The Legacy of Korematsu v. United States: A Dangerous Narrative Retold

Dean M. Hashimoto
Boston College Law School, dean.hashimoto@bc.edu

Follow this and additional works at: https://lawdigitalcommons.bc.edu/lsfp

Part of the Civil Rights and Discrimination Commons, Human Rights Law Commons, and the Military, War, and Peace Commons

Recommended Citation

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact abraham.bauer@bc.edu.
THE LEGACY OF *KOREMATSU v. UNITED STATES*: A DANGEROUS NARRATIVE RETOLD

Dean Masaru Hashimoto†

PROLOGUE

My family never discussed in any detail the internment of my father during World War II until my involvement in the relitigation of *Korematsu v. United States* as a law student in the summer of 1982. I remember as a child and adolescent possessing a vague understanding that my father had been incarcerated in a camp in the Midwest, but that episode in his life remained outside general family discussion. The only persisting references in our home to the Japanese internment were wooden picture carvings that hung in our hallway. The graceful and detailed carvings were of animals and people, all of whom had Japanese eyes. My paternal grandfather had sculpted them while he was in the internment camp. He died when I was young, so I never had the chance to listen to the stories behind those hand-carved pictures.

Consequently, my early knowledge of the Japanese internment developed from sources outside my family. One source was school. In particular, I remember vividly the summer of 1971, when I was in a public high school class in American history. One day, the class had been assigned reading about World War II, including one or two paragraphs about the Japanese internment. I remember that the text described the internment in rather neutral terms, not expressing any remorse about the episode. The teacher typically lectured, but occasionally he asked for volunteers. I will never forget my shock that day when the teacher called on me in class—although I had not volunteered—and challenged me with the question: “Was the internment of the Japanese the right thing to do in World War II?” I wanted to say no, but could not articulate why, so I told him instead that I was not sure. I remember blushing and feeling ashamed of my answer. My teacher said that the intern-

† Assistant Professor of Law, Boston College. I thank the Asian Pacific American Law Student Associations at Yale, Columbia, University of Michigan, Boston University, and Boston College for inviting me to their schools to speak on the Japanese internment, which encouraged me to write this Article. This paper was also presented in various forms at a Boston College faculty colloquium, an inauguration of a photography exhibit at Brandeis University of the Japanese internment, a general meeting of the Japan Club at Boston College, and at the Summer Institute in the History of the United States for Foreign University Teachers held at Boston College. I owe much to Dean Aviam Soifer not only for his patience and unconditional support, but also for his pointing out to me the present absence of *Korematsu v. Salerno*. Fred Yen and Jerry Kang provided invaluable assistance. I also thank Arthur Benney, Mary Bilder, Mark Haddad, Dan Kanstrom, Judy McMorrow, Aviam Soifer, and Fred Yen for critiquing drafts of this Article. Also, many thanks to Christine Button, Kirsten Nelson, Jennifer Noble, Kate Strickland, and Michael Pignatella for their excellent research assistance. I thank Bob Bloom for his intense interest in this Article and am grateful to his daughter, Martha, for inspiring me with her splendid paper on the internment. This work was supported by a faculty research grant from Boston College Law School. I dedicate this Article with love and respect to Dad.

1. 584 F. Supp. 1406 (N.D. Cal. 1984). I worked with Robert Rusky and others on this *pro bono* case while I was a summer associate for the law firm of Hanston, Bridgert, Marcus, Vlahos & Stromberg.

2. Families of the generation of Japanese Americans who endured the internment camps typically did not talk about their experience. For example, Fred Korematsu, who was the petitioner in *Korematsu v. United States*, 323 U.S. 214 (1944), did not speak about his experiences associated with the internment until the relitigation of his case. His daughter reportedly learned about his past from a high school social studies report. See Holly English, *Meeting a Famous Case: Fred Korematsu*, 114 N.J. L.J. 644 (1988).
ment had been the right thing to do because it worked and, after all, it was war. At the time, I did not challenge his thesis, but I felt perplexed and uncomfortable.

Years later, I did challenge his views when I became involved in the relitigation of the Korematsu case. Fred Korematsu sought to vacate his criminal conviction, upheld by the United States Supreme Court in 1944, for disobeying General John DeWitt’s order, which barred him from his home in San Leandro, California. Nearly 40 years after his conviction, Korematsu filed a petition of coram nobis based upon governmental misconduct. In 1982, a congressional commission exposed the governmental misconduct and concluded that, at the time of the internment order, substantial credible evidence from federal, civilian, and military agencies contradicted General DeWitt’s view that military necessity justified internment of all persons of Japanese ancestry. The commission found that there had not been military necessity; the causes of the internment were racial prejudice, war hysteria, and a failure of political leadership.

The relitigation of the Korematsu case resulted in a victory for Fred Korematsu. The government did not attempt to contradict his allegations of governmental misconduct; in fact, the government urged the court to vacate the conviction and to dismiss the underlying indictment. However, the government did challenge the petitioner’s attempt to have a hearing on the merits of his allegations of governmental misconduct. The government also argued that a published opinion by the judge was unnecessary. Given its agreement to vacate the conviction, the government’s opposition to a hearing and a written judicial opinion may seem insignificant. However, the petitioner and the Japanese American community felt strongly about both articulating the exact wrongs committed by the internment and getting supporting documents of those wrongs into evidence.

