

A Case Against Mass Deportation: The Japanese American Internment Camps and Recent Treatment of *Korematsu*

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*The large-scale deportation of non-citizens has become a preeminent policy issue. Unfortunately, executive curtailment of immigrant communities' liberty is not without historical parallels. During World War II, federal officials sent individuals of Japanese descent to internment camps through a series of executive orders and military proclamations. Although attorneys in the Department of Justice believed aspects of these actions were unconstitutional at the time, the administration prevailed at the nation's highest court. Can recognition of this past wrong aid challenges to contemporary immigration enforcement regimes? How do our courts formally account for the most egregious jurisprudential errors of the past, and endeavor to avoid repeating them? This Article examines the ways in which courts have discussed *Korematsu v. United States* in the context of immigration arrests and detention. It also provides a comprehensive review of substantive citations to *Korematsu* since it was overturned in *Trump v. Hawaii*. The abrogation of *Korematsu* buttresses the decision's utility as a negative precedent, and I endeavor to ground the relevance of overturned precedent within normative theories of constitutional interpretation. Through this analysis, I highlight significant similarities between the internment of Japanese Americans and the rhetoric surrounding immigration policy today. In this context, judicial condemnation of *Korematsu* underscores certain due process requirements for individualized hearings and suggests the need for greater scrutiny of the executive's emergency powers.*

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INTRODUCTION

During the first Trump administration, the Japanese American Citizens League filed an amicus curiae brief before the Supreme Court.¹ The plaintiff's constitutional argument was straightforward: The Court should invalidate restrictions on visa holders from certain countries, also known as the "Muslim ban,"² as an anathema to the Establishment Clause of the First Amendment.³ The League's brief was persuasive in this context because of the parallels it drew between the executive's religiously motivated policies and the racially discriminatory World War II internment camps. Over seventy years earlier, the very same organization had urged the Supreme Court to declare unconstitutional the mass detention of over 100,000 immigrants and U.S. citizens of Japanese descent.⁴ Once again, the League was sounding the alarm. In both cases, the executive had eviscerated certain rights without any individual hearings, and with scant proof that the detentions aided its interest in national security.

In *Korematsu v. United States*, the League was unsuccessful in persuading the Court to invalidate the internment camps.⁵ Decades later, in *Trump v. Hawaii*, their arguments supported the Court's decision to overrule *Korematsu*, although this may have felt like a pyrrhic victory.⁶ Nevertheless, the legal strategy merits consideration. Scholarly attention has largely focused on the judicial and extra-judicial processes through which *Korematsu* has become part of the anticanon of American jurisprudence.⁷ This category of cases includes decisions that are infamous for being constitutionally and ethically indefensible.⁸ Through this lens, some have further suggested that *Korematsu* was already "doctrinally irrelevant" prior to being overturned.⁹ Irrelevance may fairly explain courts' avoidance of *Korematsu* as a precedent for upholding governmental restrictions of liberty. Advocates' and jurists' use of the decision has charted a different trajectory, however, and the case has repeatedly been invoked to map the outer bounds of executive authority.¹⁰ In this way, *Korematsu* serves as a guidepost for how to avoid the grave wrongs of the past. Rather than banishing the decision into obscurity, the formal abrogation of

1. Brief for Japanese American Citizens League as Amicus Curiae Supporting Respondents, *Trump v. Hawaii*, 585 U.S. 667 (2018) (No. 17-965).

2. *Id.* at 14.

3. *Trump v. Hawaii*, 585 U.S. 667, 681 (2018).

4. Brief for Japanese American Citizens League as Amicus Curiae Supporting Petitioner, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 22).

5. 323 U.S. 214, 223 (1944).

6. *Hawaii*, 585 U.S. at 710; see also STEPHEN VLADECK, *THE SHADOW DOCKET* 137 (2023) (discussing why the holding of *Hawaii* seemed to enshrine the same type of executive action that was at issue in *Korematsu*, even though it formally overturned the latter decision).

7. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

8. *Id.* at 460–64.

9. Robert L. Tsai, *Supreme Court Precedent and the Politics of Repudiation*, in *LAW'S INFAMY: UNDERSTANDING THE CANON OF BAD LAW* 96, 123–24 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2021).

10. *Infra* Subpart.II.B.

Korematsu supports its deployment as a negative precedent at both trial and appellate courts. Principles that flow naturally from the doctrine of stare decisis, and which go beyond the framework of the anticanon, help provide a theoretical foundation to the way courts have integrated *Korematsu* into their constitutional analysis since *Hawaii*.

The constitutional viability of this strategy has additional urgency, given the ramifications of the Trump administration's stated goal to detain and deport millions of parents, spouses, children, neighbors, and workers who are non-citizens.¹¹ During his most recent Presidential campaign, President Donald Trump made deporting immigrants—who are deeply embedded in American life—his flagship policy issue. When President Trump discussed invoking the Alien Enemies Act as part of this plan, he took a page directly from President Franklin Delano Roosevelt's detention of immigrants and U.S. citizens of Japanese descent.¹² During World War II, U.S. citizens of Japanese descent served overseas while their parents were detained and subjected to the Alien Enemies Act back home.¹³ Currently, the psychological toll of immigration detention on individuals, families, and communities is already difficult to overstate.¹⁴ Separating parents from their young children, widely condemned in international law, is a routine form of trauma inflicted by the U.S. immigration enforcement system.¹⁵ Nevertheless, courts have afforded enormous deference to the executive's authority to detain non-citizens while their civil immigration cases are pending.¹⁶

As an inroad into this analysis, Part I of this Article provides a case study of *Reno v. Flores*, in which Justice Stevens' dissenting opinion applies *Korematsu* to the immigration detention context.¹⁷ The *Flores* case involved an early and groundbreaking challenge to the detention of unaccompanied children—minors who arrive to the United States without a parent or legal guardian present. In the 1990s, the government used security as pretense to justify the abusive treatment of thousands of children who remained detained even when a relative, such as a grandparent, aunt, or uncle, was available to care for them. When it came time for federal courts to review this detention scheme, judicial deference to the Immigration and Naturalization Service (“INS”), and

11. *How Mass Deportations Will Separate American Families, Harm Our Armed Forces, and Devastate Our Economy: Hearing Before the S. Comm. on the Judiciary*, 118th Cong. 16 (2024) (statement of Aaron Reichlin-Melnick, Senior Fellow, Am. Immigr. Council).

12. 50 U.S.C. § 21; see also KATHERINE YON EBRIGHT, BRENNAN CTR. FOR JUST., *THE ALIEN ENEMIES ACT: UNJUST, UNNECESSARY, AND UNCONSTITUTIONAL* 3, 12 (2024) (“In World War II, the Alien Enemies Act continued to serve as a tool for ancestral discrimination and ethnoracial stereotyping.”).

13. See GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* 163–70, 223–24 (2001).

14. ALINA DAS, *NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS* 115–40 (2020).

15. *Id.* at 115–22; see also Carrie F. Cordero, Heidi Li Feldman & Chimène Keitner, *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 432, 482–503 (2020) (describing criticisms levied against the United States under international law based on the United States' explicit family separation policy in 2018).

16. Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1424–32 (2019).

17. *Reno v. Flores*, 507 U.S. 292 (1993).

the government's failure to disclose important evidence of the detention centers' procedures, shielded federal officials' treatment of minors from proper review. In a footnote, Justice Stevens' dissent drew parallels between *Korematsu* and the majority's failure to properly uphold the minors' constitutional due process rights.¹⁸

The role that *Korematsu* played in *Flores* can be understood as part of its status in the anticanon, and this framework is reviewed in Part II. Certain decisions are nearly universally recognized as nadirs in our nation's jurisprudence. These cases include *Plessy v. Ferguson*, *Lochner v. New York*, *Dred Scott v. Sandford*, and *Korematsu v. United States*. From time to time, courts use these condemned cases for their value as negative precedent, to paint an opposing position as committing a similar error to one repudiated in the past decision, and to help frame what any interpretation of the Constitution should endeavor to avoid. Part II systematically reviews the way *Korematsu* has been deployed by the Supreme Court, as well as certain lower courts, after *Korematsu* was overruled in *Hawaii*.

When taking stock of *Korematsu* as a resource for constitutional analysis, Part III goes beyond the category of the anticanon and attempts to theoretically ground invocations of overturned precedent in basic principles of constitutional interpretation. Although reliance on overturned precedent seems to stand in contrast to principles of common law adjudication, this Article argues that the two are not in conflict. Once an appellate court overcomes the presumption of a past decision's validity and abrogates the decision's holding, *stare decisis* suggests a *prima facie* conclusion that the overturned holding can now serve as a cautionary source of law for future adjudicators. This inference carries additional force when the overturned case represents a particularly egregious moral wrong, as in the situation of the anticanonical cases. However, the category of negative precedential decisions outlined here is not equivalent to the set of anticanonical decisions. Part III considers the limits and normative force of courts' use of negative precedent, taking account of the institutional role of the Supreme Court.

Finally, Part IV of the Article analyzes the political reality of mass deportations in light of *Korematsu* and the history of litigation surrounding the Japanese American internment camps. Up through his inauguration, Trump repeatedly alleged that immigrants pose a dire threat to national security, which served as his primary justification for declaring a national emergency to increase deportations. Like the assertion of military necessity during World War II, there is no clear evidentiary basis for declaring a national emergency. And as with the demonization of individuals of Japanese descent, specific officials in Trump's administration are marshaling racial prejudices against immigrant communities and their U.S. citizen children.¹⁹ In legal challenges that discuss these and related

18. *Id.* at 344 n.30 (Stevens, J., dissenting).

19. See *infra* notes 349–351 and accompanying text.

issues, courts must carefully scrutinize how much deference to afford the executive's determinations of military necessity, national security, and other uses of its emergency powers.

Given the rapidly evolving implementation of Trump's campaign promises, there are limits to this Article's analysis, among other important caveats that bear mentioning. The Article draws on legal and factual developments that are current through the second Trump administration's inauguration. Additionally, when challenging immigration policies, the use of detention must be distinguished from the question of whether any individual can be deported. This Article primarily considers the former. In *Korematsu*, the Court parsed various policy prongs to allow it to narrowly rule on a military evacuation order, rather than correctly considering that order as an integral component of a comprehensive scheme that inevitably mandated detention for individuals of Japanese descent.²⁰ By primarily discussing immigration detention, rather than deportation, I do not mean to commit a similar mistake. Although immigration detention and deportation go hand in hand, deportations often lead to extreme harms that go beyond detention.²¹ Furthermore, attempting to clarify the precise constitutionality of immigration detention, as permissible under the plenary power doctrine or as an infringement of individuals' due process rights, is also beyond the scope of this Article.²² Rather, this Article aims to review the factual history of the Japanese American internment camps and the recent judicial treatment of *Korematsu* to assess whether that decision can be rigorously deployed as a bulwark against the executive's mass deportation of immigrants.

Many precedential decisions impose prohibitions against government actors. Overturning a precedent similarly establishes a prohibition on what form the law itself can take, and what can and cannot be a permissible expression of judicial authority. For *Korematsu*, the overturned precedent holds a unique type of consensus within the legal community as the embodiment of what cannot be condoned as a correct application of certain constitutional principles. In this way, the case can and should guide the court on how to properly judge similar matters. Indeed, on at least one occasion, it has already played a dissenting role within the Supreme Court's jurisprudence on immigration detention.²³

I. A CRUCIAL MOMENT IN THE EVOLUTION OF IMMIGRATION DETENTION

In *Reno v. Flores*, Justice Stevens' dissent drew a clear link between the Court's past approval of Japanese American internment and its sanction of civil

20. *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944).

21. See generally, e.g., HUM. RTS. WATCH, DEPORTED TO DANGER: UNITED STATES DEPORTATION POLICIES EXPOSE SALVADORANS TO DEATH AND ABUSE (2020) (investigating 138 cases of Salvadorans killed since 2013 following their deportation, and 70 cases “in which deportees were subjected to sexual violence, torture, or other harm”).

22. Scholars have developed a robust body of research in this area. See *infra* note 332.

23. This case is discussed in depth in the following section. *Infra* Part.I.

detention of immigrants.²⁴ Footnote thirty of his opinion remains perhaps the most powerful application of *Korematsu* by a Supreme Court justice in the context of immigration detention. In this Part, I will review Stevens' dissent in *Flores* and how *Korematsu* suggests that individualized determinations should be a constitutional requirement for certain types of civil detention. This principle helps to underline the unconstitutional status of the Trump administration's calls to indiscriminately detain and deport entire classes of non-citizens from the United States. Furthermore, *Flores* highlights how, like in *Korematsu*, government attorneys misled the courts about the facts underpinning their positions. The institutional pressures that gave rise to the government's omissions and obfuscations have implications for the appropriate level of deference towards the executive's claims of a national emergency.

A. DETENTION BEFORE AND AFTER *RENO V. FLORES*

Jenny Flores was fifteen when she fled a civil war in El Salvador and when U.S. immigration officials detained her in a hotel.²⁵ Her situation was not unique. Held in detention, federal officials gave her and other children no access to school, provided no reading material they could understand, and mandated that they live in a room with adult strangers.²⁶ Other children that the federal government detained fared far worse. In the 1980s, immigration agents at some facilities subjected immigrant children with no criminal history to strip-searches, including highly invasive searches without any alleged probable cause, and denied the children visitation from family members.²⁷ Conditions at some of these facilities could plausibly be characterized as institutionalized child abuse.²⁸

When the INS detained Jenny Flores, the agency had instituted a blanket policy of detaining unaccompanied children.²⁹ Normally, they only released these children to their parents or certain other adults.³⁰ However, one regional commissioner, Herald Erzell, directed officials to only release children to their parents or legal guardians—and no one else—despite other regions releasing children to their aunts, uncles, and grandparents.³¹ Mr. Erzell's professional background, which ostensibly qualified him to make these highly sensitive and consequential policy choices, included serving as vice president of a fast-food

24. *Reno v. Flores*, 507 U.S. 292, 344 n.30 (1993) (Stevens, J., dissenting).

25. PHILIP G. SCHRAG, *BABY JAILS: THE FIGHT TO END THE INCARCERATION OF REFUGEE CHILDREN IN AMERICA* 11, 13 (2020).

26. *Id.* at 13.

27. *Id.* at 14.

28. *Id.* at 57 (noting that settlement talks may have been driven in part by Jenny Flores' attorneys' observation that immigration officials were "going to be painted as child abusers" by the press, if the case continued).

29. *Id.* at 11–12.

30. *Id.* at 12.

31. See *Flores v. Meese*, 942 F.2d 1352, 1355 (9th Cir. 1991).

company before his appointment to the INS.³² In his new position, Erzell oversaw federal agents in the then Western Region of the INS. His directive meant that these agents stopped qualified relatives, such as grandparents, older siblings, aunts, and uncles, from taking minors out of detention, and instead, the government kept those children in federal facilities, sometimes until they turned eighteen.³³ Many children's parents were not physically present in the country, which meant his policy resulted in the children's prolonged and unnecessary detention in an array of prisons, jails, and other haphazard facilities.

As an important side note, the conditions for these minors in the 1980s and 1990s would shock most advocates who work with unaccompanied children today. The Immigration and Nationality Act and implementing regulations have gradually expanded the protection known as Special Immigrant Juvenile Status,³⁴ for example, for which many unaccompanied children now qualify.³⁵ Furthermore, now, border officials are not generally entrusted with housing unaccompanied children except for brief periods lasting less than a week.³⁶ These policies are part of the legacy of the *Flores* settlement and decades of advocacy.

Three noteworthy sources of law bear on the detention of children who arrive to the United States without a parent present.³⁷ First, since the passage of the Trafficking Victims Protection Reauthorization Act (“TVPRA”) of 2008, Unaccompanied Children (“UCs”) must be placed “in the least restrictive setting” available.³⁸ Second, before this legislation and in the wake of the September 11th attacks, immigration agencies were reorganized from the former INS to the Department of Homeland Security (“DHS”).³⁹ Along with the establishment of this new umbrella agency, primary oversight of UCs was transferred outside of DHS altogether to the U.S. Office of Refugee Resettlement within the Department of Health and Human Services, which is

32. SCHRAG, *supra* note 25, at 12; see Marcia Chambers, *Immigration Chief on West Coast Pressing Fight on Illegal 'Invasion'*, N.Y. TIMES (Dec. 4, 1986), <https://www.nytimes.com/1986/12/04/us/immigration-chief-on-west-coast-pressing-fight-on-illegal-invasion.html>.

33. See *Flores*, 942 F.2d at 1355–56.

34. See Laila L. Hlass, Rachel Leya Davidson & Austin Kocher, *The Double Exclusion of Immigrant Youth*, 111 GEO. L.J. 1407, 1427–28 (2023).

35. Compare Amy Joseph, Amy Pont & Cristina Romero, *Consent Is Not Discretion: The Evolution of SIJS and the Consent Function*, 34 GEO. IMMIGR. L.J. 263, 285–86 (2020) (noting the extremely low grants of Special Immigrant Juvenile grants, numbering in the hundreds per year in the mid-1990s, as reflected in I-485 adjustment applications), with Hlass et al., *supra* note 34, at 1443–44 (documenting the many thousands of I-485 adjustment applications based on Special Immigrant Juvenile Status per year starting in 2014).

