Post-*Dobbs* Abortion Law in Wisconsin: A Case for Doctrinal Desuetude

By Clayton Cavanaugh

I. Introduction

In its 1973 decision Roe v. Wade, the United States Supreme Court declared unconstitutional statutes criminalizing abortion at any stage of pregnancy except when necessary to save the life of the pregnant woman.[1] Roe specifically listed Wisconsin Statute § 940.04 as one such statute.[2] At the time, 940.04 stated that it prohibited the "intentional[]" destruction of the life of an "unborn child" unless necessary to "save the life of the mother," and it defined "unborn child" as a "human being from the time of conception until it is born alive."

Following Roe, the Wisconsin Legislature passed new laws prohibiting abortion either after 20 weeks or after viability, and also passed a series of laws providing specific parameters for how physicians may perform abortions.

The United States Supreme Court overturned Roe in Dobbs v. Jackson Women's Health Organization.[3] In doing so, the court breathed new life into Wisconsin Statute 940.04—while it had been held unconstitutional for over half a century, the statute had never been removed from the Wisconsin law books.

Two days after Dobbs, Wisconsin Attorney General Josh Kaul filed a lawsuit in Dane County Circuit Court seeking declaratory judgment that Wisconsin Statute 940.04 has become unenforceable as applied to abortions. Kaul offered two grounds for seeking this relief: (1) implied repeal and (2) desuetude.

Kaul's first claim is that the 1849 law is unenforceable as applied to abortions because subsequent enactments by the Wisconsin state legislature have superseded any such application through a process known as implied repeal.

Kaul also argues that 940.04 has been in disuse for so long—held unconstitutional by the United States Supreme Court ruling in Roe v. Wade for over half a century, more than a third of its existence—that it should be stricken from the body of state law. In short, though Kaul avoids the word, this second claim is one of desuetude.

As was noted in the respondent's first reply brief, Kaul cited no law to support the use of the doctrine of desuetude in his complaint. The fault is not necessarily with the Wisconsin Attorney General; there is a general lack of rigorous literature or analysis on the topic of desuetude, both as to its general nature and to specific arguments for its use in Wisconsin legal canon.

This paper will first describe the doctrine of desuetude, referring to its various forms and treatment in courts, then to its roots in the American legal tradition, and then to the core persuasive policy justifications for its use. Second, this paper will argue that the doctrine of desuetude has strong roots in the Wisconsin State Constitution and will advocate for the

[1] 410 U.S. 113 (1973)
[2] Id. at 118 n.2.
[3] 142 S. Ct. 2228 (2022)

doctrine's adoption into Wisconsin law through Attorney General Kaul's legal challenge to Wisconsin Statute 940.04. Finally, third, this paper will address concerns with the doctrine's use and provide policy reasons in support of its adoption.

II. Desuetude

A. Doctrinal Desuetude

On its own, the word "desuetude" refers to a state of disuse, or nonenforcement, while the "doctrine of desuetude" acknowledges that "under some circumstances statutes may be abrogated or repealed by a long-continued failure to enforce them."[4] It is a doctrine at least as ancient as Rome—Roman jurist Julianus is quoted to have said "wherefore very rightly this also is held, that statutes may be abrogated not only by a vote of the legislator, but also by desuetude with the tacit consent of all."[5] The doctrine in its many forms aims to address some fundamental concerns with the application of long-unenforced statutes, though it has suffered confusing and often disparaging treatment in American courts.

1. Formulations of Desuetude

There are a number of conceptions of desuetude as it relates to criminal law, though only one will be the topic of this paper. They generally fall into two groups: desuetude as a challenge to the validity of a statute, and desuetude as an individual defense to criminal prosecution.

One conception of the doctrine, the one most feared by courts, would give judges the power to declare a statute void, a power normally reserved for the legislature, when the statute has gone unenforced for many years despite open and persistent violations.[6] While it has only been recognized in West Virginia, the doctrine of desuetude has been given three-part structure in that court to determine when it is appropriate to abrogate a statue.[7]

Under this formulation, first, the prohibited conduct must be *malum prohibitum*, meaning the act is wrong primarily because it is prohibited, not because it is truly harmful and evil in itself ("*malum in se*").[8] An example of an act *malum in se*, provided by the West Virginia Court of appeals while applying this test, is axe murder, while something like embezzlement is simply *malum probibitum* (as long the money is eventually returned).[9] This element of the test is only questionably inherent to the doctrine, and makes a substantive analysis of the statute's policy despite desuetude's traditional, purely procedural purpose. As will be discussed in the section on

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[4] Mark Peter Henriques, *Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws*, 76 Va. L. Rev. 1057, 1059 (1990).
[5] Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 148 (1962).
[6] Id.
[7] Comm. on Legal Ethics of the W. Virginia State Bar v. Printz, 416 S.E.2d 720 (W. Va. 1992); (used again in State ex rel. Canterbury v. Blake, 213 W.Va. 656, 584 S.E.2d 512 (2003)); C.J. Williams, *An Argument for Putting the Posse Comitatus Act to Rest*, 85 Miss. L.J. 99, 158 (2016)
[8] Williams, *supra* note 7, at 158.
[9] Printz, 416 S.E.2d at 726.

desuetude's roots in the American tradition, its core justifications are about fair notice, arbitrariness of application, predictability, and continuity of law—these justifications do not seem to inform this element of West Virginia's analysis.