District Court Judge Marilyn Patel granted Korematsu’s motion and allowed his legal team to present the evidence in an open hearing. The evidence submitted established that the Justice Department had suppressed information from governmental sources that contradicted the Army’s assertion that the Japanese American community represented a national defense risk. Both the public hearing and the court’s announcement of its decision were heavily attended by the Japanese American community in San Francisco. These court dates served as a means of expression and catharsis for pent-up emotions, especially for the issei and nisei. When Judge Patel announced her decision to overturn Korematsu’s criminal conviction and her determination to publish her opinion, many in the courtroom wept and hugged one another.

3. See Korematsu, 584 F. Supp. at 1409. A writ of coram nobis seeks to correct errors in criminal convictions in which other remedies are not available. Id. at 1411.
4. See GEORGE MILLER, COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, 102D CONG., 2D SESS., PERSONAL JUSTICE DENIED 88-92 (Comm. Print 1992) [hereinafter PERSONAL JUSTICE DENIED]; see also Korematsu, 584 F. Supp. at 1416-17.
5. See PERSONAL JUSTICE DENIED, supra note 4, at 18; see also Korematsu, 584 F. Supp. at 1416-17.
7. See id.
10. See Korematsu, 584 F. Supp. at 1418-19.
11. See IRONS, JUSTICE DELAYED supra note 9, at 24-26. The Japanese terms used by Japanese Americans naming the generations include: issei are the immigrant generation; the first generation born in the United States are nisei; and the second generation born here, sansei. See PERSONAL JUSTICE DENIED, supra note 4, at 31.
Judge Patel's pronouncement was part of a basic transformation in how the American society views, and speaks about, the Japanese internment. The old narratives included silence in the families of *issei* and *nisei*, statements like those made by my high school teacher, and the government's opposition to having an open hearing and a published judicial opinion. The new narratives include conversations within Japanese American families about the internment experiences and its aftermath; the congressional report, *Personal Justice Denied*, which officially dispelled the myth that there was a military necessity; and Judge Patel's declaration that *Korematsu* "stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability." The new narratives also include the proclamation by President Gerald Ford that the evacuation was wrong, and President Ronald Reagan's decision to sign the Civil Liberties Act of 1988, providing restitution for and acknowledgment of the fundamental injustice of the internment.

I shared in the celebration of these new narratives and was transformed by them. Yet whenever I teach *Korematsu* in my constitutional law classes, I feel some of the uneasiness and bewilderment about it that I experienced as a high school student when I failed to answer my teacher's question to his satisfaction. Today, a different question haunts me: Could something similar to the Japanese internment happen again in this country? I wish I could honestly say that the answer is "no," or even that I am not sure. But I fear the answer is a resounding "yes" because, as Judge Patel acknowledged in her decision in the 1984 relitigation of *Korematsu*’s criminal conviction, she could only correct factual errors; she had no power to overturn the legal principles underlying the 1944 *Korematsu* decision. "Thus, the Supreme Court's decision [in 1944] stands as the law of this [1984] case and for whatever precedential value it may still have." The reason I write this Article is my concern that while public narratives about the Japanese internment have changed markedly, the *Korematsu* case remains consistent with modern legal doctrines and may lead to repetition of similar governmental actions.

**INTRODUCTION**

Just over fifty years have passed since the Supreme Court handed down the decision of *Korematsu v. United States*, upholding the constitutionality of a military order in World War II that initiated the internment of citizens of Japanese ancestry. The mass internment of citizens and resident aliens of Japanese ancestry began in March 1942 in response to President Franklin Roosevelt's Executive Order

---

12. See supra note 4.
15. See *Korematsu*, 584 F. Supp. at 1420.
9066. The President's Executive Order gave to the Secretary of War and other military commanders the power to exclude for the sake of national security all persons of Japanese ancestry from designated areas. It was conceived by General John DeWitt, military commander for the western states, who reported an imminent threat of sabotage and espionage posed by persons of Japanese ancestry. Congress ratified the mass internment program by passing a law that criminalized violations of the military orders. The internment lasted, at least for some, until 1946. Approximately 120,000 people, including 70,000 American citizens, were deported to ten relocation camps scattered across the West.

My father, Ben Masaru Hashimoto, who was at the time a nisei attending college in California's Central Valley, recalled in his memoirs:

On that well-known day, December 7, 1941, . . . after having breakfast at 9:30 a.m., I rested in my bed; whereupon, I heard the electrifying news about the bombing of Pearl Harbor by the Japanese planes. The shocking news was hardly believable at first; then, I thought, surely, they [the Japanese] are crazy and are committing suicide because I could not conceive of any way in which our enemy could win the war against the mighty United States with its tremendous resources.

The attack, my father went on to say, had an immediate impact upon all people of Japanese ancestry in the United States. Newspapers and radio broadcasts spread the hate propaganda to whip up everyone's effort toward winning the war. News media were even differentiating the physical attributes of the Japanese as against the other Orientals, so that they could be targeted for hatred.

Military orders required my father to leave his home and enter custody at a local fairgrounds. "The official name of the camp was the Merced Assembly Center, although in truth it had all the properties of a concentration camp," he wrote.

There were high barbed fences surrounding the entire area; tall guard posts with search lights were erected in several places; and soldiers had orders to shoot to kill anyone attempting to escape. Most internees were American citizens who had committed no crime, were not given any trial, and yet were imprisoned like convicted felons.