36. 8 C.F.R. § 236.3(f) (2019) (requiring Department of Homeland Security officials “transfer custody of [an unaccompanied child] as soon as practicable after receiving notification of an [U.S. Office of Refugee Resettlement (“ORR”)] placement, but no later than 72 hours.”).

37. See 6 U.S.C. § 279(g)(2) (defining “unaccompanied alien child” as a child without lawful immigration status, under eighteen years of age, who has no parent or legal guardian in the United States to provide care and physical custody).

38. 8 U.S.C. § 1232(c)(2)(A).

39. Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135.

guided by a humanitarian rather than law enforcement mission.⁴⁰ This agency is obligated to release UCs from detention when there is a capable and responsible adult sponsor for them, not necessarily their parents, which it must evaluate promptly and on an individualized basis.⁴¹ Statute and agency rules, through the second Trump administration's inauguration, state that free legal representation should be provided to many UCs.⁴² Finally, the *Flores* Settlement, reached in 1997, still binds federal actors and mandates various criteria be met to ensure that children receive a minimum degree of care if they are detained.⁴³ Infamously, the Trump administration weaponized these protections as part of its family separation policy,⁴⁴ and both the Biden⁴⁵ and the first Trump⁴⁶ administrations attempted to undercut the *Flores* agreement in other ways.

B. *KOREMATSU* AND *FLORES*

Despite the feasible framework subsequently implemented and described above, when Jenny Flores' case reached the Supreme Court in 1992, the majority did not intervene on the minors' behalf. The children had been certified as a class and asserted that the government's detention of them violated their Fifth Amendment liberty interest under the doctrine of substantive due process.⁴⁷ However, the Court decided not to construe their asserted right as a liberty interest to be "free[] from physical restraint."⁴⁸ Rather, five Justices followed the government's suggestion that there was a much narrower right at stake and characterized the question presented as whether a child could choose a particular custodian over a "government-selected child-care institution."⁴⁹ The Court concluded that such a narrow right was not protected by the Fifth Amendment.⁵⁰

Justice Stevens dissented.⁵¹ The government's haphazard assemblage of shelters and prisons did not resemble childcare institutions in any significant way, except, perhaps, for the fact that they housed children.⁵² Stevens concluded that the blanket detention of unaccompanied children when they were not

40. 6 U.S.C. § 279.

41. See 8 U.S.C. § 1232(e)(3); OFF. OF REFUGEE RESETTLEMENT, ORR UNACCOMPANIED ALIEN CHILDREN BUREAU POLICY GUIDE: SECTION § 2.2 (2025).

42. OFF. OF REFUGEE RESETTLEMENT, *supra* note 41.

43. See KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., IF11799, CHILD MIGRANTS AT THE BORDER: THE *FLORES* SETTLEMENT AGREEMENT AND OTHER LEGAL DEVELOPMENTS (2024).

44. See Nicholas Wu, *What Is the Flores Agreement, and What Happens if the Trump Administration Withdraws from It?*, JUST SECURITY (Oct. 18, 2018), <https://www.justsecurity.org/61144/flores-agreement-trump-administration-withdraws-it>.

45. See *Flores v. Garland*, No. CV 85-4544 (AGR), 2024 WL 3467715, at *1 (C.D. Cal. June 28, 2024).

46. See *Flores v. Rosen*, 984 F.3d 720, 726 (9th Cir. 2020).

47. *Reno v. Flores*, 507 U.S. 292, 296, 301–02 (1992).

48. *Id.* at 299–300, 302.

49. *Id.* at 302. This framing of detention centers as benevolent care facilities echoes nineteenth-century courts' view of houses of refuge, which imprisoned immigrant children. See Paulina D. Arnold, *How Immigration Detention Became Exceptional*, 75 STAN. L. REV. 261, 277–79, 321–23 (2023).

50. *Flores*, 507 U.S. at 301–02.

51. *Id.* at 320 (Stevens, J., dissenting).

52. See SCHRAG, *supra* note 25, at 51–56.

charged with any crime could not be constitutional.⁵³ He also recognized the stark and uncomfortable parallels between the federal detention scheme at issue and the detention of children of Japanese immigrants during World War II.⁵⁴ After framing the children's basic right as one to be free from detention, Stevens emphasized that the government should carry the burden to prove that any particular child's detention serves a legitimate government interest.⁵⁵ That is, the government should have to hold a hearing, or otherwise make an individualized determination, if it were to continue detaining a child when a responsible non-parent relative or other family member was able to care for them.

Despite this interpretation of the Due Process Clause, at the time *Korematsu* was still good law. Stevens addressed this issue in a footnote:

There is, of course, one notable exception [to the cases that support this dissent]: *Korematsu v. United States*, in which the Court upheld the exclusion from particular "military areas" of all persons of Japanese ancestry without a determination as to whether any particular individual actually posed a threat of sabotage or espionage. The Court today does not cite that case, but the Court's holding in *Korematsu* obviously supports the majority's analysis, for the Court approved a serious infringement of individual liberty without requiring a case-by-case determination as to whether such an infringement was in fact necessary to effect the Government's compelling interest in national security. I understand the majority's reluctance to rely on *Korematsu*. . . . [T]he . . . congressional decision to pay reparations to the Japanese-Americans who were detained during that period suggests that the Court should proceed with extreme caution when asked to permit the detention of juveniles when the Government has failed to inquire whether, in any given case, detention actually serves the Government's interest.⁵⁶

Justice Stevens' use of *Korematsu* is notable. The citation already serves to exert a negative, cautionary influence against the majority's opinion, despite the fact that *Korematsu* was still good law when *Flores* was decided. Furthermore, Stevens' dissent suggests that the fact that the World War II internment camps housed U.S. citizens does not necessarily foreclose the constitutional relevance of *Korematsu* in the immigration context. The Fifth Amendment has long been held to apply to any "person,"⁵⁷ including non-

53. *Flores*, 507 U.S. at 348 (Stevens, J., dissenting).

54. *Id.* at 344 n.30.

55. *Id.* at 343.

56. *Id.* at 344 n.30 (citations omitted) (quoting *Korematsu v. United States*, 323 U.S. 214, 215–16 (1944)).

57. U.S. CONST. amend. V.

citizens.⁵⁸ The Court's opinion in *Flores* is often cited to support this very principle.⁵⁹

The lack of individualized hearings is a core component of what made *Korematsu* so constitutionally dubious, in addition to morally reprehensible, and this history is worth reviewing. In *Korematsu*,⁶⁰ as in the concurrently decided case of *Ex Parte Mitsuye Endo*⁶¹ and the underlying case of *Hirabayashi v. United States*,⁶² the Supreme Court accepted the government's argument that individualized loyalty determinations were unfeasible in a short amount of time, thereby necessitating preemptive measures against all individuals of Japanese descent.⁶³ In short, the Court gave deference to the executive's factual assessment of what the military situation required, despite the military's explicit racial categorization and the enormity of the liberty interest at stake in mass detention.⁶⁴ The Court conceded that it could not "reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained."⁶⁵ In reality, military intelligence officers notified their superior commanders that individualized hearings, rather than mass arrests, were both feasible and preferable.⁶⁶ In the months after Pearl Harbor, the Attorney General was also highly skeptical that the mass apprehensions of U.S. citizens could be constitutional.⁶⁷ The Department of Justice acquiesced to defending the internment camps only after concerted efforts of certain high-ranking military

58. See *Yamataya v. Fisher*, 189 U.S. 86, 98 (1903) (holding that "foreigners" must have "due process of law"); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment . . . protects every one of these persons."); see also *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 2012 (2020) ("[A] noncitizen within the territory of the United States [] is entitled to invoke the protections of the Due Process Clause.")

59. See, e.g., *Demore v. Kim*, 538 U.S. 510, 523 (2003). But see *Zadvydas v. Davis*, 533 U.S. 678, 720 (2001) (Kennedy, J., dissenting) (citing *Flores* as part of a discussion of the variable strength of the due process clause for removable non-citizens).

60. *Korematsu v. United States*, 323 U.S. 214, 218 (1944).

61. 323 U.S. 283, 294–95 (1944).

62. 320 U.S. 81, 99 (1943).

63. *Korematsu*, 323 U.S. at 218. The factual underpinnings of this logic were later uncovered to be falsified. See *infra* notes 77–80 and accompanying text.

64. *Korematsu*, 323 U.S. at 223 ("It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry." (paraphrasing *id.* at 226 (Roberts, J., dissenting))). Justice Murphy provided the sharpest dissent on the internment camps' inherent racism. *Id.* at 239 (Murphy, J., dissenting) (finding that the justifications for the internment camps were rooted in "an accumulation of . . . misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices").

65. *Id.* at 218 (quoting *Hirabayashi*, 320 U.S. at 99).

66. See PETER IRONS, *JUSTICE AT WAR*, 202–04 (1983).

67. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS* 54–55, 62 (1983) [hereinafter *PERSONAL JUSTICE DENIED*].

officials, including Lieutenant General John L. DeWitt, notorious for his blatant fear-mongering.⁶⁸

Reviewing the information available to executive officials prior to and during World War II, it is hard to overstate the depth to which the military's stated need for preemptive mass detention was, in fact, "unfounded."⁶⁹ In his official justification for the internment camps, General DeWitt emphasized his belief that the "Japanese race is an enemy race," irrespective of citizenship status.⁷⁰ He further justified his assessment of military necessity on the baffling syllogism that the "fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."⁷¹ Although the U.S. government sent at least 100,000 individuals to internment camps, there were, at most, only a few thousand U.S. citizens and immigrants of Japanese descent that federal agencies had any professed reason to suspect of disloyalty, even after years of surveillance.⁷² These agencies put many of these individuals under suspicion simply for being prominent members of the Japanese American community, or for having connections to publications or businesses with Japanese-language names.⁷³ Nearly all of these individuals had already been detained prior to the mass internment that followed.⁷⁴

When it came time for judicial review of these circumstances, however, the government crafted its position to mislead federal courts as to why it did not hold individualized assessments before ordering detention. Originally, General DeWitt orchestrated the evacuation to camps of all individuals of Japanese descent. He claimed in a report that it was impossible to determine their loyalty

68. *See id.* at 62; TETSUDEN KASHIMA, JUDGMENT WITHOUT TRIAL: JAPANESE AMERICAN IMPRISONMENT DURING WORLD WAR II 45, 133 (2003); IRONS, *supra* note 66, at 26, 222–23, 269.

69. *Korematsu*, 323 U.S. at 218 (quoting *Hirabayashi*, 320 U.S. at 99). There is an extensive body of scholarship on the internment camps, which reviews the reports and assessments of executive officials at the time. *See* ROBINSON, *supra* note 13, at 51–72; KASHIMA, *supra* note 68, at 14–42. Additionally, historian Peter Irons has written a definitive account of the legal battles around the internment camps, which includes the conduct of many executive officials. *See generally* IRONS, *supra* note 66. For a discussion of why there was no evidence to suspect that individuals of Japanese descent were any more likely than anyone else to commit sabotage, see *infra* Part.IV.

70. JOHN L. DEWITT, *Final Recommendation of the Commanding General, Western Defense Command and Fourth Army, Submitted to the Secretary of War*, in FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 33, 34 (1943).

71. *Id.* at 34; *see also* ROBINSON, *supra* note 13, at 125–26 (discussing then-California Attorney General Warren's official endorsement of this same belief).

72. PERSONAL JUSTICE DENIED, *supra* note 67, at 54–55; *see also* ROBINSON, *supra* note 13, at 62 (discussing an FBI report finding that the vast majority of Japanese Americans remained loyal to the United States); KASHIMA, *supra* note 68, at 19–42 (describing the FBI, Department of Justice, War Department, and Department of the Navy's efforts to surveil Japanese Americans); IRONS, *supra* note 66, at 203–05 (explaining that the government estimated that less than three percent of Japanese Americans were likely disloyal); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 496–97 (1945) (noting that no person of Japanese ancestry had been convicted of sabotage or espionage as an agent of Japan).

73. KASHIMA, *supra* note 68, at 29–33; ROBINSON, *supra* note 13, at 63–64.

74. PERSONAL JUSTICE DENIED, *supra* note 67, at 54–55; *see also* Rostow, *supra* note 72, at 492–93.

to the United States on a case-by-case basis.⁷⁵ Nevertheless, the Solicitor General, in preparation for arguing *Hirabayashi* before the Supreme Court, was informed of the fact that “the only Intelligence agency responsible for advising General DeWitt gave him advice directly to the contrary.”⁷⁶ General DeWitt’s constitutionally dubious reasoning was made further factually untenable after the War Department, in need of soldiers, began to screen the loyalty of individuals of Japanese descent on a case-by-case basis.⁷⁷ With this screening procedure, it then enlisted tens of thousands of U.S. citizens of Japanese descent into the army, who served honorably.⁷⁸ Given the apparent feasibility of these individualized loyalty hearings, Department of Justice attorneys, in consultation with General DeWitt, decided to argue that a similar screening procedure would have been too time-consuming, rather than simply impossible, at the outset of World War II.⁷⁹ They then retroactively amended and republished General DeWitt’s report so that it could better support their legal argument.⁸⁰ The Assistant Secretary of War ordered the destruction of all physical copies of General DeWitt’s original report.⁸¹ Other military officials still allowed misleading information contained in the original report to be included in amicus curiae briefing, over Department of Justice attorneys’ objections.⁸²

In *Flores*, a more structural impediment prevented the Supreme Court from fairly assessing the facts of Jenny Flores’ claim. By the time the case reached the Court, a previous consent decree threatened to make the entire case moot.⁸³ Additionally, new regulations were promulgated after the complaint was filed, against which the detained minors made a facial challenge before the Court without the benefit of a trial court’s fact-finding.⁸⁴ Notably, this did not stop the government from failing to inform the Court of the conditions in which the

75. FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST, *supra* note 70, at 9 (claiming that “a positive determination could not have been made” with respect to loyalty).

76. IRONS, *supra* note 66, at 204–05 (quoting Memorandum from Edward J. Ennis, Dir. of Alien Enemy Control Unit, Justice Dep’t, to Charles Fahy, Solic. Gen. (Apr. 30, 1943)).

77. GREG ROBINSON, A TRAGEDY OF DEMOCRACY: JAPANESE CONFINEMENT IN NORTH AMERICA 203–07, 210–11, 221 (2009).

78. *Id.* at 203, 207; *see generally* ROBINSON, *supra* note 13, at 173–74 (discussing Japanese Americans’ service in the U.S. army); George Saito, *Letter to Father*, in ONLY WHAT WE COULD CARRY: THE JAPANESE AMERICAN INTERNMENT EXPERIENCE 374, 374–75 (Lawson Fusao Inada ed., 2000) (demonstrating a Japanese American soldier’s loyalty to the United States). The brother of Mitsuye Endo, the plaintiff in *Ex parte Endo*, 323 U.S. 283 (1944), was serving in the Army when Endo challenged her detention. IRONS, *supra* note 66, at 102.

79. IRONS, *supra* note 66, at 208; ROBINSON, *supra* note 13, at 184–85.

80. IRONS, *supra* note 66, at 208–12.

81. *Id.* at 211.

82. *Id.* at 212–17; *see also* ROBINSON, *supra* note 13, at 184–85 (explaining that government officials “engaged in egregious manipulation of evidence”). This misdirection by government attorneys should not absolve the responsibility of the courts. *See* Rostow, *supra* note 72, at 507, 520–23 (“[P]art of the [Supreme] Court’s basic premise of fact was that it was impossible to investigate the question of loyalty individually. As to the validity of this proposition there was neither evidence in the record nor even discussion by the Court to indicate a basis for the conclusion which might appeal to a reasonable man.”).

83. *Reno v. Flores*, 507 U.S. 292, 296 (1993).

84. *Id.* at 300–01.

immigration authorities were actually detaining children. For example, the government asserted that, due to subsequent changes in law, minors were now detained in “community based shelter care programs.”⁸⁵ In fact, many children were still being held in high-security facilities surrounded by barbed wire alongside juvenile criminal offenders.⁸⁶ Some minors were handcuffed to go to their immigration court dates, and, in at least one facility, still strip-searched every time they returned.⁸⁷

Almost a decade earlier, a U.S. District Court judge ruled that the federal government’s unindividualized strip-searches of migrant children were unconstitutional when there was no reasonable individualized suspicion of actual danger.⁸⁸ At the time, the INS conducted over seven thousand strip-searches of children per year on average.⁸⁹ The federal agents performing these invasive procedures only found what they considered to be contraband in a single instance, when a young girl carried a broken mirror.⁹⁰ For years after the Supreme Court reviewed Jenny Flores’ detention, government agents still illegally conducted strip searches of minors, in violation of the *Flores* consent decree.⁹¹ Nevertheless, the fiction of a security risk was used to justify these conditions of detention for thousands of children. A similar complete lack of evidence did not prevent the government from detaining thousands of U.S. citizens of Japanese descent during World War II.