The remaining elements of West Virginia's test are more rooted in traditional concepts of desuetude: Second, there must be "open, notorious, and pervasive violation of the statute for a long period,"[10] and third, despite these violations, there must be a "conspicuous policy of nonenforcement."[11]

This conception is often feared because some judges perceive it as merely a shortcut for pruning away laws merely because they are controversial and often broken.[12] As will be discussed in detail further on, this fear is unfounded because the careful formulation of the test and the purely procedural rather than policy analysis leaves no room for violations of the separation of powers or abuse of judicial power.

A second conception of desuetude, in response to those fears, would not nullify desuete statutes; rather, a court would simply refuse to enforce a desuete statue in those particular cases where enforcement would create identifiable harms to due process—rather than striking down the statue, this would provide a particular defendant in a particular instance immunity against enforcement.[13] Desuetude as an individual defense has the same function against arbitrary enforcement as statutory desuetude, but fails in large part to address the fair notice, predictability, and continuity of law aspects of its purpose. For these reasons, and because this limited formulation is unnecessary when fears over statutory desuetude are properly dispelled, this paper will primarily deal with statutory desuetude.

2. Treatment in Courts

Desuetude has had only very limited testing in American courts, and the sum of its exposure is muddy and uncertain. In the 1953 United States Supreme Court case District of Columbia v. John R. Thompson Co.,[14] Justice Douglas writing for the majority indicated that the lack of enforcement of a statute was not relevant to its ongoing validity. While this was concededly a rebuke of the doctrine of desuetude, the case involved neither lack of fair warning nor separation of powers concerns, and some judges and scholars still believe that in certain situations the use of the doctrine would be proper.[15] Further, the cases' facts are highly specific, which suggests the Court's rejection of the doctrine specifically in those circumstances.[16]

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[10] Id.
[11] Id.
[12] Bickel, *supra* note 5.
[13] Corey R. Chivers, *Desuetude, Due Process, and the Scarlet Letter Revisited*, 1992 Utah L. Rev. 449, 451 (1992)
[14] 346 U.S. 100 (1953).
[15] Teresa L. Scott, *Burying the Dead: The Case Against Revival of Pre-Roe and Pre-Casey Abortion Statutes in A Post-Casey World*, 19 N.Y.U. Rev. L. & Soc. Change 355, 382–83 (1992).
[16] D. Daniel Sokol, *Reinvigorating Criminal Antitrust?,* 60 Wm. & Mary L. Rev. 1545, 1568 (2019).

Less than a decade later, the Court again considered desuetude in Poe v. Ullman.[17] In Poe, the Court considered a Connecticut statute proscribing the use of contraceptives (later found unconstitutional in Griswold v. Connecticut)[18]. Refusing to decide on the merits, the court did not reach the constitutional question because the statute had not been enforced in years. Justice Frankfurter writing for the majority questioned the validity of the statute, touching upon a theory of doctrinal desuetude:

> "The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. What was said in another context is relevant here. 'Deeply embedded traditional ways of carrying out state policy …'—or not carrying it out—'are often tougher and truer law than the dead words of the written text.'"

The most recent application of desuetude in the United States Supreme Court came in the 2003 case Lawrence v. Texas.[19] The Court struck down a Texas statute making it a crime for two persons of the same sex to engage in intimate sexual conduct, noting in part:

> "The 25 States with laws prohibiting the relevant conduct referenced in the Bowers decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances."[20]

Though the opinion is difficult to parse, it is firmly rooted in Due Process, and one holding of Lawrence seems to be that a statute that is long unenforced, openly violated, and without significant moral support from the public, is unconstitutional.[21] That desuetude is discussed as a significant factor in Due Process Clause analysis provides support for the concept that desuetude itself is rooted in Due Process.

Although infrequent, other courts have supported or implied support for the doctrine's application. Judges do, from time to time, say that statutes may become unenforceable because

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[17] 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961)
[18] 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)
[19] 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)
[20] Id. at 573
[21] *See* Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 Sup. Ct. Rev. 27, 30 (2003).

they have lain unexercised too long.[22] So far, however, only the West Virginia Court of Appeals has explicitly applied the doctrine of desuetude to invalidate acts of its state legislature.[23]

B. Roots in American Tradition

While desuetude has received some complicated treatment in legal canon, its core justifications have remained as compelling as ever. The doctrine of desuetude is founded on this constitutional concept of fairness as embodied in the federal and state constitutional due process and equal protection clauses.[24] Implicit in the concept of due process are "the traditional notions of fair play and substantial justice."[25] The doctrine of desuetude shares this foundation of fairness with other doctrines based on due process, such as vagueness.[26] At the core, there are two due process and equal protection bases for desuetude based on: (1) fair notice and arbitrariness, and (2) predictability and continuity of law.

1. Fair Notice and Arbitrariness

The danger with suddenly enforcing a desuetudinal statute is that, by definition, it has been long openly and commonly violated. If after this long period of dormancy the statute was suddenly enforced, everyone who has violated that statute while it had lain entirely unenforced could be prosecuted for their violations despite a long pattern of apparent non enforceability—this creates due process concerns based on notice and arbitrary enforcement.