Military authorities later required that my father be transported by train to the Amache Relocation Center in the desert of southeastern Colorado. In this and simi-

18. See Personal Justice Denied, supra note 4, at 49. General John DeWitt recommended the mass internment to the Secretary of War, Henry Stimson, who in turn persuaded President Roosevelt to issue the executive order. See id. at 6.
19. See id. at 2.
22. See Personal Justice Denied, supra note 4, at 135, 150; Peter Irons, Justice at War 297, 365 (1983) [hereinafter Irons, Justice at War].
25. Id.
26. Id. at 1.
lar camps, people settled in barracks. Entire families were forced to live in single rooms, regardless of family size.27 Privacy and furnishings were minimal, and eating and bathing took place in mass facilities.28

The internment not only inflicted widespread emotional and physical hardship, but it also caused incalculable financial harm. Some families destroyed anything that might be construed as a tie to Japan, including art, books, pictures, and clothing. Many Japanese Americans were forced to sell their homes, farms, and cars at "fire-sale" prices in the short time—often as little as a week—between notification of internment and their entry into the camps.29

When World War II began, nearly half of the Japanese Americans on the Pacific coast were farmers. As a result of hard work and frugal living over many years, the Japanese Americans had dominated the wholesale and retail markets for fruits and vegetables in California.30 After the internment order, millions of dollars worth of crops were left standing in the fields; this investment was altogether lost. Likewise, equipment was abandoned where it stood or sold off for a fraction of its value. In a typical case, a farmer was forced to take seventy-five dollars for a tractor that he had bought several months earlier for ten times that amount.31

Small business owners were similarly exploited. A Japanese American woman approached a government official and told him she had been offered five hundred dollars for her twenty-six room hotel and that she had just three days to decide. "Three days later, she came to me in tears, frustrated and frightened,"32 noted the official; she had been forced to accept the offer. "People who were like vultures swooped down on us, going through our belongings, offering us a fraction of their value,"33 a Japanese American homeowner recalled. "When we complained to them of the low price they would respond by saying, 'you can't take it with you so take it or leave it.'"34

During times of war, citizens must bear tremendous costs and burdens; indeed, sometimes they even surrender their lives. So was the nation's treatment of Japanese Americans so intolerable in view of wartime exigency? Part I examines the constitutional analysis considering this question in Korematsu v. United States.35 Declaring that "hardships are part of war,"36 the Court upheld a military order that excluded persons of Japanese ancestry from designated coastal areas. The Court began, however, by noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny."37 But it ultimately relied on the precedent set by United States v. Hirabayashi,38 which upheld a similar curfew. The Court's analysis turned on whether the military order was within the war powers of the President and Congress.

27. See id. at 8.
28. See PERSONAL JUSTICE DENIED, supra note 4, at 11.
29. See id. at 121. The most widely quoted estimate of the total losses suffered is $400 million. It is unclear how this figure was calculated. See id. at 120.
30. See id. at 122.
31. See id. at 126.
32. Id. at 128.
33. Id. at 132.
34. Id.
35. 323 U.S. 214 (1944).
36. Id. at 219.
37. Id. at 216.
38. 320 U.S. 81 (1943).
However, the Court's opinion in Korematsu has been aptly called "a muddled hodge-podge of conflicting and barely articulate doctrine." Its mixed messages later were misinterpreted by the Court itself. The popular wisdom is that Korematsu has been, in fact, overruled as evidenced by the criticism it has received. Nevertheless, the Court continues to cite and rely on Korematsu in modern cases. Most recently, in Adarand Constructors, Inc. v. Pena, for example, the Court explicitly claimed that it relied on Korematsu in overruling more recent precedent that had applied intermediate scrutiny to federal affirmative action programs. The Court offered two conflicting interpretations of Korematsu and described its result as "inexplicable." In its first interpretation, the Court concluded that although it had set forth the "most rigid scrutiny" standard in Korematsu, it "then inexplicably relied on the principles we announced in the Hirabayashi case," which held that the "Fifth Amendment restrains only such discriminatory legislation by Congress as amounts to a denial of due process." In this interpretation, the Court indicated that it had not applied a strict scrutiny test in Korematsu. Later, in the same opinion, however, the Court offered yet a different interpretation of Korematsu. The Court noted that Korematsu has been repeatedly cited for the proposition that racial classifications made by the federal government must be subject to strict scrutiny and concluded that Korematsu teaches that "even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification." The Court's second interpretation of Korematsu assumes that it had applied strict scrutiny. Part I explores these two contradictory views.

Part I also considers the role of Korematsu as legal precedent. Since the 1980s, various individuals, groups, and courts have pronounced Korematsu insignifi-

40. See infra notes 75-79.
42. Id. at 2106.
43. Id.
44. Id. (citing Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).
45. See id. at 2107.
46. Id. at 2117.
47. This Article describes how the Court interprets Korematsu in modern cases involving due process, equal protection, and the war powers. It evaluates the Court's application of Korematsu in a number of substantive legal areas including immigration law, affirmative action programs, racial discrimination, national security, and pretrial detention. The Article concludes that Korematsu remains viable as precedent in these areas and provides an explanation for its perpetuation based on analyzing the original Korematsu opinion. This approach differs substantially from prior literature. Professor Eric Yamamoto has written a most outstanding recent evaluation of Korematsu. See Eric K. Yamamoto, Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties, 26 SANTA CLARA L. REV. 1 (1986). Like most writers, Professor Yamamoto focuses on Korematsu as precedent in national security law. However, he concludes, unlike many other authorities, that Korematsu remains valid precedent in national security law and suggests that courts should instead conduct a substantive review of governmental actions that threaten civil liberties. This Article differs from Professor Yamamoto's approach by taking a broader perspective of the legal implications of Korematsu and advocating a different type of interpretive approach. Professor Peter Irons studied the Japanese internment cases from a historical perspective. See IRONS, JUSTICE AT WAR, supra note 22. Professor Irons has also written a description of the coram nobis relitigation of these cases. See IRONS, JUSTICE DELAYED, supra note 9. The Article makes important references to these historical materials, but takes a different view of the Japanese internment cases by focusing on a doctrinal analysis. Sandra Takahata concludes that legal doctrines developed subsequent to Korematsu prevent it from influencing future decisions. See Sandra Takahata, The Case of Korematsu v. United States: Could It be Justified Today?, 6 U. HAW. L. REV. 109 (1984); see also Neil Gotanda, "Other Non-Whites" in American Legal History: A Review of Irons, 85 COLUM. L. REV. 1186 (1985).
Judgment: The Supreme Court's Korematsu decision is of little precedential significance in the modern day, the Court has not explicitly overruled it. Instead, the Court gives Korematsu meaning in several different ways. Part I describes and criticizes the logic of those who claim that Korematsu is no longer influential as precedent. Part I also shows how Korematsu has been perpetuated as precedent. The Court has abandoned its reliance on traditional stare decisis in interpreting Korematsu. Instead, it has relied on interpretive methods that either exaggerate the amount of judicial scrutiny imposed or perpetuate the legal principles of Korematsu without citation to the case. The Court also uses Korematsu based on its historical meaning. The Court's modern interpretation of Korematsu places more emphasis on the persuasive quality of the case as precedent instead of confronting its logic. This rhetorical orientation allows the legal principle contained in Korematsu to survive and flourish silently.