The Supreme Court did not review the conditions of detention in *Flores*. Instead, the majority approved restrictions on juveniles’ release to adult caregivers, based on the state’s supposedly benevolent interest in the juveniles’ well-being.⁹² But Justice Stevens was not the only one to notice the uncomfortable comparison between how the government was detaining immigrant children and what executive agencies forced children of Japanese descent to endure during World War II. In the early 1990s, Michael A. Olivas reflected on how many unaccompanied children were held in tent camps and irregular structures, including a former pesticide storage center, which were “not even as safe or as commodious as [the internment camp of] Manzanar was in World War II.”⁹³ In both *Korematsu* and *Flores*, the infringements on liberty and counterbalancing government interest were much more egregiously

85. SCHRAG, *supra* note 25, at 50–51.

86. *Id.* at 51.

87. *Id.*

88. *Flores v. Meese*, 681 F. Supp. 665, 669 (C.D. Cal. 1988).

89. SCHRAG, *supra* note 25, at 26–27.

90. *Id.* at 27.

91. See ROSA EHRENREICH, HUM. RTS. WATCH, SLIPPING THROUGH THE CRACKS: UNACCOMPANIED CHILDREN DETAINED BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE 58–68 (Lee Tucker, Lois Whitman & Cynthia Brown eds., 1997), <https://www.hrw.org/sites/default/files/reports/us974.pdf>.

92. *Reno v. Flores*, 507 U.S. 292, 305 (1993) (noting the government interest in “protecting the welfare of the juveniles”).

93. Michael A. Olivas, “*Breaking the Law*” on Principle: An Essay on Lawyers’ Dilemmas, Unpopular Causes, and Legal Regimes, 52 U. PITT. L. REV. 815, 822 (1991).

misaligned, as a factual matter, than the Justices in the majorities recognized at the time. These two cases reveal a pattern in the way that the executive frames certain detention regimes as responses to security concerns to cloud courts' constitutional assessments. This pattern supports the basic premise that courts have reason to be less deferential when the executive institutes a blanket detention scheme without any individualized justifications for its deprivations of liberty.

II. CANONICALLY BAD LAW AND *KOREMATSU* AFTER ITS FORMAL ABROGATION

As in *Flores*, judges cite decisions that they not only disagree with, but which are universally believed to be deeply wrong. Is this move merely rhetorical, or is there some doctrinal substance at play? Some Supreme Court decisions, like *Korematsu*, have now been overturned and hold no precedential value. For this subset of disfavored cases that are no longer good law, are judges' references to them persuasive adornments to their analysis, or can the cases provide real analytical value to our understanding of the Constitution? This Part reviews the literature that has attempted to provide a framework for understanding how judges have invoked certain cases for their negative weight, paying special note to the concept of the anticanon. The Part then situates *Korematsu* within this theory, given the case's frequent invocation by courts since it was overturned in *Hawaii*. Unlike certain criticisms of this latter decision, I argue that the fact that *Korematsu* was formally abrogated is crucially important to how it may be invoked in the future. Through its official disavowal, the case has become more relevant to our understanding of what the Constitution cannot condone.

A. *KOREMATSU* AND THE ANTICANON

The use of decisions for their negative value is far from unheard of. Courts, on occasion, have found it useful to bolster their holdings by distinguishing their reasoning or result from the egregious errors of the past.⁹⁴ Cases such as *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu* are perhaps the most notable judicial and moral wrongs that courts use in this way.⁹⁵ These cases hold sway not just among attorneys but also among students of U.S. history, and, at a minimum, they allow for a type of shorthand reference for low points in our nation's jurisprudence.

Among numerous cases that are cited disapprovingly, Jamal Greene groups the four aforementioned Supreme Court decisions into the anticanon of

94. See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248 (2022) (invoking *Lochner v. New York*, 198 U.S. 45 (1905) to underscore the principal of judicial excess); *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, J., dissenting) (citing Justice Holmes's dissent in *Lochner*, 198 U.S. at 76).

95. Greene, *supra* note 7.

American constitutional law.⁹⁶ The concept of the anticanon has provided a touchstone for a discussion of this set of decisions.⁹⁷ An anticanonical case is one that is frequently cited for its negative value.⁹⁸ Sometimes, in the most superficial iteration of this practice, the cases are used to merely denigrate the opposing side.⁹⁹ As David A. Strauss has stated, these particular decisions are “so thoroughly repudiated that you can discredit your opponent’s position by associating it with that decision.”¹⁰⁰ More rigorously, the decisions can be analyzed to outline past calamitous constitutional errors that the court must take great care to avoid.

These cases have also been considered by some scholars to be the mirror images of a set of canonical cases.¹⁰¹ They stand in contrast to certain lauded precedential decisions that also form touchstones for our legal discourse. Such cases might include *Brown*, overruling *Plessy*.¹⁰² Conversely, certain dissents of these infamously wrong cases are frequently cited in this vein. Greene argues that there is little “more valuable to constitutional argument than the dissent to an anticanonical case.”¹⁰³ Richard Primus has pointed out how Justice Holmes’s dissent in *Lochner* and Justice Harlan’s dissent in *Plessy* both hold similar status in the legal imaginary, despite the fact that they hold no precedential value.¹⁰⁴

For the purposes of this Article, I define “negative precedent” as any previous decision that is cited after it has been formally overturned. As a theoretical matter, this is a larger set of cases than those included within the anticanon, although in a sense more restrictive, since it may be unnecessary for a case to be formally overturned for it to be considered anticanonical.¹⁰⁵ Two other criteria distinguish anticanonical cases such as *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu*: First, the decisions sanctioned particularly egregious

96. *Id.* at 380–81; see also Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 249 (1998) (describing the anticanon as a “set of texts that shape constitutional development”).

97. See, e.g., Austin Sarat, Lawrence Douglas, Martha Merrill Umphrey & Ryan Kyle, *Telling the Story of Law’s Infamy: An Introduction*, in *LAW’S INFAMY: UNDERSTANDING THE CANON OF BAD LAW*, *supra* note 9, at 1, 2; Kaufman, *supra* note 16, at 1431; David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 939 (2016).

98. See Primus, *supra* note 96, at 248 n.23, 249 n.25.

99. See Greene, *supra* note 7, at 461, 467 (noting the similar discursive space occupied by rejection of the anticanon and condemnation of Nazism, as well as the rhetorical similarities between use of the anticanon and bare insults as a form of shorthand).

100. David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 8 (2015).

101. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1019 (1998) (arguing that cases must be analyzed considering the “twin notions of normative canonicity and anti-canonicity”); Primus, *supra* note 96, at 254 (“[E]ach member of the canon is also linked to a text that stands *outside* the canonical set.”).

102. See *Brown v. Bd. of Educ.*, 374 U.S. 483, 494–95 (1954).

103. Greene, *supra* note 7, at 445.

104. See Primus, *supra* note 96, at 249–50; see also Greene, *supra* note 7, at 413, 418, 445–47 (discussing the “canonization” of Holmes’s and Harlan’s dissents).

105. Balkin & Levinson, *supra* note 101, at 1017 (writing, in 1998, that *Korematsu* was part of the anticanon).

moral wrongs,¹⁰⁶ even if they may not contain any major internal errors of legal reasoning,¹⁰⁷ second, subsequent historical circumstances have imbued them with symbolic resonance in our political and moral discourse.¹⁰⁸ The idea of an anticanon thus incorporates normative (legal, moral) and descriptive (historicist) evaluations of certain decisions.¹⁰⁹ Even though the Supreme Court may not have made objectively serious analytical errors,¹¹⁰ a process of historical consensus has created general agreement across the political spectrum that cases such as *Plessy* and *Lochner* were not just wrong but “wrong the day they were decided.”¹¹¹ As Justice Kavanaugh noted, we believe there is a difference between *Korematsu* and some other cases that “may be unmasked as egregiously wrong based on later legal or factual understandings or developments.”¹¹² Chiefly, such decisions, including *Korematsu*, were wrong from the outset.¹¹³ The Supreme Court has now appropriately abrogated all four anticanonical cases, which means they can now serve as negative precedents, but that was not true when *Korematsu* was first described as anticanonical.¹¹⁴

Aside from the framework of the anticanon, the idea of negative precedent is not nearly as well-theorized as the idea of precedent and the practice of precedential decision making that underlies *stare decisis*. For example, the term “negative precedent” has been used somewhat loosely to describe the Supreme Court’s analysis of both overturned decisions as well as irregular and

106. Greene finds that these wrongs are unethical, rather than simply immoral, but for my purposes, this distinction is not relevant. See Greene, *supra* note 7, at 463–64.

107. *Id.* at 406–27 (“The degree to which we collectively renounce these decisions is not nearly in proportion to the outrageousness of their errors.”).

108. *Id.* at 436–60 (reviewing important “events and historical conditions that altered how we think about each case,” apart from the case’s immoral result).

109. See *id.* at 380 (“It is a curious feature of American constitutional law that the project of identifying the Supreme Court’s worst decisions is not solely a normative one.”).

110. *Id.* at 405–27 (presenting arguments for why the seriousness of legal mistake in these cases cannot account for their universal condemnation).

111. Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and *Constitutional Historicism*, 85 B.U. L. REV. 677, 678 (2005) (discussing *Lochner*, *Plessy*, and *Dred Scott*); see also *Trump v. Hawaii*, 585 U.S. 667, 710 (2018) (noting *Korematsu* was “wrong the day it was decided”); Rostow, *supra* note 72, at 491–92 (criticizing *Korematsu* as being anomalous and gravely wrong one year after the case was decided).

112. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring).

113. Thus, the anticanon is arguably composed of cases that are not defined by egregious legal errors. Greene, *supra* note 7, at 406. Nevertheless, *Korematsu* is considered to be wrong the day it was decided in part because the Supreme Court announced and applied the test of rigid scrutiny for race-based classification on the same day, in *Korematsu* itself, and nevertheless held the internment camps to be constitutional. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Rigid scrutiny is now understood to be the most demanding of all levels of constitutional scrutiny. See Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 288 (2015). However, at the time, the government did not present evidence or allege that any interned individual had committed espionage or sabotage. See *Korematsu*, 323 U.S. at 236 (Murphy, J., dissenting). Given this evidentiary lacuna, it seems impossible to square the Court’s approval of the military’s mass internment plan for individuals of Japanese descent with the Court’s professed level of heightened review.

114. See, e.g., Balkin & Levinson, *supra* note 101, at 1017.

undesirable historical practices.¹¹⁵ Nevertheless, in the following Subpart and Part III, I will argue that the value of *Korematsu* as negative precedent has changed in the time since it was formally overturned in *Hawaii*. Unlike how *Korematsu* was invoked in *Flores*, where Stevens admitted that the holding in *Korematsu* would support the opposing position against his own argument, *Korematsu* now holds sway in its abrogation. Furthermore, there is ample room for a more vigorous theoretical assessment of the value of overturned precedent as a companion to the doctrine of stare decisis.

The anticanon encompasses a set of cases that have received greater depth of disapproval, but are more limited in number, than the set of all of the overturned cases that could be cited for their negative precedential value. And in contrast to negative precedent as generally arising whenever an appellate case is overturned, an anticanonical case has its own unique explanatory force. Certain cases, such as those in the anticanon, become particularly potent for constitutional argument when they come to embody a particular type of legal and moral consensus, which together allows advocates, judges, and observers to communicate efficiently.¹¹⁶ By frequently incorporating particular cases into their decisions, judges influence “which elements of the past can count as worthy objects of interpretation.”¹¹⁷ For these reasons, the fact that *Korematsu* was overturned is important not only because the decision cannot be relied on to bolster future executive detention schemes. As the Subpart below elaborates, the Court’s recent treatment of *Korematsu* has also solidified its position as an anticanonical reference point in constitutional adjudications.

B. *KOREMATSU SINCE HAWAII*

In 2018, the Supreme Court formally overturned *Korematsu*, recognizing that it never should have been good law.¹¹⁸ Up until that point, *Korematsu* had still been “on the books” as precedent. In a few lines, the Court summarily concluded that “*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in law under the Constitution.’”¹¹⁹ Analyzing courts’ treatment of *Korematsu* since *Hawaii* gives insight into the case’s use as negative precedent.¹²⁰ Recent treatment of *Korematsu* also provides indications of courts’ willingness to recognize the

115. See, e.g., Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 273 (2017); Deborah A. Widiss, Note, *Re-Viewing History: The Use of the Past As Negative Precedent in United States v. Virginia*, 108 YALE L.J. 237, 263-64 (1998).

116. See Richard A. Primus, *Judicial Power and Mobilizable History*, 65 MD. L. REV. 171, 174 (2006).

117. *Id.*

118. *Trump v. Hawaii*, 585 U.S. 667, 710 (2018).

119. *Id.* (quoting *Korematsu v. United States*, 323 U.S. 215, 248 (1944) (Jackson, J., dissenting)).

120. Eric K. Yamamoto, one of Fred Korematsu’s attorneys in his *coram nobis* proceedings, along with Rachel Oyama, provide an illuminative analysis of certain cases’ citation to *Korematsu* as a cautionary influence before *Hawaii*. Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J.F. 688, 701–05 (2019).

historical and legal parallels between the decision and current abuses when assessing the constitutional boundaries of acceptable policy.

It seems reasonable to start with the decision of *Hawaii* itself. Despite abrogating *Korematsu*, in the matter at issue before the Court in *Hawaii*, a majority of the Justices still deferred to the executive. The majority declined to overturn President Trump's proclamation, also known as the "Muslim ban," that restricted visa holders from entering the United States if they came from seven countries with large populations of observant Muslims.¹²¹ They did so in the wake of widespread public outrage at the order¹²² and despite numerous public statements demonstrating the administration's animus against Muslims.¹²³ Justice Sotomayor's dissent in *Hawaii* equated the majority's decision with the Court's failure in *Korematsu* in no uncertain terms:

In the intervening years since *Korematsu*, our Nation has done much to leave its sordid legacy behind. Today, the Court takes the important step of finally overruling *Korematsu* . . . This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another.¹²⁴

After the decision, an outpouring of scholarship ensued, with many denouncing the majority in *Hawaii* in terms that echoed Justice Sotomayor's dissent.¹²⁵ Justices Kagan, Ginsburg, and Breyer joined Justice Sotomayor in finding that the Executive Order was unconstitutional.¹²⁶ Justice Sotomayor recognized that the Court finally held *Korematsu* to be "gravely wrong,"¹²⁷ only to perpetuate the faulty logic that underlay the wartime case's error by deferring to the executive's blanket curtailment of rights in the name of national security.

Justice Sotomayor did much more, however, than recognize that the majority had mirrored *Korematsu*. Her dissent suggested specific inroads for the type of constitutional analysis the Court should undertake instead: It should subject the Trump administration's immigration restrictions to a level of constitutional scrutiny involving comparisons to "the reasoning" of *Korematsu*,

121. *Hawaii*, 585 U.S. at 705–08, 711; Proclamation No. 9645, 82 Fed. Reg. 45161, 45164 (Sep. 24, 2017); see also VLADECK, *supra* note 6, at 129–30 (discussing Trump's "Muslim ban" and the immediate consequences of its implementation).

122. Hannah Giorgis, *The Faulty Logic in Trump's Travel Ban*, ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/trumps-travel-ban-logic-flaw/579631>.

123. See VLADECK, *supra* note 6, at 129; Yamamoto & Oyama, *supra* note 120, at 710–11.

124. *Hawaii*, 585 U.S. at 754 (Sotomayor, J., dissenting) (citations omitted) (quoting *Hawaii*, 585 U.S. at 710 (majority opinion)).

125. See, e.g., Collection, *Korematsu in the Court of History: Seventy-Five Years Later*, YALE L.J. (2019), <https://yalelawjournal.org/collection/korematsu-at-seventy-five>; Tsai, *supra* note 9; VLADECK, *supra* note 6.

126. *Hawaii*, 585 U.S. at 671.

127. *Id.* at 754.

using that decision as negative precedent.¹²⁸ The Court should assess if, and to what extent, the administration's position was rooted in "dangerous stereotypes," and whether "there was *strong evidence* that impermissible hostility and animus motivated the Government's policy."¹²⁹ The dissent suggests, without concluding, that such an evidentiary showing would call the constitutionality of the government's immigration policy into question, similarly to how the Court acknowledged and disavowed the hostility and animus that motivated internment. As an additional sign that the government's restrictions on immigrants' rights may be impermissible, the dissent urged the Court to recognize that *Korematsu* stands for the principal that an "ill-defined national security threat" may be insufficient to warrant deference to the executive.¹³⁰ And when the government is "unwilling to reveal its own intelligence agencies' views of the alleged security concerns,"¹³¹ without any concrete reason for avoiding judicial review of those opinions (and however deferential the courts should be to agencies' expertise),¹³² that lack of evidence should be "troubling,"¹³³ and may support the inference that a policy is unconstitutional.

As Stevens' dissent in *Flores* suggests, before *Hawaii* the Supreme Court had already been hesitant to cite to *Korematsu* for its precedential value.¹³⁴ Many decisions that invoked the case's holding favorably did so for its relevance as one of the first articulations that race-based classifications are deserving of strict scrutiny.¹³⁵ The Supreme Court also occasionally refers to the decision when discussing historical aspects of its jurisprudence,¹³⁶ or, since *Hawaii*, to support the general proposition that stare decisis is not always absolute.¹³⁷ Since the turn of the millennium, and before *Hawaii*, three opinions by Justice Thomas cited

128. *Id.* at 752.