The United States Supreme court has long recognized in the context of other doctrines such as the void-for-vagueness doctrine that a foundational principle of "fair notice" is that people "are entitled to be informed as to what the State commands or forbids."[27] While "ignorance of the law will not excuse" its violation, due process places some limits on this rule, including fair notice.[28] Modern standards of behavior, informed by socialization, can cause the mere constructive notice of a statute's existence to fall below the constitutional standard of due process.[29] While fair notice concerns are sufficient to justify the doctrine of void-for-vagueness, the total absence of prosecutions for large portions of a century has an even greater effect on the perception of the public than merely imprecise language—language which the vast majority of the public never

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[22] Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 Wm. & Mary L. Rev. 1575, 1706 n. 537 (2001) (collecting cases); Wayne R. LaFave, Jerold H. Israel, Nancy J. King, Orin S. Kerr, § 13.5(c) *Desuetude and lack of fair notice*, 4 Crim. Proc. § 13.5(c) (4th ed.) (collecting cases); Hill v. Smith, Morris, 1840 WL 2834 (Iowa 1840) ("we pronounce it contrary to the spirit of that Anglo-Saxon liberty which we inherit, to revive, without notice, an obsolete statute, one in relation to which long disuse and a contrary policy had induced a reasonable belief that it was no longer in force").

[23] Printz, 416 S.E.2d 720; Blake, 584 S.E.2d 512.

[24] § 23:26. *Repeal by desuetude, obsolescence, and nonenforcement*, 1A Sutherland Statutory Construction § 23:26 (7th ed.) (collecting cases).

[25] Milliken v. Meyer, 311 U.S. 457, 463 (1940).

[26] John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 Wm. & Mary L. Rev. 531, 566 (2014).

[27] Papachristou v. City of Jacksonville, 405 U.S. 156, 163 (1972).

[28] Lambert v. People of the State of California, 355 U.S. 225, 228 (1957).

[29] Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 Va. L. Rev. 2051, 2085 (2015); *see* Lambert v. People of the State of California, 355 U.S. 225 (1957).

attempts to read.[30] In essence, "[a] penal enactment which is linguistically clear, but has been notoriously ignored by both its administrators and the community for an unduly extended period, imparts no more fair notice of its proscriptions than a statute which is phrased in vague terms."[31]

The void for vagueness doctrine is also instructive by analogy to the arbitrary enforcement concern inherent to desuete statutes. The arbitrary enforcement due process concern underlying vagueness is that vague statutes give the police, judges, and juries too much flexibility to authoritatively read into the statute practically any desired content, allowing them to act capriciously.[32] Similarly, if a statute which has fallen into desuetude is allowed to serve as a basis for prosecution, the executive branch is granted essentially plenary power to disrupt any citizen's liberty at any time. "Since almost anyone, or everyone, may have breached a desuet[e] enactment, an ever present ability to exhume and apply [such enactments] endows the enforcement agencies with unfettered power to persecute whomever they please for essentially unreviewable and most often unprovable reasons."[33]

The concerns for fair warning and principled administration of law also lie at the heart of other due process doctrines that: (1) require notice of a conduct's illegality in certain circumstances; (2) estop enforcers from disavowing representations as to an act's legality, on which citizens have relied; (3) prohibit the ex post facto infliction of punishment for an act that was innocent when committed; and (4) prevent the discriminatory enforcement of laws for arbitrary reasons.[34] These due process concerns of fair notice and arbitrary enforcement which has animated the doctrine of vagueness and these many other doctrines should also be sufficient to support the doctrine of desuetude.

2. Predictability and Continuity of Law

Another aspect of due process' guarantees of fair play and substantial justice is the predictability and continuity of law, a valuable principle of doctrinal desuetude. There is an abundance of substantively unconstitutional law still in on the books in many states—stautes that ban same-sex marriage, authorize racially segregated public schools, impose religious tests for a person to hold office, or impose similar tests on those seeking to serve as a witness.[35] And just as laws severely restricting or banning abortion in various ways remained on the books after Roe v. Wade were revived after long dormancy by an act of the United States Supreme Court, as Wisconsin Statute 940.04 was, so too could these many similarly dead statutes, including those prohibiting same-sex marriage after Obergefell v. Hodges, and anti-sodomy provisions after Lawrence v. Texas.[36] These statutes would emerge as offensively anachronistic strangers in a strange land if

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[30] Bickel, *supra* note 5, at 148-156.
[31] Sokol, *supra* note 31, at 1576.
[32] Chivers, *supra* note 13, at 479.
[33] Scott Andrew Shepard, *Adverse Possession, Private-Zoning Waiver & Desuetude: Abandonment & Recapture of Property and Liberty Interests*, 44 U. Mich. J.L. Reform 557, 604 (2011)
[34] Chivers, *supra* note 13, at 489.
[35] Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 Wis. L. Rev. 1063, 1067 (2021).
[36] *See* Id. at 1079.

revived as 940.04 has been, and there is reason to believe this future may someday come to pass.[37]

While the sudden revival of such law is generally undesirable, the legislative destruction of desutudinal statutes such as these is often extremely difficult.[38] Once a law is on the books, an active minority can easily prevent its repeal. Legislatures are generally averse to repeal of existing law, and this is especially true when a well-organized and active minority still supports the statute's enforcement.[39] Further, it is simply more difficult to muster sufficient public support to compel legislatures to strike down these laws while they feel so distant from reality, precisely because they are anachronistic, widely violated, and presently inoperative. The doctrine of desuetude offers a compelling solution to these zombie laws. Rather than requiring the affected people of the state to go through the formal repeal of such a law by appealing to an unresponsive legislature, a court could conduct a rigorous analysis under the doctrine of desuetude and conclude that the law has been long violated without state enforcement and invalidate the law from the statute book. Under a process such as this, the people of a state would be able to securely rely on longstanding, widespread legal principles and common understandings of the law because sudden, monumental changes could not revive long-inoperative and often anachronistic statutes. This would accomplish an important and widely recognized policy goal closely related to due process—reliance on the predictability and continuity of the law.[40]

C. Core Policy Justifications

When applied, the doctrine of desuetude would produce generally desirable policy outcomes. Perhaps even more compelling than the doctrine of desuetude's ties to due process are its ties to the core truth of a democratic republic: popular sovereignty. The doctrine of desuetude, when it applies, invalidates statutes without prejudice and can accomplish two fundamentally democratic functions: (1) Removing the shackles of dead men by invalidating statues based on widely despised, anachronistic moral convictions and (2) answering challenges to controversial state law by kicking the issue to the politically accountable legislature to solve through the democratic process.

