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Of Loaded Weapons and Legal Alchemy, Great Cases and Bad (?) Law: Korematsu and Strict Scrutiny, 1944-2017

Scott Dewey

OF LOADED WEAPONS AND LEGAL ALCHEMY, GREAT CASES AND BAD (?) LAW: *KOREMATSU* AND STRICT SCRUTINY, 1944–2017

Scott H. Dewey[1]

Abstract

This article traces in detail how dicta in the wartime Japanese American internment cases of Korematsu v. United States *and* Hirabayashi v. United States *was taken out of context and gradually transmuted, through a process of legal alchemy or "precedent laundering," into holdings supporting the postwar strict scrutiny doctrine regarding equal protection under the Fifth and Fourteenth Amendments. The article addresses the complex, twisted prehistory of* Korematsu, *which includes the troubled Japanese American immigrant experience leading up to the internment and the growing interwar geopolitical rivalry between Japan and the United States over domination of the Asia/Pacific region. This prehistory helps illustrate why* Korematsu *was a Holmesian "great" case doomed to make "bad" law that was inapplicable in more normal legal situations and peacetime conditions. Although postwar discussion of the internment cases often tends to largely leave out or ignore the Second World War and the wider geopolitical context leading up to it, this article contends that such selective*

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amputation of the necessary historical context is legally and intellectually questionable. The language from Korematsu *and* Hirabayashi, *used briefly as a convenient if ultimately unnecessary judicial shortcut to help strike down de jure racial segregation and discrimination in the 1960s, ironically later has served primarily as a reliable tool—the "colorblind straitjacket"—for rejecting most efforts to address continuing* de facto *discrimination and structural racism. The irony is compounded because the* dicta *in question come from cases that were not primarily concerned with race as the concept has been commonly understood throughout the postwar era, but with national origin in the context of war, at which time national origin, citizenship, and loyalty necessarily matter more than usual. Yet because the wartime internment cases referred to "race" in an already out-of-date, prewar sense, they later were interpreted to be discussing "race" in the postwar sense. This terminological confusion was only partly corrected starting in the 1970s. It is also perhaps ironic that any language from opinions later rejected as tragic mistakes, even legal national disasters, should have gained, and retained, the status of legal orthodoxy. The whole muddled process reveals how, through the bending of dicta into holdings, the judiciary can fashion for itself exactly the sort of dangerous and unpredictable "loaded weapon," allowing and encouraging future overreaching by authority, that Justice Jackson warned of regarding the executive branch in* Korematsu. *Although legal scholarship and court opinions have generally accepted the overall results of the ready taking of* Korematsu*'s dicta out of context, this article seeks to appropriately "re-problematize"* Korematsu *and its lineage historically, legally, and linguistically as fundamental violations of the rules of precedent and stare decisis—the sorts of practices that may call judicial and jurisprudential legitimacy into question. The article also reflects on why such practices continue even when, in theory, the legal community should know better.*

Introduction

> These decisions do not justify today's decision. They merely prove how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision.[2]
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> Thoughtless repetition should not convert a dictum into law, but it manages to do so.[3]
>
> The war power of the national government is 'the power to wage war successfully.' … Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the government on which the Constitution has placed the responsibility of warmaking, it is not

[2] United States v. Rabinowitz, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting).
[3] Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1263 (2006).

> for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.[4]

Korematsu v. United States[5] remains one of the most seminal—and problematic—United States Supreme Court cases of the twentieth century, and it continues to cast its shadow over American jurisprudence in the twenty-first century. *Korematsu* is, supposedly, the original taproot from which all subsequent constitutional law jurisprudence arose regarding strict scrutiny of constitutionally suspect classifications, such as racial and ethnic classifications, in the context of Fourteenth Amendment equal protection.[6] *Korematsu* thus

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[4] Hirabayashi v. United States, 320 U.S. 81, 93 (1943) (Stone, C.J.).

[5] Korematsu v. United States, 323 U.S. 214 (1944). Although there were various legal challenges to the Japanese American internment, *Korematsu* is the emblematic case that rhetorically stands in for all the others, presumably because it involved the largest historical event—the evacuation order that led to relocation and internment. Not to be confused with the earlier, narrower related opinion strictly regarding criminal procedure and probation, *Korematsu v. United States*, 319 U.S. 432 (1943).

[6] *Korematsu* was, however, preceded by the famous Footnote 4 in *United States v. Carolene Products Co.,* 304 U.S. 144, 152 n.4 (1938), in which the Court in dicta noted that customary rational basis scrutiny of state actions might not be sufficient where there was "prejudice against discrete and insular minorities," a potential "special condition" which might "call for a correspondingly more searching judicial inquiry." Although the Court in *Carolene Products* never mentions strict scrutiny, some scholars posit that Justice Black's later language in *Korematsu*, 323 U.S. at 216, might have been a tacit reply to the suggestion in *Carolene Products. See, e.g.,* Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOKLYN L. REV. 219, 235 n.78 (2010). Other scholars may similarly assume a relationship or legal evolution between the earlier *Carolene Products* language and the later *Korematsu* language. *See, e.g.,* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 46 n.182 (1991). There is, however, a danger of assuming, anachronistically, that the justices then were already tying together in their own minds sporadic decisions that we, with hindsight, may trace in an overly neat chain. Notably, Chief Justice Stone did not reuse his *Carolene Products* language in his opinion in *Hirabayashi v. United States*, 320 U.S. 81 (1943). *Korematsu* was also preceded by an earlier case that used the actual term "strict scrutiny" in a non-racial context: *Skinner v. Oklahoma ex rel. Williamson*, 316 US. 535, 541 (1942) (holding eugenic sterilization of habitual criminals unconstitutional). Regarding the (seemingly

became a substantial part of the legal underpinnings for the politically, socially, and legally transformative postwar Civil Rights movement and its aftermath. *Korematsu* itself, however, arose from what is now generally conceded to have been an ill-considered, overhasty wartime emergency measure now seen as among the greatest, most tragic mass violations of civil rights in U.S. history: the federal government's wartime relocation and internment[7] of up to 120,000 Japanese American citizens and non-citizens.[8] Consequently, the *Korematsu* decision, which upheld the constitutionality of the internment program, now is seen as not only fundamentally legally wrong, but also an embarrassment to the U.S. Supreme Court and the entire American legal system—the sort of thing that, as with Auschwitz, American lawyers and judges vow, "Never again."[9] To

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relatively loose?) conceptual relationship between these three early cases proposing varying levels of judicial review, see, e.g., Greg Robinson & Toni Robinson, *Korematsu and Beyond: Japanese Americans and the Origins of Strict Scrutiny,* 68 L. & CONTEMP. PROBS. 29, 31–32 (2005); Richard B. Collins, *Too Strict?,* 13 FIRST AMEND. L. REV. 1, 9 (2014); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 772 (1969).

[7] Here I should note that recent scholars have challenged the use of "internment" to describe the whole program, arguing that the term is misleading or even whitewashing as to the harsher legal and political reality of the situation. *See, e.g.*, Roger Daniels, *Incarceration of the Japanese Americans: A Sixty-Year Perspective*, 35 HIST. TCHR. 297 (May 2002). I acknowledge such scholars' legitimate concerns about improper labeling, and persist in using the traditional term only because it remains established in common usage and widely recognized in describing the tragedy that befell Japanese Americans during the 1940s.

[8] Different documents give varying estimates of the total interned population, from 110,000 or 112,000, frequently in earlier documents from the 1940s, to around 120,000 in most later documents.

[9] Among the most extensive disavowals of *Korematsu* by the Supreme Court came in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 215, 236, 244, 275 (1995), but various other opinions after 1988 confirmed that overall rejection of the *Korematsu* majority opinion as a legal national disaster. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501; Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 635 (1989); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564 n.12 (1990); Stenberg v. Carhart, 530 U.S. 914, 953

make an already tainted "great" case even more legally and historically problematic, although the Supreme Court used language from *Korematsu* to help open the door for the postwar Civil Rights movement, it later used the same case and language to partly shut that door again as the Court, and American society generally, turned in a more conservative direction and shifted toward restraining the forward march of civil rights. Given this unusually powerful precedential footprint of an unusually flawed, tainted legal opinion, as well as the case's enormous historical significance, the evolution of *Korematsu*'s precedential footprint invites unusually close, careful analysis of exactly how language from *Korematsu* was cited explicitly by later cases to erect a precedential lineage in the equal protection context—in effect, strict scrutiny of the origins of strict scrutiny, to test its legal legitimacy according to established legal principles related to stare decisis and precedent.

This article accepts that invitation, in a manner that differs from most existing scholarship on the origins of strict scrutiny.[10] Part I provides a brief overview of the wartime Japanese American internment litigation. Part II provides relatively extensive historical background to the *Korematsu* case and related cases. In addition to the history of anti-Japanese racial/ethnic animosity in America, which frequently is included in legal-historical discussions of the case, the growing geopolitical rivalry of the United States and Japan in the early twentieth century that ultimately pulled the United States into the Second World War is also addressed—information normally left out of legal-historical treatments of the topic that is, however, necessary to an adequate understanding of the case in its historical context. The underlying racial animosity toward Japanese and Japanese Americans, and the sudden, shock-

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(2000) (Scalia, J., dissenting); Hamdi v. Rumsfeld, 542 U.S. 507, 542 (2004) (Souter, J., dissenting). Regarding Auschwitz, see, e.g., Michael Holtz, *Never Again: The Auschwitz "Warning to Humanity" Turns 70*, C.S. MONITOR (Jan. 27, 2015), https://www.csmonitor.com/World/Europe/2015/0127/Never-again-The-Auschwitz-warning-to-humanity-turns-70.

[10] Naturally, various other scholars have examined the origins of strict scrutiny in various different ways. See, e.g., discussion surrounding note 18, *infra*.

ing, very real and dangerous geopolitical crisis focused specifically on Japan, are inextricably interwoven. Although both contemporary and later critics of the wartime internment decisions may perhaps appropriately fault the *Hirabayashi*/*Korematsu* Courts for giving insufficient emphasis to the role of racial animosity in the whole equation, later commentators on the cases who largely ignore the harsh wider reality and vast significance of the Second World War might similarly be faulted for inappropriate historical de-contextualization of a case in which the historical context is paramount. Such later commentators also risk falling into the trap of smug hindsight bias.[11] Fuller historical background and re-contextualization should not only facilitate a more complete understanding of the troubled, twisted context and origins of the case, but also demonstrates how and why *Korematsu* epitomizes the sort of "great case" that makes "bad law," as Justice Oliver Wendell Holmes, Jr. famously observed.[12] The *Korematsu* and *Hirabayashi* opinions address a classic Agambenian "state of exception"—a (real or perceived) dire national emergency requiring (or used to justify) suspension of the normal operation of law—with no appropriate application to any other situations.[13] In other words,

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[11] Regarding hindsight bias, or the "I knew it all along" syndrome, see generally, e.g., Neal J. Roese & Kathleen D. Vohs, *Hindsight Bias*, 7 PERSP. ON PSYCHOL. SCI. 411 (Sept. 2012); Ulrich Hoffrage et al., *Hindsight Bias: A By-Product of Knowledge Updating?*, 26 J. EXPERIMENTAL PSYCHOL. 566 (2000); Aileen Oeberst, *When Being Wise After the Event Results in Injustice: Evidence for Hindsight Bias in Judges' Negligence Assessments*, 22 PSYCHOL. PUB. POL'Y & L. 271 (Aug. 2016).

[12] Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). The full quote is:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

[13] *See* GIORGIO AGAMBEN, THE STATE OF EXCEPTION 1–31 (Kevin Attel transl., 2005) https://khushigandhi.files.wordpress.com/2016/01/state-of-

Korematsu and its companion cases arguably represent cases too great and terrible, involving historical situations too particular, unique, and awful, for their language and holdings to be appropriately applied to, or allowed to affect, the overall structure of more ordinary law. Yet they would be so applied and allowed.

Part III addresses longstanding doctrinal problems with precedent, some of which arise regarding *Korematsu* and its precedential progeny. Particularly important is the ongoing difficulty that courts, judges, and lawyers have long experienced in accurately distinguishing holdings of cases—legally operative language in judicial opinions—from mere dicta—extraneous statements in judicial opinions that, in theory if not always in practice, should have no legal effect. This distinction, too often ignored, is crucial for jurisprudential legitimacy.[14] Part III also briefly discusses the design of a database that was used to track and categorize all subsequent citations of *Korematsu* by the Supreme Court or federal appellate courts, to provide rigorous and detailed support for the discussion in Part IV.

Part IV provides close, detailed textual analysis of the decades-long process of legal alchemy that, in effect, took dicta from *Korematsu* and the other "greatest" Japanese American internment case, *Hirabayashi v. United States*,[15] and gradually transmuted it into a supposed holding which, in turn, became the precedential foundation for the ever more elaborate (and confusing)[16] edifice of strict scrutiny doctrine in American constitutional law. As with the

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exception-giorgio-agamben-lang-and-power.pdf (especially pp. 19–22 concerning the United States).

[14] *See* Stinson, *supra* note 6, at 232.

[15] Hirabayashi v. United States, 320 U.S. 81 (1943).

[16] For just a few examples regarding the long-standing and continuing confusion in the legal community about which direction strict scrutiny is moving and just what it is doing, see, e.g., Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 295–96 (2015); Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases*, 72 U. PITT. L. REV. 1, 45–46 (2010); Nicole Duncan, Croson *Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny*, 26 COLUM. HUM. RTS. L. REV. 679, 684, 703, 707 (1995).

evolution of other areas of law and legal doctrine, the creation of postwar strict scrutiny doctrine is, overall, a story of chronological, historical, and linguistic decontextualization—grabbing snippets of language from various scattered sources spread over time and recombining them in new constructions ever more remote from their origins. This section seeks to reverse that process and carefully recontexualize the various stages and moments in the evolution of strict scrutiny. Standard accounts may tend to read history "backwards"[17]—accepting a given historical outcome, in this case modern strict scrutiny doctrine, as something necessary, inevitable, and desirable, and then tracing (and perhaps celebrating) how we reached that supposedly inevitable outcome with that specific outcome already in mind. This section instead seeks to read the history of strict scrutiny forward, including all of its fits, starts, and erratic jumps or pauses on a bumpy path that originally had no foreordained conclusion. Some earlier scholars have very capably illuminated the wider intellectual history of strict scrutiny, including how certain language might have been invoked in briefs or otherwise batted around regarding cases that ultimately produced opinions leaving few if any visible footprints of that earlier discussion.[18] This

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[17] For a relatively early reflection on this long-standing problem with historical analysis, see, e.g., James H. Buchanan, *The Danger in Reading History Backwards*, 10 EDUC. F. 69 (1945). The difficulty, perhaps impossibility, of transcending our own inherent historical situatedness, and the assumptions and aura of inevitability that accompany it, have been explored at great length in more recent decades by the likes of Michel Foucault and other postmodernist scholars.

[18] *See, e.g.*, Robinson & Robinson, *supra* note 6; Matthew J. Perry, *Justice Murphy and the Fifth Amendment Equal Protection Doctrine: A Contribution Unrecognized*, 27 HASTINGS CONST. L.Q. 243 (2000); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355 (2006). Each of these important and interesting articles offers a broader discussion of the legal/intellectual history of the origins of strict scrutiny, and how initially inchoate legal ideas and concepts gradually coalesced and took root in the law. While such analysis illuminates how the law actually does develop, the analysis is perhaps looser than that in the present article, which tests the *Korematsu* lineage against the standard of how the law is supposed to develop and how precedent is supposed to be estab-

article, however, holds judges to their contracts under the doctrine of precedent. It focuses on the evaluation of what judges actually wrote—publicly—to justify their opinions, which is the only legally legitimate basis for the evolution of lines of precedent within common law.[19] That is, common law judges have the obligation to spell out the basis for their decisions, and at least in theory, not to conceal important factors in those decisions. A very close, detailed analysis of precisely what was said at each precedentially significant moment in the evolution of strict scrutiny helps to showcase just how erratic and questionable many of these sudden leaps in time, context, and meaning actually were, and so helps to re-problematize a process that might appear much too smooth and orderly when read backwards.

Part IV also briefly traces the aftermath of this evolutionary process, including how strict scrutiny, a tool originally used only relatively briefly to help batter down the remnants of de jure discrimination, ironically was later used to restrain efforts to combat continuing de facto discrimination and structural racism in American society. The restrictive use of strict scrutiny doctrine ironically continued to grow even after its legal points of origin—*Korematsu* and *Hirabayashi*—were legally and historically discredited. Patterns of use and non-use of *Korematsu* and strict scrutiny language suggest that strict scrutiny may never really have been necessary for the dismantling of de jure segregation and discrimination, anyway. Whatever the justices might have been thinking, *Brown v. Board*,[20] for example, relied upon strict scrutiny language

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lished. Siegel notably discusses how what we think of as equal-protection strict scrutiny mostly evolved in the First Amendment, free speech context and was only imported into the Fourteenth Amendment context much later, in bits and pieces.

[19] Indeed, the extent to which there is any gap between the written explanation for a decision and what judges were actually thinking—indicating that the written explanations may be only rationalizations or glosses for an actually different but concealed decision-making process—only raises further interesting, perhaps troubling questions about the transparency and legitimacy of precedent and a common law system that depends upon it.

[20] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

or analysis basically not at all, and the same was true for other federal court opinions through the early 1960s that simply applied the Fourteenth Amendment, without strict scrutiny, to batter down segregation.[21] Thus, by 1964, when strict scrutiny first really took shape in any very clear or meaningful sense in Supreme Court jurisprudence, and even more so by 1967 when it next reappeared, much of the federal judicial bulldozing of segregation was already done. Within a relatively few years, by the mid-1970s, strict scrutiny would be shifting to the primary role it has occupied ever since—restraining the forward march of civil rights.

Notably, these changes in course tended to coincide with shifts in the political winds in the United States. Part IV discusses the four main phases of *Korematsu*'s varied jurisprudential career that generally matched various recognizable political trends or tides in the postwar United States:

(1) Its use to justify federal executive authority during the Cold War, when the strict scrutiny language largely lay dormant;
(2) Its use to justify federal judicial intervention to end racial segregation and de jure discrimination during the height of the Civil Rights era;
(3) Its later use to limit the further extension of the Civil Rights movement and to quell efforts to challenge de facto racial discrimination and structural racism from the 1970s onward; and
(4) Its use as a jurisprudential whipping boy and object for ritual hand-wringing after Congress officially apologized for the Japanese American wartime internment in 1988.

After 2000, *Korematsu* itself would rarely be cited, yet it lives on through its many strict-scrutiny progeny. Moreover, despite all the belated judicial hand-wringing over a tainted opinion, national emergencies such as the never-ending War on Terror—most recently manifested judicially in the U.S. Supreme Court's December 2017 upholding of the third version of the Trump administration's travel ban targeting travelers from six predominantly Muslim

[21] *See, e.g.*, *infra* note 199 and surrounding text.

nations[22]—raise the ongoing possibility of *Korematsu*'s rediscovery and revival in its original role of justifying federal authority.[23]

In one of the three sharp dissents to the majority opinion in *Korematsu*, Justice Robert H. Jackson provided an image that has echoed through the decades in American constitutional law. He warned how insufficient, overly passive judicial review of particular actions by the executive branch of government—especially in a military or other national emergency context—set a dangerous precedent for the next moments of attempted executive overreaching. It was like leaving a "loaded weapon" lying around that executive authority could readily grab and misuse.[24] Ironically, the wider story of *Korematsu* reveals how, through the gradual bending and twisting of precedent and especially the intentional or unintentional blurring of the boundary between holding and dicta, the judiciary, over time, can fashion its own loaded weapon for future use in unanticipated ways. This article's conclusion reflects on how this might serve the political and professional interests of judges, courts, and the legal profession generally—though perhaps not the public interest.

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[22] *See* Adam Liptak, *Supreme Court Allows Trump Travel Ban to Take Effect*, N.Y. TIMES, Dec. 4, 2017, https://www.nytimes.com/2017/12/04/us/politics/trump-travel-ban-supreme-court.html; Order in Pending Case, 138 S. Ct. 542 (2017), https://www.supremecourt.gov/orders/courtorders/120417zr_4gd5.pdf (granting a stay of an earlier preliminary injunction against the Trump travel ban). *See also* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017), and related federal district and circuit court opinions.

[23] *See* Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post*-Hamdi *World*, 54 U. KAN. L. REV. 307, 332 n.138 (2006) ("The legal repudiation of the internment has largely been a product of nonjudicial commentary. The few cases that comment on the internment criticize it in dicta only. As a result, *Korematsu* is technically "good law.").

[24] Korematsu v. United States, 323 U.S. 214, 236. This might be thought of as the Jackson corollary to the Holmes doctrine of great cases making bad law.

Part I: *Korematsu*, *Hirabayashi* & the Wartime Japanese American Internment Litigation

The Japanese American internment crisis arose after Japanese forces bombed Pearl Harbor and pulled the United States into World War II on December 7, 1941. On December 8, President Franklin Roosevelt issued Executive Order No. 9066, designed to deter espionage or sabotage by authorizing America's military leadership to create zones of military control "from which any or all persons may be excluded," and in which "the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion."[25] On February 20, 1942, Lieutenant General John L. DeWitt was appointed Military Commander of the Western Defense Command, covering the West Coast states and neighboring inland states.[26] During March 1942, DeWitt issued various proclamations establishing military authority. On March 27, following specific congressional approval of presidential executive orders regarding military affairs,[27] DeWitt imposed a curfew on "all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits" of the new restricted zone.[28] Thereafter, DeWitt issued various Civilian Exclusion Orders, culminating in Civilian Exclusion Order No. 57 of May 10, 1942, requiring the exclusion and

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[25] Hirabayashi v. United States, 320 U.S. 81, 85–86 (1943). The Court's opinion in *Hirabayashi* also includes relevant citations to statutes and the *Federal Register*.

[26] *Id.* at 86.

[27] *Id.* at 87; Act of March 21, 1942, 18 U.S.C. § 97a (repealed 1948 and reenacted as 18 U.S.C. § 1383 (repealed 1976)).