129. *Id.* at 753 (emphasis added).

130. *Id.*

131. *Id.*

132. *See id.* (noting that even "great deference to the Executive Branch in the context of national security" should not save internment or the Muslim ban).

133. *Id.* at 752.

134. *See also* Greene, *supra* note 7, at 400 (finding that "at no time since September 11 has any U.S. government lawyer publicly used the *Korematsu* decision as precedent in defending executive detention decisions" before a federal Circuit Court).

135. *Korematsu v. United States*, 323 U.S. 215, 216 ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny."); *see also* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2162 n.3 (2023) ("The first time we determined that a governmental racial classification satisfied 'the most rigid scrutiny' was . . . in the infamous case *Korematsu*." (quoting *Korematsu*, 323 U.S. at 216)).

136. *See, e.g.*, *United States v. Zubaydah*, 142 S. Ct. 959, 992–93 (2022) (Gorsuch, J., dissenting).

137. *See* *Gamble v. United States*, 139 S. Ct. 1960, 2005–06 (2019) (Gorsuch, J., dissenting) (noting that *Dred Scott*, *Plessy*, and *Korematsu* are all cases with "grotesque errors"); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring) (citing *Korematsu* to support the proposition that a case may "be egregiously wrong when decided"); *Doe v. United States*, 141 S. Ct. 1498, 1499–1500 (2021) (Thomas, J., dissenting) (dissenting from denial of certiorari).

Korematsu approvingly or at least neutrally,¹³⁸ and two of the Justices' opinions invoked the decision negatively as a warning to the Court.¹³⁹ As detailed below, the number of opinions authored by Supreme Court Justices that have cited to *Korematsu* disapprovingly has increased. After *Hawaii*, appellate opinions in the Fourth Circuit,¹⁴⁰ Second Circuit,¹⁴¹ and Ninth Circuit¹⁴² have also cited *Korematsu* as a negative precedent.

In *Students for Fair Admissions v. Harvard College*, Justice Roberts' majority opinion invoked *Korematsu* as a reminder of the dangers of "illegitimate racial classification."¹⁴³ The reference was somewhat in passing, in a footnote, as part of a historical discussion of the genesis of the strict scrutiny standard.¹⁴⁴ However, the concurrence also references *Korematsu* anecdotally as part of the broader history of discrimination faced by Asian Americans.¹⁴⁵ In the instant matter, the Court held that race-based admissions standards were unconstitutional.

Justice Roberts, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, felt compelled to make assurances that the Court's momentous affirmative action decision was in the same spirit as when the Court overturned *Korematsu*.¹⁴⁶ The concurrence argued that in both cases the racial classifications themselves were constitutionally problematic, making the argument for a "colorblind" rather than "race-conscious" view of the Fourteenth Amendment.¹⁴⁷ Notably, the comparison between college admissions standards and military detention seems strained, particularly given the wildly different intent behind the respective forms of discrimination. The assertion during World War II that the internment camps protected individuals of Japanese descent from violent harassment by other citizens was only a peripheral justification.¹⁴⁸ On the other hand, the contention that diversity benefits all students through race-conscious admissions was a central issue in *Students for Fair Admissions*,¹⁴⁹ as it has been in the canon of higher education affirmative action cases since *Bakke*.¹⁵⁰ Nevertheless, the fact decisions upholding both liberal and

138. See *Fisher v. Univ. of Tex. at Aus.*, 570 U.S. 297, 316 (2013) (Thomas, J., concurring); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 758 n.10 (2007) (Thomas, J., concurring); *Grutter v. Bollinger*, 539 U.S. 306, 351 (2003) (Thomas, J., concurring).

139. See *Ziglar v. Abbasi*, 582 U.S. 120, 181 (2017) (Breyer, J., dissenting); *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004).

140. *United States v. Curry*, 965 F.3d 313, 333 (4th Cir. 2020) (Gregory, C.J., concurring).

141. *Zuniga-Perez v. Sessions*, 897 F.3d 114, 127 (2d Cir. 2018).

142. *Sanchez v. Barr*, 919 F.3d 1193, 1196 (9th Cir. 2019).

143. 143 S. Ct. 2141, 2162 n.3 (2023) (quoting *Adarand Constructors v. Peña*, 515 U.S. 200, 236 (1995)).

144. *Id.*

145. *Id.* at 2200 (Thomas, J., concurring).

146. *Id.* at 2162 n.3 (majority opinion).

147. *Id.* at 2184–88 (Thomas, J., concurring).

148. IRONS, *supra* note 66, at 270–72.

149. *Students for Fair Admissions*, 143 S. Ct. at 2164.

150. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312–13 (1978).

conservative policies find support in *Korematsu* is a testament to its potency and potential relevance in future cases.

The dissents in *Korematsu* continue to find traction with other Justices on the Court as well. In *303 Creative v. Elenis*, the dissenters cited Justice Murphy's dissent in *Korematsu* to underscore the abhorrent and unconstitutional nature of invidious discrimination.¹⁵¹ At issue was an incipient business that hoped to engage in website and graphic design for weddings; however, the owner was concerned that she might be forced, under Colorado state law, to create websites for homosexual couples despite her opposition to gay marriage.¹⁵² The majority held that these views, and her business' ability to refuse customers accordingly, were constitutionally protected against the state's anti-discrimination statute.¹⁵³

Justice Sotomayor's dissenting opinion in *303 Creative* is notable, among other reasons, for its use of *Korematsu* to emphasize the social, extra-judicial dimensions of the Constitution:

I fear that the symbolic damage of the Court's opinion is done. But that does not mean that we are powerless in the face of the decision. . . . Every business owner in America has a choice whether to live out the values in the Constitution. Make no mistake: Invidious discrimination is not one of them. "[D]iscrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. . . . It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States."¹⁵⁴

The Supreme Court's understanding of the Constitution's symbolic, extralegal role is an enduring feature of its jurisprudence. As the dissent above suggests, the Court's social relevance is often intertwined with and mirrored by the Constitution's persuasive authority as a normative force for private actors. The notoriety of *Korematsu* and its widespread social condemnation help underscore that dimension of the Constitution's reach. The negative precedential force of the decision is connected temporally to our nation's history and laterally into the domains of politics and moral discourse. Long before *Hawaii*, Congress¹⁵⁵ and executive actors in their official capacity¹⁵⁶ had condemned the mass internment of Japanese Americans as anathema to our nation's values and political structure. Perhaps more than any other tribunal in the country, the Supreme Court helps inform what individuals consider right or wrong, apart from dictating the constitutional rules that they must abide by. In this way, the

151. 143 S. Ct. 2298, 2342 (2023) (Sotomayor, J., dissenting).

152. *Id.* at 2308 (majority opinion).

153. *Id.* at 2322.

154. *Id.* at 2342–43 (Sotomayor, J., dissenting) (citations omitted) (quoting *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting)).

155. Civil Liberties Act of 1988, Pub. L. No. 100-383, § 2(a), 102 Stat. 903, 904.

156. Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Camps*, OFF. OF PUB. AFFS. BLOG (Apr. 7, 2017), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases>; Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 19, 1976).

dissenters in *303 Creative* push back against any moral approval that the majority might appear to bestow on private actors' invidious discrimination.

Justice Robert H. Jackson's canonical dissent in *Korematsu* is recognized for a similar theme, which was most recently invoked in both *Trump v. United States*¹⁵⁷ and *Dobbs v. Jackson Women's Health Organization*.¹⁵⁸ The late Justice Jackson took pains to highlight the reverberations of Supreme Court precedent outside of the particular matter before the Court. Rather than focusing on invidious discrimination per se, he noted the implications for narrowing our understanding of constitutionally guaranteed rights with respect to future cases.¹⁵⁹ He forcefully argues that the Court has a duty to factor that functional aspect of precedent into its evaluation of executive discretion and individual rights.¹⁶⁰ Although a discreet government action may, unfortunately, transgress the Constitution, the Court's sanction of that particular type of action endures in the law:

A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order . . . [t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution.¹⁶¹

When the three dissenters in *Trump v. United States* wanted to highlight the future risks of "effectively" creating a "law-free zone around the President," they turned to this language from Jackson's dissent in *Korematsu*.¹⁶² They did not rely on any other case to underscore the negative "long-term consequences" of the matter at hand.¹⁶³ This dark side of precedent as a "loaded weapon"—unpredictable and subject to abuse—has been repeatedly invoked by courts.¹⁶⁴ At the same time, this metaphor highlights the positive power of the Court's

157. 144 S. Ct. 2312, 2371 (2024) (Sotomayor, J., dissenting).

158. 142 S. Ct. 2228, 2348 (2022) (Breyer, J., dissenting).

159. *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

160. *Id.* This argument likely was seen to be inapt for the dissenters in *303 Creative*, given that the issue before the Court in that case was a state anti-discrimination statute, rather than the executive's racial classifications. Differences in branches aside, the late Justice Antonin Scalia still found it appropriate to discuss *Korematsu* when he criticized "a misguided trial-court injunction," invoking the "loaded weapon" metaphor and quoting additional language from Jackson's dissent at length. *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 814–15 (1994) (Scalia, J., dissenting).

161. *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

162. *Trump*, 144 S. Ct. at 2371 (Sotomayor, J., dissenting).

163. *Id.*

164. This set of opinions includes a dissent authored by then-Judge Kavanaugh of the U.S. Court of Appeals for the D.C. Circuit. *United States v. Burwell*, 690 F.3d 500, 533 n.6 (D.C. Cir. 2012) (Kavanaugh, J., dissenting); *Ziglar v. Abbasi*, 582 U.S. 120, 182 (2017) (Breyer, J., dissenting); *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 815 (1994) (Scalia, J., concurring in part and dissenting in part); *O'Lone v. Est. of Shabazz*, 482 U.S. 342, 357–58 (1987) (Brennan, J., dissenting); *United States v. Brainer*, 691 F.2d 691, 700 (4th Cir. 1982) (Murnaghan, J., concurring).

holdings in our common law regime. The idea of the weapon that “lies about” also suggests the Court’s structural limitations.¹⁶⁵ In the future, when the executive might inappropriately invoke the Court’s precedent to justify abuses, such weaponized precedent will be unguarded and further from the Court’s reach. The matter could only be reviewed retroactively if and when a challenge comes before a court, and only then with the possibility of being distinguished from past precedent under the inertia of stare decisis.

One other recent Supreme Court case bears mentioning. In Justice Gorsuch’s dissent in *United States v. Zubaydah*, he drew comparisons to *Korematsu* when criticizing the executive’s characterization of evidence.¹⁶⁶ Although his analysis of *Korematsu* is somewhat historical in nature, the parallels between the two cases are noteworthy and potentially relevant for future executive assertions of a national security interest.

The facts of the case merit review. Litigation was initiated by Abu Zubaydah, who the CIA had detained in Poland.¹⁶⁷ After his detention, CIA psychologists and other agents kept him in complete isolation from any human contact for weeks.¹⁶⁸ Then, over the course of some additional weeks, they repeatedly beat him, performed rectal examinations, began to stage his burial in front of him so that it appeared they were going to kill him, waterboarded him, and subjected him to other extreme forms of abuse.¹⁶⁹ The United States never charged Mr. Zubaydah with a crime. The President later concluded that this treatment constituted torture.¹⁷⁰ Information regarding his case had been declassified long before the litigation reached the Supreme Court, and the CIA’s torture of Mr. Zubaydah was disseminated through Senate reports,¹⁷¹ the press,¹⁷² and popular media,¹⁷³ including a book by a former CIA agent.¹⁷⁴

165. *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

166. *United States v. Zubaydah*, 142 S. Ct. 959, 992–93 (2022) (Gorsuch, J., dissenting).

167. *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, Eur. Ct. H.R. (2014) (concluding “beyond [a] reasonable doubt” that Zubaydah “arrived in Poland on board a CIA rendition aircraft on 5 December 2002” and was subsequently “detained in a CIA detention facility”).

168. SENATE SELECT COMM. ON INTEL., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288, at 40 (2d Sess. 2014).

169. *Id.* at 40–44.

170. Off. of the Press Sec’y, *Press Conference by the President*, WHITE HOUSE (Aug. 1, 2014, at 14:45 ET), <https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/press-conference-president> (“[A]ny fair-minded person would believe” that the treatment constituted “torture,” and the country should “take responsibility for that so that . . . we don’t do it again in the future”); see also SENATE SELECT COMM. ON INTEL., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288, at xii (2d Sess. 2014) (describing the CIA’s use of enhanced interrogation techniques).

171. *Id.*

172. Charlie Savage, *Detainees Describe C.I.A. Torture in Declassified Transcripts*, N.Y. TIMES (June 15, 2016), <https://www.nytimes.com/2016/06/16/world/detainees-describe-cia-torture-in-declassified-transcripts.html>.

173. See, e.g., THE REPORT, Amazon Prime (Vice Studios, Topic Studios & Unbranded Pictures 2019); THE FOREVER PRISONER, HBO Max (HBO Documentary Films & Jigsaw Productions 2021).

174. JAMES E. MITCHELL & BILL HARLOW, ENHANCED INTERROGATION: INSIDE THE MINDS AND MOTIVES OF THE ISLAMIC TERRORISTS TRYING TO DESTROY AMERICA (2016); ALI SOUFAN & DANIEL FREEDMAN, THE BLACK BANNERS (DECLASSIFIED): HOW TORTURE DERAILED THE WAR ON TERROR AFTER 9/11 (2020).

Polish prosecutors commenced their own investigation into whether any Polish officials were criminally liable for their complicity in Mr. Zubaydah's torture.¹⁷⁵ As part of this investigation, Mr. Zubaydah solicited evidence from the United States government for use in Polish courts.¹⁷⁶ Through an *ex parte* application for discovery authorized by U.S. federal statute, he requested details about his interrogations, including the CIA's confirmation that he had been detained in Poland.¹⁷⁷ The CIA invoked privilege and asserted, apparently without irony, that the state secret doctrine shielded the disclosure of this widely-known information.¹⁷⁸ By the time the case reached the Supreme Court, a central question of the litigation was whether confirming that Zubaydah's detention had occurred in Poland would jeopardize national security.¹⁷⁹

How much deference should the Supreme Court grant an executive assertion that there is a risk to national security? Conversely, how willing is the Supreme Court to take stock of the history of executive misdirection and draw its own conclusions based on the evidence in the record? In this regard, the dissent in *Zubaydah* found reason to turn to the Supreme Court's infringement of liberty in *Korematsu*. Infamously, in *Korematsu*, executive officials presented evidence to the Supreme Court that "officials knew to be false at the time."¹⁸⁰ In the *coram nobis* proceedings in the 1980s to vacate Mr. Korematsu's conviction, his counsel submitted early drafts of the government's Supreme Court briefs. These documents revealed that the government knew the Final Report of Lieutenant General DeWitt, which was the crucial piece of evidence on the question of military necessity, was "in conflict with information in possession of the Department of Justice."¹⁸¹ However, the final brief in *Korematsu*, as submitted to the Supreme Court, reversed course and asked judicial notice be taken of the Final Report.¹⁸² These were not slight errors.¹⁸³ In fact, to call them errors at all may be to misunderstand the officials' manipulation of fact. As the original *Korematsu* case progressed, "several Department of Justice officials pointed out to their superiors and others the 'wilful [sic] historical inaccuracies and intentional falsehoods' contained in the DeWitt Report."¹⁸⁴

Similar intentional falsehoods were made throughout the CIA's torture of detainees and the subsequent investigations into its conduct, to the detriment of the government's ability to protect national security. For example, the CIA's

175. *United States v. Zubaydah*, 142 S. Ct. 959, 965 (2022).

176. *Id.* at 988 (Gorsuch, J., dissenting).

177. *In re Zayn Al-Abidin Muhammad Husayn*, No. 17-CV-0171, 2018 WL 11150135, at *1 (E.D. Wash. Feb. 21, 2018).

178. *Zubaydah*, 142 S. Ct. at 966.

179. *Id.* at 989 (Gorsuch, J., dissenting).

180. *Id.* at 993.

181. *Korematsu v. United States*, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984) (emphasis omitted).

182. *Id.* at 1418.

183. *Id.* ("These omissions are critical.")

184. *Id.*

briefings to a congressional oversight committee “contained numerous inaccuracies.”¹⁸⁵ Additionally, the CIA seemed to represent to foreign leaders that relevant Congress members supported the CIA’s actions, when they in fact had been critical of the interrogation program, even after the CIA had provided misleading information to those congressional representatives.¹⁸⁶ The CIA also misled Department of Justice officials and principal members of the National Security Council, repeatedly, “thereby impeding oversight and decision-making.”¹⁸⁷ Ample evidence suggests that the CIA’s actions “complicated, and in some cases impeded,” other Executive agencies’ national security prerogatives.¹⁸⁸ And the efficacy of the torture program for the purposes of extracting useful information was widely debunked, even as the CIA continued full steam ahead. All of which begs the question: Up to what point should courts defer to the government’s factual presentations, let alone bare assertions, of a national security interest?