1. Anachronistic Moral Convictions

One of the most compelling policy justifications for adopting the doctrine of desuetude is that it, almost as a matter of definition, could in a principled manner invalidate those statutes which exist without ongoing public support, particularly those which have been previously struck down

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[37] Dobbs, 142 S. Ct. at 2301 (Thomas, J., Concurring) ("we should reconsider all of this Court's substantive due process precedents, including Griswold, Lawrence, and Obergefell"). State law prohibitions against interracial marriage could also be revivied if the Court's famous Substantive Due Process holding in Loving v. Virginia, 388 U.S. 1 (1967), was overturned under this same reasoning, but this case was somehow ignored in Justice Thomas' concurrence.

[38] Hillary Greene, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 Yale L. & Pol'y Rev. 169, 181 (1997)

[39] Arthur E. Bonfield, *Abrogation of Penal Statutes by Nonenforcement*, 49 Iowa L. Rev. 389, 390 (1964).

[40] As argued by Wisconsin Attorney General Josh Kaul (Complaint ¶¶51-58, Kaul v. Kapenga , 2022 WL 3134176 (Wis. Cir. June 28, 2022)).

as unconstitutional. Often violated but rarely enforced laws usually lack significant public support.[41] When the Supreme Court struck down the antisodomy law at issue in Lawrence v. Texas, the Court added to its history of cases implying the inherent power of the judiciary to strike down anachronistic laws that are wildly out of touch with existing social convictions.[42] And it did so with an explicit recognition that the framers "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[43] The same principle that obsolescence of public moral conviction should drive doctrinal change has been hypothesized to be at the very core of the United State Supreme Court's decision to strike down the Connecticut law against contraceptive use at issue in Griswold v. Connecticut.[44]

When a statute reflects moral principles which were dominant at the time of its passage but lost this status since, as most of the major substantive due process case law, the statute is maintained only by the fact that it is easier to add to the law books than it is to subtract.[45] It is then that desuetude becomes a useful tool of democratic principles. When such a statute makes its way to the courts, it can be analyzed under desuetude. Generally the conduct in these laws is not considered *malum in se*, they have been openly and pervasively violated for a long period, and they are largely unenforced. In that case, the court can invalidate the statute under the doctrine of desuetude and return the question to the people to evaluate under the modern social mores. This accomplishes a generally desirable social outcome: the laws of a state reflect the will of its people. If one left their milk in the summer sun yesterday, they know they cannot rely on the safety of its consumption tomorrow, even if it is returned to the refrigerator today. Neglect transforms and spoils the appropriateness of reliance on old assumptions, and this understanding is implicit to the doctrine of desuetude.

2. Democratic Principles and Legislative Accountability

In addition to more easily resolving issues of popularly repugnant, morally anachronistic statutes, applying the doctrine of desuetude would also solve a myriad of hotly contested constitutional issues by returning old, controversial statutes to the legislature for a second look under modern political pressures.

When an old statute exists as a result of ancient political process and public support, it may be challenged as violating the constitution as it is understood under a more modern interpretation. In such times the court is called upon to resolve the matter in a manner that would, due to the controversy, be deemed by a significant portion of the country to be an anti majoritarian,

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[41] Sunstein, *supra* note 21, at 50.
[42] Thomas B. McAffee, Overcoming Lochner in the Twenty-First Century: Taking Both Rights and Popular Sovereignty Seriously As We Seek to Secure Equal Citizenship and Promote the Public Good, 42 U. Rich. L. Rev. 597, 629 (2008).
[43] 539 U.S. 558, 579 (2003).
[44] Bickel, *supra* note 5, at 154-156; Sunstein, *supra* note 21, at 50; McAffee, *supra* note 42, at 629.
[45] Bonfield, supra note 30, at 390.

unaccountable overstep into policymaking—a realm befitting the legislature far better than the judiciary.

This has been the case for many of the most contentious constitutional law decisions, but Bickel points as example to the law at issue in Griswold v. Connecticut:[46] a statutory prohibition on the use of contraceptives enacted in 1879 based on then-prescient social mores that went largely unenforced until its eventual invalidation in 1965 under a theory of substantive due process.[47] It remained the law at the time it was challenged, a time where its underlying assumptions of morality were extremely controversial, only by default.[48] Desuetude solves this political deadlock without resorting to judicial policymaking.