The modern Court's difficulty in understanding Korematsu and its distortion as precedent had its genesis in the Korematsu Court's failure to provide a logical explanation for reaching its result and choosing instead to rely on persuasive rhetoric. To describe and explain the opinion's lack of an integrated analysis, I take a narrative-based approach to interpreting Korematsu. This technique is sensitive to the intertwined roles of rhetoric and logic as well as to social influences involved in the creation of narratives and their subsequent transformations. Part II traces the origins of the narratives incorporated into the Court's written opinion and considers other available narratives ignored by the Court, particularly those of the parties most intimately involved: Korematsu and DeWitt. Part II also describes how the Court integrated and attributed meanings to the narratives contained within Korematsu. The section next offers and analyzes a two-tiered decisionmaking model for how narratives are selected in the original opinion. It provides a study of the Court's silence about difficult issues relating to race relations and how this silence has dangerous consequences.

Several commentators wrote excellent critiques of Korematsu shortly after the Court issued the opinion. See Rostow, supra note 21; tenBroek, supra note 39; Nanett Dembts, Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions, 45 COLUM. L. REV. 175 (1945). Although these three articles provide classic analyses of Korematsu, they do not give explanations similar to that proposed in this Article for the Court's muddled and contradictory analysis. For an excellent collection of materials about the Korematsu case and its relitigation, see THE MASS INTERNMENT OF JAPANESE AMERICANS and THE QUEST FOR LEGAL REDRESS (Charles McClain, ed., 1994).

Finally, scholars have also described and criticized the reparations movement. Professor Mari Matsuda provides a compelling analysis of the reparations movement from a critical perspective in Critical Race Theory and Critical Legal Studies: Contestation and Coalition, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 63 (Kimberle Crenshaw et al. eds., 1995); see also Philip Tajitsu Nash, Moving for Redress, 94 YALE L.J. 743 (1985).


This Article contributes to the branch of the law and narrative movement that studies legal opinions as narratives. See, e.g., Jane B. Baron, The Many Promises of Storytelling in Law, 23 RUTGERS L.J. 79, 85-89 (1991); Ruth Baker Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U.L. REV. 1185 (1992); Robert M. Cover, Violence and the Word, 95 YALE L.J. 1601 (1986); Aviam Soifer, Reviewing Legal Fictions, 20 GA. L. REV. 871 (1986). This Article advances this literature by methodically studying the Court's changing narratives about Korematsu and demonstrating that these narratives matched the public's changing perceptions about the fairness of the Japanese internment. It furthermore shows how this dynamic mirrors the Court's selection of narratives in the original opinion. It provides a study of the Court's silence about difficult issues relating to race relations and how this silence has dangerous consequences.
tives may have been selected for integration into the Court's opinion. Then, I develop the idea that the Court's emphasis on choosing narratives and assigning them meaning based on persuasive appeal, rather than on their logical relevance resulted in the disjointed quality of the written opinion. This practice led to the failure to establish what I term the "interpretive-narrative link"—a meaningful connection between the narrative and the Court's rule of law. The failure to establish this link caused the disharmony among messages within the opinion about the standard of review imposed.

Part III explains why the Court should privilege adjudication based on the narrative-interpretive link. This is not a call for less rhetoric; it would be naive to deprecate its importance. Instead, this is a plea for more explicit logical connections. The Court has excessively favored persuasive appeal over logical analysis in its use of Korematsu as precedent. The Court should confront Korematsu when it is logically relevant to a case. The Justices ought to provide explanation about how Korematsu is interpreted, despite rhetorical cost. Emphasis on the importance of the interpretive-narrative link in doctrinal interpretation would mean explicitly acknowledging Korematsu's legal presence through the traditional method of stare decisis as well as through historical interpretation. I call, however, for an abandonment of interpretive methods that rely on exaggeration based on the rhetoric contained within Korematsu and also for discarding those that permit reliance sub silentio. Only through continuing public conversations about the modern-day meaning of Korematsu can its potentially dangerous principles and rhetoric be limited effectively.