[28] *Hirabayashi*, 320 U.S. at 88. Nazi Germany and Fascist Italy declared war on the United States on December 11, 1941. *See* Stephen Frater, *December 11, 1941: Hitler and Arguably the Most Insane and Pivotal Decision in History,* TheHistoryReader.com (Dec. 11, 2011), http://www.thehistoryreader.com/modern-history/december-111941-hitler-arguably-insane-pivotal-decision-history/.

evacuation of all persons of Japanese ancestry, citizens and non-citizens alike, from the West Coast.[29]

Hirabayashi v. United States[30] (decided on June 21, 1943) primarily concerned the March 1942 curfew. Gordon Hirabayashi, a Japanese American citizen born in 1918 in Spokane, Washington, deliberately challenged both the curfew and the relocation order on the basis that he was a loyal citizen of the United States, that the congressional approval of the executive and military orders was "an unconstitutional delegation of Congressional power," and that "the restriction unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries in violation of the Fifth Amendment."[31] The Court deferred to federal executive and congressional authorities' opinions that the curfew was justified by the risk of sabotage or espionage by disloyal members of the targeted communities who could not be quickly and accurately separated from the rest of their community.[32]

Korematsu v. United States[33] (decided December 18, 1944) specifically concerned Civilian Exclusion Order No. 34, one of the many such military orders issued under the authority of Executive Order 9066 and cumulatively leading to the Japanese American exclusion and internment.[34] U.S.-born citizen Fred Korematsu's counsel raised similar arguments to those advanced in *Hirabayashi*. Following the reasoning in *Hirabayashi*, the Court in *Korematsu* again deferred to federal executive and congressional authority and found that the particular order in question—and Fred Korematsu's prosecution for violating it—were justified under the circumstances existing at the time.[35] The Court explicitly refused counsel's implicit invitation to "pass at this time upon the whole subsequent detention program in both assembly and relocation centers," focus-

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[29] *Hirabayashi*, 320 U.S. at 88–89.
[30] *Id.*
[31] *Id.* at 83, 84.
[32] *Id.* at 98–105 (noting, inter alia, "Appellant does not deny that, given the danger, a curfew was an appropriate measure against sabotage" (*id.* at 99)).
[33] Korematsu v. United States, 323 U.S. 214 (1944).
[34] *Id.* at 214, 215, 216–17.
[35] *Id.* at 217–24.

ing instead more narrowly on "the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order." [36] Three Justices—Justices Jackson, Murphy, and Roberts—dissented, finding the internment orders unconstitutional and racially discriminatory.[37]

Korematsu and *Hirabayashi* are the two most towering examples of broader litigation over the wartime Japanese American relocation and internment. However, on the same day that the Court decided *Korematsu* and refused to pass judgment on the whole internment program, it also decided *Ex parte Endo*[38] (decided on December 18, 1944) and held that it was unconstitutional for the federal War Relocation Authority to continue to detain a demonstrably loyal Japanese American citizen.[39]

Part II: Background— The Road To, and From, *Korematsu*

Beyond the brief summary above, to have any hope of properly understanding the *Korematsu* case and related cases in context frankly requires at least some basic understanding of the complex history of Japanese Americans in the United States, the geopolitical friction that led to war between Japan and the United States, and how these historical processes converged to produce the mass victimization of Japanese Americans in 1942. The case arose at a major crisis moment during the greatest global catastrophe (yet) in human history and involved the lives and fates of 120,000 people, the vast majority of whom had done almost nothing to bring this calamity upon themselves. Its long, convoluted, complex background and vast scale help to illustrate why *Korematsu* is indeed a truly "great" case in the Holmesian sense—the sort of distinctive,

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[36] *Id.* at 221.
[37] *Id.* at 225 (Roberts, J., dissenting); *id.* at 233 (Murphy, J., dissenting); *id.* at 243 (Jackson, J., dissenting).
[38] *Ex parte* Endo, 323 U.S. 283 (1944).
[39] *Id.* at 302–04.

one-of-a-kind case that "make[s] bad law" and should perhaps be kept apart—even quarantined—from the rest of the law as such.

First, a disclaimer: the complicated story of *Korematsu* explicitly or implicitly raises a wide range of interesting, often troubling questions about the wider history of America's entry into and involvement in the Second World War—particularly the internment itself—as well as postwar history, the Cold War, the history of the Civil Rights movement, and later events. It also necessarily involves the earlier story of Japanese immigrants coming to America and encountering envy, resentment, and racial animosity. Most such historical matters cannot be addressed here in the depth they deserve. This article seeks to supply only a necessary bare minimum. There is, of course, a vast literature available on many of these topics.[40]

A. The Japanese American Immigrant Experience

Japanese immigrants began arriving on the North American mainland in significant numbers after a savage wave of racist anti-

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[40] For a sampling of the extensive literature just regarding the Japanese American internment and its aftermath, see, e.g., Scott Hamilton Dewey, *In Search of California's Legal History: A Bibliography of Sources*, 10 CAL. LEGAL HIST. 71 (2015), http://www.cschs.org/wp-content/uploads/2016/01/CLH15-Dewey-Web-012016.htm (see subject heading on "Japanese Americans"). Both *Korematsu* and *Hirabayashi* themselves include helpful summaries of facts from the early 1940s, as does Eugene V. Rostow's classic article, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (June 1945). A good brief description of the events of the 1940s, both before and after *Korematsu*, may be found in *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), a case brought by surviving internees and their descendants alleging taking of their property without due process under the Fifth Amendment. For a now classic overview of the pre–World War II history of Japanese Americans, see generally YUJI ICHIOKA, THE ISSEI: THE WORLD OF THE FIRST GENERATION JAPANESE IMMIGRANTS, 1885–1924 (1988). Regarding *Korematsu* and the later undoing of *Korematsu*, see PETER IRONS, JUSTICE AT WAR (1983); PETER IRONS, JUSTICE DELAYED (1989); MITCHELL T. MAKI ET AL., ACHIEVING THE IMPOSSIBLE DREAM: HOW JAPANESE AMERICANS OBTAINED REDRESS (1999).

Chinese agitation along the West Coast, especially in California,[41] ultimately led to United States federal laws and policies banning further Chinese immigration—most notably the Chinese Exclusion Act of 1882.[42] Unlike the early Chinese Americans, who after being driven from the California gold fields tended to cluster in West Coast cities working as shopkeepers or laborers or in laundries or restaurants,[43] the early Japanese Americans transplanted Japanese intensive farming practices to West Coast states and carved out a special niche as truck farmers raising fruits and vegetables for urban markets.[44] As with the Chinese, the Japanese immigrants' efficiency and ability to stretch very limited incomes relative to Anglo Americans triggered Anglo resentment. The

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[41] *See, e.g.*, Nicole Grant, *White Supremacy and the Alien Land Laws of Washington State*, U. WASH. (Winter 2007), http://depts.washington.edu/civilr/alien_land_laws.htm (noting the "virulent anti-Chinese racism that first gained momentum in California and quickly spread up the West Coast"); John R. Wunder & Clare V. McKanna, Jr., *Chinese and California: A Torturous Legal Relationship*, 2 CAL. SUPREME COURT HIST. SOC'Y Y.B. 195 (1995).

[42] Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (1882); for fuller background, also see generally ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT (1998).

[43] Any such generalization is necessarily an oversimplification, of course; for instance, early Chinese immigrants also famously worked on the western leg of the first transcontinental railroad, as well as in fisheries and in agriculture, and some also migrated far from the West Coast. A relative few also became professionals or successful business entrepreneurs. Resentful, racist western-state Anglos attempted to drive Chinese immigrants out of most industries where they managed to establish footholds, however. *See generally, e.g.*, PING CHIU, CHINESE LABOR IN CALIFORNIA, 1850–1880: AN ECONOMIC STUDY (1967).

[44] CAREY MCWILLIAMS, WHAT ABOUT OUR JAPANESE-AMERICANS? 3–4 (1944), http://content.cdlib.org/view?docId=hb329004sw&brand=calisphere&doc.view=entire_text; COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 43 (1982). Again, this generalization, though largely accurate, is an oversimplification; Japanese Americans also worked as shopkeepers, many notably got into produce marketing along the West Coast, and others entered the professions or engaged in myriad other activities.

Japanese American quest for land and success at farming further provoked racist fears of a Japanese takeover of West Coast agriculture.[45]

Predictably, this racial animosity produced calls for state and federal legislation to stop Japanese immigration and segregate Japanese Americans. But unlike China, which was then a chaotic, dysfunctional, crumbling former empire too weak to protest effectively,[46] Japan, through a remarkable program of national discipline, re-organization, and re-education, had remade itself into the first modern industrial nation of Asia,[47] with a powerful modern navy that surprised the world by sinking most of Russia's Pacific fleet at the Battle of Tsushima in the Russo-Japanese War of 1904-05.[48] Japan thus could not be pushed around in the same way as

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[45] DONALD J. PISANI, FROM THE FAMILY FARM TO AGRIBUSINESS: THE IRRIGATION CRUSADE IN CALIFORNIA AND THE WEST, 1850–1931 442 (1984). *See also generally, e.g.*, ROGER DANIELS, THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION (1962); John A. Gothberg, *Press Reaction to Japanese Land Ownership in California*, 47 JOURNALISM & MASS COMM. Q. 667 (1970) (noting that Japanese often came as laborers, but turned to farming after Anglo workers drove them out of other industries).

[46] PAUL J. BAILEY, CHINA IN THE TWENTIETH CENTURY 14–67 (2d ed. 2001) (chapter on the fall of the Qing dynasty). The weakness of China's late imperial period was soon followed by political fragmentation, chaos and bloodshed due to competing regional warlords during the Nationalist period. *See id.* at 89–92.

[47] ANDREW GORDON, A MODERN HISTORY OF JAPAN: FROM TOKUGAWA TIMES TO THE PRESENT 61–75, 115–25 (2003).

[48] *Battle of Tsushima*, WIKIPEDIA, https://en.wikipedia.org/wiki/Battle_of_Tsushima (last visited Jan. 12, 2018). This striking defeat of a western nation, through superior use of western technology including radio telegraphy as well as modern steel "dreadnought" battleships, followed Japan's earlier flexing of its new muscles at the expense of its Asian neighbors by colonizing Korea from the 1870s onward and defeating the crumbling Chinese empire in the first Sino-Japanese War of 1894, which resulted in Japanese control of both Korea and the Chinese island of Formosa now known as Taiwan. *See* S.C.M. PAINE, THE JAPANESE EMPIRE: GRAND STRATEGY FROM THE MEIJI RESTORATION TO THE PACIFIC WAR 8–46 (2017). As the Wikipedia editors correctly point out, the Battle of Tsushima was "naval history's only decisive sea battle fought by

China was. The Japanese government and citizenry were angered by anti-Japanese agitation and enactments in West Coast states. A potential diplomatic crisis was averted by the face-saving, so-called "Gentlemen's Agreement" of 1907, under which the U.S. agreed not to undertake specifically anti-Japanese federal legislation and to quell such state and local initiatives, and the Japanese government

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modern steel battleship fleets"; the Battle of Jutland between Britain's Royal Navy and the German Kaiser's new rival fleet during World War I was inconclusive, see Niall MacKay et al., *Weight of a Shell Must Tell: A Lanchestrian Reappraisal of the Battle of Jutland*, 101 HIST. 536, 536–37 (Oct. 2016), and although naval arms limitation treaties between the First and Second World Wars focused on battleships, see, e.g., Trent Hone, *The Evolution of Fleet Tactical Doctrine in the U.S. Navy, 1922–1941*, 67 J. MIL. HIST. 1107, 1108 (Oct. 2003), and ambitious nations built super-battleships such as the Nazi Germans' *Bismarck* and *Tirpitz* and the Imperial Japanese battleships *Yamato* and *Musashi*, all battleships, including the super-battleships, later proved vulnerable to attack by aircraft. *See, e.g.*, Christopher Klein, *Remembering the Sinking of the Bismarck*, HISTORY.COM (May 26, 2016), http://www.history.com/news/remembering-the-sinking-of-the-bismarck; Bomber Command Museum of Canada, *The Sinking of the Battleship Tirpitz*, http://www.bombercommandmuseum.ca/tirpitz.html (last visited Dec. 15, 2017); John Bertrand, *What We Learned ... From* Yamato-*Class Battleships*, 33 MIL. HIST. 16 (Sept. 2016) (noting fates of Japanese super-battleships *Yamato* and *Musashi*); Joseph F. Callo, *What We Learned ... From the Battle of Taranto*, 30 MIL. HIST. 19 (July 2013) (in the first great aircraft carrier surprise attack in history, the Royal Navy's Mediterranean Fleet neutralized much of the powerful Italian Navy in 1940 using obsolescent biplane torpedo bombers, the same ones that crippled the mighty *Bismarck*); Richard P. Hallion, *Dress Rehearsal for Pearl Harbor?*, 22 WORLD WAR II 54, 61 (Dec. 2007) (the Japanese closely studied and learned from the British success at Taranto in planning the second great aircraft carrier surprise attack at Pearl Harbor); *Sinking of* Prince of Wales *and* Repulse, WIKIPEDIA, https://en.wikipedia.org/wiki/Sinking_of_Prince_of_Wales_and_Repulse (Royal Navy battleships sunk by land-based Japanese bombers during ineffective British defense of Malaya and Singapore in December 1941). The *Yamato* and *Musashi* had 18-inch guns, the largest ever, bigger than the 16-inch guns standard in the U.S. Pacific Fleet and the 15-inch guns used by both the Royal Navy and the Nazi German super-battleships. The guns and the ships proved to be largely status symbols of only ceremonial value, and ultimately mostly a useless cost to taxpayers, as aircraft carriers replaced battleships as the "Queens of the Seas."

agreed not to issue further passports for Japanese laborers seeking to emigrate to the United States.[49]

Tacitly anti-Japanese laws and policies continued to be enacted at the state level, however, most notably in California with its 1913 and 1920 Alien Land Laws that nominally applied to all non-citizens but in effect particularly targeted Japanese immigrants, which other West Coast states promptly imitated.[50] Further developments at the federal level also restricted Japanese Americans' rights. In 1922, the U.S. Supreme Court ruled that Japanese immigrants could not become U.S. citizens.[51] The 1924 Immigra-

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[49] Carl R. Weinberg, *The "Gentlemen's Agreement" of 1907–08*, 23 OAH MAG. HIST. 36 (Oct. 2009). In particular, the U.S. government agreed to restrain anti-Japanese school segregation policies in the city of San Francisco, which was done. *See also* S. Rand Berner, Diplomacy Begins at Home: San Francisco, Theodore Roosevelt, and Japan (2007) (unpublished master's thesis, San Jose State University) (concerns 1906 anti-Japanese school segregation order in San Francisco).

[50] *See* Grant, *supra* note 41; Robert Higgs, *Landless by Law: Japanese Immigrants in California Agriculture to 1941*, 38 J. ECON. HIST. 205 (Mar. 1978); Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CALIF. L. REV. 7 (1947); Bruce A. Castleman, *California's Alien Land Laws*, 7 W. LEGAL HIST. 25 (1994). The Alien Land Laws particularly affected all people who could not be naturalized as citizens, which included basically all immigrants from East or South Asia; however, in the early decades of the 20th century, the numbers of immigrants from other points of origin, such as Koreans, Filipinos, Sikhs and other ethnicities from South or Southeast Asia, were small compared to the Japanese American population—so although the various state Alien Land Laws applied to all Asians, they especially targeted Japanese immigrants.

[51] Ozawa v. United States, 260 U.S. 178 (1922). In a now rather strange-seeming little fragment of America's twisted racial history from the heyday of scientific racism and eugenics, Ozawa's attorneys contended that the Japanese were part of a different race than the Chinese, a "Malayan" race more like Caucasians, such that although the Chinese might have properly deserved racial discrimination, their client did not. Basically, Ozawa's argument was that he and other Japanese were white after all and did not come under the age-old restrictions limiting naturalization to white Europeans or the descendants of African American slaves; the U.S. Supreme Court rejected that argument. *See also* M. Browning Carrott, *Prejudice Goes to Court: The*

tion Act, which mostly focused on southeastern European nationalities by limiting annual immigration from any nation to no more than two percent of that nation's population in the United States in 1890, also ended outright nearly all Japanese immigration and other immigration from Asia.[52]

Thus Japanese immigrants could not become citizens and also could not legally purchase land in Western states as non-citizens. However, regardless of West Coast anti-Asian racial animosities, Japanese American children born in the United States were officially U.S. citizens under the Fourteenth Amendment to the U.S. Constitution.[53] Japanese American would-be farmers thus turned to

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Japanese & the Supreme Court in the 1920s, 62 CAL. HIST. 122 (Summer 1983).

[52] Immigration Act of 1924, Pub. L No. 68-139, 43 Stat. 153 (1924); Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 80–81 (Jun. 1999). Along with putting quotas on immigration from Europe, the 1924 act largely shut off immigration of people who could not be naturalized as citizens under the 1790 and 1870 Naturalization Acts—in other words, all people who were non-white and not of African descent. *See id.* at 81. *See also* IZUMI HIROBE, JAPANESE PRIDE, AMERICAN PREJUDICE: MODIFYING THE EXCLUSION CLAUSE OF THE 1924 IMMIGRATION ACT (2001); Lucy Elizabeth Salyer, Guarding the "White Man's Frontier": Courts, Politics, and the Regulation of Immigration, 1891–1924 (1989) (Ph.D. dissertation, University of California, Berkeley) (focused on Chinese immigrants, but also covers Japanese and East Indian immigration).

[53] All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. Perhaps somewhat ironically and probably largely unintentionally, a constitutional amendment that was mostly designed to establish the citizenship of former African American slaves, to clean up the horrible legal and constitutional mess left after the abolition of slavery, wound up also giving rights to the native-born children of immigrants from Asia whose parents remained unable to be naturalized as citizens under the Naturalization Acts of 1790 and 1870.

quasi-legal methods of getting access to farmland, including making purchases in the names of their citizen minor children or using Anglo American straw purchasers.[54] In the face of all these hurdles, by the 1930s, the Japanese Americans were a relatively stable, successful immigrant community.[55]

B. Geopolitical Friction

By the 1930s, however, ominous new developments would further threaten the still-tenuous position of Japanese Americans as U.S.-Japanese relations sharply deteriorated. Japan and the U.S. had been, nominally, allies in the First World War. Japan promptly joined the Allied side in August 1914 to seize valuable German trading concessions in China,[56] while the U.S. entered the war only

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[54] Nicole Grant capably describes this somewhat perverse legal logic, which later versions of alien land laws sought to crack down on. Grant, *supra* note 41. *See also* Higgs, *supra* note 50; Yuji Ichioka, *Japanese Immigrant Response to the 1920 California Alien Land Law*, 58 AGRIC. HIST. 157 (Spring 1984); Masao Suzuki, *Important or Impotent?: Taking Another Look at the 1920 California Alien Land Law*, 64 J. ECON. HIST. 125 (Mar. 2004).

[55] *See, e.g.*, Masao Suzuki, *Success Story? Japanese Immigrant Economic Achievement and Return Migration, 1920–1930*, 55 J. ECON. HIST. 889, 889–93 (Dec. 1995) (noting Japanese Americans' legendary pre-war success, but explaining how part of their relative statistical success in elevating their community to increasingly middle-class status resulted from a wave of migration back to Japan by less successful Japanese immigrants to America).

[56] *See* BAILEY, *supra* note 46, at 22, 74–77, 123. During the 1800s, coastal areas of China were effectively colonized by European (and North American) nations that successfully took control of "trade concession" zones of the crumbling Chinese empire. *See id.* at 20–29. Great Britain was early in this process; hence the longstanding British control of the port city of Hong Kong. Indeed, during the mid-1800s, Great Britain fought the two Opium Wars against China to enforce British trading rights in China (contrary to policies of the struggling Chinese empire to keep out British imports of opium grown in the Indian subcontinent among other trade goods). *See id.* at 21; John Brown, *The Opium Wars*, 21 MIL. HIST. 34 (Apr. 2004). Other European or European-derived nations later got into the act, notably including France, the United States, Russia, and Germany. Those readers who faintly remember references to the "Boxer Rebellion" from high school or college history survey courses may or may not know that that Boxer Rebellion was an abortive

much later in April 1917. With the onset of the Great Depression and the resulting sharp social, economic, and political stresses, Japan, like Germany and Italy, moved in the direction of militarist expansionism at the expense of its neighbors, justified by harsh fascist, racist ideology.[57] In the Japanese and Asian context, this meant that Japan felt that it had the right to conquer and subjugate China, Korea, and other Asian nations, whose people the Japanese then viewed as racially inferior, as well as the right to appropriate the colonial holdings of Europe and the United States and replace westerners as the colonial overlord of Asia.[58] Thus, using a staged

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effort by Chinese rebels to throw out the "foreign devils" that had taken control of their territory and their lives; the United States among others was instrumental in using military force to put down the rebellion and restore the status quo ante (i.e., foreign control of Chinese territory and de facto violation of Chinese sovereignty). *See* BAILEY, *supra* note 46, at 34–43. Although Japan was nominally an ally in World War I, both Britain and the United States were already uneasy over Japan's very visible, overly eager imperial designs regarding China. *Id.* at 123.

[57] *See, e.g.*, *Japanese Militarism*, WIKIPEDIA, https://en.wikipedia.org/wiki/Japanese_militarism (last visited Jan. 12, 2018); *Statism in Showa Japan,* WIKIPEDIA, https://en.wikipedia.org/wiki/Statism_in_Shōwa_Japan (last visited Jan. 12, 2018). The latter article notes that Japanese racist ultra-nationalism was not necessarily the same as western fascism, and this point is well-taken; everything Japan did before and during the Second World War was done independently in a distinctively Japanese way, including bringing the United States into the war against the wishes of Japan's western fascist nominal allies. For a more detailed discussion, see Stephen S. Large, *Japanese Nationalist Extremism, 1921–1941, in Historical Perspective*, in NATIONALISMS IN JAPAN 85–109 (Naoko Shimazu ed., 2006).

[58] *See, e.g.*, Asia for Educators, *Japan's Quest for Power and World War II in Asia*, COLUM. U. (2009), http://afe.easia.columbia.edu/special/japan_1900_power.htm (noting Japan's resentment of Europe and North America's racism toward Asians as well as Japan's own racist views of other Asians in the territories it conquered). For a fuller treatment of this topic, see LOUISE YOUNG, JAPAN'S TOTAL EMPIRE: MANCHURIA AND THE CULTURE OF WARTIME IMPERIALISM 95–106, 362–73 (1997). Regarding Japan's quasi-religious self-perception as the master race of Asia with a mission to liberate Asia from Western colonial control and replace Western imperialists with Japanese overlords, see, e.g., Bill Gordon, *Japan's March Toward Militarism* (March 2000), http://wgordon.web.wesleyan.edu/papers/jhist2.htm (noting the

supposed provocation as a pretext, Japanese forces seized the large northern Chinese province of Manchuria in 1931.[59] Using a similar pretext, Japan invaded the rest of China in 1937 in a savage, brutal military campaign that freely targeted Chinese citizens as well as soldiers, most infamously in the brutal "Rape of Nanking" in which tens if not hundreds of thousands of Chinese citizens and soldiers allegedly were wantonly murdered by Japanese soldiers for sport.[60] Along with an uncommonly high overall level of savage brutality in its waging of its imperialist war in China, Japan also revived the use of poison gas, in flagrant violation of the Geneva protocols to the Hague Convention and to the horror of China and the rest of the world. Japan also attempted to use biological warfare by spreading anthrax, typhoid, cholera, and the plague.[61]

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growing popularity of ultranationalist groups in Japan during the 1930s that "believed that the moral purity of the Yamato race and Japan's unique ancestry as descendants of the sun goddess Amaterasu entitled the Japanese to such a leadership role in Asia"); *see also* Large, *supra* note 57.

[59] *See* YOUNG, *supra* note 58, at 29–41.

[60] *See* H.P. WILLMOTT, THE GREAT CRUSADE: A NEW COMPLETE HISTORY OF THE SECOND WORLD WAR 19–28 (1989); IRIS CHANG, THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II 28–104 (1997); *Nanking Massacre*, WIKIPEDIA, https://en.wikipedia.org/wiki/Nanking_Massacre. Wikipedia notes that Japanese ultra-nationalists have long denied that the Rape of Nanking ever happened, and have successfully airbrushed it out of Japanese history textbooks. Most of any legitimate continuing debate, however, is only over the extent of the atrocities, rather than whether they actually happened.