The ability to declare a statute invalid by desuetude would remove the Court from the necessity of definitively deciding "issues on which the political processes are in deadlock."[49] Instead, a ruling by the court that the statute is desuete and therefore invalid would "turn the thrust of forces favoring and opposing the present objectives of the statute toward the legislature, where the power of at least initial decision properly belongs in our system."[50] The application of the desuetude rule would therefore shift the "burden of inertia" to the present-day legislature and keep the court out of substantive policy decisions more fitting of a democratically accountable body of government.[51] To a government in which the separation of powers, legislative accountability, and democratic principles are valued, this is a highly desirable outcome.[52]

III. Adopting Desuetude in Wisconsin

A. Full Doctrinal Adoption

Wisconsin Attorney General Kaul's legal challenge to 940.04 is a compelling opportunity to utilize and adopt the doctrine of desuetude in Wisconsin. There have been those who criticize desuetude as, for example, "contrary to every principle of American or English common law.[53] Upon review of the doctrine and its relatives, this rather dramatic claim is revealed to be without basis. There are two main sources in the Wisconsin state constitution for the doctrine of desuetude: (1) the Due Process/Equal Protection Clause in Article I, Section 8 and (2) Article XIV, Section 13, the Common Law Continued in Force.

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[46] 381 U.S. 479 (1965).
[47] Bickel, *supra* note 5, at 147.
[48] Id.
[49] Id. at 146.
[50] Id. at 148.
[51] Coenen,*supra* note 22, at 1705.
[52] Indeed, the United States Supreme Court at least has signaled its strong support for these values. *See* Dobbs, 142 S. Ct. at 2277.
[53] Poe v. Ullman, 367 U.S. 497, 511 (1961) (Douglas, J., Dissenting).

1. **Article 1, Section 8 Due Process Clause**

Though the doctrine of desuetude could easily be found at the heart of the federal Due Process Clauses, Article 1, Section 8 of the Wisconsin Constitution would provide even more fertile ground for the new old doctrine.

Wisconsin's Due Process Clause—Article I, Section 8—guarantees that "[n]o person may be held to answer for a criminal offense without due process of law, and no person for the same offense may be put twice in jeopardy of punishment, nor may be compelled in any criminal case to be a witness against himself or herself." The Wisconsin Supreme Court generally interprets Article I, Section 8 as coterminous with the protections of the federal Constitution's Due Process Clauses.[54] However, "decisions from the United States Supreme Court interpreting analogous provisions in the federal constitution are eminent and highly persuasive, but *not controlling*, authority."[55]

Despite this general rule of lockstep interpretation, the Wisconsin state constitution has a long history as a sanctuary of new legal interpretations intended to favor private rights. In contrast to the United State Supreme Court's treatment of the federal Due Process Clauses, "because the rights protected by Article I, section 8 are 'sacred,' [the Wisconsin Supreme Court] construe[s] this provision *liberally, 'in favor of private rights.*'"[56] This policy has led to a long history of the Wisconsin Supreme Court reading the Wisconsin state constitution above and beyond lockstep with its federal counterpart in the conscious pursuit of stronger private rights.[57] And this pattern has continued into the present, leading Wisconsin to be one of the most exceptional states with regard to state supreme courts declining to narrow state constitutional rights in the face of narrowing parallel federal rights.[58] In its departures from lockstep interpretation of Article 1, Section 8, the Wisconsin Supreme court has relied heavily upon policy concerns and a need to preserve the integrity of the Wisconsin criminal justice system.[59] Sufficiently compelling policy concerns have led the Wisconsin Supreme court to increasingly "'utilize' Article I, Section 8 of the Wisconsin Constitution" as a tool to accomplish socially desirable outcomes.[60]

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[54] State v. Halverson, 2021 WI 7, ¶ 26, 395 Wis. 2d 385, 400, 953 N.W.2d 847, 854.
[55] State v. Knapp, 2005 WI 127, ¶ 57, 285 Wis. 2d 86, 114, 700 N.W.2d 899, 913 (internal quotation marks omitted) (emphasis added).
[56] Id., ¶ 63 (emphasis added).
[57] The Honorable Lynn Adelman & Shelley Fite, *Exercising Judicial Power: A Response to the Wisconsin Supreme Court's Critics*, 91 Marq. L. Rev. 425, 449 (2007); Hoyer v. State, 180 Wis. 407, 193 N.W. 89 (1923) (recognizing the exclusionary rule before the United States Supreme Court recognized it in Mapp v. Ohio, 367 U.S. 643 (1961)); Carpenter v. County of Dane, 9 Wis. 249, 253 (1859) (holding that the State of Wisconsin must provide indigent criminal defendants with counsel long before the holding of Gideon v. Wainwright, 372 U.S. 335 (1963)).
[58] Scott A. Moss & Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U. L. Rev. 175, 213 (2008)
[59] Knapp, 2005 WI at ¶¶75, 79; State v. Dubose, 2005 WI 126, ¶ 36, 285 Wis. 2d 143, 169, 699 N.W.2d 582, 595, abrogated by State v. Roberson, 2019 WI 102, ¶ 36, 389 Wis. 2d 190, 935 N.W.2d 813.
[60] Knapp, 2005 WI at ¶ 56; The Honorable Diane S. Sykes, Reflections on the Wisconsin Supreme Court, 89 Marq. L. Rev. 723, 733 (2006)

For the reasons outlined in prior sections, the doctrine of desuetude has deep roots in the due process clause. However, even if Wisconsin Courts could not base the adoption of desuetude on federal Due Process, Article I, Section 8 of the Wisconsin Constitution would still justify the doctrine's incorporation into legal canon. While a rejection of the doctrine based on federal due process may be persuasive, there is no reason to believe it forecloses Wisconsin's adoption. The major factor which has driven the Wisconsin Supreme Court to interpret its state Due Process Clause more expansively than its federal counterpart is that the Court construes Article I, Section 8 liberally in favor of private rights. Desuetude is naturally a doctrinal defender of private rights—by its nature, the doctrine can only abrogate state regulation of private conduct. It is more than appropriate, both due to desuetude's roots in due process and the Wisconsin Supreme Court's favoring of private rights in interpreting Article I, Section 9, for the Court to incorporate desuetude into the state's legal canon. However, there are also compelling policy reasons which could independently support the state's adoption of doctrinal desuetude.