In both *Korematsu* and *Zubaydah*, executive officials misled the Court on issues of national security with motivations entirely apart from a proper application of the law or their constitutional duties: Racial animus,¹⁸⁹ institutional pressure,¹⁹⁰ personal shame at their transgressions,¹⁹¹ or some combination of the above likely played a role in their misrepresentations. National security determinations, which the executive can legitimately claim within its purview, provide a flexible standard to keep courts at bay. The dissent in *Zubaydah* was quick to note that “executive officials can sometimes be tempted to misuse claims of national security to shroud major abuses and even ordinary negligence.”¹⁹² In the case of the CIA’s prolonged torture of Mr. Zubaydah, the details were already widely disseminated, and the political issue for the government plausibly appeared to be saving itself from a “modest measure of embarrassment.”¹⁹³ In the case of *Korematsu*, the government similarly attempted to avoid embarrassment. Years later, in the *coram nobis* proceedings that ultimately vacated Fred Korematsu’s conviction, the government was still “not prepared to confess error,” and moved to summarily

185. SENATE SELECT COMM. ON INTEL., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288, at xv (2d. Sess. 2014).

186. *Id.*

187. *Id.*

188. *Id.* at xvi.

189. DEWITT, *supra* note 70.

190. See James A. Michener, *Introduction to MICHIE WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA’S CONCENTRATION CAMPS 27–28* (1976).

191. See *United States v. Zubaydah*, 142 S. Ct. 959, 1001 (2022) (Gorsuch, J., dissenting) (“[I]t seems that the government wants this suit dismissed because it hopes to . . . avoid (or at least delay) further embarrassment for past misdeeds.”); Michener, *supra* note 190, at 52 (considering that then-Secretary of the Navy Frank Knox presented fallacies about Japanese Americans to Congress to remove blame from “himself and the Administration for the unspeakable humiliation that Pearl Harbor represented”).

192. *Zubaydah*, 142 S. Ct. at 992 (Gorsuch, J., dissenting).

193. *Id.* at 985.

dismiss to avoid discussing the issue of Japanese internment camps.¹⁹⁴ A question remains whether courts should, with the legacy of *Korematsu* in mind, more rigorously scrutinize the record in order to properly apply the law.

Advocates may find it useful to review the roll of negative precedent outside of the nation's highest court. There are strong signals that the use of *Korematsu* as a legal tool is common enough in lower federal courts. Circuit courts have drawn on *Korematsu* to underscore the ways that improper racial animus can underlie executive action, particularly in the context of immigration enforcement. The Second Circuit and Ninth Circuit have cited Justice Murphy's dissent in *Korematsu* when discussing how "immigration enforcement that is based not on individualized suspicion but on ethnic generalizations teeters on the verge of 'the ugly abyss of racism.'"¹⁹⁵ These cases are notable insofar as *Korematsu* is cited in the courts' holdings, rather than in a dissenting opinion.

The Second Circuit appeal arose from Fourth and Fifth Amendment challenges to exclude testimony from immigration removal proceedings.¹⁹⁶ There, state troopers entered a residence at four in the morning along with two Customs and Border Patrol ("CBP") officers, who the state officials later claimed they brought as translators.¹⁹⁷ "[I]t seems odd," the Circuit Court opined, "that the state troopers did not have their own interpreters and instead imposed on two agents from another, federal, law enforcement agency to provide translation services for one suspected fugitive."¹⁹⁸ The state police also claimed they had a felony search warrant for an individual, who was not home at the time, although no search warrant was ever produced during the course of the litigation.¹⁹⁹ After the law enforcement officers secured the premises, they began to question two other men in the residence about their nationality and immigration status.²⁰⁰ The only document to support the search that the state officials ever offered, presumably furnished by the ICE agents, was an administrative immigration form that claimed "known Hispanic migrants" lived in the home.²⁰¹ The Second Circuit took pains to remind the parties that being Hispanic and a migrant is not a crime, and thus could not form a legitimate basis for reasonable suspicion.²⁰² The Second Circuit further found there was "substantial evidence that the search was improperly based on race" in violation

194. *Korematsu v. United States*, 584 F. Supp. 1406, 1413 (N.D. Cal. 1984).

195. *Zuniga-Perez v. Sessions*, 897 F.3d 114, 127 (2d Cir. 2018) (quoting *Maldonado v. Holder*, 763 F.3d 155, 174 (2d Cir. 2014) (Lynch, J., dissenting) (quoting *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting))); see also *Sanchez v. Barr*, 919 F.3d 1193, 1196 (9th Cir. 2019) (citing the same nested set of decisions).

196. *Zuniga-Perez*, 897 F.3d at 122.

197. *Id.* at 126.

198. *Id.* (emphasis omitted).

199. *Id.* (noting there was no information in the administrative record "specifying where and when [the alleged warrant] was issued" or "its terms and scope").

200. *Id.* at 119–20.

201. *Id.* at 125.

202. *Id.* at 127.

of the Constitution.²⁰³ Like the dissent in *Flores*, the court emphasized that immigration enforcement must be “individualized,”²⁰⁴ and not based on racial categories alone.

District court decisions have also frequently employed comparisons with *Korematsu* when discussing issues as varied as public health mandates,²⁰⁵ loan assistance programs,²⁰⁶ gun restrictions,²⁰⁷ access to abortion services,²⁰⁸ compassionate release from prison,²⁰⁹ and religious freedom.²¹⁰ Many recent district court citations after *Hawaii* were made in the context of executive emergency actions during the COVID-19 Pandemic.²¹¹ Even though none of the trial court decisions are precedential, they raise the specter of the persuasive force of *Korematsu* and similar anticanonical decisions in the wake of those decisions’ official abrogation. Many of these citations only mention *Korematsu* in passing. Nevertheless, the use of *Korematsu* is clearly widespread. When a decision such as *Korematsu* is painted as being outside the law, courts at all levels still point to the decision to inform an understanding of the limits of the executive’s powers.

III. CONSTITUTIONAL NORMS AND THE VALUE OF OVERTURNED PRECEDENT

A. THE BASIC PREMISE OF INVOKING OVERTURNED PRECEDENT

The question of why courts invoke overturned precedent is not as well theorized as the virtues of *stare decisis*.²¹² However, these two forms of reasoning are not necessarily in tension. Courts should follow the holdings that were previously laid down: this is how precedent in common law systems

203. *Id.* at 125.

204. *Id.* at 127.

205. *Hernandez v. Grisham*, 508 F. Supp. 3d 893, 977 (D.N.M. 2020) (noting that civil liberties must be protected “even during a public health crisis”); *Denv. Bible Church v. Azar*, 494 F. Supp. 3d 816, 829 (D. Colo. 2020) (noting that national emergencies cannot provide a blanket excuse for government action).

206. *Nuziard v. Minority Bus. Dev. Agency*, 721 F. Supp. 3d 431, 489–90 (N.D. Tex. 2024) (arguing against stronger forms of deference to executive agencies).

207. *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1027 (S.D. Cal. 2021) (noting that deference to the executive should not be absolute), *vacated and remanded*, No. 21-55608, 2022 WL 3095986 (9th Cir. Aug. 1, 2022).

208. *Robinson v. Marshall*, 454 F. Supp. 3d 1188, 1202 n.18 (M.D. Ala. 2020) (noting how courts should review state actors in emergency situations).

209. *United States v. Smith*, 460 F. Supp. 3d 783, 789 (E.D. Ark. 2020) (“It is in times of crisis that the temptation for government officials to exceed their authority or to turn a blind eye to constitutional limitations is at its zenith.”).

210. *Cassell v. Snyders*, 458 F. Supp. 3d 981, 994 (N.D. Ill. 2020) (“[G]overnment claims of emergency have served in the past as excuses to curtail constitutional freedoms.”).

211. *See, e.g.*, *Denv. Bible Church v. Azar*, 494 F. Supp. 3d 816, 822 (D. Colo. 2020); *Hernandez v. Grisham*, 508 F. Supp. 3d 893, 921–23; *Smith*, 460 F. Supp. 3d at 788; *Cassell*, 458 F. Supp. 3d at 987.

212. *See, e.g.*, Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286–87 (1990); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 37–54 (2001); Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1158–73 (2005).

works.²¹³ In the wake of the overturning of *Roe v. Wade*, the values that stare decisis upholds—among them predictability, respect for reliance interests, and trust in the law and its institutions²¹⁴—have been championed by liberal members of the Supreme Court.²¹⁵ However, the principal is not generally partisan. One appealing feature of stare decisis is that it elegantly embodies the basic legal prerogative that judges should not make policy choices based on their personal beliefs or the political will of the people.²¹⁶ Rather, they should apply the principles of law fairly in all matters, which means doing so in the way that was done previously for similar cases.²¹⁷ Toward this end, abiding by the holdings of past cases aims to ensure that the rule of law is consistently applied to the wide variety of matters that come before the courts, and that individuals in society can rely on those principles when structuring their activities.²¹⁸

Given this tradition, all lawyers learn the necessary skill of distinguishing cases.²¹⁹ This technique of legal analysis is entirely consistent for explaining the way that courts treat both valid precedent and overturned precedent, with some important deviations. Under traditional common law reasoning, judges will look at past cases from higher courts that appear relevant to the matter at hand, discern the holdings in the past cases, and apply that rule of law to the current facts before the court. Sometimes, the current case contains a different set of circumstances not considered by past decisions, which appear legally relevant. A judge may feel compelled by their legal intuition toward a particular result that differs from what past blackletter law would dictate.²²⁰ In those cases, under the common law, the judge can amend the old precedent by announcing a caveat, which may itself become precedential.

The principle of distinguishing cases in this way is part and parcel of common law reasoning, while constitutional interpretation contains a vast array of more particularized tools of analysis.²²¹ However, the mindset of judges who apply constitutional precedent is inherited from legal training in the common

213. See *Doctrine of Precedent*, BLACK'S LAW DICTIONARY (12th ed. 2024); THE FEDERALIST NO. 78 (Alexander Hamilton).

214. Powell, *supra* note 212.

215. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2333–35, 2348 (2022) (Breyer, J., dissenting).

216. Powell, *supra* note 212.

217. Paul J. Watford, Richard C. Chen & Marco Basile, *Book Review: Crafting Precedent*, 131 HARV. L. REV. 543, 545 (2017) (reviewing BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT (2016)).

218. Powell, *supra* note 212, at 286; see also Nelson, *supra* note 212, at 36 (analyzing “reliance interests” as one of the oldest recognized virtues protected by the common law system of precedent).

219. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 7–8 (1997); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 745, 782–83 (1992); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 163–64 (1921).

220. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 894–95 (1996).

221. See, e.g., Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007) (“[I]t is debatable whether the doctrine of stare decisis can be reconciled with popular sovereignty-based originalism.” (emphasis omitted)).

law tradition.²²² Justice Antonin Scalia made this point, adding a dose of legal realism, when he observed that, “like good common-law judges, the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean.”²²³

To be clear, not all application of precedent involves distinguishing a case. Rules derived from a past decision are often directly applied to the matter at hand without any reference to the material facts of the previous holding. Nevertheless, as Cass Sunstein has argued, an informed jurist, or well-prepared advocate, always keeps tools of analogical reasoning close at hand if the need to distinguish precedent arises.²²⁴

What I have described so far is a technique that applies far beyond the narrow category of the anticanon. Nevertheless, when courts cite to anticanonical cases such as *Lochner*, *Dred Scott*, *Plessy*, or *Korematsu*, the opinions often use analogical reasoning to show why they are avoiding the grave mistakes of the past. In his discussion of the anticanon, Jamal Greene wonders whether “the law would be any different were [the anticanonical cases] never cited,” since they are not in fact binding.²²⁵ However, overturned precedent serves as a guide insofar as these decisions help outline the types of rules and interpretations that are anathema to the law, highlighting those prohibitions with a level of clarity that may be absent from comparisons with valid decisions. Analogical reasoning is the basic engine behind this process. This is true whether the court invokes an anticanonical decision, or any other overturned precedent. In *Zubaydah*, when Gorsuch compares the Court’s deference to claims of state secrets to the deference awarded in *Korematsu* for military necessity, he does so to argue that the law requires a higher level of evidentiary scrutiny.²²⁶ Otherwise, the Court might strike the improper balance between judicial and executive authority. In this type of constitutional reasoning, instead of the Court only searching for a valid precedent that would apply to the situation at hand, the fact that a possible outcome would be similar to an abrogated precedent suggests that the Court needs to chart a different path. When the Court applies good precedent, the result may be clear given the rule of the prior case.²²⁷ The

222. See Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 796–802 (2018) (reviewing arguments for understanding constitutional stare decisis as arising from the Constitution’s text or, alternatively, “as part of the common law background that predated the Constitution and remained intact after ratification”); Strauss, *supra* note 220, at 885 (“[T]he common law—rather than any model based on the interpretation of codified law—provides the best way to understand the practices of American constitutional law.”); Scalia, *supra* note 219, at 39–40 (describing the development of certain legal standards for some constitutional amendments as a “preeminently a common-law way of making law”). *But see* Michael Stokes Paulsen, *The Intrinsic Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005) (“*Stare decisis* is unconstitutional.”).

223. Scalia, *supra* note 219, at 39.

224. See Sunstein, *supra* note 219, at 748 (“Reasoning by analogy . . . is the mode through which the ordinary lawyer typically operates.”).

225. Greene, *supra* note 7, at 382.

226. See *supra* notes 175–184 and accompanying text.

227. See Sunstein, *supra* note 219, at 782–83.

same cannot be said of negative precedent, since the rule of law cannot be inferred solely from a case that has been overturned. However, in most other respects, we should expect the legal tools of analogical reasoning to be similar.²²⁸

As Sunstein stated about this gesture of legal abstraction, the “major challenge facing analogical reasoners is to decide when differences are relevant.”²²⁹ The same is true whether drawing either a negative or positive inference from past decisions. Relevance in the law is judged by whether the differences between two cases are material.²³⁰ If no material difference exists between an overturned precedent and the case at hand, and a court is asked to reach a similar conclusion of law as that overturned case, then that is a strong indication that the position is not sound. This is based on the intervening precedential ruling that overturned the previous precedent. Aside from this intermediary step of intervening precedent, this is not a substantively different form of reasoning from differentiating a case from any valid precedential decision.²³¹

In this sense, this type of analogizing or differentiating from overturned precedent is appealing insofar as it is entirely consistent with other modes of legal reasoning.²³² We should like it when one mode of analysis aligns with already existing interpretive approaches.²³³ Certainly, it would be notable if the underlying logic of two modes of interpretation differed wildly.²³⁴ The reasons for this are beyond aesthetic. When different types of analysis are compatible, it allows for uniformity in how courts approach issues, and, ideally, can lead to clearer statements of the law.

B. A WRINKLE IN THE APPLICATION OF OVERTURNED PRECEDENT

At first blush, relying on overturned precedent may be unintuitive. There is no actual past precedent once a case’s holding is abrogated, so what the court is actually applying can be obfuscated when negative precedent is invoked by name.²³⁵ The abrogation of the past case is what holds the force of law, not the past case itself. This intervening abrogation allows courts to draw a negative

228. *See id.* at 745–46.

229. *Id.* at 745.

230. *See id.*

231. *See id.* at 745–47.

232. *See* Lash, *supra* note 221, at 1439 (noting that choosing different forms of legal reasoning “requires a normative theory that weighs the costs” between approaches).

233. *See* Sunstein, *supra* note 219, at 790–91 (discussing how analogical reasoning “fits uniquely well with a system based on principles of stare decisis”).

234. *See, e.g.,* N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2177 (2022) (Breyer, J., dissenting) (arguing that “the Court’s rejection of means-end scrutiny and adoption of a rigid history-only approach [] is anomalous,” and therefore unappealing).

235. *See, e.g.,* Greene, *supra* note 7, at 382 (“[A]nticanonical cases are not the law; they are its opposite. Their holdings cannot reasonably be relied upon, and it is not obvious how the law would be any different were they never cited.”).

inference from the overturned decision when a matter has materially similar facts and presents a similar question of law. Although judges and lawyers do not consider negative precedent binding in any formal sense, they employ this type of analogical analysis all the time.²³⁶

The specter of overturned decisions predominates in some unusual ways, however. Courts invoke Justice Holmes' dissent in *Lochner* and Justice Harlan's dissent in *Plessy*, for example, "as if they were legally authoritative precedents."²³⁷ The intervening decision that overturned that past holding, which could be thought of as the only remaining binding piece of law, is often absent from subsequent negative citations of the overturned case. This is a key difference between the regular application of precedent and courts' treatment of negative precedent. Perhaps courts fail to cite the overruling case because the abrogated precedent has not been succinctly overturned in a single decision, or exactly what piece of the holding has been overturned remains unclear.²³⁸ Regardless, the intervening case does not always provide a potent description of what errors courts should try to avoid.