[61] PAINE, *supra* note 48, at 134. To develop their chemical and biological weapons, the Japanese experimented on live human subjects—Chinese prisoners of war or civilians—at the infamous Unit 731 in Manchuria, although this remained mostly unknown until after the Second World War. *Id.* Even Nazi Germany never revived the use of poison gas (though like other nations it was ready to do so); Hitler himself had been gassed during World War I. The Japanese re-learned the lessons of World War I from their experimentation with chemical and biological warfare: that such weapons are very erratic and almost as likely to harm those deploying them as the intended victims. *Id.* In an interesting echo of earlier British imperialism in China, to help fund their costly campaign in China, the Japanese also resorted to drug trafficking—deliberately spreading the cultivation and use of opium in China. *Id.*

In addition to discomfort or revulsion at Japan's bald-faced imperial aggression in China, the United States had other, deeper, more long-standing reasons for suspicion of Japan, as diplomats and naval strategists were well aware. Great Britain, with a relatively long and harmonious relationship with the United States from the mid-1800s onward and a mostly defensive posture regarding its extensive imperial holdings, caused Americans few worries in the Pacific. Japan's rapid and aggressive rise to military and particularly naval power, however, and the absence of any other likely major contender, meant that in planning for the possibility of war in the Pacific, U.S. naval strategists focused primarily on Japan as America's likeliest opponent throughout the early twentieth century.[62] This equation was even more obvious to Japanese naval strategists, who focused obsessively on the United States after the Russian Empire ceased to be a naval threat thanks to the Bolshevik Revolution.[63] Ironically, from the late 1920s onward, a recurring theme in Japanese naval staff officers' war games was a carrier-launched attack on Pearl Harbor as a prelude to the decisive, Tsushima-like slugging match of battleships that would determine the outcome of the war.[64]

More ominously, in Japan, the naval strategists' plans for war with the United States were echoed strongly in popular culture, with many popular novels from 1909 onward harping on the theme of an inevitable naval war with America (nearly all ending with victory for Japan).[65] This trend only worsened through the 1930s, with more popular war-scare literature warning that "it was only a matter of time before the 'unavoidable clash between America and Japan.'"[66] The militant Japanese ultra-nationalism and xenophobia of the 1930s, whipped up further by the Japanese media, included a

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[62] *See* Ikuhiko Hata, *Admiral Yamamoto's Surprise Attack and the Japanese Navy's War Strategy, in* FROM PEARL HARBOR TO HIROSHIMA: THE SECOND WORLD WAR IN ASIA AND THE PACIFIC, 1941–45 55, 58–60 (Saki Dockrill ed., 1994).
[63] *Id.* at 55–57.
[64] *Id.* at 58–59.
[65] *Id.* at 55–57.
[66] YOUNG, *supra* note 58, at 102–03.

virulent anti-Western and especially anti-Anglo-Saxon strain. Japanese nationalists "racialized" any Western resistance to Japanese imperial ambitions, in the League of Nations or elsewhere, and transformed matters of international law (or basic human decency) into a simplistic (but crowd-pleasing) clash of White versus Yellow, in which the Japanese (rather like Nazi Germany) saw themselves as righteous, innocent victims. They also appointed themselves the champions of all the Asiatic peoples in this struggle.[67] In particular, the Japanese Army sought to demonize the West and stir up anti-Anglo/European racist hatred through pamphlets with titles such as *Guard Against the White Peril*, intended to whip up public support for its major and costly military adventures in China. These pamphlets were mirror images of the racist tracts warning against the "Yellow Peril" that had circulated throughout the West prior to World War I.[68] Many nationalist extremists, who gained growing public support in Japan through the 1930s, "blamed what they termed the 'decline of culture' … in the 1920s and 1930s on the destructive influences of Western rationalism" and, rather like Nazi Germany, sought to revert to a mythical, mystical, "pure" Japanese cultural tradition—while keeping all the advantages of modern Western technology.[69] Others ranted against the "twin evils of Soviet communism and Anglo-Saxon liberal democracy."[70]

In sum, Japan during the 1930s, in terms of its political and military leadership and popular culture, was turning into a brutally imperialist and vehemently anti-Western society with a special racist hatred of Anglo-Saxons and their political and cultural institutions—together with a deep-rooted and growing sense of the inevitability of war with the United States and faith in ultimate Japanese victory. Indeed, the growing self-image of the Japanese as an invincible master race, rather like the self-image of Nazi Germany, helps to explain why the Japanese shifted from their

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[67] *Id.* at 101–05, 146–49.
[68] *Id.* at 146–48.
[69] Large, *supra* note 57, at 97, 101.
[70] BAILEY, *supra* note 46, at 120.

traditional defensive naval strategy plans and thought that they could successfully fight the United States at sea while simultaneously being militarily and economically over-committed on land in China.[71] This ultra-nationalist military takeover of Japanese society and political leadership spelled trouble for the United States, and provided the United States with ample justification for a generalized suspicion of Japan.

Americans in the 1930s, enduring the Great Depression and maintaining false hopes for neutrality and isolationism, were probably less obsessed with Japan than Japan was with America. The United States favored China in its struggle for survival against Japan, though as a nominally neutral nation, it did relatively little directly to help the Chinese in their fight.[72] The U.S. ultimately did, however, start to apply diplomatic and economic pressure against Japan, including reducing or cutting off shipments of American aviation fuel, oil and scrap iron in 1940–41 that were crucial for building and fueling the Japanese war machine.[73] In response to U.S. pressure, in 1940, Japan joined Nazi Germany and Fascist Italy in the Tripartite Pact, better known as the Axis.[74] Although

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[71] *See generally* Hata, *supra* note 62, at 55–72; PAINE, *supra* note 48, at 121–39.

[72] America's mostly rhetorical support for China stands in stark contrast to the Roosevelt administration's actively and aggressively bending the definition of "neutrality" to support Great Britain from 1939-1941, showing where U.S. foreign policy priorities lay. *See* discussion in note 75, *infra*.

[73] *See* WILLMOTT, *supra* note 60, at 159–69; PAINE, *supra* note 48, at 146–48. The 1940 scrap iron embargo resulted from the U.S. government's displeasure at Japan's uninvited occupation of Vichy French Indochina. The oil embargo against Japan in the summer of 1941 ratcheted up pressure on Japan, given that the United States supplied 80 percent of Japan's oil. The U.S. embargoes pushed Japan's military leadership, unwilling to back away from its imperialist aggression in Asia, toward contemplating attacking the U.S., Great Britain, and the Dutch East Indies (for their petroleum reserves). The Netherlands, like France, was then occupied by Nazi Germany, so the status of its Asian colonies was somewhat in limbo. As with Indochina, Japan readily filled the power vacuum.

[74] *See, e.g.,* Jeremy A. Yellen, *Into the Tiger's Den: Japan and the Tripartite Pact, 1940*, 51 J. CONTEMP. HIST. 555 (2016); PAINE, *supra* note 48, at 149–51. Japan's act was intended as an implicit threat to the United States—and,

the U.S. was still nominally neutral in the Second World War, at this time, the Roosevelt administration already was committed to helping Great Britain survive and effectively viewed Germany and Italy as enemy nations. Indeed by 1941, the Roosevelt administration had already authorized U.S. naval units in the North Atlantic to fire upon German submarines.[75] Japan's alliance with the western fascist nations only increased official (and probably also popular) U.S. suspicion and hostility toward the Japanese.

Japanese Americans thus were left uncomfortably stretched or torn between two nations and two worlds that were pulling apart

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Yellen notes, also a way of keeping German influence out of Southeast Asia —rather than an expression of any significant shared interests with the western Axis nations. The "Axis" originally referred to the Rome-Berlin fascist alliance created by treaty in 1936, later extended to include Tokyo/ Japan, although Japan basically never coordinated with its supposed western fascist allies on most matters. Most notably, Japan maintained peace with the Soviet Union when Germany desperately wanted Japan to attack, and the Japanese brought the United States into the war when Germany wanted them not to.

[75] *See, e.g.*, John M. Scheussler, *The Deception Dividend: FDR's Undeclared War*, 34 INTERNATIONAL SECURITY 133, 153–57 (Spring 2010); James I. Marino, *Undeclared War in the Atlantic*, WARFARE HISTORY NETWORK (Nov. 23, 2016), http://warfarehistorynetwork.com/daily/wwii/undeclared-war-in-the-atlantic/. The classic scholarly treatment of the undeclared naval war between the United States and Nazi Germany on behalf of Great Britain is WILLIAM L. LANGER & S. EVERETT GLEASON, THE UNDECLARED WAR, 1940–1941 (1953). The 1940 destroyers-for-bases deal, by which the United States gave Great Britain a substantial number of (aging) U.S. naval destroyers in exchange for remaining British naval bases in the Western Hemisphere, and the Lend-Lease Act of 1941, which authorized the (neutral) United States to freely supply war materiel to Great Britain and later even Soviet Russia in order to fight Nazi Germany, represent additional overt and major stretching of the definition of neutrality. *See, e.g.*, *Destroyers for Bases Agreement*, WIKIPEDIA, https://en.wikipedia.org/wiki/Destroyers_for_Bases_Agreement; *Lend-Lease*, WIKIPEDIA, https://en.wikipedia.org/wiki/Lend-Lease. China received some aid under Lend-Lease, but only $1.6 billion compared to $31.4 billion for Great Britain and $11 billion for Soviet Russia. Much of the U.S. aid to China only went to fuel corruption in the Chinese Nationalist Government. *See, e.g.*, DVD: CHINA: A CENTURY OF REVOLUTION, PART I: CHINA IN REVOLUTION, 1911–1949 (Zeitgeist Films 1989) (classic documentary video).

from each other. In the United States, they largely acted as a model immigrant community, working unusually hard and seeking education, middle-class status, and acceptance in the face of continuing racial animosity.[76] At the same time, many Japanese Americans—the *Issei* (first-generation immigrants) more than the *Nisei* (American-born second-generation immigrants)—also hoped to remain true to their culture of origin.[77] Some Japanese American families thus sent their children to Japan for prolonged visits, schooling, and training in being properly Japanese.[78] At that time, being properly Japanese included a society-wide religious worship of the emperor of Japan as a God-Emperor, something rather different from what Japanese American youth would have experienced in the United States.[79] In the 1930s, being properly Japanese

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[76] *See, e.g.*, Suzuki, *supra* note 55, at 889–93; JAMES C. MCNAUGHTON, NISEI LINGUISTS: JAPANESE AMERICANS IN THE MILITARY INTELLIGENCE SERVICE DURING WORLD WAR II 3–15 (2006).

[77] The *Issei* in particular wanted to see their children remain culturally Japanese, but the *Nisei*, although pulled in two different ways, were drawn more strongly to American culture, even though that culture continued to marginalize them. *See, e.g.*, MCNAUGHTON, *supra* note 76, at 8–10.

[78] Many *Issei* parents sent their *Nisei* children to Japanese language schools in America, while some sent their children to school in Japan, which for boys then included compulsory military education (and indoctrination). Apparently for most such young Japanese Americans, the experience of life in Japan tended to make them feel more American and less Japanese. It also, however, provided an additional basis for suspicion among U.S. authorities who generally did not understand the *Nisei* youth's overall reaction to such experiences. *See id.* at 11–15.

[79] Regarding the very real power of the imperial cult over Japanese citizens' minds before and during the Second World War, see generally, e.g., KENNETH J. RUOFF, IMPERIAL JAPAN AT ITS ZENITH: THE WARTIME CELEBRATION OF THE EMPIRE'S 2,600TH ANNIVERSARY (2014). Naturally, it is probably very hard for most Americans and Japanese, in the very changed (and clearly American-dominated) postwar era, to fully believe or understand Japan's prewar mindset and how a well-educated and successful modern nation could have seen such bizarre beliefs grip the entire nation, but the same conundrum exists regarding how Germans could have worshipped Adolf Hitler and his Nazi ideology, a better-known example of society-wide irrationality.

also included celebrating the emperor's military victories and the defeat of his enemies, and for young males, military service.[80] Even for American-born, American citizen *Nisei*, Japan encouraged and extended dual citizenship, and many *Nisei* held dual citizenship, raising concerns among U.S. officials regarding divided loyalties.[81] Many Japanese Americans, perhaps understandably, tended to take some "home team" pride in Japanese military conquests in China and, much like Japanese in Japan, donated money to support Japanese troops, even as their new home nation grew increasingly displeased with Japan's military adventures.[82] Such activities, mostly innocently intended, nevertheless fueled official suspicion regarding Japanese American loyalty in the United States.[83] Unfortunately for the Japanese Americans, they were increasingly in the position of quasi-enemy nationals—citizens of a hostile nation—even before war officially broke out between Japan and the United States. And ironically, even as American sympathy for the plight of the Chinese was (gradually) helping Anglo Americans to overcome

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[80] Regarding the militarization of Japanese society during the interwar years, see, e.g., CHANG, *supra* note 60, at 25–34.

[81] *See, e.g.*, MCNAUGHTON, *supra* note 76, at 11 (noting that through 1924, Japan automatically granted dual citizenship to Japanese nationals' children born abroad, and that after 1924, Japanese citizenship was extended if parents registered their children with Japanese consulates, as many parents did).

[82] *See, e.g.*, Charlotte Brooks, *The War on Grant Avenue: Business Competition and Ethnic Rivalry in San Francisco's Chinatown, 1937–1942*, 37 J. URB. HIST. 311, 316–17 (2011). Most Japanese Americans were also probably unaware or disbelieving of the brutal atrocities committed by Japanese forces in China, which were airbrushed out of Japanese news reports. Many Japanese Americans donated money to support Japan's war in China. *See, e.g.*, GREG ROBINSON, A TRAGEDY OF DEMOCRACY: JAPANESE CONFINEMENT IN NORTH AMERICA 38 (2009); Yuji Ichioka, *Japanese Immigrant Nationalism: The Issei and the Sino-Japanese War, 1937–1941*, 69 CAL. HIST. 260 (1990). Some Japanese Americans, mostly *Nisei* and hence American-born U.S. citizens, joined in the Japanese colonization of Manchuria and even fought in the Japanese army there. *See* John J. Stephan, *Hijacked by Utopia: American Nikkei in Manchuria*, 23 AMERASIA J. 1 (1997).

[83] ROBINSON, *supra* note 82, at 35–39; MCNAUGHTON, *supra* note 76, at 11–15.

some of their traditional anti-Asian racist animosity, it likely further increased their overall suspicions and hostility regarding Japanese Americans.[84]

Japanese Americans, for all their hard work and best efforts, were thus stuck in a brewing, almost boiling, ugly geopolitical situation not of their own making that would cruelly make them innocent victims. Although racism was unquestionably a factor in the whole equation, it was far from the only one, nor probably even the primary one, at that charged moment in time.

Following the U.S. scrap iron and oil embargoes against Japan and further deterioration of U.S.-Japanese diplomatic relations during 1940–1941, Japanese naval forces bombed Pearl Harbor on December 7, 1941, in what President Franklin D. Roosevelt famously labeled "a date which will live in infamy."[85] All eight battleships of the U.S. Navy's Pacific Fleet were sunk or badly damaged—at a time when battleships were still viewed as a nation's main naval defense.[86] Seemingly through sheer luck, the aircraft carriers of the U.S. Pacific Fleet were not at Pearl Harbor

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[84] *See, e.g.*, Brooks, *supra* note 82, at 317. And, as ever, many Anglo-Americans still couldn't tell the two nationalities apart.

[85] *"A Date Which Will Live in Infamy": FDR Asks for a Declaration of War,* AMERICAN SOCIAL HISTORY PRODUCTIONS, INC., http://historymatters.gmu.edu/d/5166/ (last visited Jan. 12, 2018).

[86] *See e.g.*, John Mueller, *Pearl Harbor: Military Inconvenience, Political Disaster*, 16 INT'L SEC. 172, 172–77; *see also* Hone, *supra* note 48. Although the age of the battleship was in fact already over and aircraft carriers would thenceforth be the queens of the sea—and thus the losses at Pearl Harbor were actually less crippling than they appeared, as Mueller explains—nobody yet knew that at the time for certain. The carrier-focused Pacific naval war that followed would provide the proof of that premise. *See* Mueller, *supra.* Ironically, notwithstanding their development of highly effective aircraft carrier strike forces and tactics, Japanese naval strategists, like those in other nations, in the 1930s and 1940s still anticipated winning a single smashing naval victory in the Pacific by using their battleships to "cross the T" of the enemy's fleet, as at Tsushima and Jutland. *See* Malcolm Muir, Jr., *Rearming in a Vacuum: United States Navy Intelligence and the Japanese Capital Ship Threat, 1936-1945*, 54 J. MIL. HIST. 473, 473–74 (Oct. 1990). United States naval strategy also remained primarily fixated on battleships. *See generally* Hone, *supra* note 48.

that fateful morning. Had they been, America might have been left effectively without any navy in the Pacific. Twenty-four hundred American servicemen were killed and almost 1,200 injured in a devastating surprise attack prior to a declaration of war. That abruptly awakened America from its dreams of neutrality and raised a blood-boiling rage and grim desire to wreak vengeance upon Japan.[87] Japanese forces' lightning-quick seizure of the U.S.-held Philippines and Guam, the British strongholds of Hong Kong and Singapore, the Dutch East Indies, and other allied territories in early 1942 only deepened those sentiments.[88]

It is worth pointing out here that virtually any nation that had pulled off what Japan did at Pearl Harbor and afterward likely would have been "racialized" in the minds of angry, vengeful Americans. Nations at war racialize each other—view each other's citizens as less than human just for being members of the nation that "caused the war." Anglo Americans over the years have shown themselves quite able to racialize even other white, European nationalities during wartime—that is, characterize them as somehow fundamentally different, flawed, perhaps brutish, and lower in evolutionary rank than Anglo Americans. The Germans received that treatment during the hysteria surrounding the First World War,

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[87] *See, e.g.*, *Pearl Harbor Unites Americans Behind President Roosevelt*, PACIFIC WAR HISTORICAL SOCIETY, http://www.pacificwar.org.au/pearlharbor/Pearl_Harbor_unites.html (last visited Jan. 16, 2018). Ironically, because Roosevelt and his administration had pre-decided, and had secretly made agreements with Great Britain, that whatever happened, Germany had to be addressed first, the Roosevelt administration had to persuade angry Americans to take on Germany, which had never attacked the United States, first when they wanted to pay back Japan, which had. Germany eased this predetermined process for Roosevelt by declaring war on the United States even though it did not have to under the existing, mutually defensive terms of the Tripartite Pact. *See* Frater, *supra* note 28.

[88] *See* PAINE, *supra* note 48, at 156–57 (noting Japan's "stunning success" and how, "In the first five months of 1942, Japan took more territory over a greater area than any country in history, and did not lose a single major ship."). Japan's stunning conquests tended to give some color to the 1930s Japanese ultra-nationalist sense of being the master race and left its military leaders dangerously victory-drunk. *See* Hata, *supra* note 62, at 66.

the Russians during the Cold War, and more comically even the French for their failure to side with the United States in some of its most recent foreign military adventures.[89] Moreover, Americans perceived the surprise attack before a declaration of war as an act not of war, but of murder—as well as a flagrant violation of the rules of war and international diplomacy.[90] The instinctive wartime racialization of an enemy and bitterness over the nature of the Pearl Harbor attack were thus combined with existing attitudes of racial hostility or superiority toward Asian peoples—plus almost certainly an added sense of resentment over seeing Anglo Americans and Britons militarily humiliated by an Asian nation. The Pearl Harbor attack also left the still re-arming United States militarily very vulnerable throughout the Pacific region, as subsequent stinging

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[89] During World War I, American orchestras stopped performing works by Beethoven, and Americans renamed sauerkraut "liberty cabbage," banned teaching of German in schools, and killed dachshunds, all to avoid the taint of a supposedly barbaric German culture. *See generally* ERIK KIRSCHBAUM, BURNING BEETHOVEN: THE ERADICATION OF GERMAN CULTURE IN THE UNITED STATES DURING WORLD WAR I (2015). Russians were alternately caricatured as a nation of bucolic, brutish peasants, or as underhanded, ruthless spies, particularly from the Bolshevik Revolution through the Cold War, and such stereotypes are resurfacing again along with growing diplomatic friction between Russia and the United States. *See, e.g.,* Meagan Day, *Bear, Bolshevik, Buffoon, Spy: The American Tradition of Fearing Russia,* TIMELINE (Aug. 15, 2016), https://timeline.com/history-fear-russia-c81656ec36a2. French resistance to America's second Gulf War triggered an ongoing drumbeat of jokes characterizing the French as inherently cowardly. *See, e.g.,* Myriam Miedzian, *Anti-French Stereotypes Still Served Up,* THE HUFFINGTON POST (May 25, 2011), https://www.huffingtonpost.com/myriam-miedzian/antifrench-stereotypes-st_b_36460.html. Other white, European nationalities, such as the Irish and the Italians, were long harshly racialized even during peacetime.

[90] Admiral Isoroku Yamamoto, the architect of the Pearl Harbor attack, reportedly was upset with Japanese diplomatic envoys for not severing diplomatic ties with the United States before the attack as planned, because he was familiar with American culture and society and knew how especially enraged Americans would become over a "sneak" attack. *Isoroku Yamamoto's sleeping giant quote*, WIKIPEDIA, https://en.wikipedia.org/wiki/Isoroku_Yamamoto%27s_sleeping_giant_quote (last visited Jan. 12, 2018).

U.S. defeats by Japan demonstrated. Although wars in American (and other nations') history have always produced wartime hysteria, in American history there has hardly ever been a better justification for wartime hysteria.

Leaving aside the rarified world of legal and constitutional theory, in the real world of human group psychology, politics, and emotion—especially with the still limited overall level of racial awareness and tolerance existing in the United States in 1941—there likely was never much chance that the fury directed at Japan and the Japanese would not rub off on the hapless Japanese Americans in some horrible fashion. Nor was there ever much chance that the law or courts could have stopped a political tidal wave of such sentiments had they wished to.

Here, too—even at risk of committing what might be seen as constitutional law sacrilege—it is also worth pointing out that in light of the whole geopolitical situation in the Asia-Pacific region that had developed between the World Wars, U.S. authorities, unfortunately, had ample reason to harbor *generalized* suspicions and concerns regarding Japanese Americans and how they would respond to the situation. Indeed, such authorities would have been foolish not to. Japan had become a very dangerous, recklessly imperialistic outlaw nation which, like Nazi Germany and Fascist Italy, flouted the League of Nations and the global world order. In the grips of its ultra-nationalist military and political leadership, Japan also had developed a xenophobic, racist hatred of the West, especially Anglo-Saxons, and had increasingly come to accept and even embrace the inevitability of war with the United States—a war which the proud Japanese expected to win even against the odds through racial superiority. Japan sought to maintain its cultural connections with Japanese living overseas, and many Japanese Americans, especially older ones, sought to maintain cultural ties with their ancestral homeland. Had those cultural ties included firm beliefs in the sort of national and cultural values that Japan had inculcated in its people since the onset of the Great Depression, including militant anti-Westernism, anti-Americanism, and limitless self-sacrifice for Japan's emperor, then Japanese Americans

necessarily could have been extremely dangerous to the wider American society and a cause for worry.

With hindsight, we all know today that such *generalized* suspicions were in fact not justified at the *particular* level for the overwhelming majority of Japanese American citizens, noncitizens, families, and communities. We also likely wish that Anglo-American authorities at the time, who generally knew and understood relatively little about Japanese Americans, would have listened to the Japanese Americans' defenders who proved to be right about their overall loyalty and lack of danger, such as Carey McWilliams.[91] Yet such far-sighted advocates mostly constituted a relative fringe of progressive leftists, who traditionally had been marginalized in American society. Although the progressive elements had a relatively brief moment in the sun during the depths of the Great Depression, they would be steadily and harshly re-marginalized from the Second World War through the Cold War. In the panic of the moment, their counsel went unheeded.