Wisconsin courts should also adopt the doctrine of desuetude through Article 1, Section 8 of the Wisconsin state constitution based on the highly compelling policy considerations furthered by the doctrine. The Wisconsin Supreme Court considers what it deems good policy when it interpreted Article 1, Section 9, and as discussed above, there are extensive policy concerns which would justify the adoption of desuetude in Wisconsin by its application to Attorney General Kaul's legal challenge to Wisconsin Statute 940.04. Abortion is, safe to say, a controversial topic. A healthy majority of Wisconsin voters support access to abortion services, which would be almost entirely dissolved by the enforcement of Wisconsin Statute 940.04.[61] But whether one considers the statute to be a result of anachronistic moral convictions or merely a controversial topic is of no consequence—either way, it would be appropriate to heed the words of the United States Supreme Court and "return the power to weigh those arguments to the people and their elected representatives" as it instructed when it overturned Roe.[62] The core democratic principles served by desuetude are even more prescient considering that, at the time Wisconsin Statute 940.04 was enacted, women did not have the right to participate in the democratic process— but now the Court's "decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not [any longer] without electoral or political power."[63] Attorney General Kaul's challenge to Wisconsin Statute 940.04 is a near-perfect opportunity to utilize Article 1, Section 8 to adopt a substantially beneficial legal doctrine and help blaze a new path through Due Process jurisprudence.

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[61] Evan Casey, *Wisconsin Voters Show Overwheming Support For Abortion Rights, Marijuana Legalization Through Advisory Referendums*, WPR, (Nov. 10, 2022, 12:25 PM), https://www.wpr.org/wisconsin-voters-show-overwhelming-support-abortion-rights-marijuana-legalization-through-advisory.

[62] Dobbs, 142 S. Ct. at 2259.

[63] Id. at 2277.

It is now that one might wonder how Wisconsin Statute 940.04 would fare when analyzed under a traditional formulation of doctrinal desuetude. The answer is, unfortunately, underwhelming and just as uncertain as the rest of the doctrine's treatment over its long lifetime.

First, the court would inquire whether the act prohibited by 940.04, here abortion because it is the challenged function of the statute, is *malum prohibitum*—wrong primarily because it is prohibited, not because it is truly harmful and evil in itself ("*malum in se*").[64] This is, unfortunately, the very core of the controversy in the challenge. To many in favor of the statute's preservation, it is quite literally a statute prohibiting murder. It may sway the court that a substantial majority of Wisconsin residents do not appear, based on polling, to view it this way—however that will depend entirely on the composition of the reviewing court. This element of desuetude is uncertain.

Second, there must be "open, notorious, and pervasive violation of the statute for a long period;"[65] and third, there must be a "conspicuous policy of nonenforcement."[66] To satisfy these elements, Attorney General Kaul cites to various scholarly findings that, though these mid-19th century laws criminalizing abortion at any stage of pregnancy remained "on the books" for a very long time, they were rarely enforced, despite estimates that between 1900 and 1970, one of every three to five pregnancies ended in abortion, and during the 1950s and 1960s, there were approximately one million abortions that violated existing criminal statutes every year.[67] Upon a favorable review of these materials, there seems little chance a court could find anything other than that 940.04 has been largely unenforced despite open, notorious, and pervasive violations for almost its entire existence. Therefore, as it does with infamous Chevron deference, the result of the analysis seems to turn exclusively on step one of the test. However, considering that invalidation under desuetude would serve only to kick the issue to the legislature and therefore the democratic process, it seems possible that a friendly court would could err on the side of desuetude and thereby give the Wisconsin state legislature a chance to simply vote on the issue again as instructed by the United States Supreme Court.

2. Common Law Preservation

If the court cannot justify the adoption of full doctrinal desuetude via Article I, Section 8, it could very well instead adopt desuetude as a common law doctrine under Article XIV, Section 13 of the Wisconsin State Constitution.

The judicial branch has certain powers which inhere to its vesting with the "judicial power."[68] One such power is that of ensuring common law notions of procedural fairness.[69] Another is the

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[64] Williams, *supra* note 7, at 158.
[65] Printz, 416 S.E.2d at 726 (1992)
[66] Id.
[67] Complaint ¶¶ 51-58, Kaul v. Kapenga , 2022 WL 3134176 (Wis. Cir. June 28, 2022)).
[68] State v. Picotte, 2003 WI 42, ¶ 18, 261 Wis. 2d 249, 261, 661 N.W.2d 381, 387.
[69] *See, e.g.* Talbot v. Ames Constr., 904 P.2d 560, 565 (Idaho 1995) (the judicial branch has certain inherent powers, including powers to guarantee an orderly and fair disposition of cases)

power to adapt and develop the common law through the judicial process.[70] Together, these powers could easily be used to accomplish the application of doctrinal desuetude through common law procedural requirements, using the same analysis as desuetude under any other method of adoption.