Judicial citations to the anticanonical cases, without any direct citation to the intervening overruling case, occurs in part because the anticanonical cases carry symbolic weight within the legal imaginary.²³⁹ Some of this symbolic capital derives from social forces, political discourse, and specific actors who help shape how we remember the prior cases.²⁴⁰ For the Constitution, "there is no single interpretive community, but legion."²⁴¹ Parsing through this complex set of social pressures can inform a historicist analysis of the law. More traditional doctrinal considerations undoubtedly shape the symbolic force of overturned precedents as well.²⁴² The enormous change in how the Supreme Court applied strict scrutiny to race-based challenges after World War II, for example, places *Korematsu* at a unique inflection point in our nation's constitutional jurisprudence. Noah Feldman reflects on the interplay between symbolic influence and precedent when comparing *Korematsu*, before it was overturned, to *Ex parte Endo*, which as a practical matter was arguably just as consequential when it was decided:

236. See, e.g., *supra* Subpart.II.B (reviewing citations to *Korematsu* after it was overturned in *Hawaii*).

237. Primus, *supra* note 96, at 245–46.

238. Jamal Greene, *Is Korematsu Good Law?*, 128 YALE L.J.F. 629, 632 (2019) ("If a case is simply overruled without the opinion stating which aspects of the case it is disavowing, the overruling can itself remain subject to contestation."); see, e.g., David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373–74 (2003) (noting how *West Coast Hotel Co v. Parrish*, 300 U.S. 79 (1939) is considered to be the end of the *Lochner* era).

239. Greene, *supra* note 7, at 440.

240. Balkin & Levinson, *supra* note 101, at 995 ("[C]anons are historical creations in which rational design and precision engineering are wishful thinking.").

241. Tsai, *supra* note 9, at 99.

242. See, e.g., Primus, *supra* note 96, at 255 (describing how *Brown v. Board of Education*, 347 U.S. 483 (1954), shapes how we remember *Plessy v. Ferguson*, 163 U.S. 537 (1896), in part, although not entirely, because of how the decision did away with the separate-but-equal doctrine for public schooling).

Famous decisions take on a life of their own, both symbolically and legally through the precedents that they set. In these realms of symbol and precedent, Douglas's *Endo* opinion lacked the all-important heft of the constitutional decision in *Korematsu*. Interpreting a unique, time-limited presidential order is not the same as interpreting the Constitution.²⁴³

The *Endo* decision eschewed the constitutional questions that arose from internment, while providing a practical path to release from detention through habeas corpus.²⁴⁴ Understandably, future commentators focused on the Court's failings in *Korematsu* and criticized the shadow that the decision cast over the promise of equal protection and due process.²⁴⁵

In this way, while valid constitutional precedent informs courts' understanding of the law, courts may also draw from the symbolic resources of a potent negative precedential decision—and the resulting analysis can still be rigorous. For example, in *Obergefell*, Justice Roberts devotes a section of his dissent to the problems with the right to contract in *Lochner*, as a way of elaborating the proper constitutional role of the federal judiciary with respect to state rights.²⁴⁶ He criticizes both *Lochner* and the majority's approval of the constitutional right to gay marriage as overstepping, in his view, the federal courts' proper role; they enshrine certain forms of individual autonomy over the objection of a democratically elected legislature.²⁴⁷ Regardless of whether or not one might agree with his view, the comparison that he draws between the two cases' liberty interests is outlined with some level of detail.²⁴⁸ Notably, these constitutional arguments are not fashioned with respect to *West Coast Hotel Co. v. Parrish*, the case that most clearly overturned *Lochner's* extension of substantive due process.²⁴⁹ That decision goes unmentioned in Roberts' dissent.²⁵⁰ Rather, his interpretive efforts are buoyed by the force of the negative precedent itself.

243. NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 247 (2010).

244. *Ex parte Endo*, 323 U.S. 283, 297 (1944) (noting that the Court did “not come to the underlying constitutional issues” but that release from detention must be allowed).

245. Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1934 (2003) (reviewing how *Korematsu* remains “an infernal baseline,” even though *Ex parte Endo* was announced the same day and was intended to stop the internment camps); ROBINSON, *supra* note 13, at 229 (“[I]t was the now generally forgotten *Endo* ruling, in which the Court unanimously held that the government had no right to detain any concededly loyal citizen without charge,” that more immediately meant “the government could no longer legally confine any loyal Nisei.”); see, e.g., Erwin Chemerinsky, *Korematsu v. United States: A Tragedy Hopefully Never to Be Repeated*, 39 PEPP. L. REV. 163, 166-70 (2011); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1042-43 (2004).

246. *Obergefell v. Hodges*, 576 U.S. 644, 699-706 (2015) (Roberts, J., dissenting).

247. *Id.* at 701-05.

248. See *id.* at 703-06.

249. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 n.1 (1937).

250. *Obergefell*, 576 U.S. at 686-713. Only one paragraph is devoted to subsequent decisions' criticisms of *Lochner*, while the case itself is cited to repeatedly in at least seven separate paragraphs.

C. THE ENDURING NORMATIVE REVERBERATIONS OF OVERTURNED PRECEDENT

Can the approach of invoking overturned precedent find additional normative support outside of the cases in the anticanon? Is this type of reasoning desirable in adjudication or useful as a form of advocacy?

I would argue in the affirmative. First, the principles of *stare decisis* suggest that abrogated precedent is uniquely well-suited to help inform our understanding of what is and is not lawful. A core component of *stare decisis* is that judges should abide by courts' past decisions, even if they believe they could have reached a different result as a matter of first impression.²⁵¹ For this reason, when an appellate court chooses to abrogate a past decision—rather than merely carve out an exception to a prior rule—it makes a bold statement as to what the law cannot be. The court holds out the prior holding as an example of what is unequivocally outside the law, and, in that way, the abrogated precedent serves as a potentially useful guardrail for future cases.

In certain instances, such as with *Korematsu* and other cases in the anticanon, a court or the legal community may go much further, and conclude that a case was “wrong the day it was decided.”²⁵² But in all overturned cases, at a minimum, the overruling court must overcome the norm of *stare decisis*, which functions as an additional burden to justify why the past decision was particularly incorrect.²⁵³ The precise criteria that the Supreme Court applies in this regard vary a great deal, and they may be lower for constitutional holdings than for statutory interpretations.²⁵⁴ However, there must be some “special justification or strong grounds” to depart from the prior decision.²⁵⁵ And once a court decides to break from the *stare decisis* norm, observers can presume that the overturned precedent was significantly wrong. In anticanonical cases, like *Korematsu*, the wrongs are egregious, but an overturned case's error need not reach those depths of wrong to help frame what the proper rule of law ought not be.²⁵⁶

251. See Nelson, *supra* note 212, at 2 (recognizing that, due to *stare decisis*, “conventional wisdom now maintains that a purported demonstration of error is not enough to justify overruling a past decision”).

252. Balkin, *supra* note 111; Greene, *supra* note 7, at 387; Trump v. Hawaii, 585 U.S. 677, 710 (2018).

253. Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014).

254. Powell, *supra* note 212, at 287 (recognizing the view that “*stare decisis* should operate with special vigor in statutory cases” since Congress always retains the ability to amend a statute); see also Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring) (surveying factors the Court has employed when evaluating the principal of *stare decisis*, including the quality of the precedent's reasoning; the precedent's consistency and coherence with other decisions; changed law or facts since the prior decision; workability; reliance interests; and the age of the precedent).

255. Ramos, 140 S. Ct. at 1414 (Kavanaugh, J., concurring). But see Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2279 (2024) (Gorsuch, J., concurring).

256. In this way, I am making a broader, although not inconsistent, argument than others have made with respect to the anticanon. See J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on “The Banjo Serenader” and “The Lying Crowd of Jews,”* 20 CARDOZO L. REV. 1513, 1553 (1999) (“[The] ‘anti-canon’ of wrongly decided cases [] help[s] frame what the proper principles of constitutional interpretation

And when prior decisions did commit truly grave errors, that is all the more reason to explicitly avoid those same outcomes. The cases in the anticanon are widely condemned.²⁵⁷ This consensus may be in part due to historical contingencies rather than faulty legal analysis within the decisions themselves.²⁵⁸ Even so, certain decisions, among them *Korematsu*, stand for low points in our legal history, and there is every reason that courts should strive to avoid similar results. Any pragmatic or realist theory of constitutional interpretation ought to incorporate some formulation of this goal.

For this reason, rigorously addressing these cases as part of an analysis of what the law should *not* be is essential. This includes an attempt to understand the cases' surrounding factual history and the Court's blind spots at the time. Such an approach is the most transparent attempt at avoiding similar abhorrent outcomes. Allegra M. McLeod has argued that recognizing judicial error can and should be a rigorous part of courts' constitutional analysis.²⁵⁹ As presented in certain Supreme Court dissents, an "honest, critical appraisal of the profound problems in constitutional discourse makes it possible to fundamentally reimagine ingrained doctrinal rules, patterns of thought, and persistently troubled practices as their actual implications are laid bare."²⁶⁰ A legal system that encourages judges to distinguish current holdings from overturned precedent is valuable as an extension of stare decisis.²⁶¹ It also allows the courts to properly incorporate a self-reflective discussion of the law's own failings, the failings of current and past doctrine, and the limitations of the judicial system itself.²⁶²

Additionally, the idea of negative precedent recognizes the value of actually abrogating past decisions as well, rather than letting disfavored holdings fall into obscurity with the possibility of being resurrected. The normative value of abrogating bad precedent is explained in none other than Justice Jackson's canonical dissent in *Korematsu* itself.²⁶³

D. THE LIMITATIONS OF OVERTURNED PRECEDENT

The principle of stare decisis supports the premise that courts can use overturned precedent to pinpoint certain unfavorable outcomes or faulty

should be."); Greene, *supra* note 7, at 380–81 (“[The anticanon] map[s] out the land mines of the American constitutional order, and thereby help[s] to constitute that order: we are what we are not.”).

257. Greene, *supra* note 7, at 387–402 (surveying criticism of these decisions in law review articles, casebooks, Senate confirmation hearings, and federal appellate court opinions).

258. Greene, *supra* note 7, at 381; Balkin & Levinson, *supra* note 101, at 995; Tsai, *supra* note 9, at 99.

259. Allegra M. McLeod, *Police Violence, Constitutional Complicity, and Another Vantage*, 2016 SUP. CT. REV. 157, 183–88.

260. *Id.* at 188.

261. *But see id.* at 186 (noting that judicial recognition of past error can lead to “a welcome willingness to question stare decisis”).

262. *See* Lash, *supra* note 221, at 1439 (noting that choosing different forms of legal reasoning “requires a normative theory that weighs the costs” between approaches).

263. *See* *Korematsu v. United States*, 323 U.S. 214, 245–46 (1944) (Jackson, J., dissenting).

reasoning that they are attempting to avoid. Nevertheless, judges may be concerned that repeated reliance on overturned precedent may erode or give the appearance of eroding the sanctity of *stare decisis*.²⁶⁴ I use the term “appearance,” since any hesitation to cite to overturned precedents may include concerns of rhetoric and perception. Although current invocations of overturned precedent are often fleeting, if judicial opinions devoted lengthier sections to discussing overturned cases, then this past history of overcoming *stare decisis* may appear to play a larger role in courts’ jurisprudence. There may be a concern, valid or not, that a recognition of precedent’s fallibility is one step down a road towards abrogating more precedent.

Insofar as this concern exists, it is not a slight one. As Justice Breyer lamented in his dissent in *Dobbs*, “[w]eakening *stare decisis* threatens to upend bedrock legal doctrines . . . [It] creates profound legal instability.”²⁶⁵ Courts’ adherence and respect for precedent may appear less firm if judges frequently discuss how they have overruled themselves. The landmark decision of *Dobbs*, which overturned *Roe*, also provides a counterexample to decisions that have been universally condemned as wrong. Although many conservative commentators abhorred *Roe*,²⁶⁶ the nation overall has remained divided with respect to the Court’s decision to overrule it.²⁶⁷ The decision’s contested terrain exemplifies a related objection to using negative precedent, namely that a unified set of principles is not always clear from a case’s abrogation. Does the overturning of *Roe* imply the need for judicial restraint, and the intervention of the political branches, concerning some of the most highly controversial topics? Or does its abrogation more narrowly validate a certain type of originalism? The answer to these questions is far from settled.²⁶⁸

Apart from *stare decisis*, courts’ reticence in analyzing overturned precedent may also stem from an additional dimension of perception: they are loath to dwell on their own past errors. This is a particularly salient concern for the Supreme Court. “Courts in general, and apex courts in particular, are attentive to their own legitimacy.”²⁶⁹ Supreme Court opinions that focus on the

264. See Powell, *supra* note 212, at 286–87 (describing *stare decisis*’ role in maintaining the Supreme Court’s “public legitimacy”); Nelson, *supra* note 212, at 68 (recognizing that advocates of a strong version of *stare decisis* may argue that “frequent overruling jeopardizes public acceptance of the courts’ decisions”).

265. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 413 (2022) (Breyer, J., dissenting).

266. Tsai, *supra* note 9, at 97.

267. PEW RSCH. CTR., MAJORITY OF PUBLIC DISAPPROVES OF SUPREME COURT’S DECISION TO OVERTURN *ROE V. WADE* 4 (2022).

268. Nevertheless, the fact that a case’s abrogation may be susceptible to differing interpretations does not per se mean that it is an improper source of constitutional analysis. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739 (1995).

269. Justin Collings, *After Law’s Infamy: Judicial Self-Legitimation in the Aftermath of Judicial Evil*, in *LAW’S INFAMY: UNDERSTANDING THE CANON OF BAD LAW*, *supra* note 9, at 13, 14–16; see also Tsai, *supra* note 9, at 100 (arguing that the Supreme “Court’s instinct toward self-preservation treats it as dangerous to acknowledge external competitors for interpretive authority,” such as social movements that mobilize against existing precedent); Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1120

Court's own mistakes may risk undermining the public's faith in the Court as the ultimate legitimate arbiter of the Constitution. Despite the ways in which anticanonical decisions encapsulate certain grave wrongs and highlight the need to approach constitutional questions with an awareness of history, the Court may find it more convenient to ignore overturned decisions altogether.²⁷⁰ Avoidance may be all but inevitable when the Justices involved in infamous decisions are still on the Court.²⁷¹

The reluctance to publicly reflect on past errors, however, must be balanced against the utility of being forthright. As a matter of perception, the Supreme Court gains legitimacy from its ability to be honest, fair, and impartial; the Court's recognition of its own past mistakes upholds these values. When the public's trust in the political branches is in doubt, as it is now,²⁷² judicial candor may set the Court apart.²⁷³ Additionally, the Court's written decisions also help publicly disseminate relevant aspects of our nation's history. More directly, the Court's use of anticanonical decisions may help steer lower courts away from similar harms. A selective judicial memory may help shield the institution of the Court from certain types of public scrutiny, but it cannot protect the Court from committing or condoning the same wrongs.

IV. IMMIGRATION ENFORCEMENT AND THE LEGACY OF *KOREMATSU*

During the 2024 presidential campaign through inauguration, President Trump put forth the large-scale deportation of immigrants as a signature policy issue. His primary justification for forcibly relocating immigrants, as expressed in official documents and at his rallies, was that they present a danger to their U.S. citizen neighbors.²⁷⁴ However, national security is not a factually defensible justification for mass deportation, and should collapse under any level of judicial scrutiny. The proposals to displace immigrant communities parallel Japanese American internment in important respects: The executive's policy lacks a factual basis, it finds its strongest political support in prejudiced opinions of specific executive advisors and organizations, and the executive's proposals supplant already available mechanisms that better protect individualized

(1995) (analyzing an approach to Supreme Court jurisprudence that can be defined in part "by the clear and explicit recognition of the importance of maintaining the Court's power and esteem and of the role that stare decisis doctrine plays in achieving this end").

270. Collings, *supra* note 269, at 15–16.

271. See Powell, *supra* note 212, at 284 ("[A] new Justice is less bound by precedent in construing a provision of the Constitution than a Justice who was sitting when a precedent was decided."); Greene, *supra* note 7, at 384 (discussing how the Court could not assign *Korematsu* to its proper place in history until Chief Justice Warren, and Justices Black and Douglas, had left the Court).

272. Claudia Deane, *Americans' Deepening Mistrust of Institutions*, PEW (Oct. 17, 2024), <https://www.pew.org/en/trend/archive/fall-2024/americans-deepening-mistrust-of-institutions>.

273. The need for judicial candor exists "along a spectrum" of different contexts and topics, and forthright discussion of institutional error may permissibly factor into the type of candor that we normatively value from the judiciary. Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2269 (2017).

274. See, e.g., Proclamation No. 10886, 90 Fed. Reg. 8327 (Jan. 20, 2025); *infra* note 312.

process. Given this reality, which is further analyzed below, there need not be a balancing of the alleged government interest and real constitutional rights before leveling a threshold critique against mass deportation, since these policies are not in service of national security.

Although, as of the time of this writing, the full force of Trump's policy has not been put into effect, this Part reviews the rhetoric and background of Trump's proposals through his second administration's inauguration day. It then turns to the available scholarly research regarding the claims related to immigration and crime. In making this argument, this Part provides examples of legal guideposts drawn from the errors of *Korematsu* based on how the internment camps were implemented. This Part does not claim to be able to predict what exact form mass deportation may take, either during the course of Trump's second administration or in subsequent administrations. Many of the lessons from *Korematsu* go towards the question of deference to the executive's evidentiary determinations of a national security interest more broadly. The legal community is obligated to avoid the negative precedential example of *Korematsu*, and, indeed, federal courts at every level already incorporate such analysis into their adjudications. Even at this stage of generality, the similarities and differences between the Trump administration's efforts to detain and deport non-citizens and Roosevelt's internment camps of World War II show the fragile legal underpinnings of large-scale federal detention of immigrant communities.