To point out that some level of *generalized* suspicion regarding Japanese Americans was justified by the whole dire geopolitical situation and was, frankly, inevitable, is emphatically *not* to justify the tragic, disastrous end results of this generalized suspicion, or the failure of U.S. authorities to more properly and adequately test these *generalized* suspicions at the *particular* level before uprooting 120,000 almost entirely innocent, loyal people. It is, however, to suggest that what has become the established narrative in American law and history regarding the tragedy—that the Japanese American internment was purely and simply the product of racism—is much too facile an intellectual shortcut that grossly oversimplifies what is inherently a much more complex and troubling set of events. The grounds for generalized suspicion were there regardless of race, and would have applied to people of any race whose origins traced to a nation with a relationship to the United States as toxic as Japan's.

The grounds for generalized suspicion are what set both the curfew and internment processes in motion. The established

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[91] *See* MCWILLIAMS, *supra* note 44.

rhetoric regarding the internment tragedy too often tends to read as though the Japanese Americans were singled out more or less at random; of course they were not, as the majority opinions in both *Hirabayashi* and *Korematsu* make clear. Nor were they singled out on the basis of *race* as we have understood the concept throughout the postwar period, because, obviously, Chinese Americans, Filipino Americans, and other Asian Americans were not targeted for internment. Japanese Americans were singled out for special, harsh treatment because of their national origin, and not randomly out of a general dislike of that national origin, but because the nation in question was at war with the United States (and militarily had pulled off the unthinkable, leaving the nation in a state of extreme crisis). Meaningful analysis of racial or national origin discrimination requires differential treatment of similarly situated groups. Notwithstanding the perhaps slightly tortured arguments of Gordon Hirabayashi's and Fred Korematsu's counsel to the contrary, the harsh reality of Japan's exploits, causing a military crisis along the West Coast, meant that Japanese Americans were, inherently, at that moment and in that place, differently situated from any other nationality—even from German Americans and Italian Americans, because Germany and Italy had not attacked the United States, and certainly not in the Pacific.

To say all this is also emphatically not to deny that Anglo-American anti-Asian racial animosity was a significant factor in the whole equation. Such racial/national-origin-based hostility doubtlessly made it easier for authorities even to consider a vast relocation and internment program, together with the relatively small, geographically concentrated, and insular nature of the Japanese American community that made such relocation logistically possible. [To round up millions of German American or Italian American citizens scattered across the continent would have been a much larger task, probably impossible. Again, German and Italian nationals in West Coast exclusion areas were rounded up and interned.[92]]

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[92] Alan Rosenfeld, *German and Italian Detainees*, DENSHO ENCYCLOPEDIA, http://encyclopedia.densho.org/German_and_Italian_detainees (last visited Feb. 13, 2018). Rosenfeld notes that Germans and Italians were the largest

There is also little doubt that America's impotent fury and desire to punish Japan in early 1942 helped inspire grabbing and punishing the only Japanese whom Americans could get their hands on, as legal scholar Eugene Rostow alleged in 1945.[93] Yet even leaving racism aside altogether, the facts of the whole situation likely provided a sufficient basis for setting in motion the relentless (il)logic leading toward internment—whether or not the process could have gotten all the way there without the added ingredient of racial hostility. At any rate, to say that the internment tragedy was purely and simply the product of racism is, in effect, to deny the wider context and unavoidable harsh reality of the Second World War; and to do that is somewhat historically and intellectually unsound—it massively oversimplifies the whole situation that confronted federal judges and makes it appear easier and more straightforward than it was.

In particular, domestication of the Japanese internment cases as mere garden-variety racism airbrushes away the fundamental and highly problematic issues raised by those cases: namely, the proper role of the judicial branch, and the inevitably shifting balance between judicial and executive authority, during times of national crisis when the judiciary must substantially defer to executive officials with authority regarding the crisis. The standard established narrative—that "it was just racism"—tends to assume that there was actually an easy right answer to the whole question that most of the Supreme Court Justices, generally well regarded for their intellects and overall character and decency in other areas, were simply too foolish, short-sighted, or racist themselves to see right in front of them. The established narrative also tends to assume, with the safety and smugness of hindsight, that decision-making in moments of national crisis should be no different from that during ordinary peacetime and normalcy. And that the federal

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foreign-born populations in the continental United States before the war, each community numbering in the millions, and that of the roughly 11,500 German Americans and 3,000 Italian Americans interned during the war, many were U.S. citizens. He also observes that General DeWitt initially hoped to remove all German and Italian Americans from the West Coast, also.

[93] *See* Rostow, *supra* note 40, at 497, 508.

judges who decided the internment cases during the 1940s basically should have been able to ignore the harsh reality of the Second World War (as later legal-historical accounts have sometimes tended to do). Although we might well wish for and strive for that goal, dire national emergencies remain, inevitably, states of exception to normal legal process, and the (real or perceived) magnitude and urgency of the crisis will in practice tend to determine the degree of suspension of ordinary legality—regardless of legal theory.[94] National security crises necessarily exist in a "no-man's land between public law and political fact,"[95] and the role of the judiciary and the appropriate balance of its power with other branches of government remain uncertain and situation-contingent in confronting them. Perhaps it is precisely because of these very uncomfortable facts that the standard legal history narrative has opted for the overly simplified, domesticated account of what went so wrong with *Korematsu* and *Hirabayashi*—and can go similarly wrong with other national crises.

C. Relocation and Internment

The devastating Pearl Harbor attack and its aftermath raised the question of how to handle the more than 120,000 Japanese Americans—Japanese nationals and their American-born, citizen descendants—living in the continental United States.[96] Most were

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[94] As Agamben describes the conventional understanding of the state of exception, "[T]he state of exception constitutes a 'point of imbalance between public law and political fact' … that is situated—like insurrection and resistance—in an ambiguous, uncertain, borderline fringe, at the intersection of the legal and the political'[.]" AGAMBEN, *supra* note 13, at 1. It is thus difficult if not impossible for the law to neatly comprehend and account for ultra-legal governmental actions that may be (or seem to be) required by the exigencies of the moment of crisis.

[95] *Id.*

[96] Hohri v. United States, 586 F. Supp. 769, 772 (D.D.C. 1984). There are some possible slight discrepancies in the total numbers given regarding the internment. Sources refer frequently to 120,000 persons being interned, but the same sources also sometimes note the estimate of 112,000 Japanese Americans living in the West Coast states. *See, e.g.*, *Hohri*, 586 F. Supp. at

relatively recent, first- or second-generation immigrants, including a mix of (younger, *Nisei*) citizens and (older, *Issei*) non-citizens,[97] mostly in California. Many, purely by happenstance, lived near strategically important facilities (and hence were automatically under additional suspicion of possible intent to conduct espionage or sabotage through no fault of their own). Nearly all lived near the West Coast that suddenly no longer had a navy to protect it.[98] Regional military policy decisions fell to Lieutenant General John L. DeWitt, who unfortunately comes across in the historical record as a particularly narrow-minded anti-Japanese bigot, though his hostile opinions were widely shared throughout the Pacific coastal

772, 775, 777. Japanese Americans not living in West Coast states generally were not interned, but the vast majority of Japanese Americans lived near the West Coast at the start of World War II. There was by 1940 an even larger population of Japanese Americans living in Hawaii, representing more than a third of the population there. Hawaiian Japanese Americans were not interned, but the entire territory of Hawaii was subject to martial law until late 1944, with Japanese Americans watched most closely. *See* Jane L. Scheiber & Harry N. Scheiber, *Martial Law in Hawaii*, DENSHO ENCYCLOPEDIA, http://encyclopedia.densho.org/Martial_law_in_Hawaii/ (last visited Jan. 12, 2018). One of the long-standing myths surrounding the wartime internment is that no Italian or German nationals were interned, but that is incorrect; in particular, a substantial number of Italian enemy nationals from the San Francisco area were interned, though nothing like the numbers of Japanese Americans, and not with citizens and non-citizens rounded up indiscriminately. *See generally, e.g.*, Rosenfeld, *supra* note 92; JOHN CHRISTGAU, "ENEMIES": WORLD WAR II ALIEN INTERNMENT (1985) (primarily concerns German nationals, but also discusses Italian and Japanese Americans); Dewey, *In Search of California's Legal History*, *supra* note 40 (section on "Italian Internment").

[97] The *Sensei* generation (children of at least one *Nisei* parent) also had begun to appear.

[98] MCWILLIAMS, *supra* note 44, at 1–3. McWilliams, in a 1944 pamphlet, gave figures from the 1940 Census of 126,947 Japanese Americans living in the continental United States, with 112,353 of those in the three West Coast states and nearly 80 percent of the total, or nearly 100,000, living in California. McWilliams gives an estimate of around 110,000 Japanese Americans being relocated and interned.

states, doubtlessly even more so after Pearl Harbor.[99] DeWitt recommended evacuation of Japanese Americans from the West Coast, which was politically popular with West Coast politicians (including California Attorney General and later Governor and Supreme Court Justice Earl Warren)[100] and western state populations generally.[101] Yet due to bureaucratic delays as well as the military's (appropriate) concerns about the legality of the matter and insistence upon explicit authorization from the Roosevelt administration and Congress, this process was not officially authorized until March 1942 and did not get underway until May 1942.[102] Ironically, the internment began not long before the Battle of Midway in June 1942, which would finally mark the end of the disastrous, humiliating string of losses the United States suffered at the hands of Japan throughout the first several months of the war,

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[99] *Hohri*, 586 F. Supp. at 774; Rostow, *supra* note 40, at 531–32. Indeed, whatever existing, rooted animosity there may have been toward the Japanese in western states, the national feeling of fury and revulsion over the Japanese surprise attack, as well as later revelations such as Japanese soldiers' starvation, torture, and killing of American prisoners of war during the infamous Bataan Death March, probably made a good many Americans throughout the nation, who might formerly have been largely oblivious and unaware of Japanese or Japanese Americans, vehemently anti-Japanese, at least throughout the war.

[100] *See, e.g.*, G. Edward White, *The Unacknowledged Lesson: Earl Warren and the Japanese Relocation Issue*, 93 VQR (Autumn 1979), http://www.vqronline.org/essay/unacknowledged-lesson-earl-warren-and-japanese-relocation-controversy; Brian Niiya, *Earl Warren*, DENSHO ENCYCLOPEDIA, http://encyclopedia.densho.org/Earl%20Warren/ (last visited Jan. 12, 2018) ("[I]n 1942, as the attorney general of the state of California, Warren was a vocal proponent of forcibly removing all Japanese Americans from the West Coast."); Earl Warren, WIKIPEDIA, https://en.wikipedia.org/wiki/Earl_Warren (last visited Jan. 16, 2018) ("As attorney general, Warren is most remembered for being the moving force behind Japanese internment during World War II."). Warren's enthusiasm for the internment likely helped his successful run for governor in late 1942.

[101] *Hohri*, 586 F. Supp. at 774; Rostow, *supra* note 40, at 497 (June 1945).

[102] *Hohri*, 586 F. Supp. at 774–75 (discussing the promulgation of Executive Orders 9066 and 9102); Rostow, *supra* note 40, at 497–98.

and would significantly reduce the level of military emergency along the West Coast.[103]

The relocation followed an earlier curfew imposed upon Japanese Americans (and German and Italian nationals) along the West Coast shortly after the Pearl Harbor attack.[104] The relocation was in effect a substitute for the harsher option of putting the entire West Coast region under martial law, as was done in the Hawaiian

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[103] *See generally* CRAIG L. SYMONDS, THE BATTLE OF MIDWAY (2011); *see also* WILLMOTT, *supra* note 60, at 180–82. Of course, nobody knew for certain in May 1942 that there would be a Battle of Midway, that it would turn out largely by luck to be a smashing American victory, and that it would be the turning point in the Pacific war. Americans then only knew the humiliating American losses of the Philippines, Guam, Wake Island, and other U.S. holdings in the Pacific, along with the Japanese seizure of Singapore, Hong Kong, Malaya, and the Dutch East Indies (now Indonesia) that left them in unchallenged control of most of the Pacific Ocean, plus a costly partial U.S. victory/defeat in the Battle of the Coral Sea that stopped Japan's rapid advance toward Australia. *See, e.g.*, *Hirabayashi*, 320 U.S. at 94. Japan's astonishing military successes, including the rapid neutralization of Britain's supposedly impregnable fortress and naval base at Singapore along with the Pearl Harbor attack, left the stunned Western allies unsure about just how much the Japanese were able to do and what other surprises they might have in store; they already had achieved the "impossible." Japan's smashing successes in its risky ventures also left most of its military leaders supremely overconfident. Had the Battle of Midway turned out differently, as it easily could have, with the loss of all of the U.S. Pacific Fleet's remaining aircraft carriers and skilled naval pilots along with Midway Island, then any turning point in the Pacific War likely would have been delayed by another year at least, and the West Coast of the United States would have been wide open to Japanese attack if not invasion. As with earlier wars, after the First World War, the United States had let its standing army dwindle to a small, poorly equipped force, and although it had excellent, advanced designs in the pipeline, at the start of the war, America's military aircraft and especially fighter planes in service were generally below the standards of both Japanese and German air forces and would remain so into 1943. Japan had plans to invade and conquer the Hawaiian Islands, which likely would have gone ahead had the Battle of Midway turned out differently. *See generally* JOHN J. STEPHAN, HAWAII UNDER THE RISING SUN: JAPAN'S PLANS FOR CONQUEST AFTER PEARL HARBOR (1984).

[104] Hirabayashi v. United States, 320 U.S. 81, 85–91 (1943).

Islands.[105] The relocation was justified by federal military officials on the grounds that it was impossible to separate loyal Japanese Americans from disloyal ones quickly enough to avoid a heightened risk of espionage and sabotage, particularly in light of the many non-citizens or dual citizens in the population.[106] A further justification was that the relocation was necessary for the Japanese Americans' own safety, to protect them from reprisals by angry Americans, which was a very real concern. Another, perhaps unstated concern was stopping the harassment and abuse of other Asian Americans who were frequently mistaken for Japanese Americans.[107]

Although the federal government also had some evidence indicating that most Japanese Americans were loyal to the United States and had engaged in little or no verifiable espionage or sabotage activities during the months after Pearl Harbor (which was in fact true), the government left this evidence out of its report justifying the relocation, as well as its briefing to federal courts in litigation regarding the internment, and emphasized other, shakier, more alarmist evidence suggesting risk and danger.[108]

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[105] *See* Scheiber & Scheiber, *supra* note 96.

[106] Progressive, pro-Japanese American legal scholar Eugene Rostow blasted the internment program for moving forward, without individualized determinations of loyalty or disloyalty, at a time when U.S. courts were open. Rostow, *supra* note 40, at 490. Yet to say that courts were open also ignores the fact that in dealing with more than 100,000 individuals, any process more meaningful than a quick rubber-stamp procedure necessarily would have been both massively time-consuming and resource-intensive—and would moreover have required the expenditure of resources on people whom the wider society then perceived as pariahs.

[107] See Jane Hong, *Asian American Response to Incarceration*, DENSHO ENCYCLOPEDIA, http://encyclopedia.densho.org/Asian%20American%20response%20to%20incarceration/ (last visited Jan. 12, 2018). Nor, under the circumstances—a state of crisis and a frantic, belated mobilization for total war—were federal, state, or local authorities likely to provide or prioritize the sort of special police protection that the beleaguered Japanese Americans likely would have needed to ensure their safety.

[108] Although much was made of this missing evidence during the 1980s litigation to undo the internment, as though its proper inclusion would have changed everything back in 1942, that conclusion unfortunately is probably

The *Hirabayashi* case, which reached the U.S. Supreme Court in the summer of 1943, concerned the constitutionality of the curfew;[109] *Korematsu*, decided in December 1944, concerned the evacuation order.[110] Given the delays in judicial process between the federal district court level and the Supreme Court, both decisions occurred well after Japanese Americans already had been herded into internment camps mostly in Rocky Mountain or desert regions east of the West Coast states. In both cases, the Court majorities found the restrictions targeting Japanese Americans to have been justified under the circumstances.[111]

Here again, it is perhaps worthwhile to pause to put aside legal and constitutional theory and look at the historical reality that faced federal judges confronted with the Japanese internment litigation. The federal district court judges, on the front lines of judicial process, were confronted by a political tidal wave with a powerful aura of necessity and inevitability regarding both the curfew and the internment program. The nation was locked in a global total war of a sort that it had never experienced before to the same extent (not even during the First World War). The nation faced grave dangers and hardships, and had suffered numerous major defeats. The United States and its allies were mostly looking relatively ineffectual through the end of 1942; the British were at risk of losing Egypt and the Suez Canal (as well as contact with India, Australia, and New Zealand); the Soviet Union was at risk of collapse before a renewed Nazi German onslaught on the Eastern Front; and the United States was at risk of losing the naval Battle of the Atlantic against better organized and more experienced German U-boat skippers. In the Pacific theater, even after America's lucky break at Midway, U.S. forces were locked in a drawn-out, brutal slugging match against Japanese forces on Guadalcanal in the

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doubtful and anachronistic; given the mood of wartime hysteria, the evidence exonerating the Japanese Americans likely would have been given less weight than it deserved, as routinely happens with evidence even under less charged circumstances.

[109] Hirabayashi v. United States, 320 U.S. 81 (1943).

[110] Korematsu v. United States, 323 U.S. 214 (1944).

[111] *Hirabayashi*, 320 U.S. at 100–05; *Korematsu*, 323 U.S. at 217–19.

South Pacific to prevent the Japanese from advancing further toward Australia, lasting from August through December 1942. The war only really started to turn around for the Allies at the end of 1942 and the beginning of 1943, with major Allied victories at Stalingrad, El Alamein, and Guadalcanal and the U.S. amphibious landings in French North Africa.[112] Up until that point, the war, and the United States, remained very much in a state of crisis. Duly appointed U.S. military authorities had declared that the relocation of the Japanese Americans was necessary, and offered supposedly substantial evidence to justify their position. More broadly, the government's attitude was that it was taking no chances regarding national security, and the dire international situation appeared to justify that stance. For a judge to resist all that political pressure at that moment not only would have taken a vast amount of personal courage, but also likely would have been perceived as irresponsibly obstructing the war effort. Some angry citizens doubtlessly would have seen it as treasonous. Nor are judges especially qualified to make determinations regarding military necessity, as Chief Justice Stone pointed out in the *Hirabayashi* opinion. Had the war effort gone badly, or had events transpired that gave color to U.S. authorities' suspicions about Japanese Americans, any judge who had stood in the way of the internment likely would have been pilloried, and his career ruined forever. To put it mildly, the stakes were very high. It was professionally and politically dangerous to get the decision wrong and federal judges, who mostly would have been swept up in the same overall mood of total war, obedience to military authority, and self-righteous anger at Japan, had every incentive to go along with the political tidal wave—and perhaps sincerely believe in it—rather than resist it.

By mid-1943, by contrast, it was looking as though the Allies would likely prevail, and by late 1944 that outcome appeared almost certain. Thus it became progressively easier to look back on the internment and see that it had in fact been unnecessary; it also became easier to fall into the trap of hindsight bias and presume that everybody should have known all along that it was unneces-

[112] *See* WILLMOTT, *supra* note 60, at 196–209, 232–53.

sary.[113] Yet by that time, it was also too late to turn back the clock—120,000 Japanese Americans already had been herded into internment camps. The Supreme Court, in *Hirabayashi* and *Korematsu*, could have undercut the U.S. government and its war effort politically and rhetorically, and embarrassed the Roosevelt administration and potentially affected the 1944 presidential election, while also closing the barn door after the horse was already gone with regard to the reality of Japanese American internment.[114] It also would have required the Court to reverse its overall position on a fundamental jurisprudential principle, for seven of the nine justices on the Court in late 1944 had been appointed by President Franklin D. Roosevelt (all but Justice Roberts and Chief Justice Stone, who was however elevated to that position by Roosevelt) to replace the sorts of justices who had systematically obstructed both congressional and federal executive initiatives to combat the Great Depression.[115] The later New Deal Court in general thus may have been philosophically inclined to defer to congressional and executive authority of the sort exercised in the internment program.[116]

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[113] Regarding hindsight bias, or the "I knew it all along" syndrome, see generally, e.g., Neal J. Roese & Kathleen D. Vohs, *Hindsight Bias*, 7 PERSP. ON PSYCHOL. SCI. 411 (Sept. 2012); Ulrich Hoffrage et al., *Hindsight Bias: A By-Product of Knowledge Updating?*, 26 J. EXPERIMENTAL PSYCHOL. 566 (2000); Aileen Oeberst, *When Being Wise After the Event Results in Injustice: Evidence for Hindsight Bias in Judges' Negligence Assessments*, 22 PSYCHOL. PUB. POL'Y & L. 271 (Aug. 2016).

[114] This might have been different if, for instance, the Supreme Court had original jurisdiction regarding particular major constitutional questions, as Prof. Jamal Green has suggested. *See* Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. 124, 152 (Nov. 2014), http://harvardlawreview.org/wp-content/uploads/2014/11/vol128_greene_comment.pdf.

[115] *See, e.g.*, Richard G. Menaker, *FDR's Court-Packing Plan: A Study in Irony*, HISTORY NOW, https://www.gilderlehrman.org/history-by-era/new-deal/essays/fdr%E2%80%99s-court-packing-plan-study-irony (last visited Jan. 12, 2018); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUPREME COURT REV. 347 (1966).

[116] *See generally, e.g.*, Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007); *see also* Steven B. Lichtman, *The Justices and the*

The seven (or eight) Roosevelt appointees also likely felt some level of political and also perhaps personal loyalty to the president who appointed them.[117] Two of the eight Roosevelt appointees—Justices Murphy and Jackson—nevertheless found the internment to be unconstitutional.[118] They enjoyed both hindsight and hindsight bias, and seem not to have been troubled by the fact that even a majority opinion striking down the internment would have been a mere rhetorical flourish which would demonstrate the actual powerlessness of the courts. The Japanese Americans would have been left in the internment camps through the end of the war regardless.[119]

Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918–2004, 65 MD. L. REV. 907, 936–38 (2006).

[117] Regarding some of the psychology and interpersonal dynamics of the *Korematsu* Court as it approached its decision, see Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 128–33 (2006) (derived from JOHN FERREN, SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE (2004)).

[118] Justice Murphy also wanted to dissent in *Hirabayashi*, but was pressured and dissuaded by colleagues from breaking ranks. *See id.* at 128. Green also notes that other justices—Rutledge and Douglas—initially were uncomfortable with upholding the constitutionality of the Japanese American internment. *Id.* at 129. It is worth emphasizing just how unusual Justice Murphy was in his racial progressivism regarding Japanese Americans, both within the judiciary and the wider American public, at a time when the relatively few voices who spoke out for the Japanese Americans were progressive leftists (like Carey McWilliams), (western state) ACLU members, and communists and socialists—the sorts of people who gained a brief, limited window of opportunity to express and promote their views during the Great Depression, but were already in the process of being re-marginalized in American society with the onset of the Second World War, even before they would face worse treatment during the Cold War.

[119] One of history's greatest demonstrations of the actual powerlessness of the U.S. Supreme Court involved another historic mass violation of human rights, the federal government's forcible removal of the Cherokee Nation from its ancestral homeland in the 1830s notwithstanding the Court's upholding of the Cherokees' rights in *Worcester v. Georgia*, 31 U.S. 515 (1832). When confronted with a political tidal wave of public opinion, including most of the leadership of the executive and legislative branches of the federal govern-

By late 1944, with any threat of Japanese invasion long past and Japanese Americans generally having demonstrated their loyalty to the United States in many ways, including the heroics of the legendary, highly decorated, all-Japanese American 442nd Regimental Combat Team in the tough fighting in Italy and southern France,[120] U.S. authorities generally recognized that there

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ment, the Court was, unfortunately, impotent. *See* Tim Alan Garrison, *Worcester v Georgia (1832)*, NEW GEORGIA ENCYCLOPEDIA (Chris Dobbs ed., July 19, 2017), https://www.georgiaencyclopedia.org/articles/government-politics/worcester-v-georgia-1832.