I. Korematsu as Legal Precedent

Part I summarizes the Korematsu opinion and traces how the Court has interpreted it in later cases. Many commentators contend that this is an unimportant topic because Korematsu represents a legal precedent of little significance in the modern day. These scholars focus on the traditional use of Korematsu in stare decisis. They tend to ignore modern interpretive techniques applied to Korematsu. While the Court may sometimes not cite Korematsu, even when considering issues that are closely analogous, its obvious absence raises questions about why the Court avoids distinguishing it or declaring it overruled. Alternatively, the Court may exaggerate the significance of Korematsu. For example, the Court frequently claims that in Korematsu it applied strict scrutiny under the Equal Protection Clause, despite the fact that it clearly did not do so. Finally, the Court sometimes refers to Korematsu as an historical example of a wrongly-decided opinion, even though it has not yet been explicitly overruled.

A. The Court Opinion

In the traditional recital of facts at the beginning of the Korematsu opinion, the Court\textsuperscript{49} tells us little about "[t]he petitioner." The Court neglected to mention even his name, much less why he chose to violate the military order. The only facts describing the petitioner, which the Court distilled from the detailed, four-page narrative in the brief\textsuperscript{50} submitted on behalf of the petitioner, were that he was an

\textsuperscript{49} Justice Hugo Black delivered the Court opinion and was joined by Chief Justice Stone and by Justices Reed, Douglas, and Rutledge. See Korematsu, 323 U.S. at 215.

\textsuperscript{50} See Brief for Appellant at 3-7, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22), reprinted in 42 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 95, 101-05 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].
American citizen of Japanese descent” and that “[n]o question was raised as to petitioner’s loyalty to the United States.”

The Court kept the petitioner a stranger to the reader to avoid inviting sympathy or rejection based on his racial identity.

Instead of summarizing the petitioner’s narrative, the Court focused on the crime itself and supplied a detailed analysis of its legal basis. “The petitioner... was convicted in a federal district court for remaining in San Leandro, California, a ‘Military Area,’ contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area.” By disobeying the military command, the petitioner violated “the Act of Congress, of March 21, 1942, 56 Stat. 173,” which made it a criminal offense, subject to imprisonment or criminal fine.

The Court then quoted, at length, the statute and stated that the exclusion order was also “substantially based upon Executive Order No. 9066, 7 Fed. Reg. 1407.” The Court also quoted the executive order: “the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities.”

The Court prefaced its legal analysis by stating “that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.” While not all such restrictions are unconstitutional, “courts must subject them to the most rigid scrutiny.” The Court reasoned that while “[p]ressing public necessity” may serve as justification for restrictions based on racial classifications, “racial antagonism” could not. This prefatory paragraph has the appearance of an apology—indeed, it seems out of context—as the remaining opinion went on to try to justify the Court’s unquestioning deference to the conclusions reached by military authorities.

The Court narrowed the legal issue to the constitutionality of the military order excluding persons of Japanese ancestry from the coastal area. Justice Black’s majority opinion expressly avoided deciding whether the internment was unconstitutional. Thus, the orders that required detention at assembly centers and the internment at relocation camps were not considered in Korematsu: “It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case.” Rather, the narrow issue addressed by the Court was the constitutionality of a “temporary exclusion” of persons of Japanese ancestry from a coastal area in time of emergency.

The Court found that Hirabayashi v. United States, decided more than a year before, was directly on point because it involved the same congressional act and

---

52. Id.
53. Id. at 216.
54. See id.
55. Id. at 216-17.
56. Id. at 217 (emphasis added).
57. Id. at 216.
58. Id.
59. Id.
60. Id.
61. Id. at 222.
62. See id. at 219.
executive order. In *Hirabayashi*, the Court sustained a conviction for violation of a curfew order that had been imposed on persons of Japanese ancestry in a coastal area. The Court in *Korematsu* emphasized the narrowness of its opinion by limiting its discussion to the first of the three issues decided in *Hirabayashi*, and concluded that the exclusion based on Japanese ancestry did not exceed the war powers of Congress and the President. The legal analysis was wholly devoted to discussing this single issue. The Court acknowledged that exclusion of Korematsu from his home was a greater deprivation of liberty than the imposition of a curfew. But, it concluded—without providing factual support—that both the exclusion and the curfew bore a “definite and close relationship to the prevention of espionage and sabotage.”

Military authorities, acting pursuant to congressional authorization, had determined that the “curfew provided inadequate protection” and had thus reasonably ordered exclusion.

The Court then referred by page to the part of *Hirabayashi* that discussed how Congress and the President had determined, when deliberating whether to exercise their war powers, that there was an urgent necessity to segregate based on Japanese ancestry rather than to make individual determinations of loyalty. The Court in *Korematsu* failed, however, to review or cite any particular evidence to justify the failure to initiate individual hearings to determine if there were citizens who posed substantial risks of involvement in sabotage or espionage. The only specific evidence pointed to by the Court was that, based on a questionnaire distributed to those who were interned, “[a]pproximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.” The Court failed to note that the questionnaire was administered about a year after the incarceration had begun and thus reflected the resentment felt by the internees at that time toward the United States.