Before *Korematsu* was adjudicated, the proposal of using racial classification to forcibly relocate individuals of Japanese descent was considered abhorrent by some contemporaries.²⁷⁵ Many more advocates have recently denounced declaring a national emergency to justify the detention and deportation of immigrants.²⁷⁶ If avoiding the errors of *Korematsu* means anything, it necessitates pushing back against the use of national security to indiscriminately detain and deport immigrants and their children who are present in the United States.

In the context of Roosevelt's administration, the executive had an obligation during World War II to protect the country from the dangers of espionage and sabotage by foreign governments.²⁷⁷ The idea that individuals of

275. IRONS, *supra* note 66, at 39, 44, 61, 133–34 (noting some internal dissent within both the executive branch and the American Civil Liberties Union, the latter of which nevertheless took the official position of supporting the internment). *But see* FELDMAN, *supra* note 243, at 239 (“Overall . . . the record of even civil libertarians in the history of Japanese-American internment is not gratifying.”).

276. Press Release, Anthony D. Romero, ACLU Exec. Dir., ACLU Statement on Trump's Plan to Use Military to Mass Deport Immigrants (Nov. 18, 2024), <https://www.aclu.org/press-releases/aclu-statement-on-trumps-plan-to-use-military-to-mass-deport-immigrants>; Michael Waldman, *Trump's Mass Deportation Plans*, BRENNAN CTR. FOR JUST. (Nov. 19, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/trumps-mass-deportation-plans>; NAT'L IMMIGR. L. CTR., *Analysis of Trump Day 1 Executive Orders: Unconstitutional, Illegal, and Cruel* (Jan. 21, 2025), <https://www.nile.org/articles/analysis-of-trump-day-1-executive-orders-unconstitutional-illegal-and-cruel>.

277. Preventing espionage and sabotage was the stated objective of Roosevelt's executive orders and the subsequent proclamations. *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

Japanese descent living in the United States, as a group, presented a disproportionate risk of colluding with Japan was the executive's justification for race-based internment.²⁷⁸ When federal agencies assessed this threat, they considered any acts against the nation that individuals of Japanese descent had perpetrated, as well as any risk that such acts could be perpetrated in the future.²⁷⁹

As has been repeatedly documented, there was no known instance of any individual in the internment camps having committed espionage or sabotage prior to their detention.²⁸⁰ Rather, dozens of individuals of Japanese descent were victims in the bombing of Pearl Harbor, and tens of thousands of others helped defend the country after the United States entered the war.²⁸¹ In the 1980s, Congress appointed a commission to investigate the internment camps.²⁸² Military officials testified before the Commission that, despite the stated objective of President Roosevelt, and the bare assertions of General DeWitt and the Secretary of the Navy Frank Knox, the decision to relocate Japanese Americans "was not taken on the basis of actual incidents of espionage, sabotage or fifth column activity."²⁸³

These findings were submitted as evidence in the *coram nobis* trial that vacated Fred Korematsu's prior conviction for refusing to evacuate from his home.²⁸⁴ The U.S. Attorney arguing against Mr. Korematsu stated on the record that it was appropriate for judicial notice to be taken of the Commission's report, including its finding that no individual in the internment camps had ever been found to have committed any espionage or sabotage.²⁸⁵ There has not been any sabotage or espionage uncovered in the years since.²⁸⁶ Ultimately, over forty years after the internment camps were closed, Congress authorized that reparations be paid to the individuals that the military had forcibly relocated.²⁸⁷

278. For a blistering critique of the racial prejudice that underlies this logic, Eugene V. Rostow's prominent contemporaneous analysis is worth highlighting. Rostow, *supra* note 72, at 505.

279. See ROBINSON, *supra* note 13, at 61–63.

280. PERSONAL JUSTICE DENIED, *supra* note 67, at 3–8; KASHIMA, *supra* note 68, at 39; ROBINSON, *supra* note 13, at 85; Tsai, *supra* note 9, at 121–23; Michener, *supra* note 190, at 46. In fact, the government conceded this point when the issue was litigated. See IRONS, *supra* note 66, at 179.

281. ROBINSON, *supra* note 77, at 60, 203 ("The outstanding combat record of the all-Nisei, segregated 100th Battalion/442nd Regimental Combat Team and the Nisei interpreters in the Military Intelligence Service, compiled at the horrid cost of thousands of battlefield casualties, encouraged government officials to push the release of inmates from the camps.")

282. Comm'n on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96-317, 96 Stat. 964 (1980).

283. PERSONAL JUSTICE DENIED, *supra* note 67, at 50.

284. *Korematsu v. United States*, 584 F. Supp. 1406, 1414–16 (N.D. Cal. 1984).

285. *Id.* at 1414; see also *supra* note 280.

286. KASHIMA, *supra* note 68, at 39. Distinct from Japanese immigrants and their U.S. citizen children, there was espionage committed by Japanese consular officials, which was known to the U.S. government at the time. See ROBINSON, *supra* note 77, at 44–47.

287. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903. Some called for financial compensation even before the camps were closed. See, e.g., Rostow, *supra* note 72, at 533.

These findings are not merely retrospective. For years leading up to the issuance of Executive Order 9066, U.S. intelligence agencies had studied whether there was a risk that individuals of Japanese descent might act on behalf of Japan if the United States entered the war. Their investigations demonstrated, repeatedly, that Japanese immigrant communities presented no significant national security risk greater than any other ethnic group, such as Germans or Italians.²⁸⁸ Among other agencies, the Office of Naval Intelligence (“ONI”) oversaw this task in earnest. Within this agency, Lieutenant Commander Kenneth Duval Ringle helped lead ONI’s efforts. He had served in Japan for three years and was one of the only individuals in the Navy who spoke Japanese fluently.²⁸⁹ With the help of agents from the Federal Bureau of Investigation (“FBI”) and local police, he burglarized the Japanese consulate and broke into a safe to retrieve confidential documents.²⁹⁰ He also established a network of informants within the Japanese immigrant community.²⁹¹ Through his investigations, one Japanese Navy lieutenant was found to be conducting espionage, and he was allowed to leave the United States without being prosecuted.²⁹²

Lieutenant Ringle also found that, contrary to the administration’s concerns, Japan was unlikely to rely on the Japanese immigrant community or their U.S. citizen children for espionage, and instead more likely to rely on white individuals with whom they contracted.²⁹³ In reviewing the confidential communications that he uncovered, the Japanese government appeared to be highly suspicious of Japanese immigrants and their descendants, whom it allegedly viewed “as cultural traitors not to be trusted.”²⁹⁴ Lieutenant Ringle’s report supported the position that individuals of Japanese descent posed no particular danger to the United States. Going further, he concluded that, should detention be deemed necessary, individual hearings were preferable to mass internment.²⁹⁵

Lieutenant Ringle’s report was read by cabinet members, and his findings were corroborated by other agencies as well.²⁹⁶ John Edgar Hoover, as the head of the FBI, did not believe that Japanese immigrants and their children presented a unique threat to national security, and made the FBI’s opinion known to the President.²⁹⁷ Curtis Burton Munson, an intelligence agent through the Office of

288. PERSONAL JUSTICE DENIED, *supra* note 67, at 3–8; Yamamoto & Oyama, *supra* note 120, at 694–98; KASHIMA, *supra* note 68, at 32–33; Michener, *supra* note 190, at 39–47.

289. KASHIMA, *supra* note 68, at 36.

290. *Id.* at 37.

291. PERSONAL JUSTICE DENIED, *supra* note 67, at 53.

292. ROBINSON, *supra* note 77, at 36–37; KASHIMA, *supra* note 68, at 37.

293. *See* ROBINSON, *supra* note 13, at 70–71, 77–78; IRONS, *supra* note 66, at 203–04.

294. KASHIMA, *supra* note 68, at 37.

295. *See* IRONS, *supra* note 66, at 203–04.

296. *See* KASHIMA, *supra* note 68, at 37.

297. PERSONAL JUSTICE DENIED, *supra* note 67, at 55; *see also* KASHIMA, *supra* note 68, at 129; ROBINSON, *supra* note 13, at 100–01.

the President, also concluded that Japanese immigrant communities were, as a whole, “loyal to the United States.”²⁹⁸ He summarized the intelligence community’s opinion that, at a minimum, “local Japanese . . . would [not] be . . . any more disloyal than any other racial group” from countries with whom the United States was at war.²⁹⁹

These facts did not prevent the creation of internment camps exclusively for individuals of Japanese descent.³⁰⁰ Importantly, they also did not stop the U.S. Supreme Court from approving of their detention, despite the Fifth Amendment, and despite applying a nascent form of strict scrutiny to race-based classifications.³⁰¹ What can we make of this complete breakdown in judicial review?

For one, government attorneys knowingly withheld information in the three Japanese internment cases that reached the Supreme Court.³⁰² First in *Hirabayashi*, and then in *Korematsu*, the government alleged that ethnic Japanese living on the West Coast had sent radio transmissions to Japanese submarines, which allowed the submarines to locate and attack U.S. military vessels.³⁰³ The Department of Justice knew that these allegations were false.³⁰⁴ Indeed, multiple Department of Justice officials believed the report containing the allegations contained “wilful [sic] historical inaccuracies and intentional falsehoods.”³⁰⁵ Nevertheless, the Solicitor General proactively struck out language from a preliminary draft of the government’s brief that had conceded, albeit evasively, that conflicting information existed as to whether radio communications occurred.³⁰⁶ The final brief submitted to the Supreme Court went further and asked that judicial notice be taken of the allegations, without any caveats.³⁰⁷ Despite an internal record of written objections from Department of Justice officials, the government “relied heavily” on these false allegations when making its argument that Japanese internment met the standard of military necessity.³⁰⁸

As the U.S. District Court for the Northern District of California noted when granting *coram nobis* relief: “[*Korematsu*] stands as a caution that in times

298. KASHIMA, *supra* note 68, at 40.

299. *Id.*

300. Why these facts did not persuade President Roosevelt and certain advisors is discussed further below in this Part.

301. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

302. ROBINSON, *supra* note 77, at 218–25; KASHIMA, *supra* note 68, at 220.

303. ROBINSON, *supra* note 77, at 224; *Korematsu v. United States*, 584 F. Supp. 1406, 1418 (N.D. Cal. 1984).

304. Yamamoto & Oyama, *supra* note 120, at 694–95; ROBINSON, *supra* note 77, at 224.

305. *Korematsu*, 584 F. Supp. at 1418 (quotations omitted); *see also* ROBINSON, *supra* note 13, at 209–10 (noting that, contrary to the report, no U.S. vessels were sunk by Japanese forces in the Pacific at the beginning of 1942); Yamamoto & Oyama, *supra* note 120, at 695–96.

306. ROBINSON, *supra* note 77, at 224; *see also Korematsu*, 584 F. Supp. at 1417–18; Yamamoto & Oyama, *supra* note 120, at 697.

307. *Korematsu*, 584 F. Supp. at 1418.

308. *Id.*

of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.”³⁰⁹ Eugene V. Rostow, writing in the *Yale Law Journal* shortly after *Korematsu* was decided, summarized the problem less abstractly:

The Supreme Court had a real alternative in the *Korematsu* case: it could have remanded for trial on the necessity of the orders. The courts have found no special difficulty in investigating such questions, and there is no reason why they should. . . . The first and greatest anomaly of the *Hirabayashi*, *Korematsu* and *Endo* cases is that they seem to abandon the requirement of a judicial inquiry into the factual justification for General DeWitt’s decisions.³¹⁰

This history should be kept in mind when the Trump administration’s immigration policies reach the courts. As a matter of rhetoric, Trump has already enshrined his immigration policies under the mantle of military necessity and national security.³¹¹ Repeated in campaign speeches that Trump gave in the week leading up to the November 2024 election, he described immigrants as posing a military threat to the United States, according to transcriptions by the media outlet Roll Call.³¹² It would not be hyperbole to suppose that many of his

309. *Id.* at 1420.

310. Rostow, *supra* note 72, at 531. More broadly, Noah Feldman has suggested that Rostow’s article on the Japanese American internment cases is “still the most important criticism of them.” FELDMAN, *supra* note 243, at 253.

311. *See, e.g.*, Exec. Order No. 14,159, 90 Fed. Reg. 8443 (Jan. 20, 2025) (claiming that immigrants pose “significant threats to national security and public safety”).

312. Donald Trump, Campaign Rally in Reading, Pa. (Nov. 4, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-reading-pennsylvania-november-4-2024> (“We are an occupied country. . . . [They have] military-style weapons.”); Donald Trump, Campaign Rally in Raleigh, N.C. (Nov. 4, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-raleigh-north-carolina-november-4-2024> (“This is an invasion of our country. I’m taking it out of the military.”); Donald Trump, Campaign Rally in Grand Rapids, Mi. (Nov. 4, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-grand-rapids-michigan-november-4-2024> (“[W]e live in an occupied country. . . . [They] have military-type equipment.”); Donald Trump, Campaign Rally in Pittsburgh, Pa. (Nov. 4, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-pittsburgh-november-4-2024> (“[T]hese are military invasions without the uniforms.”); Donald Trump, Campaign Rally in Macon, Ga. (Nov. 3, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-macon-georgia-november-3-2024> (“The United States is now an occupied country.”); Donald Trump, Campaign Rally in Lititz, Pa. (Nov. 3, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-lititz-pennsylvania-november-3-2024> (“We will not be invaded. We will not be occupied.”); Donald Trump, Campaign Rally in Kinston, N.C. (Nov. 3, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-kinston-north-carolina-november-3-2024> (“The United States is now an occupied country. . . . They’re vicious, violent, and like military age.”); Donald Trump, Campaign Rally in Salem, Va. (Nov. 2, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-salem-virginia-november-2-2024> (“We will not be invaded. . . . We will not be conquered.”); Donald Trump, Campaign Rally in Gastonia, N.C. (Nov. 2, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-gastonia-north-carolina-november-2-2024> (“These towns have been invaded and conquered, no different than a military invasion.”); Donald Trump, Campaign Rally in Greensboro, N.C. (Nov. 2, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-greensboro-north-carolina-november-2-2024> (“I will invoke the Alien Enemies Act of 1798.”); Donald Trump, Campaign Rally in Warren, Mi (Nov. 1, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-warren-michigan-november-1-2024> (“We will not be occupied.”); Donald Trump, Campaign Rally in

supporters elected him in order to carry out immigration policy militarily. This rhetoric was borne out on the day of Trump’s second term inauguration when he proclaimed that “the current situation at the southern border qualifies as an invasion under Article IV, Section 4 of the Constitution.”³¹³ Among his executive actions, he ordered a review of whether to use the Insurrection Act of 1807,³¹⁴ through which he could mobilize the military in the interior of the country.³¹⁵

Military necessity cannot be used as a justification for curtailing due process rights of immigrants without some evidentiary basis. This is particularly true where no such evidence of a foreign attack, national emergency, or security crisis exists. In the last ten years alone, over a dozen studies examining city,³¹⁶ state,³¹⁷ and national³¹⁸ statistics have further confirmed that immigrants are no more likely than U.S. citizens to commit crime, let alone present a military threat.³¹⁹ Both local cities’ sanctuary policies³²⁰ and federal programs to stop

Milwaukee, Wis. (Nov. 1, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-milwaukee-wisconsin-november-1-2024> (“It’s like a military invasion. . . . [T]hey’re military-grade.”); Donald Trump, Campaign Rally in Albuquerque, N.M. (Oct. 31, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-albuquerque-new-mexico-october-31-2024> (“We will not be invaded. We will not be occupied.”); Donald Trump, Campaign Rally in Henderson, Nev. (Oct. 31, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-henderson-nevada-october-31-2024> (“[W]e’re an occupied country. . . . And they have equipment that’s military-grade.”); Donald Trump, Campaign Rally in Green Bay, Wis. (Oct. 30, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-green-bay-wisconsin-october-30-2024> (“We are being invaded, and we are being conquered, just like it was a military operation.”); Donald Trump, Campaign Rally in Rocky Mount, N.C. (Oct. 30, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-rocky-mount-north-carolina-october-30-2024> (“We will not be invaded.”); Donald Trump, Campaign Rally in Allentown, Pa. (Oct. 29, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-allentown-pennsylvania-october-29-2024> (“[T]his horrible migrant invasion ends. . . . [T]hey have the weapons of a fine military.”); Donald Trump, Campaign Rally in Atlanta, Ga. (Oct. 28, 2024), <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-campaign-rally-atlanta-october-28-2024> (“These towns have been conquered . . . as though a foreign enemy was invading, a military was invading.”).

313. Proclamation 10888, 90 Fed. Reg. 8333, 8335 (Jan. 20, 2025).

314. Proclamation 10886, 90 Fed. Reg. 8327, 8328 (Jan. 20, 2025).

315. 10 U.S.C. § 251; see also Joseph Nunn & Elizabeth Goitein, *Guide to Invocations of the Insurrection Act*, BRENNAN CTR. FOR JUST. (2022), <https://www.brennancenter.org/our-work/research-reports/guide-invocations-insurrection-act>.