[120] *See, e.g.*, Franklin Odo, *442nd Regimental Combat Team*, DENSHO ENCYCLOPEDIA, http://encyclopedia.densho.org/442nd_Regimental_Combat_Team/ (last visited Jan. 12, 2018). Notably, most of the soldiers in the 442nd were from Hawaii, and as such probably remained closer to the land, hard agricultural labor (for instance on sugar plantations), and traditional Japanese culture than the more Americanized *Nisei* of the mainland. At any rate, the 442nd, with their 9,486 Purple Hearts (awards for being wounded in battle) along with 21 Congressional Medals of Honor among the roughly 14,000 men who served in the unit, showed a characteristically Japanese sense of duty and discipline transcending the 1940s-vintage normal overall American sense of duty and discipline. The 442nd also later fought in France. As a scholar recently pointed out, the discipline and determination of the Japanese American soldiers was, perhaps somewhat ironically, characteristically Japanese, like that of the Japanese kamikaze pilots and soldiers who fought to the last man. *See generally* Yukie O, Cultural Origins of the Kamikaze Special Attack Corps and the 442nd Regimental Combat Team during World War II: A Comparison between the Japanese Soldiers Raised in Japan and the *Nisei* Soldiers Raised in America (May 2011) (Ph.D. dissertation, Oklahoma State University, https://shareok.org/bitstream/handle/11244/6784/Department%20of%20History_10.pdf?sequence=1. For purposes of wartime propaganda, including combating Japanese propaganda that happily spread the news about the internment camps in Asian nations and elsewhere, the United States generally was eager to portray all the Japanese Americans as loyal. As a result, the stories of those Japanese Americans who were disloyal and/or renounced U.S. citizenship—whether out of frustration and resentment at U.S. treatment of Japanese Americans, or simply because they felt an allegiance to Japan—mostly has remained hidden until recent decades, when historians have studied the "bad boys" among the Japanese Americans and the Tule Lake Segregation Center in California where they often were sent. *See, e.g.*, DONALD E. COLLINS, NATIVE AMERICAN ALIENS: DISLOYALTY AND THE RENUNCIATION OF CITIZENSHIP BY

was certainly no longer any justification for continuing the internment. The evacuation order was lifted immediately after Franklin Roosevelt won another term in office in November 1944. The timing was no coincidence, either, for the administration remained concerned about possible political backlash from still vehemently anti-Japanese voters throughout the United States.[121] Lifting the evacuation order still left most Japanese Americans interned in camps, however, and needing support and assistance to leave the camps and reintegrate into society. Such support mostly was not forthcoming until after the war was over, if then. The nation, still at war, had other priorities—and as such, the internment camps remained open through 1945 and into March 1946.[122] In December 1944, as it decided *Korematsu*, the Court also decided *Ex parte Endo*, holding that it was unconstitutional for the United States to continue to intern demonstratedly loyal Japanese Americans,[123] but most internees nevertheless remained in the camps well into 1945.

JAPANESE AMERICANS DURING WORLD WAR II (1985); ERIC L. MULLER, FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II (2001); EILEEN H. TAMURA, IN DEFENSE OF JUSTICE: JOSEPH KURIHARA AND THE JAPANESE AMERICAN STRUGGLE FOR EQUALITY (2013); WILLIAM MINORU HOHRI, RESISTANCE: CHALLENGING AMERICA'S WARTIME INTERNMENT OF JAPANESE-AMERICANS (2001); CHERSTIN M. LYON, PRISONS AND PATRIOTS: JAPANESE AMERICAN WARTIME CITIZENSHIP, CIVIL DISOBEDIENCE, AND HISTORICAL MEMORY (2012); Lon Kurashige, *Resistance, Collaboration, and Manzanar Protest*, 70 PAC. HIST. REV. 387 (August 2001); Harry Ueno et al., *Speaking for Ourselves: Dissident Harry Ueno Remembers Manzanar*, 64 CAL. HIST. 58 (Winter 1985). At any rate, contrary to the legend of the 442nd and the wartime newsreels of Japanese American internees happily playing baseball, not all internees were poster-children for U.S. wartime propaganda purposes.

[121] *Hohri*, 586 F. Supp. at 776.

[122] *Hohri*, 586 F. Supp. at 776 (noting that as of the end of the war in August 1945, over half of the internees remained in the internment camps). Some other sources report January 1946 as the date of the internment camps' final closure.

[123] *Ex parte* Endo, 323 U.S. 283, 301–04 (1944).

D. The Long Road to Reparations

After the war, in 1948, the federal government sought to lay the whole unfortunate episode to rest through passage of the American-Japanese Evacuation Claims Act as an exclusive legal remedy for the many Japanese Americans who lost property in the ill-planned, poorly organized chaos at the beginning of the internment program.[124] In theory, there was supposed to be an orderly process whereby the internees' property would be properly stored, sold, or held for them;[125] the reality was entirely different, and many internees lost everything they owned, including through the inability to pay taxes on farmland while interned.[126] More than 26,000 claims were filed and $37 million dollars paid out,[127] though not all former internees with valid claims participated in the program, and certainly not all losses were compensated. Meanwhile, Japanese Americans set about rebuilding their shattered lives, and the whole tragedy largely faded from the national memory for a time—except for certain historians, notably Roger Daniels, who helped to keep the issue alive during the period between the 1940s and the 1980s.[128]

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[124] *Hohri*, 586 F. Supp. at 784–85.

[125] *Id.* at. 775.

[126] *See, e.g.*, William Yardley, *Bob Fletcher Dies at 101; Helped Japanese-Americans*, N.Y. TIMES (Jun. 6, 2013), http://www.nytimes.com/2013/06/07/us/bob-fletcher-dies-at-101-saved-farms-of-interned-japanese-americans.html (Anglo Californian saved three Japanese American neighbors' farms by working them and paying the taxes through the early 1940s).

[127] *Hohri*, 586 F. Supp. at 785. Adjusted for inflation, the $37 million in 1948 dollars comes to between about $369 million and $1.14 billion in 2016 dollars, depending on the specific measurement approach used. The average payout in 1948 was around $1,400, between about $14,000 and $43,000 in 2016 dollars, between about $7,000 and $16,000 in 1988 dollars (when the U.S. Congress officially apologized and granted reparations for the internment). *See Relative Value of the US Dollar*, MEASURINGWORTH.COM, https://www.measuringworth.com/uscompare/ (last visited Jan. 12, 2018). Simpler measurement systems using the official U.S. Consumer Price Index produce the lower figure (around 1,000% growth) for 2016 dollars.

[128] *See* DANIELS, *supra* note 45.

By the 1980s, Asian Americans' rising self-awareness as a racial minority community that had long been subjected to racial discrimination in the United States helped rekindle interest and activism regarding the internment tragedy.[129] This new energy,

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[129] *See generally, e.g.*, DARYL J. MAEDA, CHAINS OF BABYLON: THE RISE OF ASIAN AMERICA (2009) (tracing new Asian American radicalism during the late 1960s and early 1970s). Although scholars recently have explored the roots of Asian American radicalism, it is likely fair to say that most solidly middle-class Japanese Americans probably were not particularly radical. It also may deserve emphasis here that the very concept of Asian Americans as a single group, and a brother-/sisterhood crossing national and ethnic divisions, is entirely a recent cultural artifact of the late-postwar United States resulting from the forgetting of longstanding ethnic animosities among Asian ethnicities and nationalities—at least in America. Through at least the 1940s, for instance, Chinese Americans and Japanese Americans often viewed each other with suspicion. *See, e.g.*, Brooks, *supra* note 82; Jane Hong, *Asian American Response to Incarceration*, DENSHO ENCYCLOPEDIA, http://encyclopedia.densho.org/Asian%20American%20response%20to%20incarceration/ (last visited Jan. 12, 2018). Activist historian and scholar Yuji Ichioka first introduced the term "Asian American" and formed the first multi-ethnic Asian American political alliance during the 1960s. *See* K. Connie Kang, *Yuji Ichioka, 66; Led Way in Studying Lives of Asian Americans*, L.A. TIMES (Sept. 7, 2002), http://articles.latimes.com/2002/sep/07/local/me-yuji7. At the time of the Second World War and for centuries before then, for instance, Chinese traditionally viewed the Japanese as culturally inferior, the Japanese viewed the Chinese as culturally inferior, both more powerful nations that took turns in lording over Korea viewed the Koreans as culturally inferior, the Koreans resented such perceptions, and all northern East-Asian nationalities likely tended to perceive more Southeast Asian nationalities as culturally inferior. *See, e.g.*, YOUNG, *supra* note 58, chapter 3 (noting the surge in Japan's sense of racial superiority and corresponding sense of the inferiority of its Asian neighbors during the 1930s); CHANG, *supra* note 60, at 30 (noting Imperial Japan's racist contempt for Koreans, but its more complex mixture of respect and resentment toward the Chinese and their culture). Japan's notoriously harsh, brutal treatment of the various southeastern Asian nationalities it subjugated—Filipinos, Vietnamese, Indonesians, etc.—clearly expressed Japan's sense of its ethnic superiority and also left seething resentments toward Japan to this day in many corners of Asia. A quick tour of the Internet also reveals that echoes of the traditional Asian ethnic pecking order continue today. *See, e.g*, "Yellow Gal," *Hierarchies*, YELLOW GAL: MUSINGS OF AN ASIAN AMERICAN GIRL (Jan. 22, 2011), http://yellowgal.blogspot.com/

together with the ongoing research of activist historians of the topic, helped lead to the appointment of a congressional Commission on Wartime Relocation and Internment of Civilians (CWRIC), which in 1982 produced a report, *Personal Justice Denied*, charging that the whole internment had been essentially groundless and resulted purely from racial animosity and wartime hysteria.[130] *Coram nobis* litigation in northern California during the 1980s reopened the internment cases and revealed that in the wartime litigation, the federal government had deliberately withheld key evidence tending to demonstrate the overall lack of reasons for fear or suspicion of Japanese Americans. On that basis, a federal district court formally reversed Fred Korematsu's criminal conviction for violation of the evacuation order.[131] Similar litigation was undertaken regarding wartime curfew violation defendants Gordon Hirabayashi and Minoru Yasui.[132] In 1983, Japanese American internment survivors and their descendants filed suit under the Fifth Amendment Takings Clause for full restoration of the property they lost on account of the bungled and unnecessary evacuation and internment.[133] The U.S. federal district court for the District of Columbia held that their claims were barred by the statute of limitations, and higher courts ultimately upheld the district court on appeal.[134] This result helped to further energize the movement

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2011/01/hierarchies.html; Sierra Adkins, *Experiencing the Asian Hierarchy Firsthand in a Korean Hagwon*, PILIPINO AMERICAN UNITY FOR PROGRESS, INC. (Nov. 14, 2013), http://www.unipronow.org/blog/experiencing-asian-hierarchy; *Do Asian People Stereotype Other Asians?*, ASK METAFILTER (Jun. 20, 2006), http://ask.metafilter.com/40602/Do-Asian-people-stereotype-other-Asians.

[130] COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 18 (1982), https://www.archives.gov/research/japanese-americans/justice-denied.

[131] Korematsu v. United States, 485 F. Supp. 1406 (N.D. Cal., April 1984).

[132] United States v. Yasui, 48 F. Supp. 40 (1942); Hirabayashi v. United States, 627 F. Supp. 1445 (1986); Hirabayashi v. United States, 828 F.2d 591 (1987); Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985).

[133] Hohri v. United States, 586 F. Supp. at 772–73.

[134] *Id.* at 786–91, 795; *see also* Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986); Hohri v. United States, 793 F.2d 304 (D.C. Cir. 1986); United

seeking an official apology and reparations from the United States Congress, which came in 1988 with passage of the Civil Liberties Act and a total payout of $1.6 billion—$20,000 to each surviving Japanese American who had suffered internment.[135] The enactment represented a belated political counter-wave to the earlier political tidal wave that had swept Japanese Americans from their homes.

Meanwhile, during the more than four decades between the internment and the reparations, throughout which time Japanese Americans theoretically could and frankly should have received more justice and an apology, the law and its courts failed to resolve the situation satisfactorily. The law and the courts instead waited for Congress to fix a problem that was too big for the law and the courts. Basically, only after Congress declared it politically safe to do so did the Supreme Court and lower courts fall all over them-

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States v. Hohri, 482 U.S. 64 (1987); Hohri v. United States, 847 F.2d 779 (Fed. Cir. 1988). There was initially uncertainty over whether the appeal should be heard by the D.C. Circuit or the Federal Circuit; the Supreme Court determined that was the Federal Circuit's prerogative. Judge Oberdorfer, in his district court opinion, noted that although the uncovering of dishonesty and withholding of information in the original Korematsu and Hirabayashi prosecutions did not overcome the statute of limitations, it did favor the congressional award of reparations then being discussed in the U.S. Congress. *Hohri*, 586 F. Supp at 795–96. In particular, Judge Oberdorfer explained why, in his view, the "new" evidence that had impressed the court in the Northern District of California was not really new, and had been available for decades from immediately after the end of the Second World War. *Id.* at 786–91.

[135] Civil Liberties Act of 1988, 50 U.S.C. app. §§ 1989b–1989b9 (current version as amended at 50 U.S.C. §§ 4211–4220 (2012 & Supp. III 2015). It's perhaps worth pointing out that Congress' intervention in Japanese American reparations was, inherently, a political solution to a messy, complicated legal/political problem—sort of a cutting of a legal Gordian Knot that the judiciary apparently was reluctant to try to untangle. To emphasize the political, symbolic, and not traditionally legal orientation of Congress' belated solution, all survivors received the same amount, regardless of their actual losses and, apparently, whether those losses had been partly or entirely compensated by the earlier federal program in 1948.

selves in saying how awful the Japanese internment decisions were.[136]

Congress, the CWRIC, and the Supreme Court in *Adarand Constructors*,[137] among others, would all seek to domesticate and pigeonhole *Korematsu* and *Hirabayashi* much too neatly and easily as simple, straightforward cases of racial discrimination. Yet although racial animosity was certainly there, there was also a great deal more, including major geopolitical rivalry between two powerful nations and resulting national security concerns specifically regarding citizens of a hostile foreign nation that initially appeared to be colorable if ultimately wrong. The Japanese wartime internment cases also serve as further prime examples of the overall incapacity of the judicial system to address and control war hysteria, along with the various constitutionally embarrassing First World War-era First Amendment cases (which mostly involved white Americans),[138] the Cold War cases (ditto),[139] and even more recent

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[136] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 635 (1989); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564 n.12 (1990); Hamdi v. Rumsfeld, 542 U.S. 507, 542 (2004) (Souter, J., dissenting); Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting). Circuit court judges actually started challenging *Korematsu* somewhat earlier than the Supreme Court, although such opinions mostly appeared after the *coram nobis* litigation, and after the reparations movement in Congress was well underway. *See, e.g.*, United States v. Fern, 484 F.2d 666, 670 (7th Cir. 1973) (noting the "unfortunate ruling in *Korematsu*"); Culver v. Secretary of Air Force, 559 F.2d 622, 636 (D.C. Cir. 1977) (noting criticism of *Korematsu* and Justice Murphy's "stinging dissent"); United States v. Melendez-Carrion, 790 F.2d 984, 1013 n.5 (2d Cir. 1986); *In re* Kingsley, 802 F.2d 571, 583 (1st Cir. 1986); McDonell v. Hunter, 809 F.2d 1302, 1310–11 (8th Cir. 1987); Bay Area Peace Navy v. United States, 914 F.2d 1224, 1232–33 (9th Cir. 1990); Hartness v. Bush, 919 F.2d 170, 175 (3d Cir. 1990) (Edwards, J., dissenting); Estate of Clayton v. C.I.R., 976 F.2d 1486, 1491 n.16 (5th Cir. 1992) [and many more]. The circuit courts were also somewhat freer in their use of the Murphy and Jackson dissents from *Korematsu*.

[137] *See* discussion of *Adarand*, *infra* notes 214–18 and surrounding text.

[138] *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616 (1919). Schenck and Abrams were likely both Jewish,

examples from the War on Terror. To treat *Korematsu* and *Hirabayashi* as mere examples of garden-variety racial discrimination in order to make them easier to interpret and process legally, and to leave out the actual context of the Second World War almost entirely, is to do violence to history and, perhaps, mischief to the law.

Korematsu, decided in the shadow of the greatest global crisis yet experienced, came long after Japanese Americans already had been interned, but long before the whole hideous mess of the Second World War had been cleaned up—and before the politics, emotions, and anger triggered by that cataclysm had settled down. The U.S. Supreme Court, confronting this awful situation, gave a belated (and reluctant) stamp of approval to a decision made earlier with incomplete facts in a state of crisis, magnified by wartime hysteria and tinged with racial hostility, involving 120,000 mostly innocent, harmless people.[140] It was truly a "great" case—the kind that produces "bad law."

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however, and thus ethnically distinctive, but they were also not the only wartime free speech defendants.

[139] *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951).

[140] It is perhaps worth pointing out here what was before the Supreme Court, speaking practically and politically: in a situation where 120,000 Japanese Americans had been evacuated and interned, ultimately needlessly, and were still in the internment camps, the Court, by declaring the evacuation and internment orders null and void, could have undercut the Roosevelt Administration and the whole war effort, and could also have triggered angry political backlash from Americans who had not forgotten Pearl Harbor, while effectively doing at best little, at worst nothing whatsoever, for the internees, who were doomed to remain not the nation's top priority as long as the war continued. Grandiose theory about the power of the Law and the Court aside, the Court, in actuality, probably had little power in late 1944 except, perhaps, to make the whole situation worse. Dissenters such as Justices Murphy and Jackson were in the perhaps enviable position of grandstanding and getting to say that they were right without really stirring up the hopeless political reality of the situation. In a classic article on the wartime cases involving Japanese Americans, Eugene V. Rostow, who saw the whole matter as an embarrassing legal train wreck and sympathized with the Japanese American internees, skewered Justice Jackson's dissent, in particular, as fundamentally absurd, calling it a "fascinating and fantastic essay in nihilism." *See* Rostow, *supra*

Justice Hugo Black, author of the *Korematsu* opinion, never cited the case again for any reason throughout his long tenure on the Supreme Court. He probably had the right idea regarding how to handle a case that unique and toxic.[141]

Part III: Problems with Precedent

Moving from the realm of history to that of law, this section addresses longstanding problems with the doctrine of precedent in general, and with the distinction between holdings and dicta in particular—problems that are heavily implicated in *Korematsu*'s strict scrutiny lineage. This section also briefly discusses a system that was devised to track *Korematsu*'s full precedential footprint and allow a full forensic investigation of it, to confirm just how, when, and by whom the case has been used—explicitly, not merely implicitly—in later judicial opinions.[142]

A. Precedent and Its Discontents

Notwithstanding that precedent is supposedly central and fundamental to the whole Anglo-American common law system, those relatively few legal scholars who have studied the topic in depth have long agreed that precedent, and how it functions and how it is created, is both dimly understood and massively under-theorized within the law and legal scholarship. For decades, legal scholars have bemoaned both the overall lack of empirical analysis of precedent as well as a resulting lack of theorization. To pick just a few examples:

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note 40, at 510–12. Rostow was likely in almost full agreement with Justice Murphy's ringing dissent, however.

[141] Justice Black also apparently went to his grave believing that the Court had made the correct decision in *Korematsu*.

[142] Implicit references to earlier cases are interesting in terms of legal-intellectual history but should have no precedential value. Only explicit citations of cases in later cases can have precedential legitimacy, by definition.

- "[T]he nature and effect of [precedent] has been woefully understudied . . . ."[143] (2006);
- "Perhaps the most important, yet understudied, area of legal research involves precedent. . . . [T]here has been only limited theorizing about, and relatively little empirical investigation of, the operation of precedent . . . "[144] (2005);
- "[O]ur theoretical understanding of the practice [of using precedent] is still at a very primitive stage . . ."[145] (1989); and
- "The use of precedents to create rules of legal obligation has . . . received little theoretical or empirical analysis" (1976).[146]

Given this overall paucity of empirical data and theorization regarding precedent in general, intensive case studies of the actual operation and evolution of precedent in practice regarding a particular precedential lineage should be, inherently, welcome contributions to legal scholarship.

Of course, there are perhaps an almost infinite number of different lines of precedent that could be studied, many of them also relatively important—which might raise the question, why this one in particular?

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[143] Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?* 100 NW. U. L. REV. 517, 517, 518 (2006). For the record, a growing number of empirical studies of various different bodies of law and precedent have been appearing particularly within the past decade or so.

[144] 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, 1157 (2005).

[145] Larry Alexander, *Constrained by Precedent,* 63 S. CAL. L. REV. 1, 3 (1989).

[146] William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & ECON. 249, 250 (1976). *See also* Anton-Hermann Chroust, *Law: Reason, Legalism, and the Judicial Process*, 74 ETHICS 1, 3 (1963) ("[L]egal rules and principles are never fully known and never fully clear, except perhaps to some particularly benighted first-year law student"; "Legal reasoning . . . is in fact 'reasoning' from concrete case to concrete case within a loosely defined and probably undefinable concatenation of half-intuitive and half-discursive mental operations that are often expressed in such vague terms as 'precedent,' *stare decisis*, and 'legal authority'").

The doctrine of strict scrutiny certainly is a legal doctrine of particular interest and importance, as well as one that has been politically controversial from the Civil Rights era and early desegregation through the later political battles over affirmative action and the Supreme Court's curtailing of civil rights activism from the late 1970s onward. The major cases regarding affirmative action, whether in higher education or elsewhere,[147] have drawn an unusually high level of general public attention.[148] Thus the progeny of *Korematsu*, and the whole doctrine of strict scrutiny emerging from *Korematsu*, represent a topic of unusual political interest that produced an unusually politically sensitive, high-stakes body of precedent.

Korematsu's very interestingness, however, admittedly may raise another theoretical concern regarding the empirical study of precedent: namely, as a notorious, (in)famous case, it arguably is not representative of "normal" precedent and law emerging from more "normal" cases. Judge Richard Posner has pointed out how the U.S. Supreme Court is inherently and inevitably a more political court than lower courts, deciding those relatively few, exceptional, politically problematic cases which could not be dealt with through more normal legal processes the way the vast majority of legal cases are.[149] In keeping with this awareness of the inherent

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[147] *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); Adarand Constructors, Inc. v. Pena 515 U.S. 200 (1995); Grutter v. Bollinger 539 U.S. 306 (2003); Fisher v Univ. of Tex. at Austin, 570 U.S. 297 (2013).

[148] *See, e.g.*, Cass R. Sunstein, *Political Deliberation, Affirmative Action, and the Supreme Court*, 84 CALIF. L. REV. 1179, 1195, 1198 (1996), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12406&context=journal_articles (noting "considerable public attention" and "a great deal of media attention" focused on affirmative action cases and programs); *Supreme Court Tackles Debate over Affirmative Ac*tion, PBS NEWSHOUR (Apr. 1, 2003), http://www.pbs.org/newshour/updates/law-jan-june03-scotus_04-01-03/ (noting "the high amount of public attention the cases have garnered").