This is a realistic outcome under Wisconsin law. Article XIV, Section 13 of the Wisconsin state constitution provides that "[s]uch parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature." While Article XIV, Section 13 preserves the force of the common law, it does not merely lock Wisconsin common law into its configuration at the time of ratification. This provision is "impliedly subject, because of the historical course of development of the common law, to the process of continuing evolution under judicial power."[71] And the very basis of desuetude is the common law developments of customs over time, which has a deep philosophical basis in the writings of fundamental historical legal thinkers as well as modern legal experts.[72] The doctrine of desuetude's basis in the continuation of the common law could also simply supplement its basis in due process to strengthen the overall argument for its adoption in Wisconsin.

B. As an Aspect of Implied Repeal

As an alternative to direct desuetude, the doctrine may instead be adopted as an important aspect of a more commonly accepted method of assuring fair notice—implied repeal.[73] A statute that has fallen into continuous disuse will often fall behind social developments, but it may also become inconsistent with subsequent legislative enactments. When this occurs, a court may conclude that the legislature made an affirmative decision to repeal--made implicitly rather than explicitly.[74] The state of Wisconsin recognizes implied repeals in two circumstances: (1) Where earlier-enacted law conflicts with the later-enacted law and (2) where the later-enacted laws are intended as a substitute for earilier-enacted law.[75]

Wisconsin Attorney General Josh Kaul seeks a declaratory judgment that Wisconsin statute 940.04 is unconstitutional as applied to consensual abortions. Kaul has, wisely, incorporated desuetude both as a standalone challenge to the statute and as a whispered element of the implied repeal claim. The argument under implied repeal follows thusly. Wisconsin Statute 940.04, enacted in 1849, broadly criminalized abortion at any stage of pregnancy unless necessary to save the pregnant woman's life. In 1973, the Supreme Court in Roe specifically identified

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[70] State v. Picotte, 2003 WI 42, ¶ 18, 261 Wis. 2d 249, 261, 661 N.W.2d 381, 387.
[71] Dippel v. Sciano 155 N.W.2d 55, 37 Wis.2d 443 (1967).
[72] Sokol, *supra* note 16, at 1567–68 (listing these experts).
[73] Bonfield, *supra* note 30, at 390; Corey R. Chivers, Desuetude, Due Process, and the Scarlet Letter Revisited, 1992 Utah L. Rev. 449, 453 (1992).
[74] Greene, *supra* note 30, at 194 n. 74.
[75] Complaint ¶45, Kaul v. Kapenga , 2022 WL 3134176 (Wis. Cir. June 28, 2022); Posadas v. Nat'l City Bank of New York, 296 U.S. 497, 503 (1936); Wisth v. Mitchell, 52 Wis. 2d 584, 589, 190 N.W.2d 879 (1971); State v. Dairyland Power Co-Op., 52 Wis. 2d 45, 51, 187 N.W.2d 878 (1971); Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2462 (2019).

Wisconsin Statute 940.04 as an unconstitutional statute, barring its enforcement.[76] Shortly after, in 1985, the Wisconsin legislature enacted Wisconsin Statute 940.15, which criminalizes an abortion only after the point of "viability" and had exceptions for protecting the life of the mother.[77] Since then, the legislature has further enacted various other rules for how legal abortions may be performed, such as allowing abortions only before 20 weeks excepting medical emergency,[78] requiring abortion-providing doctors have admitting privileges to hospital within 30 miles,[79] and various other regulations of legal abortions, including informed consent, a waiting period, the use of ultrasound, how abortion-inducing drugs are administered, and later-term abortions.[80]

In essence, in response to Roe's declaration that abortion could not be banned outright, the Wisconsin legislature has through many enactments provided the parameters for when a legal abortion may be performed.[81] The installation of this extensive framework was fundamentally incompatible with a preexisting ban on abortion at any stage of pregnancy unless necessary to save the pregnant woman's life, which 940.04 would accomplish if applied.[82] Therefore, these subsequent enactments of the legislature impliedly repealed 940.04 as it applies to abortions.

Kaul's claim that Wisconsin Statute 940.04 has been repealed by implication "is not favored in statutory construction" by Wisconsin courts.[83] Wisconsin courts "will not 'lightly or quickly' conclude that statutory provisions are irreconcilable."[84] However, the presumption against implied repeal carries less weight where the earlier statute is an obscure and generally forgotten one.[85]

Therefore, Kaul's implied repeal theory is supplemented by the doctrine of desuetude. In his challenge to Wisconsin Statute 940.04, Kaul sites research indicating that the statute has not been enforced against abortions for many decades, and that even pre-Roe, such laws were sparingly, and disparately, enforced, even though prohibited abortions remained relatively common.[86] Desuetude necessarily bolsters the argument that the subsequent statutes were intended to impliedly repeal 940.04—a statute which not only *wasn't* enforced, but *couldn't* be enforced for 50 years. The later enactments simply must have been intended to replace a statute that was going to be continuously and notoriously violated without the possibility for enforcement, and these later enactments clearly seem to accomplish that goal.