Thus, the Court appeared to justify its holding based on questionnaire data obtained after internment as well as on the *Hirabayashi* precedent. Furthermore, the

64. See *Korematsu*, 323 U.S. at 217.
65. The *Hirabayashi* Court decided three major issues. First, it held that Congress and the President, acting together, were within the war powers in authorizing the curfew order. See *Hirabayashi*, 320 U.S. at 92-93. Second, the curfew order did not violate the Due Process Clause of the Fifth Amendment by discriminating based on race. See id. at 100-02. Finally, the promulgation of the curfew order by General DeWitt was not based on an unconstitutional delegation of legislative power. See id. at 102-05.
67. See id. at 217-219. After identifying the single legal issue, id. at 217-18, the Court then provided an analysis, id. at 218-19, which shadowed the discussion in *Hirabayashi*, see *Hirabayashi*, 320 U.S. at 96-99, on this same point.
68. *Korematsu*, 323 U.S. at 218; see also *Hirabayashi*, 320 U.S. at 96-99.
70. See id.
71. See id. (“Here, as in the *Hirabayashi* case, ‘... we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. ...’”) (citing *Hirabayashi*, 320 U.S. at 99). This was the last page in the *Hirabayashi* opinion devoted to discussing the issue of whether the curfew order was within the war powers of the government. The pages following were devoted to the issue of whether this racial classification violated the equal protection requirement under the Fifth Amendment. See *Hirabayashi*, 320 U.S. at 99-105.
72. According to Professor Rostow, one reason for this failure was the lack of a trial record or other form of evidence. See Rostow, *supra* note 21, at 509.
74. See infra note 278 and accompanying text.
Court’s belief that individual suffering was inescapable in times of war pervaded the entire opinion. After stating its holding, the Court acknowledged that, “we are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships.” Then, when the Court finally identified “the petitioner” as “Korematsu” on the next-to-last page of its opinion, it could state: “Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire . . . .” The Court emphasized that the war was horrible and cruel and that many other unidentified victims were unable to plead for mercy and justice. The Court’s contextualization served to justify its conclusion that, in this wartime situation, individuals of Japanese ancestry did not have a right to be identified and to have their stories heard.

B. The Relationship of Korematsu to Other Internment Cases

The Court may genuinely have considered Korematsu to be a case of little significance. After all, the Court construed Korematsu as merely reaffirming Hirabayashi. The President had declared the termination of the exclusion order and an initiation of the disbanding of the internment just prior to the Court’s issuance of Korematsu. Moreover, the Court announced its decision in Ex parte Endo the same day it issued Korematsu. In Endo, the Court held that the continued internment of a Japanese American was unauthorized under the congressional statute that had authorized the curfew, exclusion, and internment. The Court concluded that because the petitioner had been ascertained to be loyal, she could not be detained while the government was attempting to obtain clearance from those areas to which she wanted to return. The Court stated that it was narrowly construing the statute “to allow the greatest possible accommodation between [constitutional] liberties and the exigencies of war.” Thus, the Court at the moment Korematsu was handed down may have believed that it was a case of minor significance.

If the Korematsu Court did think that Korematsu was relatively insignificant, this may explain some of the narrative features of its opinion. The brevity of the text and the conclusory analysis are consistent with this interpretation. Moreover, the overall tone of the Court opinion emphasized that it was a narrow holding, not going “beyond the issues raised,” not deciding “momentous questions.” Thus, the Court, and Justice Black in particular, may have been surprised when Korematsu later received so much attention. It has achieved notoriety for the same reasons that

76. Id. at 223 (emphasis in original).
77. Prior to the Court’s announcement of Korematsu, the Solicitor General publicly proclaimed that the military order that required exclusion had been officially rescinded. See PERSONAL JUSTICE DENIED, supra note 4, at 235. The War Department had recognized in early 1943 that military necessity could no longer justify continuing the internment. See id. at 214. The President finally agreed to initiate the release of internees after he was re-elected in November 1944. See id. at 232. The United States was winning the war in the Pacific, and the danger of Japanese invasion had passed. By the time the Court announced its opinion, the government had already decided against continuing the exclusion order. The question of its constitutional legitimacy remained, however, because Korematsu appealed his criminal conviction for violating the military order.
78. 323 U.S. 283 (1944).
79. Id. at 302.
80. Id. at 292.
81. Id. at 300.
82. Korematsu, 323 U.S. at 222.
83. Id.
may have misled the Court into thinking that it was an insignificant decision. Because Korematsu followed Hirabayashi, the Court had a second opportunity to correct what is now universally agreed to be a terrible error in judgment. The Court’s repetition of error seems even more egregious because the circumstances at the time of Korematsu made it as easy as it could ever be in a wartime situation: in over two years, not one person interned had been shown to be disloyal; the internment was being disbanded; and the War Department and even military authorities were conceding that the internment had had no logical basis from the start. There was no need to rush to judgment. For all practical purposes, the Court’s opinion was moot on the day it was issued. Yet the Court handed down a decision that is now thought to be among its worst judgments.

Although Endo signaled the beginning of the end of the internment, the Court’s reliance on statutory interpretation to reach its conclusion meant that Hirabayashi and Korematsu stood for the constitutional principles emerging from the internment cases. This result appears deliberate. In Hirabayashi and Korematsu, the Court broadly interpreted the same statute to encompass authority to issue the curfew and exclusion orders, despite the statute’s failure to specify that these might be done based on racial ancestry. In Endo, however, the Court rejected such a broad approach to reading of the statute. The outcome in Endo allowed the perpetuation sub silentio of the constitutional doctrine contained in Hirabayashi and Korematsu.

C. The Perpetuation of Korematsu as Precedent

Korematsu remains an important influence in constitutional law. The Court relies on several different methods in attributing meaning to Korematsu in its opinions. The Court’s reliance on Korematsu can be analyzed based on a decisionmaking model. An evaluation based on this model indicates that the Court selects and uses methods based on its perception of the persuasiveness of its interpretation of Korematsu rather than its logic. This observation explains the evolving reliance on various interpretive methods since Korematsu was decided. Most recently, the Court has depended on methods that hide the Court’s reliance on Korematsu or that put it in an historical context.