[149] *See* RICHARD A. POSNER, HOW JUDGES THINK 27–28, 269–75 (2008). This article was being written during the time when Judge Posner announced his retirement from the Seventh Circuit without even taking senior status. Not-

exceptionalism of Supreme Court jurisprudence, legal scholars exploring precedent recently have tended to focus on larger batches of opinions involving more "normal" law from lower courts.[150] While such points are all well-taken, the crucial importance of *Korematsu*, directly or indirectly, in all subsequent civil rights litigation regarding strict scrutiny of suspect classifications frankly justifies closer analysis of what is admittedly a very special, unusual—and political—case and precedential lineage.

In particular, *Korematsu*'s tangled history includes a peculiar trajectory that invites closer scrutiny. After serving as a precedential wellspring of the Civil Rights movement's rapid forward march based upon the Fourteenth Amendment equal protection doctrine during the 1960s,[151] the strict scrutiny doctrine that

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withstanding this sudden change of status, he will remain "Judge Posner" in the minds of many of us who attended law school and entered practice during his prolonged reign as an unusually prolific judge and the leading legal scholar in the United States.

[150] *See, e.g.*, Lindquist & Cross, *supra* note 144; Frank B. Cross, *Decision-making in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457 (2003); DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS (2002). For examples of earlier studies tracing the full precedential footprints of a particular legal doctrine at levels lower than that of the U.S. Supreme Court, see Scott Hamilton Dewey, *The Case of the Missing Holding: The Misreading of* Zafiro v. United States*, the Misreplication of Precedent, and the Misfiring of Judicial Process in Federal Jurisprudence on the Doctrine of Mutually Exclusive Defenses*, 41 VAL. U. L. REV. 149 (2006); Scott Dewey, *Irreconcilable Differences: The Ninth Circuit's Conflicting Case Law Regarding Mutually Exclusive Defenses of Criminal Codefendants*, 8 BOALT J. CRIM. L. 2 (2004); Scott Dewey, *How Judges Don't Think: The Inadvertent Misuse of Precedent in the Strange Career of the Illinois Doctrine of Antagonistic Defenses, 1876–1985*, 9 J. JURIS. 59 (2011). These studies, and other research covering all fifty states, show that the doctrine of mutually exclusive defenses was, in every jurisdiction, basically the misbegotten result of language haphazardly taken out of context or borrowed from some foreign jurisdiction and assumed into existence without any proper holding or reasoning process.

[151] *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954) (the companion opinion to the more famous Brown v. Bd. of Educ., 347 U.S. 483 (1954)); McLaughlin v. Florida, 379 U.S. 184 (1964); Loving v. Virginia, 388 U.S. 1 (1967).

Korematsu spawned later became a threat to affirmative action and the basis for torpedoing programs oriented toward enhancing racial equity and justice.[152] Indeed, strict scrutiny arguably became a kind of "colorblind straitjacket," according to which any racial classification of any sort in any state or federal law was presumed to be basically dead on arrival at the Supreme Court as strict scrutiny moved toward being "strict in theory, but fatal in fact."[153] So legal colorblindness, a tool or doctrine that initially appeared to be useful for clearing away the lingering undergrowth of de jure segregation and discrimination in the 1950s–1960s, later proved to be a major obstruction for efforts to challenge continuing de facto discrimination and inequality from the 1970s onward.[154] Law professors

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[152] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors, Inc. v. Pena 515 U.S. 200 (1995); Grutter v. Bollinger 539 U.S. 306 (2003); Fisher v Univ. of Tex. at Austin, 570 U.S. 297 (2013). Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), was a rare exception to this overall trend.

[153] Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring). *See also, e.g.*, Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Newer Model for Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (origins of "'strict' in theory and fatal in fact" language); *but see also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 833–41 (2006) (finding that 27% of race-based suspect classifications, usually for affirmative action purposes, survived strict scrutiny by federal courts).

[154] *See, e.g.*, Girardeau A. Spann, *Writing Off Race*, 63 L. & CONTEMP. PROBS. 467, 471 n.30 (Spring 2000) ("Notwithstanding Supreme Court dicta to the contrary, … the strict equal protection scrutiny now applied to racial affirmative action has always proven to be fatal since the Court's now-discredited decision in *Korematsu* [.]"). *But see also* Winkler, *supra* note 153, at 833–41. It is hard to know whether the discrepancy in results reported between Spann and Winkler might be due to their focusing on a differing time period, magnitude of case, or universe of cases. Even accepting Winkler's results, of course, nearly three-quarters of racial classifications were rejected during his period of study. Moreover, the fact that strict scrutiny usually shoots down programs but doesn't always might tend to indicate, more than anything, that rather than controlling the decision and judges' discretion as it is supposed to, strict scrutiny remains somewhat arbitrary in application, and perhaps rather closer to "what the judge had for breakfast" than it should in theory.

involved in Critical Race Theory, among others, have found fault with the colorblind straitjacket and have questioned its intellectual and legal soundness.[155]

Thus, *Korematsu* and its progeny are legally and historically problematic, and there is a special reason to focus on what exactly *Korematsu* said, to determine whether later cases may have over-summarized, over-distilled, or otherwise over-loosely used language in *Korematsu* over time to the point where *Korematsu* is now generally presumed to have said things it may actually not have. In addition to the possibility that *Korematsu* has been misread or misinterpreted, there is the further question regarding its precedential value: given that the *Korematsu* opinion has been largely discredited in both law and history—and even has been compared to the likes of *Dred Scott v. Sandford* and *Plessy v. Ferguson*[156]—how can there be any basis for anything built on this tainted foundation at all?

B. Dicta vs. Holding: A Blurred Boundary

Closely associated with the broader problems of precedent, and of particular importance regarding the legal history of *Korematsu*, is the problem of properly defining and distinguishing holdings from dicta—and the problem of courts and lawyers routinely blurring

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[155] *See, e.g.*, Gotanda, *supra* note 6, at 2–3 and generally; Sonu Bedi, *Collapsing Suspect* Class *with Suspect* Classification: *Why Strict Scrutiny is Too Strict and Maybe Not Strict Enough*, 47 GA. L. REV. 301, 303–07 (2013); Tanya Washington, *Jurisprudential Ties That Blind: The Means to End Affirmative Action*, 31 HARV. J. RACIAL & ETHNIC JUST. 1000 (2015); David Schraub, *Unsuspecting*, 96 B.U. L. REV. 361 (Mar. 2016). Justice Thurgood Marshall already complained about the growing rigidity of strict scrutiny in *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting).

[156] Dred Scott v. Sandford, 60 U.S. 393 (1857); Plessy v. Ferguson, 163 U.S. 537 (1896). Justice Scalia specifically grouped *Korematsu* with these other infamous cases in *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting vehemently in a partial-birth abortion case).

that boundary.[157] As with precedent generally, in theory, the distinction between holdings—words and statements in legal opinions that have, and are intended to have, enforceable legal impact—and dicta—legally extraneous words and statements with no such impact—should be crystal clear.[158] In reality, it is not[159]—even though this very distinction is crucial to maintaining the legitimacy of the law.[160] As Judith Stinson has observed, "[T]oo often lawyers argue for, and judges treat, extraneous statements made in a prior case—that is, dicta—as holding."[161] She notes that this "ratcheting up of persuasive law into binding law is problematic" in various ways: "To the extent that courts treat dicta as holding, they are more likely to reach incorrect decisions, to exceed their judicial authority, and to generate illegitimate results."[162] Although courts, in considering the cases before them, sometimes try to be helpful to litigants by distinguishing the present case from other, hypothetical cases in which the outcome might be different,[163] such hypothetical discussion is not legally binding. As legal scholars have pointed

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[157] *See generally* Stinson, *supra* note 6. Stinson provides a range of examples of how this blurring of boundaries occurs and the legal consequences, as well as a helpful overview of what various judges and legal scholars have said on the issue. I have followed Stinson's approach in attempting to standardize use of dicta in the collective plural form, rather than trying to distinguish between the singular and plural forms where multiple statements are often involved.

[158] *Id.* at 223–24 (discussing efforts to clearly define holdings and dicta).

[159] *Id.* at 219–20 and generally. Stinson adds, "A holding is generally thought of as those parts of a judicial opinion that are 'necessary' to the result. Dictum, on the other hand, is simply anything in a judicial opinion that is *not* the holding. But the distinction is more difficult to capture in practice than these narrow definitions suggest." *Id.* at 223. Although this point is very well taken, it's also worth pointing out that there is some language in court opinions that does not fall within any gray area and is perfectly easy to distinguish from a holding: for instance, language diametrically opposed to the holding that refers to entirely different, hypothetical situations. *See* discussion *infra*.

[160] *Id.* at 232 ("Elevating dicta into holding . . . creates instability in the law that threatens its very legitimacy." [Paragraph structure altered.]).

[161] *Id.* at 221.

[162] *Id.*

[163] *Id.* at 230 (discussing courts' honest efforts to assist future litigants in understanding legal issues).

out, "When a court suggests what the proper result should be under circumstances not before that court, the case in controversy limitation is violated" with regard to federal courts, while state courts are bound by parallel separation of powers limitations that prohibit the judicial branch from acting in a legislative capacity.[164]

As already noted, the U.S. Supreme Court is different from other courts in certain fundamental ways, including being an inherently more political court deciding inherently more political issues.[165] Because the Supreme Court often discusses major cases at great length, it is also an unusually dicta-generating court[166] that provides discussion of issues from potentially many angles, including in concurring or dissenting opinions that, at least according to legal theory, may (or in the case of crucial, majority-winning concurrences, may not) be legally irrelevant to the holdings.[167] Yet notwithstanding its special power and status, the Supreme Court is still a court of law, and is, for the sake of its own legitimacy, still obliged to follow the law and most of the rules that apply to other courts. For example, if the Supreme Court, due only to its unusualness, were free to ride over the distinction between dicta and holdings, then that might leave the rest of us not with "the rule of law," but only rule by persons. For this reason, even at the exalted

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[164] *Id.* at 228 (further noting that "courts should decide only the cases they are presented with, not future disputes").

[165] *See* POSNER, *supra* note 149, at 27–28, 269–75; see also Stinson, *supra* note 6, at 242–44, and the sources cited there.

[166] Stinson, *supra* note 6, at 244 (noting, inter alia, "[B]ecause they are so long Supreme Court opinions simply have more space to include dicta.").

[167] Regarding the precedential confusion and uncertainty caused by plurality and concurrence opinions, see generally, e.g., Melissa M. Berry et al., *Much Ado about Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation after* Rapanos, 15 VA. J. SOC. POL'Y & L. 299 (2008); James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515 (2011); Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L. REV. 933 (2013); Ryan C. Williams, *Questioning* Marks: *Plurality Decisions and Precedential Constraint,* 69 STAN. L. REV. 795 (2017).

level of the Supreme Court, the distinction between holding and dicta arguably matters, or should matter.[168]

If so, then it is perhaps ironic that the language at issue in *Korematsu* has long been recognized as dicta by various notable legal scholars.[169] Justice Sandra Day O'Connor also said as much.[170] Some scholars also note the irony in *Korematsu*'s dicta becoming a powerful legal principle while its holding went in the dustbin of history.[171] This suggests perhaps a certain breezy nonchalance regarding the Supreme Court's use of dicta—that the Court can do what it likes with language because it is *the* Court, and that its transmutation of dicta into holding is no problem. To

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[168] Again, see generally Stinson, *supra* note 6. As her article title notes, "Why Dicta Becomes Holding and *Why It Matters*") (emphasis added). Stinson argues convincingly that it does matter.

[169] *See, e.g.*, *"Suitable Home" Tests under Social Security: A Functional Approach to Equal Protection*, 70 YALE L.J. 1192, 1197 (1961); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 772 (1969); Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 22 n.18 (1977); Gotanda, *supra* note 6, at 46 n.182; Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan's Account of* Regents of the University of California v. Bakke, 19 YALE L. & POL'Y REV. 341, 362 n.92 (2001); Jack M. Balkin, Plessy, Brown, *and* Grutter*: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1707 (2005); Laurence H. Tribe, *Soundings and Silences*, 115 MICH. L. REV. ONLINE 26, 63 (2016).

[170] Adarand Constructors v. Pena, 515 U.S. 200, 214.

[171] *See, e.g.*, Seth F. Kreimer, *Rays of Sunlight in a Shadow "War": FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1215 n.314 2007) (noting "*Korematsu*, a case whose holding was transformed from precedent to anti-precedent, and whose dictum regarding 'strict scrutiny' of racial classifications became the keystone of two generations of equal protection analysis."); Mher Arshakyan, *The Impact of Legal Systems on Constitutional Interpretation: A Comparative Analysis: The U.S. Supreme Court and the German Federal Constitutional Court*, 14 GERMAN L.J. 1297, 1304 (2013) ("When Justice Hugo Black in *Korematsu* said all legal restrictions which curtail the civil rights of a single racial group are immediately suspect, no one could have imagined at that time that this expression that was once dicta would be used as a key libertarian principle in future cases.")

the extent that attitude prevails, this article seeks to challenge it and re-problematize the issue. For any system of law, necessarily, must be concerned with making decisions in the "right" way—according to established legal rules—as well as seeking "right" outcomes,[172] or there is no need for the law, and we can all place ourselves in the hands of a benevolent dictator—or a benevolent, unelected super-legislature comprised of nine extremely privileged senior citizens wearing black robes. At any rate, if the related doctrines of precedent and *stare decisis* have any meaning, then the distinction between holding and dicta, between what is actually decided and what is merely discussed, should also have meaning at all levels of judicial process. And if these doctrines really do not matter and are in the end only smoke and mirrors, then perhaps we should be honest with ourselves and dispense with them.

C. The Database

A relatively quick check of known major cases citing *Korematsu* on civil rights issues suggests that there has been relatively little meaningful or in-depth commentary from the Court regarding *Korematsu*, particularly in the early decades, despite it becoming a cornerstone for the entire edifice of Fourteenth Amendment strict scrutiny that has developed since the Second World War.[173] Yet in confronting a case as important and fraught with controversial legal, political, and historical overtones as *Korematsu* and its progeny, it seemed desirable to be able to confirm, modify, or reject that overall impression more conclusively. To do that, a relatively full forensic investigation of *Korematsu*'s entire precedential footprint was conducted, including the careful tracing of every federal court opinion at the Supreme Court or circuit court level that cited or merely

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[172] For a thoughtful reflection on the balance to be struck between procedural fairness and substantive justice and the ways different legal theorists have sought to strike that balance, see generally Heidi Margaret Hurd, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 S. CALIF. L. REV. 1417 (1988). *See also, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[173] *But see* note 6, *supra*, regarding *Carolene Products* and *Skinner*.

mentioned *Korematsu* (or *Hirabayashi*) from the 1940s onward. Along with tracking all direct (primary) citations of *Korematsu*, indirect (secondary) use of *Korematsu* regarding strict scrutiny was also tracked by closely following the precedential lineages of the later Supreme Court opinions that used *Korematsu* (or *Hirabayashi*) to construct the edifice of strict scrutiny: *Bolling v. Sharpe*,[174] *McLaughlin v. Florida*,[175] and *Loving v. Virginia*.[176] All such resulting data was compiled into sortable spreadsheets with dozens of separate categories.[177] The goal was that rather than the evolution of

[174] Bolling v. Sharpe, 347 U.S. 497 (1954).

[175] McLaughlin v. Florida, 379 U.S. 184 (1964).

[176] Loving v. Virginia, 388 U.S. 1 (1967). In theory, a perfect full forensic precedential investigation would include not only primary and secondary uses of a case or doctrine, but also tertiary and beyond—although to conduct such analysis might also be beyond normal human patience or endurance. For good measure, other cases and their progeny that might have expanded the definition of strict scrutiny, indirectly if not directly, were also included in the overall precedential dragnet, such as *Ex parte Endo*, 323 U.S. 283 (1944); *Oyama v. California*, 332 U.S. 633 (1948); and *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948). *Oyama* and *Takahashi*, however, which were cases involving the assertion and denial of Japanese American rights in the immediate postwar period, developed limited independent precedential traction, while *Endo*, which did develop independent precedential traction lasting for decades up to the present, has been limited to the context of national security, loyalty, and habeas corpus.

[177] For example, there are 59 separate Supreme Court cases including 98 separate opinions (concurrences and dissents along with majority or plurality opinions) producing 119 citing instances concerning *Korematsu* from the 1940s through 2013. At the federal circuit level, there are 160 cases including 169 opinions and 173 citing instances. This tally represents all identifiable citations of *Korematsu* as precedent and excludes early or later cases specifically associated with the wartime litigation over the Japanese American internment. Data categories include, inter alia, type of opinion (majority/plurality, concurrence, dissent); the Justice who authored the opinion; Justices who joined the opinion (for majorities and pluralities as well as concurrences or dissents); related cases along with or other than *Korematsu* cited in the opinion (including the aforementioned 1943 *Korematsu* opinion); whether the opinion was an affirmance or a reversal; the type or topic of the case (e.g., discrimination, criminal sentencing, antiradicalism, presidential power, war profiteering); what sort of right was at issue in the case; whether the case

strict scrutiny doctrine being simply lost in the "Bramble Bush"[178] as with most other lines of precedent, it would be possible to trace and analyze each separate use of *Korematsu*, and hence each separate node in the whole complex network of precedent that ultimately produced strict scrutiny as we know it today.

Although this process was rigorous, it also proved to be perhaps overkill in the *Korematsu* context. The hope was that carefully tracking all citations of relevant cases might reveal interesting patterns to help justify courts' reliance upon the *Korematsu* lineage. Instead, the process merely confirmed the results of simpler searches indicating that there was indeed very little meaningful analysis of *Korematsu* by the Supreme Court or federal circuit courts during the period between 1944 and 1967 when the equal-protection strict scrutiny doctrine was—to put it indelicately—basically assumed into existence in keeping with the perceived political needs of the times.[179] The following section addresses that process in detail.

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quoted *Korematsu* or related cases; the depth of use/analysis of *Korematsu* or related cases; in which decade the case was decided; the historical period in which the case was decided; the presidential administration at the time of decision (e.g., "Nixon"); and the Chief Justice/Court at the time of decision (e.g., "Rehnquist Court").

[178] Just a rhetorical nod to Karl Llewellyn's famous introduction to law and the study of law, THE BRAMBLE BUSH (1930).

[179] Leaving aside the central issue of strict scrutiny, reading through and categorizing the various cases citing *Korematsu* also reveals other potentially interesting patterns regarding legal or general history that might otherwise be difficult to keep track of as they flicker on or off amidst a large number of cases over a long span of years. Thus *Korematsu* and its progeny potentially offer a fascinating broader longitudinal case study in how judicial language evolves, and precedent accretes atop earlier precedent, to construct doctrines that perhaps could never have been imagined at the outset, in an ongoing feedback relationship with wider historical trends and patterns. That is something for a future study, however.

Part IV—Legal Alchemy: Transmutation of Dicta to Holding in the *Korematsu* Lineage

This section discusses in detail how, over the course of decades, the U.S. Supreme Court gradually erased the distinction between dicta and holding regarding *Korematsu*. A detailed investigation is warranted because, as always in law, it is not just the fact that a decision is reached, but how it is reached, that matters. Legal opinions only have legitimacy to the extent that they are arrived at through an appropriate and legitimate process. In particular, at least in theory, for common law decisions to be legitimate for use as precedent, they must clearly state and leave a written record of the basis for the decision, which should in fact be the actual basis for that decision, not a mere rationalization or pretext.

A careful, thorough tracing of the emergence of the Fourteenth Amendment strict scrutiny doctrine from *Korematsu*, however, indicates that the entire edifice of strict scrutiny was erected on a remarkably slender, tenuous precedential foundation. It appears that common-sense dicta in *Korematsu*, situated at the very beginning of the majority opinion far from any legal discussion or analysis and seemingly never intended to be part of any actual holding, lay mostly fallow for a decade, then was summarized very briefly and cited without quotation in passing in a footnote together with *Hirabayashi* in *Bolling*, which itself appears to have been basically a quick, thinly reasoned afterthought tacked onto its bigger, better-known companion case, *Brown v. Board of Education*.[180] The *Bolling* language on strict scrutiny, in context, appears to be merely later dicta citing earlier dicta. Both the *Korematsu* and *Bolling* (and *Hirabayashi*) language then lay fallow for another decade before being rediscovered and treated as full-blown citable authority in *McLaughlin* in 1964 and *Loving* in 1967—both of which used all three cases only as quick sound-bites in passing and did not discuss or analyze them at any length. Thereafter, the newly transmuted

[180] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

holding entrenched itself progressively further in the law by sheer repetition in passing.[181]

What follows is a close look at the relevant language from *Korematsu*, *Hirabayashi*, and their key progeny in erecting the edifice of what we now know as the strict scrutiny doctrine. Particularly popular passages, frequently taken out of context and cited or quoted in later opinions, are italicized. In keeping with the doctrine of precedent, the purpose is to highlight exactly what a particular opinion said, as well as exactly what later opinions said the earlier opinion said.

Hirabayashi (1943; Chief Justice Stone) at p. 100:

> *Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.* *** [Citations of earlier cases] We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. *Because racial discriminations are in most circumstances irrelevant and therefore prohibited*, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others.[182]

Although the language in *Hirabayashi* comes from the section of the opinion in which the Court is discussing and delivering its holding, in context, it is clear that the key passages cited by later courts to support strict scrutiny are dicta and not part of the holding. The Court makes it clear that the curfew imposed on Japanese Americans along the West Coast is not a "distinction[]

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[181] Again, see Leval, *supra* note 2, at 1263 ("Thoughtless repetition should not convert a dictum into law, but it manages to do so.").
[182] Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

between citizens *solely* because of their ancestry" or a "legislative classification or discrimination based on race *alone*"; the policy in question was based on the fact that Japan attacked the United States and the two nations were at war, so from that the Japanese Americans were, inevitably, differently situated from other nationalities. Similarly, the popular, later much-quoted language regarding the generally irrelevant and prohibited nature of racial discriminations is immediately followed by language explaining why here, the discrimination is neither irrelevant nor prohibited. The holding of the case was, of course, that a curfew applied specifically to Japanese Americans was justified under the circumstances. Thus all the key language from *Hirabayashi* used in later cases to support strict scrutiny is both extraneous and contrary to the holding—i.e., it is dicta.[183]

This is of course not to say that the *Hirabayashi* dicta was legally or morally "wrong." It was an appropriate general statement of fundamental fairness, decency, and common sense, as well as a way of distinguishing the United States, in theory if not always in practice, from the viciously, brutally racist, fascist nations against which the nation was then fighting. But it has, and presumably was intended to have, no more specific, enforceable legal effect than any similar general rhetoric coming from the White House, Congress, the wartime "Why We Fight" propaganda films, or any other institutions in American society. What is, arguably, legally "wrong" is to treat such language as a holding, or as a specific, enforceable legal commandment.

Korematsu (1944; Justice Black) at p. 216:

> *It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.* That is not to say that all such restrictions are unconstitutional. *It is to say that courts must subject them to the most rigid scrutiny.* Pressing public necessity may sometimes justify the existence of such restrictions; *racial antagonism never can.*[184]

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[183] *See* Stinson, *supra* note 6, at 223–25.

[184] Korematsu v. United States, 323 U.S. 214, 216 (1944).