316. Sungil Han & Alex R. Piquero, *Is It Dangerous to Live in Neighborhoods with More Immigrants? Assessing the Effects of Immigrant Concentration on Crime Patterns*, 68 CRIME & DELINQ. 52, 69 (2022).

317. Michael T. Light, Jingying He & Jason P. Robey, *Comparing Crime Rates Between Undocumented Immigrants, Legal Immigrants, and Native-Born US Citizens in Texas*, 117 PNAS 32340, 32342 (2020).

318. Ran Abramitzky, Leah Boustan, Elisa Jácome, Santiago Pérez & Juan David Torres, *Law-Abiding Immigrants: The Incarceration Gap Between Immigrants and the US-Born, 1870–2020*, 6 AM. ECON. REV.: INSIGHTS 453 (2024).

319. Graham C. Ousey & Charis E. Kubrin, *Immigration and Crime: Assessing a Contentious Issue*, 1 ANN. REV. CRIMINOLOGY 63, 68–74 (2018) (conducting a meta-analysis of previous research, and concluding that, as immigration increases, there is a slight decrease in crime, which is more pronounced for violent crime); AM. IMMIGR. COUNCIL, *DEBUNKING THE MYTH OF IMMIGRANTS AND CRIME* 4–6 (Oct. 2024), https://www.americanimmigrationcouncil.org/sites/default/files/research/debunking_the_myth_of_immigrants_and_crime.pdf (summarizing this literature and providing additional citations).

320. Marta Ascherio, *Do Sanctuary Policies Increase Crime? Contrary Evidence From a County-Level Investigation in the United States*, SOC. SCI. RSCH., May 19, 2022, at 1, 11.

deportations³²¹ are associated with lower crime rates. Other specific crimes that have received attention from the Trump administration, such as illegal drug use and driving under the influence, are generally less prevalent when there is more immigration.³²²

Despite the robust consensus that immigration does not increase crime, Trump has made the specter of homicide by immigrants a centerpiece of his most recent presidential campaign.³²³ Any homicide is abhorrent. So is using the deaths of specific individuals for political gain and populist messaging, with the ultimate result of limiting the rights of entire groups of people. Insofar as immigration is associated with a decrease in violent crime,³²⁴ Trump's rhetoric and policies are at best a distraction from real solutions that could lower rates of violent acts.

Specifically, in addition to the previously cited studies, analysts have shown that U.S. citizens commit homicides at significantly higher rates than both lawfully present immigrants and undocumented immigrants.³²⁵ Other researchers have corroborated these findings in peer-reviewed publications, concluding there has been no immigration-fueled increase in homicides in recent years.³²⁶ According to a study done in Texas, undocumented immigrants commit homicide at a rate at least twenty-six percent lower than U.S. citizens do, and lawful immigrants are at least sixty-one percent less likely than U.S. citizens to commit homicide.³²⁷ These state-based figures have been subjected

321. Christian Gunadi, *Does Immigrant Legalization Affect Crime? Evidence from Deferred Action for Childhood Arrivals in the United States*, 178 J. ECON. BEHAV. & ORG. 327, 332–33, 335–44 (2022) (examining the effects of the DACA program on rates of violent crime and property crime).

322. Ben Feldmeyer, Diana Sun, Casey T. Harris & Francis T. Cullen, *More Immigrants, Less Death: An Analysis of Immigration Effects on County-Level Drug Overdose Deaths, 2000–2015*, 60 CRIMINOLOGY 667, 682 (2022); Michael T. Light, Ty Miller & Brian C. Kelly, *Undocumented Immigration, Drug Problems, and Driving Under the Influence in the United States, 1990–2014*, 107 AM. J. PUB. HEALTH 1448, 1451–53 (2017).

323. See, e.g., Dan Gooding, *Families of Jocelyn Nungaray, Rachel Morin Blame Border Policy for Deaths*, NEWSWEEK (Sep. 27, 2024, at 17:10 ET), <https://www.newsweek.com/donald-trump-illegal-immigration-jocelyn-nungaray-rachel-morin-1960529>. Donald Trump's campaign events frequently displayed video clips and montages discussing the murder of Jocelyn Nungaray in Houston, Texas. See *supra* note 312.

324. See Ousey & Kubrin, *supra* note 319, at 69–74.

325. Alex Nowrasteh, *Illegal Immigrant Murderers in Texas, 2013–2022*, CATO POL'Y ANALYSIS 6 fig. 3 (2024), <https://www.cato.org/sites/cato.org/files/2024-06/Policy-Analysis-977-new-release-date.pdf>.

326. Light et al., *supra* note 317, at 32341 (peer-reviewed); Feldmeyer et al., *supra* note 322 (peer-reviewed). But see SEAN KENNEDY, JASON RICHWINE & STEVEN A. CAMAROTA, CTR. FOR IMMIGR. STUD., MISUSE OF TEXAS DATA UNDERSTATES ILLEGAL IMMIGRANT CRIMINALITY 4 (2022), <https://cis.org/sites/default/files/2022-10/texas-crime.pdf> (not peer-reviewed). The Center for Immigration Studies argued in 2022 that only “serious crimes” are reliably correlated with data about immigration status, which is why the most recent studies from the Cato Institute have examined homicides. Compare *id.* at 1, with Nowrasteh, *supra* note 325, at 6–7; see also Alex Nowrasteh, *The Center for Immigration Studies Is Still Wrong About Illegal Immigrant Crime in Texas*, CATO: AT LIBERTY (Mar. 6, 2024, at 10:43 PT), <https://www.cato.org/blog/center-immigration-studies-still-wrong-about-illegal-immigrant-crime-texas>.

327. Nowrasteh, *supra* note 325, at 1.

to public scrutiny, refined, and duplicated.³²⁸ These results are among the most robust insofar as Texas has one of the largest immigrant populations in the country, and it is also the only state that systematically coordinates information regarding convictions and immigration status between state and federal officials.³²⁹

These studies show that policymakers' techniques and our willingness to examine our own biases have advanced markedly since the first half of the twentieth century. At that time, General DeWitt had justified mass detention by summarily noting that "racial affinities are not severed by migration."³³⁰ Federal courts can and should now hold the executive to some minimal factual accountability in regard to immigration policy.

As a matter of immigration policy, the rate of crime is relevant to evaluating whether the Trump administration's declaration of a national emergency is at all rational, let alone reasonable or constitutional. But let us assume a national crime emergency does exist. Individual instances of delinquency, taken on their own, cannot be used as a reasonable basis for preemptive detention of an entire demographic group, even in the case of a national emergency. The fact that one Japanese naval officer was found to be conducting espionage in the United States did not justify forcibly relocating all immigrants of Japanese descent.³³¹ In *Korematsu*, there was no plausible link suggesting that immigrants of Japanese descent or their U.S. citizen children were likely to commit sabotage or espionage, and, nevertheless, a lack of judicial scrutiny permitted the executive to unconstitutionally detain them for years without any individualized process. The Constitution should not permit prolonged or indefinite detention under a similar rationale now, either.

In truth, the Supreme Court has eschewed clarifying constitutional questions in the context of immigration detention.³³² As previously mentioned, today there is not any rational basis for using the executive's emergency powers

328. Compare *id.* at 2–4, with Michelangelo Landgrave & Alex Nowrasteh, *Illegal Immigrant Incarceration Rates, 2010–2018*, CATO POL'Y ANALYSIS 2–8 (Apr. 21, 2020), https://www.cato.org/sites/cato.org/files/2020-04/PA_890_DOI.pdf (expanding on 2020 Cato research by analyzing criminal convictions over a longer time period, and focusing on homicides); see also Light et al., *supra* note 317, at 32341.

329. Light et al., *supra* note 317, at 32341.

330. DEWITT, *supra* note 70.

331. See KASHIMA, *supra* note 68, at 37; ROBINSON, *supra* note 77, at 36.

332. See Laila L. Hlass & Mary Yanik, *Studying the Hazy Line Between Procedure and Substance in Immigrant Detention Litigation*, 58 HARV. C.R.–C.L. L. REV. 203, 232–34 (2023) (analyzing how, in the context of habeas petitions, the Supreme Court has left little guidance to lower courts about the constitutional limits on civil detention of immigrants); Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565, 603–08 (reviewing recent decisions on the rights of immigrants who are deemed to be on the threshold of entry); Fatma Marouf, *Immigration Law's Missing Presumption*, 111 GEO. L.J. 983, 1016–19 (2023) (reviewing a circuit split as to whether a due process right to a bond hearing exists); Arnold, *supra* note 49, at 312–30 (discussing historical reasons why the law of immigration detention has avoided the doctrinal reforms of other civil detention schemes).

in the first place, unlike the wartime context of World War II.³³³ If there is any constitutional prohibition to be drawn from overturning *Korematsu*, then courts must subject the blanket, unindividualized, militarily-enforced detention of immigrants to evidentiary scrutiny.

By comparing the internment camps and the Trump administration's calls for mass deportations, I do not mean to suggest that the two events are equivalent, legally or otherwise. Important differences exist, among them that Roosevelt's executive orders targeted a large number of U.S. citizens.³³⁴ Many, if not most, of the tens of thousands of U.S. citizens were children under eighteen years old when the federal government forcibly compelled them into camps with their foreign-born parents.³³⁵ The executive's detention of law-abiding U.S. citizens in this way is abhorrent. This large-scale denial of U.S. citizens' liberty due to an explicit racial classification has little direct parallel in the post-Reconstruction United States. Under current doctrine, the level of constitutional protection afforded to non-citizens, on the other hand, may depend on issues such as whether or not they were lawfully admitted or paroled into the United States,³³⁶ or whether they have adjusted their status to become lawful permanent residents,³³⁷ among other factors.

Given that the U.S. internment camps could not be justified militarily based on the evidence at the time, one may wonder why the executive branch felt so compelled to create them. A full sociological and historical examination of the executive branch's policies is beyond the scope of this Article, but the political mobilization of popular prejudices, along with specific ideologically driven executive officials, is worth considering. The military attack on Pearl Harbor by the Japanese government provided a central catalyst for the U.S. government's subsequent restrictions of liberty.³³⁸ Aside from this wartime context, there is a similar dynamic that can be seen in the current calls for mass deportations.

Historian Greg Robinson, among others, has noted that the Roosevelt administration's internment camps found their popular base in a West Coast movement that was resolutely anti-immigrant.³³⁹ Prominent politicians in California after World War I, including future Supreme Court Justice Earl Warren, relied on nativist organizations and their allies as part of their political

333. *But see* ROBINSON, *supra* note 13, at 210 (noting how military necessity had been eroded as a justification by the time the Supreme Court decided *Korematsu*).

334. *But see* Exec. Order 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025) (curtailing citizenship).

335. WAR RELOCATION AUTHORITY, U.S. DEP'T OF THE INTERIOR, THE EVACUATED PEOPLE: A QUANTITATIVE DESCRIPTION 100 tbl. 37 (1946); *see also* KASHIMA, *supra* note 68, at 9.

336. *See, e.g.*, Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020).

337. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 80 (1976).

338. IRONS, *supra* note 66, at 26–27.

339. ROBINSON, *supra* note 13, at 23–27; *see also* IRONS, *supra* note 66, at 277 (“Roosevelt’s desire for partisan advantage in the 1944 elections provides the only explanation for the [six month] delay in ending internment.”).

base.³⁴⁰ These nativist organizations did not distinguish between U.S. citizens of Japanese descent and non-citizens when doing so would dilute their message of white nationalism. In the years after World War I, for example, a coalition of groups created a five-point plan calling for the elimination of birthright citizenship through constitutional amendment, along with other policies to restrict the rights of individuals of East Asian descent.³⁴¹ Some of these groups had oral argument for eliminating birthright citizenship before the Ninth Circuit on the very same day that the court heard oral argument on the merits of Japanese American internment.³⁴² The nativists' anti-immigrant platform may have been one of the earliest proposals to eliminate birthright citizenship after the Supreme Court's decision in *United States v. Wong Kim Ark*, which formally recognized that right.³⁴³

The early calls to eliminate birthright citizenship are notable, since they highlight how Roosevelt's treatment of individuals of Japanese descent and Trump's immigration policies have similar ideological features. President Roosevelt's understanding of immigration policy arose during widespread fears of a "yellow peril,"³⁴⁴ and, long before Roosevelt assumed the presidency, he understood how to mobilize this sentiment to support his political objectives.³⁴⁵ Future Chief Justice Warren, then California Attorney General, delivered influential testimony before Congress that "relied heavily on the amateur sleuthing of right-wing and anti-Oriental groups."³⁴⁶ General DeWitt, one of the principal architects of the Japanese internment camps, was perceived to be a racially motivated zealot by many of his peers.³⁴⁷ He infamously justified the internment camps for U.S. citizens with the slur that "a Jap's a Jap."³⁴⁸ Likewise, President Trump's primary immigration advisor Stephen Miller has promoted white nationalist ideologies.³⁴⁹ Trump has stated his own preference, also in

340. See ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* 85–91, 99 (1972); IRONS, *supra* note 66, at 213–14.

341. DANIELS, *supra* note 340, at 84–85 (1972) (excluding children whose "parents are of a race eligible to citizenship").

342. IRONS, *supra* note 66, at 176–80.

343. 169 U.S. 649, 705 (1898).

344. PERSONAL JUSTICE DENIED, *supra* note 67, at 27–28, 30–38.

345. ROBINSON, *supra* note 13, at 23–27 (noting that, as Assistant Secretary of Navy, "FDR seized on the 'yellow peril' as a lever to call for increased naval preparedness"); see also IRONS, *supra* note 66, at 268–70 (reviewing pressure on FDR to continue to detain individuals in the internment camps for "partisan advantage in the 1944 congressional elections").

346. IRONS, *supra* note 66, at 213.

347. See KASHIMA, *supra* note 68, at 129–34, 268; IRONS, *supra* note 66, at 26, 269.

348. IRONS, *supra* note 66, at 223.

349. See JEAN GUERRERO, *HATE MONGER: STEPHEN MILLER, DONALD TRUMP, AND THE WHITE NATIONALIST AGENDA* 101–05 (2020) (discussing Stephen Miller's early intellectual influences, including the white supremacists Richard Spencer and Peter Brimelow, and Miller's sharing of white nationalist articles with Breitbart); Jonathan Swan, Maggie Haberman, David A. Fahrenthold & Charlie Savage, *Stephen Miller, Channeling Trump, Has Built More Power Than Ever*, NY TIMES (Jan. 17, 2025), <https://www.nytimes.com/2025/01/16/us/politics/stephen-miller-trump.html> ("Mr. Trump said that if it was up to Mr. Miller there would

coarse terms, for immigration from countries with predominantly white populations.³⁵⁰ This rhetoric is just one example in a long pattern of the Trump administration's parroting of white nationalist tropes.³⁵¹

For Roosevelt's administration, as well as for Trump and his advisors, the question of limiting immigration arises within a broader set of prejudices regarding the racial composition of the United States. This framework helps explain why the Trump administration has unconstitutionally attempted to eliminate birthright citizenship as well, echoing the calls of the white nationalist organizations of the early twentieth century.³⁵² The curtailment of immigrants' rights has dovetailed with curtailing the rights of citizenship.

CONCLUSION

Insofar as the doctrine of *stare decisis* holds sway, it stands alongside a shadow of overturned precedent, which has its own unique value for adjudicating what falls outside the law. Of those constitutional decisions that were truly egregiously wrong, courts have every reason to carefully and concretely consider their legacy. Indeed, much of this analysis is already taking place in opinions issued at every level of the federal judiciary.

Courts' continued discussions of Japanese American internment helps emphasize certain basic principles. A need for judicial restraint, however valid, cannot permit unlimited deference to the executive's bare claim that a national emergency exists. Considering this and the forces that allowed for, and acquiesced to, the program of Japanese American internment, courts will take note of the fact that we are not currently defending any foreign attack on U.S. soil. They should also recognize that there is no evidence to support the blanket targeting of immigrants in the name of national security or a similar invocation of the executive's emergency powers.

At the same time, rights such as the liberty interest in being free from detention must be central considerations in the context of due process. Despite the heightened tenor of immigration rhetoric, this principle need not be controversial. And within the long arc of history and frequent fluctuations in immigration policy, the universal repudiation of *Korematsu* stands for this basic constitutional value. Courts have the ability to mandate individualized determinations for immigrants who are detained, which they often do through

be only 100 million people in this country, and they would all look like Mr. Miller, according to a person with knowledge of the comment."); Jean Guerrero, *Stephen Miller and White Nationalism*, NPR (Nov. 14, 2019, at 05:02 ET), <https://www.npr.org/2019/11/14/779208233/stephen-miller-and-white-nationalism> ("[E]mails show Miller encouraging Breitbart [editors] to pull news from a white supremacist website that promotes the great replacement theory.").

350. Ibram X. Kendi, *The Day Shithole Entered the Presidential Lexicon*, ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054>.

351. Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 198–200 (2019).

352. See Exec. Order 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025).

habeas corpus petitions. Individual hearings such as these, at a minimum, must be kept open and available in the context of immigration. Within the framework of our Constitution, the government cannot find an adequate interest to counterbalance the calls of thousands of individuals to be free from detention.