1. Current Assessment of Korematsu’s Insignificance

Popular wisdom has it that Korematsu has silently passed away as legal precedent. Curiously, this view is especially supported by those who have made significant contributions by criticizing the original decision. Forty-three years after writing his famous article criticizing Korematsu, Professor Rostow stated, “I would submit that Korematsu has already been overruled in fact, although the Supreme Court has never explicitly overruled it. The case has been overruled in fact because of the criticism it has received . . . .” Most recently, similar pronouncements have been made by those associated with presidential apologies, legislative restitution, and the
coram nobis relitigation of the Japanese internment cases. For example, the congressional report, Personal Justice Denied, declared, “Today the decision in Korematsu lies overruled in the court of history.”90 The report contended that subsequent case law rendered Korematsu “a curiosity, not precedent on questions of racial discrimination”91 and further claimed that “each part of the decision, questions of both factual review and legal principles, has been discredited or abandoned.”92 After his successful effort in the relitigation of Korematsu, one of the co-counsel declared that the 1984 ruling “sucked away the factual underpinnings”93 of the 1944 case. Indeed, in granting the coram nobis petition to vacate Fred Korematsu’s conviction, Judge Patel observed that the “Justices of [the Supreme] Court and legal scholars have commented that the decision is an anachronism in upholding overt racial discrimination as ‘compellingly justified.’”94

The celebration of the end of Korematsu’s reign is premature; Korematsu lives. To believe otherwise is to rely on the same logic that was expounded by the government and those who opposed the relitigation of Korematsu. The Justice Department opposed the Korematsu relitigation because it argued that subsequent precedent made it unnecessary for courts to redecide Korematsu’s relevant legal issues.95 Former Justice Arthur J. Goldberg, a member of the congressional commission that issued Personal Justice Denied, criticized the coram nobis effort as “unnecessary and potentially damaging.”96 He contended, prior to the relitigation, that the coram nobis effort was unnecessary because Korematsu had been overruled.97 Indeed, repeated public claims as to Korematsu’s insignificance have been echoing ever since the Justice Department’s similar argument in the original case.

The legal arguments that Korematsu is insignificant rest on narrow, incomplete understandings about the role of precedent in constitutional interpretation. This conventional view construes the Court’s failure to cite Korematsu, despite its relevance, as overwhelming evidence that it is not influential.98 This conventional wisdom assumes that the Court’s practice is to state explicitly all precedent on which it relies in its decisionmaking. Furthermore, the popular wisdom misconstrues exaggerated interpretations of Korematsu as benign or even helpful. Thus, it is widely assumed that there is no danger in citing Korematsu as establishing the principle of strict scrutiny in equal protection jurisprudence.99 This view misapprehends the legal context surrounding Korematsu as precedent. The conventional view relies on the general perception that doctrinal development in constitutional law is linear and

90. Personal Justice Denied, supra note 4, at 238.
91. Id. at 239.
92. Id.
94. Korematsu, 584 F. Supp. at 1420.
95. See id. at 1413, 1420.
97. See Irons, Justice Delayed, supra note 9, at 14.
98. In Personal Justice Denied, the commission concludes that “the Japanese American cases have never been followed and are routinely cited as the only modern examples of invidious racial discrimination which the Supreme Court has not stricken down.” Personal Justice Denied, supra note 4, at 239. Thus, it concludes that Korematsu is only a “curiosity, not precedent on questions of racial discrimination.” Id. Judge Patel’s opinion noted that only Hirabayashi and Korematsu have upheld the overt use of racial classifications as constitutional and thus labeled them an “anachronism.” 584 F. Supp. at 1420; see also Cooper et al., supra note 89, at 197 (quoting section by Professor Rostow) (“Although the Supreme Court has not overruled the case, I do not think any practicing lawyer today would cite the decision in a brief.”).
99. See Personal Justice Denied, supra note 4, at 239.
forward in progression\textsuperscript{100} rather than recognizing its episodic and regressive tendencies. Moreover, this popular wisdom rests on pointing to subsequent favorable legislation and statutory interpretation\textsuperscript{101} and fails to recognize the preemptive power of constitutional decisionmaking. Finally, those who believe that \textit{Korematsu} has little legal significance explain that the only reason the Court has not overruled it is for lack of opportunity.\textsuperscript{102} I demonstrate below that all these assumptions are false. Even when presented with a recent opportunity to overrule \textit{Korematsu}, the Supreme Court instead relied on it to overrule another case.\textsuperscript{103}

2. \textit{The Evolutionary Progression of Interpretive Methods}

The Court has relied on traditional techniques in interpreting \textit{Korematsu}. Under \textit{stare decisis}, \textit{Korematsu} has been held to be on point or distinguishable. The Court has also used \textit{Korematsu} in ways not explainable by traditional \textit{stare decisis}. It has been interpreted to be relevant to cases raising legal issues far removed from those decided in \textit{Korematsu}. Alternatively, the Court sometimes has consciously not cited \textit{Korematsu} when giving citations for propositions for which \textit{Korematsu} is directly on point. Finally, the Court has interpreted its applicability in light of \textit{Korematsu}'s historical significance.

\textbf{a. Stare Decisis}

The \textit{Korematsu} case has been applied in a traditional manner under \textit{stare decisis}, primarily from the 1940s through the 1960s, in cases involving postwar regulation,\textsuperscript{104} immigration law,\textsuperscript{105} and national security law.\textsuperscript{106} \textit{Stare decisis} typically requires analysis based on analogy: the Court compares the holding and the associated

\begin{flushright}
\textsuperscript{100} See generally Takahata, supra note 47 (advancing argument that under current legal doctrines, \textit{Korematsu} would be decided differently); see also Personal Justice Denied, supra note 4, at 239 ("the law has evolved in the last forty years . . ."). Former Justice Goldberg claimed that \textit{Bolling v. Sharpe}, 347 U.S. 497 (1954), overruled \textit{Korematsu} on the equal protection issue. See Irons, supra note 9, at 13. Actually, the Court in \textit{Bolling} cited \textit{Korematsu} as support for the standard of strict scrutiny. See \textit{Bolling}, 347 U.S. at 499.