The key language from *Korematsu* appears in the second paragraph of the majority opinion, several pages away from all the discussion that was the actual holding. So there is no real risk of confusing it with the holding based upon mere proximity. As with *Hirabayashi*, all the key statements later used to support strict scrutiny are clearly conditioned in context. Although "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," not "all such restrictions are [necessarily] unconstitutional." Such restrictions should be "subject … to the most rigid scrutiny." [Here, notably, Justice Black selected the rhetorical flourish of "the most rigid scrutiny"; one might well wonder whether he ever would have imagined that this particular language, a figure of speech, could touch off unending debate about how strict the very strictest scrutiny must be, or whether United States constitutional law would have come out differently had he used any similar expression such as just "rigid scrutiny" or "very rigid scrutiny"?] The opinion notes that pressing public necessity may in fact sometimes justify such restrictions, but that "racial antagonism never can." It would have been clearer and more precise if Justice Black, echoing Chief Justice Stone in *Hirabayashi*, had added the additional qualification, "racial antagonism *alone* never can," given that the fact of Japan and the United States being at war necessarily added a factor beyond racial antagonism alone, as the holding makes clear.[185] Again, as with *Hirabayashi*, the majority opinion in *Korematsu* went on to find that the evacuation and internment of West-Coast Japanese Americans was justified under the circumstances, so again, the various popular, later much-quoted language supporting strict scrutiny is dicta that is extraneous and contrary to the holding. And again, the *Korematsu* dicta offers a general statement of fairness, decency, and common sense, appealing to basic values the nation should always uphold (even if it did not always do so in practice).[186]

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[185] *Id.* at 217–19.

[186] Given the taking of words, even figures of speech, out of context from *Hirbayashi* and *Korematsu* and the subsequent over-literal worshipping of those words as commandments, the author is reminded of the scene from Monty Python's "Life of Brian," where Brian, mistaken for the Messiah,

Notably, however, the language in *Korematsu* is perhaps even easier to take out of context than that in *Hirabayashi*. The (resounding, and perhaps slightly grandstanding?) rhetoric is more absolute and unqualified: "the most rigid scrutiny"; "racial antagonism never can." The *Korematsu* language also starts to take the form of a seemingly enforceable legal commandment: "courts must subject them . . . ." Although Justice Black presumably did not intend this result, placing this language far away from the actual holding may have made it that much easier for later courts to ignore the actual holding altogether, which might also partly account for *Korematsu*'s greater popularity than *Hirabayashi* in the strict scrutiny lineage.

The *Korematsu* language also includes a qualification or distinction that would be overridden or ignored in later cases: it refers explicitly to "all legal restrictions which *curtail the civil rights* of a single racial group" as "immediately suspect." Thus Justice Black's dicta applies only to legal restrictions that implicate civil rights (as established and defined by legislatures and/or courts of law), not to any hypothetical non-legal restrictions, legal restrictions affecting only lower-level rights or privileges, or supposed civil rights that are only claimed but not legally established. [187] Later courts often

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irritably tells his horde of admiring worshippers to "Piss Off!" Whereupon the worshippers reply, "How shall we piss off?" Yes, the example is absurd, but hyper-literal analysis of the meaning of "most rigid scrutiny" is not so different. Moreover, if any subsequent court or opinion is going to make significant results hang on over-analysis of a particular combination of words, seemingly they should at least make sure such words are from a holding, not dicta. MONTY PYTHON'S LIFE OF BRIAN (HandyMade Films 1979).

[187] As another peculiar example of the perverse potentialities that arise from taking certain language in holdings or dicta too literally while perhaps not taking other language literally enough, note that the *Korematsu* dicta specifically applies only to "all legal restrictions which curtail the civil rights *of a single racial group*." Justice Black and the Court were, of course, confronted with policies that singled out one particular (ethnic and national origin, not racial) group for harsher treatment and were not considering wider possibilities of discriminations covering multiple groups. Yet read over-literally, the dicta in *Korematsu* can be interpreted to say that racial discriminations might be acceptable so long as they apply to more than one racial group. That in

have tended to erase all such possible distinctions by treating any restrictions of any sort relating to race as immediately suspect (and subject to the most rigid scrutiny).[188]

Bolling (1954; Chief Justice Warren) at p. 499:

> *Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.*[3] [FN 3: Citing (only briefly and without quotation or further explanation) *Korematsu* at 216; *Hirabayashi* at 100.] As long ago as 1896, this Court declared the principle 'that the constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the states, against any citizen because of his race.' …."[189]

Chief Justice Warren's invocation of both *Korematsu* and *Hirabayashi* in *Bolling* is, obviously, remarkably brief and unspecific. It drops the "curtailing civil rights" qualification in *Korematsu* and indicates—ratcheting up the rhetorical level somewhat—that any racial classification of any sort regarding any issue is not only "immediately" but "constitutionally" suspect. Warren's elliptical, over-distilled statement here also invites hypothetical challenges: is anything contrary to "our traditions" (whatever those may be, and never defined any more precisely here) indeed truly, inherently, constitutionally suspect?[190] Notably, *Bolling* also reinstates *Hira-*

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turn would mean that, for example, two or three groups could be freely discriminated against, or that policies favoring whites and disfavoring every other group would pass constitutional muster, because the discriminations against all the other groups did not single out just one racial group for abuse. Although this may be a rather absurd example, it is also a warning against the very sort of over-literalism—particularly over-literalism regarding dicta!—that is a recurring theme in the story of *Korematsu*.

[188] As a rare exception to the overall rule, however, Justice Stevens raised this very distinction in a footnote in *Adarand Constructors v. Pena*, 515 U.S. 200, 253 n.7 (1995).

[189] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[190] The United States was and is traditionally mostly Judeo-Christian, or even just plain Christian, for instance; would that make any non-Judeo-Christian religion "constitutionally suspect"? The U.S. also traditionally marginalized

bayashi's "solely on race" qualification and backs slightly away from *Korematsu*'s "most rigid scrutiny" language, calling instead for "scrutin[y] with particular care." [Which is, again, an appropriate statement of common sense.] In an act of legal alchemy, Warren took both *Korematsu* and *Hirabayashi*, stirred them together so as to make them effectively indistinguishable, took bits and pieces of each entirely out of context—scrutiny and suspect from *Korematsu*, "solely upon race" and "contrary to our traditions" from *Hirabayashi*—and distilled them into one very brief, rhetorically resounding statement that is effectively only dicta citing other dicta. As with its predecessors, the *Bolling* language is another statement expressing general American values of fairness and decency, but one that is looking ever more like an enforceable legal commandment—particularly when taken out of context.

In context, Warren actually somewhat reinforced *Korematsu*'s "curtailing civil rights" qualification by invoking the 1896 case that specified, "so far as civil and political rights are concerned."[191] Thus, although Warren might perhaps be faulted for cavalierly lumping together and over-distilling *Korematsu* and *Hirabayashi* in a way that made the new amalgam easy to lift out of context, later courts are to blame for going ahead with this further decontextualization, as the quick, easy, sound-bite language from *Bolling* increasingly became a substitute for any actual analysis of either *Korematsu* or *Hirabayashi*.

Adding to the irony, it is perhaps worth pointing out that *Bolling* was in effect a very brief, three-page addendum to its

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women and people of color, and to some extent still does; would that make challenges to such marginalization automatically constitutionally suspect? American courts, going back to the 1800s, may also have a tradition of delivering rhetoric (in dicta) on anti-discrimination that is more high-blown than the actual results.

[191] The 1896 case in question is *Gibson v. Mississippi,* 162 U.S. 565, 591. Ironically, legal scholars have pointed out that the language Warren quoted is also dicta. *See, e.g.*, Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 767 (1999); John Robert Renner, *The Indian Child Welfare Act and Equal Protection Limitations on the Federal Power over Indian Affairs*, 17 AM. INDIAN L. REV. 129, 148 (1992).

better-remembered companion case, *Brown v. Board of Education* (which itself included only a rather slender ten or eleven pages of analysis).[192] It appears that *Bolling* only existed as a quick justification, more or less in passing, for why federally controlled school districts in the District of Columbia would be desegregated along with state school districts. To do so, *Bolling* (quickly and briefly) equated Fifth Amendment due process with Fourteenth Amendment equal protection specifically in the context of school desegregation. *Brown*, although emphatically a case concerning civil rights and equal protection, is not about strict scrutiny.[193] *Bolling* is not really a case about strict scrutiny, either, aside from the somewhat watered-down and generally reasonable passing reference to scrutiny with "particular care." *Bolling*, in its brevity, did not even say that much about due process. Legally (and politically), it appears to have been a quick, convenient way to overcome a peculiar, somewhat vestigial jurisdictional anomaly. Thus it is particularly ironic that *Bolling*'s passing dicta citing dicta became yet another cornerstone of the strict scrutiny edifice.

In short, a proper, full legal consideration of either strict scrutiny or the equation of federal due process with state equal protection would have required much fuller discussion. *Bolling* provided neither. It was a bit more like a judicial sleight-of-hand trick.

Although *Korematsu* and *Hirabayshi* have long been cited primarily for their (supposed) strict scrutiny language, that language and its egalitarian rhetorical potential mostly lay fallow for a decade until *Brown*, *Bolling*, and Chief Justice Warren's (unfortunately still premature) effort to get around congressional inaction and intransigence and kick-start nationwide desegregation.[194] After

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[192] Brown v. Bd. of Educ., 347 U.S. 483 (1954), https://www.princeton.edu/~ereading/Brown1.pdf.

[193] Notably, none of the characteristic terminology, including words such as "strict," "rigid," "scrutiny/-ize," "suspect," or "classification," appear anywhere in *Brown*. Nor does any really identifiable strict scrutiny analysis. *Brown* was decided straightforwardly on Fourteenth Amendment equal protection.

[194] The civil rights implications of *Korematsu* and *Hirabayashi* were raised somewhat tentatively, and basically strictly regarding Japanese Americans, in

Warren's dream met with "massive resistance" in the South or apathy in most other places, including the Eisenhower White House,[195] *Korematsu* and *Hirabayshi* as well as *Bolling* all lay fallow for another decade, by which time Dr. Martin Luther King, Jr.'s 1963 civil rights campaign in Birmingham, Alabama had raised the issue of desegregation to a nationwide and international level with a growing sense of crisis.[196] Suddenly, as if on cue, strict scrutiny reappeared, like a rabbit pulled out of a hat.

McLaughlin (1964; Justice White) at pp. 191–193:

> Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious. ... But we deal here with a classification based upon the race of the [p. 192] participants, which must be viewed in light of the historical fact that the central purpose of the

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cases of the late 1940s, such as *Oyama v. California*, 332 U.S 633 (1948), and *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948). For a fuller discussion of the wider, intellectual historical penumbrae of the cases, however, see Robinson & Robinson, *supra* note 6.

[195] *See, e.g.*, Brown *at 60: The Southern Manifesto and "Massive Resistance" to* Brown, NAACP LEGAL DEFENSE FUND, http://www.naacpldf.org/brown-at-60-southern-manifesto-and-massive-resistance-brown (last visited Jan. 16, 2018); *Eisenhower, Dwight David*, MARTIN LUTHER KING, JR. AND THE GLOBAL FREEDOM STRUGGLE, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_eisenhower_dwight_david_1890_1969.1.html (last visited Jan. 12, 2018) (noting President Eisenhower's overall reluctance to aggressively enforce civil rights law).

[196] Scholars generally acknowledge that the Kennedy administration went from a relatively timid, reluctant approach to civil rights issues not so different from the Eisenhower administration, and finally moved more aggressively toward federal intervention in civil rights, only after the major civil rights campaign in Birmingham in the spring of 1963. *See generally, e.g.*, Daniel Stevens, *Public Opinion and Public Policy: The Case of Kennedy and Civil Rights*, 32 PRESIDENTIAL STUD. Q. 111; Kenneth T. Andrews & Sarah Gaby, *Local Protest and Federal Policy: The Impact of the Civil Rights Movement on the 1964 Civil Rights Act*, 30 SOC. F. 509 (2015).

> Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. *This strong policy renders racial classifications "constitutionally suspect," [Bolling at 499]; and subject to the "most rigid scrutiny," [Korematsu at 216]; and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, [Hirabayashi at 100]. Thus it is that racial classifications have been held invalid in a variety of contexts.* See, e.g., [three cases]; [Brown v. Board] (segregation in public schools).
>
> We deal here with a racial classification embodied in a criminal statute. In this context, where the power of the State weighs most heavily upon the individual or the group, we must be especially sensitive to the policies of the Equal Protection Clause which, as reflected in congressional enactments dating from 1870, were intended to secure "the full and equal benefit of all laws and proceedings for the security of persons and property" and to subject all persons "to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."…
>
> Our inquiry, therefore, is whether there clearly appears in the relevant materials some *overriding statutory purpose* requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise. Without such justification the racial classification contained in [the Florida statute at issue] is reduced to an invidious [p. 193] discrimination forbidden by the Equal Protection Clause.[197]

Justice White correctly noted the long-established and much-discussed traditional focus of the Fourteenth Amendment on eliminating official racial discrimination by states. He then took a string of statements out of context from *Bolling*, *Korematsu,* and *Hirabayshi* to support the point, even though none of those cases or sections of cases specifically addressed the point in question, as they were all decided on the basis of the Fifth Amendment.[198] *Bolling* is distilled as "racial classifications [are all] 'constitutionally suspect,'" which loses the "curtailing civil rights" qualification found in both *Korematsu* and *Bolling* (in context). White invoked *Korematsu* to bring back "the 'most rigid scrutiny,'" and added

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[197] McLaughlin v. Florida, 379 U.S. 283, 191–93 (1964) (emphasis added).

[198] *Bolling* and *Hirabayashi* briefly mention the Fourteenth Amendment; *Korematsu* does not.

perhaps a rhetorical flourish to *Hirabayshi*'s more spare language with "'in most circumstances irrelevant' *to any constitutionally acceptable legislative purpose*." White then added his statement, "*Thus it is that racial classifications have been held invalid in a variety of contexts*," and cited *Brown* among other cases. This latter statement fits well with the earlier statement regarding the purpose of the Fourteenth Amendment, but as written, it tends to imply that *Brown* and other cases were decided as they were because of holdings and principles stated in *Bolling*, *Korematsu,* and *Hirabayashi*—which is entirely if probably unintentionally misleading, because none of the cited cases, including *Brown*, ever cited *Bolling*, *Korematsu,* or *Hirabayashi* regarding either strict scrutiny or suspect classifications, and did not rely on strict scrutiny analysis in striking down segregation as violating equal protection.[199]

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[199] The four cases cited as, at least implicitly, the products of holdings in *Korematsu*, *Hirabayashi*, and/or *Bolling*, do not really cite any of those cases. Tancil v. Woolls, 379 U.S. 19 (1964); Anderson v. Martin, 375 U.S. 399 (1964); Watson v. City of Memphis, 373 U.S. 526 (1963); Brown v. Bd. of Educ., 349 U.S. 294 (1955). *Brown* briefly notes the existence of *Bolling* in a passing reference with a footnote at p. 495, footnote 12: "This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment." *Brown,* 349 U.S. at 495 n.12. The various cited cases all appear to be unaware of the actual or potential existence of strict scrutiny, and one, *Tancil*, is only a brief memorandum opinion (therefore with no precedential value) regarding the brief district court opinion in *Hamm v. Virginia State Bd. of Elections*, 230 F. Supp. 156 (E.D. Va. 1964). The three cases other than *Brown* all reveal perhaps a different vignette of the slippage between holding and dicta: although *Brown* specified that its holding applied only to segregated schools, by 1963—after the Civil Rights movement had really heated up—federal courts were using *Brown* and its language of "separate educational facilities are inherently unequal" as a general concept and established rule for striking down segregation in every situation. *See, e.g.,* Watson, 373 U.S. at 538 (rejecting "an impermissible obeisance to the now thoroughly discredited doctrine of 'separate but equal'"); Hamm, 230 F. Supp. at 157 ("The 'separate but equal' racial doctrine was condemned a decade ago in *Brown*[.]"). Interestingly, as support for his claim regarding the "thoroughly discredited doctrine of 'separate but equal'" in *Watson*, Justice Goldberg cited only *Brown* along with *Dawson v. Mayor of Baltimore*, 350 U.S. 877 (1955) and

Justice White, in effect, took disparate bits of legal language, of holding and non-holding, out of context, dumped them all in the same pot, and stirred them together.

Notably, the fact that none of the latter four cited cases (nor even, in reality, *Bolling*) needed strict scrutiny to strike down segregation and discrimination under the Fourteenth Amendment (or the Fifth Amendment) implies that de jure segregation and discrimination likely could have been dismantled well enough without the rhetorical gloss of strict scrutiny that would later morph into the color-blind straitjacket. This in turn raises the possibility that the vaunted strict scrutiny doctrine, protector of our core constitutional rights, may have been largely a confusing and unnecessary constitutional rabbit-hole that might better have been avoided.

Justice White then added an important qualification to his discussion by noting how racial classifications in criminal statutes (which inevitably implicate civil rights issues) are particularly dangerous and require particular care—an eminently reasonable observation. This, however, raises an implicit logical conundrum: if, as already stated, any and all racial classifications, including non-criminal classifications, are "'constitutionally suspect'" and already require the "'most rigid scrutiny,'" then how can racial classifications in the criminal context receive even more rigid, "especially sensitive" scrutiny? Here, rhetorical flourishes appear to be colliding with each other.

With the Civil Rights movement continuing to heat up toward boiling over during the 1960s, including a new militancy as younger and more radical leaders seized the torch from Dr. King,[200] strict scrutiny did not wait another decade for its next appearance.

Muir v. Louisville Park Theatrical Assn., 347 U.S. 971 (1954)—the latter two cases both involving segregation in public recreational facilities, and both Supreme Court opinions ironically memoranda opinions with no formal precedential value.

[200] *See, e.g.*, for a brief version of the story, David J. Garrow, *The Civil Rights Movement Before and After Martin Luther King, Jr.*, WASH. POST (Feb. 7, 2014), https://www.washingtonpost.com/opinions/the-civil-rights-movement-before-and-after-martin-luther-king-jr/2014/02/07/11493318-8383-11e3-bbe5-6a2a3141e3a9_story.html?utm_term=.6fc1beb9f3f4. There are various

Loving (1967; Chief Justice Warren) at p. 11:

> There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. *Over the years, this Court has consistently repudiated "(d)istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." [Hirbayashi at 100]. At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," [Korematsu at 216], and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. …*
>
> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. *We have consistently denied* [p. 12] *the constitutionality of measures which restrict the rights of citizens on account of race.* There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.[201]

In *Loving*, Chief Justice Warren followed his own earlier *Bolling* opinion (though without citing it) and *McLaughlin* in further selectively distilling, summarizing, and airbrushing *Korematsu* and *Hirabayshi*. In Warren's hands, the 24-year-old *Hirabayashi* opinion suddenly joins the ranks of precedents apparently existing since time immemorial in a mythical past: "Over the years, this Court has consistently repudiated …" suggesting a long and uninterrupted pattern of behavior rather than the aspirational statement of principle appearing in *Hirabayashi*. Chief Justice Stone's more

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book-length sources that discuss the transition from the Southern, non-violent civil rights movement to the Northern, militant movement. For just one notable example, see, e.g., TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS, 1965–1968 (2006).

[201] Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (emphasis added).

measured and honest statement, "[L]egislative classification or discrimination based on race alone has often been held to be a denial of equal protection," is somewhat grandiloquently transformed into "this Court has consistently repudiated" such discrimination—conveniently airbrushing the Court's record and overlooking cases such as *Plessy* and *Ozawa* along with *Korematsu* and *Hirabayashi*, as well as the fact that the recycled *Hirabayashi* language was not part of its holding.[202]

Warren ratcheted up the rhetoric by going beyond *McLaughlin* in presenting *Korematsu*'s aspirational dicta as an established legal commandment and ironically treating "the 'most rigid scrutiny'" as a *minimum* requirement for *all* racial classifications, criminal or otherwise, affecting established civil rights or not (while also keeping *McLaughlin*'s "most rigid scrutiny" conundrum): "*At the very least*, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny[.]'" Although White's *McLaughlin* opinion could be interpreted to be addressing only the particularly sensitive criminal context in requiring an "overriding statutory purpose"—and because the case involved a criminal case and statute, its actual holding presumably should have been so limited, as was also true with *Loving*—Warren's looser language in *Loving* collapsed any such distinction, declaring that any sort of racial classification automatically must overcome "the 'most rigid scrutiny'" by demonstrating necessity regarding "some permissible state objective[.]" In this way, *Korematsu*'s common sense with a qualification—"legal restrictions which curtail … civil rights"—became a commandment with no qualification—any racial classifications of any sort must receive "the 'most rigid scrutiny.'"

Although *McLaughlin*'s "overriding statutory purpose" and *Loving*'s "necessary" and "permissible" language remained undefined, to the extent later opinions followed and embraced the transmutation of dicta into holding seen in *Bolling*, *McLaughlin*, and

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[202] Admittedly, Chief Justice Warren's rhetoric regarding treatment of "citizens" would not have applied to *Ozawa* when Japanese immigrants could not become citizens.

Loving, the path lay open toward ultra-strict scrutiny through a sort of inexorable logic. For once *Korematsu*'s common-sense dicta regarding "the most rigid scrutiny" (and perhaps somewhat unfortunate and gratuitous rhetorical use of the word "most") came to be seen as a commandment rather than mere common sense or aspirational rhetoric, ever stricter levels of scrutiny were favored by definition. In theory, if any given level of judicial scrutiny would let a classification past, obviously, an even stricter level would not, meaning that there always must be a stricter level of scrutiny up to the point of automatic, knee-jerk rejection of any racial classification—which would be in fact the absolute strictest scrutiny. Clearly there is a danger to taking hyperbolic or aspirational rhetoric out of context and treating it as a legal commandment—particularly when such rhetoric was clearly dicta and not holding, anyway.

*A. Post-*Loving *Entrenchment of Strict Scrutiny*

After *Loving*'s completion of the precedent-laundering process of transmuting dicta into a supposed holding and legal commandment, the new doctrine of strict scrutiny continued to burrow into and entrench itself within the law even as it distanced itself and grew harder to trace from its origins. One version of this saw the court, briefly and in passing, repeating and reaffirming the bundling together of *Korematsu* and/or *Hirabayashi* with *Bolling* (and/or *McLaughlin* or *Loving*) as a kind of mantra, with no meaningful discussion or analysis.[203] The other main version was even more

[203] *See, e.g.*, the first such post-*Loving* opinion, Hunter v. Erickson, 393 U.S. 385, 391–92 (1969) (White, J.) ("Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, [citing McLaughlin v. Florida, 379 U.S. 184, 192 (1964) and Loving v. Virginia, 388 U.S. 1, 10 (1967)]; racial classifications are 'constitutionally suspect,' [citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954)], and subject to the 'most rigid scrutiny,' [citing Korematsu, 323 U.S. 214, 216 (1944)]. They 'bear a far heavier burden of justification' than other classifications, [citing McLaughlin, 379 U.S. at 194].") Justice White followed *Loving*'s language and ignored his own distinction in *McLaughlin* regarding criminal cases by extending the "far heavier burden of justification" to the non-criminal context.

stripped down, involving brief statements of, more or less, "of course suspect classifications draw strict scrutiny/are inherently suspect," with a brief citation in main text or footnote, with or without a pincite, to one or another case in the *Korematsu* lineage.[204]

There were perhaps two notable modifications in the post-*Loving* process of assuming strict scrutiny into existence. First, after twenty-one years of dormancy, *Oyama* and *Takahashi* were rediscovered and were cycled back into the strict scrutiny precedent stream, starting with Chief Justice Warren's 1969 majority opinion in *Kramer v. Union Free School Dist. No. 15*,[205] where in passing in footnote 9, Warren observed, "Of course, we have long held that if the basis of classification is inherently suspect, such as race, the statute must be subjected to an exacting scrutiny, regardless of the subject matter of the legislation. *See, e.g.*, [McLaughlin at 192, Oyama at 640, and Takahashi at 420]."[206] Neither *Oyama* nor *Takahashi* really say anything about or illustrate strict scrutiny or inherently suspect classifications, nor do they use that terminology to any significant degree,[207] so, precedentially speaking, the rein-

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[204] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 633 (1969); Cruz v. Beto, 405 U.S. 319, 326 n.5 (Rehnquist, J., dissenting); Moore v. City of East Cleveland, 431 U.S. 494, 551 (1977) (White, J., dissenting).