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[76] Complaint ¶23, Kaul v. Kapenga, 2022 WL 3134176 (Wis. Cir. June 28, 2022); Roe, 410 U.S. at 188 n.2.
[77] Complaint ¶¶30-31, Kaul v. Kapenga , 2022 WL 3134176 (Wis. Cir. June 28, 2022).
[78] Wis. Stat. § 253.107; Complaint ¶32, Kaul v. Kapenga , 2022 WL 3134176 (Wis. Cir. June 28, 2022).
[79] Wis. Stat. § 253.095(2); Complaint ¶34, Kaul v. Kapenga , 2022 WL 3134176 (Wis. Cir. June 28, 2022).
[80] Complaint ¶34, Kaul v. Kapenga , 2022 WL 3134176 (Wis. Cir. June 28, 2022).
[81] Id. ¶33.
[82] Id. ¶29.
[83] State v. Black, 188 Wis. 2d 639, 645, 526 N.W.2d 132, 135 (1994).
[84] In re Commitment of Matthew A.B., 231 Wis. 2d 688, 706, 605 N.W.2d 598 (Ct. App. 1999).
[85] *Repeal by desuetude, obsolescence, and nonenforcement*, *supra* note 24 (collecting cases).
[86] Complaint ¶52-53, Kaul v. Kapenga, 2022 WL 3134176 (Wis. Cir. June 28, 2022).

Wisconsin courts' recognition of desuetude as an important factor in implied repeal would be a positive outcome of Kaul's legal challenge, and would avoid much of the separation of powers concerns raised by full doctrinal desuetude. As simply an aspect of implied repeal, desuetude could not alone act as an exercise of raw judicial policymaking—it would *require* an act of the legislature which implied a repeal of the desuete statute. This is also the detriment of this application of desuetude as merely a compelling factor in implied repeal analysis—it requires an act of the legislature which is sufficiently incompatible with the desuete statute to justify its repeal. For reasons previously discussed, that is a taxing requirement.

IV. Addressing Concerns

A. Separation of Powers

Many view the court's ability to invalidate statutes under the doctrine of desuetude as a violation of the separation of powers.[87] In essence, this fear is that doctrinal desuetude hands to the judiciary the power to make substantive policy decisions despite the legislature's clear role as the branch intended to reflect publicly desirable social policy.[88] It seems unlikely, however, that those who disfavor doctrine over fears of judicial overreach into legislative powers would find, upon review of the situations in which it would most obviously apply, that the existing judicial approach to desuete statutes is more restrained. Historically, in cases such as Lawrence and Griswold which are arguably best understood to have an undercurrent of doctrinal desuetude, the overcurrent of substantive due process analysis has resulted in entirely new substantive rights being created by the judicial branch.[89] This has been criticized consistently by at least one sitting United States Supreme Court Justice as sweeping judicial overreach.[90] If these cases could have been decided on narrower, non prejudicial grounds such as doctrinal desuetude, the federal Supreme Court would not have to answer controversial questions best left to the politically accountable legislative branch. Indeed, the doctrine is not a threat to the separation of powers, but rather its most ardent, eager defender.

B. Judicial Abuse

Others voice a similar fear that the doctrine of desuetude would be abused at the hands of the judiciary to declare as "obsolete" or "desuetudinal" statutes that do not promote the judges' personal views of valid policy.[91]

This fear is unfounded, and based on a misconception of the doctrine. This common misconception, that "because a certain number of people do not like an Act and because a good many people disobey it, the Act is therefore 'obsolescent' and no one need pay any attention to

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[87] Chivers, *supra* note 13, at 459
[88] Id. at 460.
[89] *See* Sunstein, *supra* note 21, at 30; Bickel, *supra* note 5, at 154-156.
[90] Dobbs, 142 S. Ct. at 2301 (Thomas, J., Concurring).
[91] Chivers, *supra* note 13, at 460.

it,"[92] would of course be concerning with regard to judicial abuse if it were true. However, in reality, desuetude is a principled method of kicking obsolete statutes back to the legislature, not a seizure of expansive power.

As discussed earlier, desuetude in any form requires careful, principled analysis of whether there has been "open, notorious, and pervasive violation of the statute for a long period" and whether there has been a "conspicuous policy of nonenforcement." There is no room for value judgments on the substantive policy of a statute. The core concern of the analysis is the procedural fairness of a statute's enforcement based on long standing, verifiable traditions.

Desuetude does not and can not dictate what the law is, and can not abolish any particular legal practice or state prohibition on behavior. When a statute is struck down as void for desuetude, it can easily be revived by reenactment, which would benefit the public by reintroducing it to the public consciousness and allowing the legislature to essentially tie-break. A judicial power simply cannot be prone to abuse if (1) its application is carefully circumscribed and (2) its use can be entirely reversed and its future application long prevented by a simple and single act of legislation. A statute void for vagueness, a widely accepted doctrinal power held by the courts, would require rewriting and reintroduction to the lawmaking process, and could immediately be considered vague again and again until it meets the court's standards. This process is generally not considered too prone to abuse. Why then would the power to declare a statute void for desuetude be particularly prone to judicial abuse? If the statute is declared void for desuetude, it can be reinstated by subjecting it, unchanged, to the legislative process. If it is made law again, it would be essentially immune to a void-for-desuetude challenge for a "long period" of at least several decades, even if it was *again* left unenforced. The doctrine simply does not allow a court to say what the law is or should be, but rather requires the court by the doctrine's very nature to defer to the democratic process.

V. Conclusion

The doctrine of desuetude has long sat dormant at the foundation of due process and core democratic principles. Courts have treated the doctrine with disdain, confusion, and fear. But upon a careful consideration of its substance, justifications, and roots in Wisconsin law, it is time that Wisconsin courts pick up this discarded doctrine and begin a new history of strong democratic principles, accountability, and private rights.

[92] Bickel, *supra* note 5, at 148.