," *New York Times*, Apr. 16, 2018; Brief of Karen Korematsu et al. as Amici Curiae, Trump v. Hawaii, No. 17–965, March 30, 2018.

50 Hirabayashi v. United States, 320 U.S. 81 (1942).

51 Trump v. Hawaii, 138 S. Ct. 2392 (2018), 138 S. Ct. at 2433 (Sotomayor and Ginsburg, J.J., dissenting). Americans were divided over the travel ban before the Court ruled, with some polls showing that a plurality opposed the ban. At the same time, a majority of Americans see it as an attempted Muslim ban despite the Court's characterization of it in religiously neutral terms; 59% backed lower court rulings that had enjoined earlier versions of the policy. Grace Sparks, "Americans Have Been Split on Trump's Travel Ban for a While," *CNN Politics*, June 26, 2018.

52 Charlie Savage, "Korematsu, Notorious Supreme Court Ruling on Japanese Internment, Is Finally Tossed Out," *New York Times*, June 26, 2018 (highlighting Sotomayor's prediction that "Trump v. Hawaii may go down in Supreme Court history as a second coming of *Korematsu*).