[205] Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (Warren, C.J.).

[206] *Id.* at 628 n.9.

[207] *Oyama* includes a very brief, passing reference to "rigid scrutiny" in Justice Murphy's concurrence. Oyama v. California, 332 U.S. 633, 663 (1948). *Takahashi* includes none of the standard strict scrutiny terminology. In *Oyama*, at the cited page, Chief Justice Vinson wrote, "In our view of the case, the State has discriminated against Fred Oyama; the discrimination is based solely on his parents' country of origin; and there is absent the compelling justification which would be needed to sustain discrimination of that nature." *Id.* at 640. So *Oyama* alludes in passing to the need for a compelling justification for nationality-based discrimination, in terms not that different from those found in various non-strict scrutiny equal protection cases over the years. *Takahashi* includes even less language related to strict scrutiny. Takahashi v. Fish & Game Comm'n., 334 U.S. 410, 420 (1948). Notably, both *Oyama* and *Takahashi*, relatively racially progressive opinions for their times, were decided in 1948, when there was still some remaining afterglow from the wartime "United Nations" sense of a common front against Axis evil

troduction of *Oyama* and *Takahashi* as support for the strict scrutiny doctrine appears to be mere gratuitous buttressing.[208] Also, notably, neither case really involves race in the sense that concept has been understood during the postwar era—i.e., Japanese are not (any more) viewed as a separate "race" apart from other peoples of East Asia.[209] Later opinions also dutifully recycled one or both of the suddenly rediscovered cases.

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and aggression, and before both the full settling in of the Cold War mentality and the death of Justice Murphy, both of which happened in 1949. The Soviets' successful explosion of an atomic bomb and Chinese communists' victory in the Chinese civil war both occurred in 1949 and helped pave the way for Cold War panic, paranoia and McCarthyism in the United States.

[208] Robinson & Robinson, *supra* note 6, discuss in detail how the concept of strict scrutiny appearing in *Korematsu* may have influenced both the litigating parties and the justices in both *Oyama* and *Takahashi* as well as the African American higher education cases of the late 1940s leading up to and preparing the ground for *Brown*. The Robinsons even point out how the U.S. Justice Department's amicus brief in *Takahashi* specifically raised *Korematsu* and its requirement of a "pressing public necessity." Robinson & Robinson, *supra* note 6, at 48. However, *Korematsu* left no clear precedential footprint in the resulting Court opinions. Interestingly, Justice Black, author of the majority opinions in both *Korematsu* and *Takahashi*, never cited *Korematsu* in any of his opinions for any reason after 1944.

[209] The indirect references to the Japanese as a "race" in both *Korematsu* and *Hirabayashi*, as well as General DeWitt's (in)famous statement that "The Japanese are an enemy race," date back to the era of scientific racism and eugenics from the late 1800s through the 1930s, at which time various nationalities or regional populations were described as separate races, typically ranked in a hierarchy by the most powerful nationalities of the era (especially the English and Germans) according to how much like, and similar in appearance to, the English and Germans they were. *See generally, e.g.*, Rutledge M. Dennis, *Social Darwinism, Scientific Racism, and the Metaphysics of Race*, 64 J. NEGRO EDUC. 243 (Summer 1995). Thus, for example, the Irish, the Italians, and the Spanish were all referred to (and generally also viewed themselves) as different races with distinctive characteristics. The Japanese were no exception. *See, e.g.*, Alexander Francis Chamberlain, *The Japanese Race*, 3 J. RACE DEV. 176 (1912). The Japanese, as still the most insular of all advanced industrial societies, still are also more likely to perceive themselves as a unique race, and they apparently do have some relatively distinctive genetic features relative to most neighboring populations

The other modification came in 1971 in *Graham v. Richardson*,[210] when relatively new Supreme Court Justice Harry Blackmun or his clerks apparently realized that cases like *Korematsu* and *Hirabayashi* really were not about race, at least as the concept has been understood since the Second World War, but about ethnicity and national origin. Blackmun correctly substituted *Bolling*, *McLaughlin*, and *Loving* in the purely "race" category and used *Oyama*, *Korematsu*, and *Hirabayashi* in a new "nationality" slot.[211] Various later cases adopted this modified form of the strict scrutiny mantra.[212] Using one or another version of the stock language assuming the existence of strict scrutiny, subsequent cases typically recycled the same citations in the same overall construction and order, citing the exact same page numbers if pincites were provided—implying that justices and clerks may have been recycling the derivative language more or less verbatim rather than going back to consider the original cited cases.

Already by the early 1970s, the Court's flirtation with more aggressive expansion of civil rights was drawing to a close, as various justices began to push back against the trend and frequently cited the *Korematsu* lineage in so doing.[213] Probably not by mere

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of Asia. *See, e.g.*, Hideo Matsumoto, *The Origin of the Japanese Race Based on Genetic Markers of Immunoglobulin G*, 85 PROC. JAPAN ACAD., SER. B, PHYS. & BIOL. SCI. 69 (2009); *The Origins of the Japanese People*, NAKASENDO WAY, https://www.nakasendoway.com/the-origins-of-the-japanese-people/ (last visited Jan. 22, 2018) (noting that "many Japanese today maintain a strong belief in the unique identity of the Japanese race.")

[210] Graham v. Richardson, 403 U.S. 365 (1971).

[211] *Id.* at 371 nn. 21 & 22.

[212] *See, e.g.*, Lindsey v. Normet, 405 U.S. 56, 73 nn. 21 & 22 (1972) (White, J.); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 105 nn. 63 & 64 (1973) (Marshall, J., dissenting); B.P.O.E. Lodge No. 2043 v. Ingraham, 411 U.S. 924, 927 nn. 3 & 4 (1973) (Douglas, J., dissenting); Frontiero v. Richardson, 411 U.S. 677, 682 nn. 7 & 9 (1973) (Brennan, J.); Kahn v. Shevin, 416 U.S. 351, 357 nn. 1 & 3 (1974) (Brennan, dissenting); Mathews v. Lucas, 427 U.S. 495, 504, nn. 9 & 10 (1976) (Blackmun, J.) Most such cases also added *Takahashi* in the new "nationality" slot.

[213] *See, e.g.*, Harper v. Virginia State Bd. of Elections, 382 U.S. 663, 681 (1966) (Harlan, J., dissenting); Shapiro v. Thompson, 394 U.S. 618, 652

coincidence, this change of judicial tack coincided with the reawakening of American conservatism demonstrated by the election of President Richard M. Nixon in both 1968 and 1972. The early 1970s also brought early reverse discrimination cases that the Court was able to sidestep, but dissenting justices pointed to the by-then well-entrenched colorblind *Korematsu* mantra.[214] In 1978, the Court saw the first great higher education affirmative action/ reverse discrimination case that couldn't be sidestepped: *Bakke v. Regents of the University of California.* [215] Although Justice Powell's plurality opinion crafted the diversity partial escape-hatch that universities have been using liberally ever since, it, and the Court majority, came down firmly on the side of overall color-blindness in striking down racial quotas.[216] Powell discussed and cited *Korematsu* and its progeny more than any opinion since 1944, but such discussion shared and recycled all the assumptions regarding strict scrutiny that had taken root since *Bolling* in 1954. [217] Powell's lengthy opinion also twice used the classic quotation from *Hirabayashi* regarding "distinctions based upon ancestry" being "odious" to a free people,[218] which thenceforward would primarily be used by conservative justices in opinions questioning affirmative action programs.[219]

(1969) (Warren, C.J., dissenting); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 639 (1969) (Stewart, J., dissenting); Lindsey v. Normet, 405 U.S. 56, 73 nn. 21 & 22 (1972) (White, J.); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16 (1973) (Powell, J.)

[214] B.P.O.E. Lodge No. 2043 v. Ingraham, 411 U.S. 924, 927 nn. 3 & 4 (1973) (Douglas, J., dissenting to memorandum opinion); DeFunis v. Odegaard, 416 U.S. 312, 339 (1974) (Douglas, J., dissenting to finding of mootness).

[215] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[216] *Id.* at 319–20.

[217] *Id.* at 287–307.

[218] *Id.* at 290–91, 294.

[219] Fullilove v. Klutznick, 448 U.S. 448, 525 (1980) (Stewart, J., dissenting); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213 (1995) (O'Connor, J., plurality); Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (O'Connor, J.); Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 742, 751 (2007) (Roberts, C.J.; Thomas, J., concurring) ("irrele-

Korematsu continued to be brandished in the battle between Court liberals and conservatives about how to apply strict scrutiny through 1987. Then, from 1989 to 2000, after Congress formally apologized and granted reparations to internment survivors in 1988, *Korematsu* was mostly cited as a legal national disaster in various cases,[220] including its comparison to *Dred Scott* and *Plessy*.[221]

In one of these cases, *Adarand Constructors*, Justice O'Connor, in her plurality opinion, discussed *Korematsu* and its history probably more than all the other preceding Court jurisprudence combined.[222] Yet her discussion, as well as other opinions in *Adarand*, basically included and assumed all the intellectual baggage that had accreted around *Korematsu* and its progeny regarding strict scrutiny. In particular, Justices O'Connor and Ginsburg both explicitly refer to the *Korematsu* Court having stated and then misapplied the strict scrutiny standard as though that standard as it existed by the late twentieth century was already in existence in 1944.[223] O'Connor notably treats the *Korematsu* language as a legally binding standard even as she

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vant"). Liberal Justice Brennan also used the quote once more, in *McCleskey v. Kemp*, 481 U.S. 279, 341 (1987) (Brennan, J., dissenting).

[220] *See, e.g.,* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501; Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 635 (1989); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564 n.12 (1990); Hamdi v. Rumsfeld, 542 U.S. 507, 542 (2004) (Souter, J., dissenting).

[221] Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

[222] *See generally* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

[223] *Id.* at 215 ("But in spite of the 'most rigid scrutiny' standard it had just set forth, the Court then inexplicably relied on 'the principles we announced in the *Hirabayashi* case,' … to conclude that … the racially discriminatory order was nonetheless within the Federal Government's power."); *id.* at 236 ("*Korematsu* demonstrates vividly that even "the most rigid scrutiny" can sometimes fail to detect an illegitimate racial classification[.]"); *id.* at 275 (Ginsburg, J., dissenting) ("[I]n [*Korematsu*], scrutiny the Court described as "most rigid," … nonetheless yielded a pass for an odious, gravely injurious racial classification."). Various legal scholars have noted that actually, the *Korematsu* and *Hirabayashi* Courts neither applied nor even really stated any standard, other than deference to national authorities at a time of crisis. *See, e.g.*, Epstein & Knight, *supra* note 169, at 362 n.92; Neil Gotanda, *New Directions in Asian American Jurisprudence*, 17 ASIAN AM. L.J. 5, 34 (2010).

also refers to it as "promising dictum."[224] Perhaps somewhat bizarrely, although Justices O'Connor's, Ginsburg's, and Stevens' opinions all mention or allude to the Second World War, they never mention that America's war was in fact with Japan, and the language tends to imply that the U.S. was singling out Japanese Americans for abuse more or less at random.[225] All in all, in its treatment of *Korematsu*, the various *Adarand* opinions find the Court basking ostentatiously in the political safety of Congress' 1988 pronouncement regarding the Japanese American internment—and engaging in a veritable festival of historical anachronism and smug hindsight bias that reduces *Korematsu* and *Hirabayashi* to garden-variety racial discrimination cases. *Adarand* seemingly represents a sort of legal-political-rhetorical sleight of hand trick that simultaneously discredits and discards *Korematsu* as a case and holding while further elevating and reinforcing the politically useful dicta from that toxic case. It seeks, belatedly, to neatly make sense of an overall process—the blurring of the holding-dicta divide and the laundering of precedent from *Korematsu* through *Bolling*, *McLaughlin*, and *Loving*—that logically perhaps did not and could not entirely make sense.[226]

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[224] Adarand, 515 U.S. at 214.

[225] *Id.* at 214–15, 236; *id.* at 244 (Stevens, J., dissenting); *id.* at 275 (Ginsburg, J., dissenting). In an interesting glimmer of insight—and seemingly the first time the point was raised in the fifty-one years since 1944—Justice Stevens pointed out, "Despite the majority's reliance on [*Korematsu*], that case does not stand for the proposition that federal remedial programs are subject to strict scrutiny. Instead, *Korematsu* specifies that "all legal restrictions *which curtail the civil rights of a single racial group* are immediately suspect." [*Korematsu*, 323 U.S. at 216.]. The programs at issue in this case (as in most affirmative-action cases) do not "curtail the civil rights of a single racial group"; they benefit certain racial groups and impose an indirect burden on the majority." *Adarand*, 515 U.S. at 253 n. 7. (emphasis added).

[226] I should note for the record: Justices O'Connor, Ginsburg, and Stevens are among my favorite jurists who have served on the Court during my lifetime, and nothing I have said is intended as any sort of personal attack or criticism. Rather, it is a somewhat ironic reflection on the way the law works in actual practice if not in theory.

There have been four major phases to *Korematsu*'s career as a loaded weapon since 1944. It spent the early postwar years serving primarily—and true to its actual holding—as a ready (perhaps over-ready?) justification for executive authority during the Cold War.[227] During the (regrettably brief?) Civil Rights moment from the mid-1960s to the early 1970s, *Korematsu* was used as a weapon in the hands of a virtuous cause: the dismantling of de jure segregation and racial discrimination. With the onset of conservative backlash against 1960s-vintage liberalism—a historical moment that has continued basically to the present—*Korematsu* was routinely brandished to deter or blunt more aggressive legal challenges to continuing de facto discrimination and structural racism.

After Congress' ritual disavowal of the whole Japanese American internment, *Korematsu* had a brief fourth act in the role of jurisprudential whipping boy, joining the ranks of *Dred Scott* and *Plessy* among the officially acknowledged legal national disasters of American history and being waved around for rhetorical impact by liberal and conservative judges alike, before being mostly laid to rest and forgotten or ignored as a constitutional embarrassment. However, as noted, even after the American legal community ostentatiously shoveled dirt onto *Korematsu*'s coffin, its main surviving offspring—strict scrutiny used primarily for conservative purposes—has seen an extended, seemingly never-ending run of Act III, and its various precedential progeny remain strong and healthy. So for good or ill, depending on one's political proclivities, *Korematsu*'s ghost still haunts American law.[228]

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[227] *See, e.g.*, Lichter v. United States, 334 U.S. 742, 766 n.9 (1948); Harisiades v. Shaughnessy, 342 U.S. 580, 589 n.16 (1952); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 661 n.3 (1952) (Clark, J., concurring); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 222 n.5 (1953) (Jackson, J., dissenting); Trop v. Dulles, 356 U.S. 86, 106 (1958) (Brennan, J., concurring); Greene v. McElroy, 360 U.S. 474, 515 (1959) (Clark, J., dissenting).

[228] Moreover, as with other tainted precedent that was never fully and officially laid to rest, *Korematsu* could spring back to life to the extent that circumstances again make it legally/judicially/politically convenient—particularly given that most of the post-1988 ritual hand-wringing over the case

Conclusion: The Judiciary's Loaded Weapon

The twisted tale of *Korematsu* is an example of precedent not acting in reality the way precedent is supposed to act in theory.[229] One might reasonably suppose that there should have been more meaningful discussion of just where the Court was going and what it was doing before it took the common-sense dicta of *Korematsu* and fashioned it—in unreflective and sporadic fits and starts at various politically charged historical moments divided by decade-long gaps—into a powerful weapon that can be used at the Court's discretion to strangle virtually any governmental program targeting structural racial inequality—the colorblind straitjacket. This provided a convenient if perhaps legally unnecessary shortcut for appropriately retiring the lingering vestiges of de jure discrimination—but it also has been, arguably, a similarly useful shortcut for inappropriately short-circuiting challenges to remaining de facto discrimination.

In his *Korematsu* dissent, Justice Jackson memorably described how excessive judicial deference to military authority at one moment of crisis invited further overstepping of proper boundaries by the military or executive authority later on:

> A military order, however unconstitutional, is not apt to last longer than the military emergency.... But once a judicial opinion ... rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The 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.[230]

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was only dicta. *See, e.g.*, Gruber, *supra* note 23, at 332 n.138 (2006) ("The legal repudiation of the internment has largely been a product of nonjudicial commentary. The few cases that comment on the internment criticize it in dicta only. As a result, *Korematsu* is technically "good law.").

[229] *See, e.g.*, various articles by Dewey, *supra* note 150.

[230] Korematsu v. United States, 323 U.S. 214, 246 (Jackson, J., dissenting).

In short, judicial deference in an emergency situation can set a bad, dangerous precedent for the future.

The story of *Korematsu* suggests that overly flexible use of precedent, including over-distilling and over-summarizing, taking clips of language out of context, and particularly the gradual bending and twisting of dicta into supposedly ironclad legal rules and doctrines, is a different way of creating a loaded weapon to be left lying around, inviting potential future misuse—in this case, by the judiciary itself.

This raises the question: why do lawyers and judges continue to misuse dicta and transmute it into holdings?

To quote comedian Henny Youngman (out of context): "They want to."[231]

Seriously. Notwithstanding that the blurring and blending of holdings and dicta has been a problem for decades, perhaps forever, and notwithstanding thoughtful scholars having offered suggestions and instructions for fixing the problem,[232] still it continues, and as with precedent generally, comparatively speaking, it still does not receive all that much attention or analysis. If the problem were perceived to be as grave in reality as it should be in theory, something would have been done about it already. There would already be clear rules for distinguishing dicta from holdings, and they would already be followed.[233]

So the transmutation of dicta apparently has some other evolutionary advantage in the law that keeps it there.

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[231] The entire quote from Henny Youngman is: "Why do Jewish men die before their wives? They want to." Tom Kuntz, *Word for Word / Henny Youngman; He Delivered Deftly and Carried a Big Catskill Shtick*, N.Y. TIMES (March 1, 1998), http://www.nytimes.com/1998/03/01/weekinreview/word-for-word-henny-youngman-he-delivered-deftly-carried-big-catskill-shtick.html.

[232] Two fairly recent examples include Stinson, *supra* note 6, and Leval, *supra* note 2.

[233] The same goes for Justice Holmes' great cases and bad law—they, too, would already be properly policed, or quarantined, if the law really felt the need to.

Like any loaded weapon, the ready convertibility of dicta into holding gives the judiciary added (political/rhetorical) power. Judges, collectively, have the power to say what the law means, and with the availability of dicta used as holdings, they are not even so closely bound by what was said before in actual holdings.

In particular, the transmutation of dicta helps answer a logical conundrum in the law: how can the law, and the common law in particular, be celebrated for stability and flexibility both at the same time?[234]

In reality, is not possible to maximize these two variables; they necessarily exist in an inverse relationship to each other—more flexibility equals less stability, and vice versa.

But it may be possible to practice flexibility yet make it look like stability.

Thus, the actual flexibility of precedent in practice, and especially the harnessing of dicta as holdings, may represent a sort of legal/judicial conjuring trick that allows the law to change while maintaining the appearance of stability, by pointing, when convenient, to things that never actually were properly decided and treating them as already decided. *Korematsu* and *Carolene Products* are only two especially salient examples of this process.

Lawyers, certainly in an adversarial common law system, are inherently rhetorical entrepreneurs and opportunists: it is to their political and economic advantage to persuade others to believe that language says what they or their clients want it to say, whether it really does or not, and whether or not it could legitimately be interpreted differently. Judges are former lawyers.[235] Although they sit as referees over counsel's rhetorical competition, they also remain in fundamental ways players in the whole (ultimately rhetorical and political) game known as the law. Indeed, judges share with lawyers a powerful professional as well as political interest in assuring, through rhetoric, that the general public main-

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[234] *See* Dewey, *How Judges Don't Think*, *supra* note 150, at 67–68 and sources cited there.

[235] "Lawyers in black bathrobes," as my former Contracts professor, Arthur Rosett, used to say.

tains its faith in the law, and that the law is seen as something more than mere politics practiced in an unusual, ritualized manner.[236]

Thus, notwithstanding how precedent is supposed to work in theory, there may be method in the madness of transmutation of dicta into holdings. This may help inject into the whole system the flexibility necessary to adjust to major political changes while maintaining the appearance of stability.

If so, then the story of *Korematsu* and its precedential progeny may be, rather than an anomaly or glitch in the system, a prime example of the system working as it, tacitly, needs to (or wants to). Following earlier, dramatic, rapid political changes in the first half of the twentieth century, the United States went through a further series of major, rapid, sometimes wrenching political changes during the postwar era, of which the Civil Rights movement was one particularly striking example. The law had to change fast to have any chance of keeping up with all this political change; to change fast, it had to be flexible.[237] The same flexibility later allowed the law to do a political about-face as the nation's overall political mood shifted back toward conservatism toward the end of the century—all the while claiming to be standing on prior decisions and honoring the rule of law.

Similarly, "great" cases and the "bad" law they produce, about which Justice Holmes complained, may also be an integral part of a complex wider equation. Their unusual holdings and dicta, like circuit splits and other contradictory precedent, or dicta converted into holdings, always give the law a range of options to move in various different possible directions as perceived political needs require—while still allowing the law to claim that it is merely

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[236] And even more so since the United States has become a nation where virtually any and every issue can ultimately get kicked up to the Supreme Court to decide. *See, e.g.*, Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601 (2015).

[237] Regarding moments of rapid change in the law, see, e.g., Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 613–17, 635–45 (2001) (describing "punctuated equilibria" theory and how law, like evolution, may at times move forward (or backward?) in rapid, sudden bursts).

following precedent and hence following its own rules. And this helps to maintain the appearance of stability. Like a loaded gun, it's potentially useful for the judiciary to have all those precedential possibilities lying around to choose from.

Although this may augment the political and professional power of the judiciary and lawyers in general, whether this is good for the rest of us may be another question. There have been historical moments when the judiciary's loaded weapon was used for purposes most of us now would regard as heroic, such as *McLaughlin* and *Loving*.[238] Yet the same sort of bending and twisting of precedent and dicta that produced the strict scrutiny doctrine probably also brought us the likes of *Citizens United*[239] (or name your own least favorite Supreme Court decision here). Similarly, even if one might welcome a loaded weapon in the hands of a Justice Brennan, would they also in the hands of a Justice Scalia—or Gorsuch (or vice versa)? Any loaded weapon can be used for good or ill, but is always dangerous. And the more judges can manufacture supposedly binding legal authority out of dicta—or indeed out of thin air—the further we all move away from rule of law and closer to de facto rule by (unelected) men and women.[240]

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[238] For a thoughtful, interesting celebration of the equitable, even liberating potential of dicta, see generally Foster Calhoun Johnson, *Judicial Magic: The Use of Dicta as Equitable Remedy*, 46 U.S.F. L. REV. 883 (2012).

[239] Citizens United v. FEC, 558 U.S. 310 (2010) (holding that corporations have the same free speech rights as actual human citizens).

[240] That is not to say that our elections have been accomplishing much in recent decades.