\textsuperscript{101} The report, Personal Justice Denied, argued that in Duncan v. Kahanamoku, 327 U.S. 304 (1946), the Court struck down the imposition of martial law in Hawaii and thus showed no deference to military authorities. See \textit{Personal Justice Denied}, supra note 4, at 238-39; see also Takahata, supra note 47, at 137-38 (also relying on \textit{Duncan}). The Court relied, however, on statutory interpretation, rather than on constitutional grounds. See \textit{Duncan}, 327 U.S. at 313-18.

\textsuperscript{102} In Personal Justice Denied, the commission indicated that the reason that \textit{Korematsu} has not been overruled is because "we have not been so unfortunate that a repetition of the facts has occurred to give the Court that opportunity . . . ." \textit{Personal Justice Denied}, supra note 4, at 239; see also Irons, supra note 22, at 366.


\textsuperscript{104} See Lichter v. United States, 334 U.S. 742, 767 n.9 (1948) (citing \textit{Korematsu} to support the view that post-war recovery of excess profits on war contracts was constitutional given comparable "federal regulation of civilian liberty and property in proportion to the increasing demands of modern warfare").

\textsuperscript{105} See Zemel v. Rusk, 381 U.S. 1, 14 n.13 (1965) (holding that denial of passports for travel to Cuba was not a denial of due process and citing \textit{Korematsu} for support that due process requirements are a function of the extent of the necessity for the restriction); Trop v. Dulles, 356 U.S. 86, 106 (1958) (Brennan, J., concurring) ("[W]here Congress has determined that considerations of the highest national importance indicate a cause of action for which an adequate substitute is lacking, I cannot say that this means [expatriation] lies beyond Congress' power to choose."); Shaughnessy v. United States, 345 U.S. 206, 222 (1953) (Frankfurter, J., dissenting) (citing \textit{Korematsu} to support assertion that due process renders what may be due to a "strong state as well as to a free individual"). Immigration cases also raise national security issues. See infra notes 196, 199.

\textsuperscript{106} See, e.g., Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 661 (1952) (Clark, J., concurring) (distinguishing \textit{Korematsu} because Congress expressly authorized the presidential actions).
\end{flushright}
facts of a case previously decided with the legal issues and facts in a case at issue.\textsuperscript{107} If the pertinent legal issues are sufficiently analogous, the Court may follow the prior case and cite it for support. Alternatively, if the prior case bears some analogy, but is not sufficiently on point to be determinative—or perhaps there is a more analogous case already decided—the Court may distinguish it.

\textit{Korematsu} has been cited as being on point and thus supportive of an outcome reached as well as being distinguishable and of no persuasive value. A typical example of the former is \textit{Harisiades v. Shaughnessy},\textsuperscript{108} decided in 1952 at the beginning of the Cold War. The Court upheld a statute authorizing the deportation of a resident alien based on a past history of membership in the Communist Party.\textsuperscript{109} The \textit{Harisiades} Court cited \textit{Korematsu} for two principles. First, the Court observed that federal policy governing aliens was “vitaly and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.”\textsuperscript{110} The Court concluded that because these policies were “so exclusively entrusted to the political branches of government,”\textsuperscript{111} they were “largely immune from judicial inquiry or interference.”\textsuperscript{112} The Court cited \textit{Korematsu} in a footnote to show the extent of the “war power over even citizens.”\textsuperscript{113} The Court cited \textit{Korematsu} a second time when it observed that Communist aggression was creating “hardships for loyal citizens”\textsuperscript{114} and thus “it is hard to find justification for holding that the Constitution requires that its hardships must be spared the Communist alien.”\textsuperscript{115} The Court then turned to the example of the government’s exclusion of Japanese citizens from their homes and businesses and cited \textit{Korematsu}.\textsuperscript{116} Thus, \textit{Korematsu} provided direct support for the use of immigration policy to support the exclusion of a resident alien.

The Court’s reliance on \textit{Korematsu} in \textit{Harisiades} shows the potentially large influence \textit{Korematsu} might have on constitutional law. It could be used to justify sweeping measures by the government over aliens and citizens alike by way of \textit{a fortiori} logic. As shown in \textit{Harisiades}, if the government can show that its activities are connected to its sovereign powers, \textit{Korematsu} could be construed to justify measures at least equivalent to excluding citizens from their homes without providing due process.

Alternatively, the Court has found it necessary to distinguish \textit{Korematsu}. For example, in \textit{Kent v. Dulles},\textsuperscript{117} decided in 1958, for example, the Court interpreted a federal statute not to authorize the Secretary of State to deny passports to citizens because of their alleged ties to the Communist Party.\textsuperscript{118} The Court found that a citizen’s right to travel was a liberty interest under the Due Process Clause of the

\textsuperscript{107} See Susan W. Brenner, \textit{Precedent Inflation} 17 n.24 (1992). Despite the central nature of the practice of \textit{stare decisis}, it has been said that “our theoretical understanding of the practice is still at a very primitive stage” and “if one were to ask law students, lawyers, judges, or legal academics what following precedent entails, one would almost surely get a variety of inconsistent answers.” Larry Alexander, \textit{Constrained by Precedent}, 63 S. Cal. L. Rev. 1, 3 (1989).

\textsuperscript{108} 342 U.S. 580 (1952).

\textsuperscript{109} See id. at 591-92, 598.

\textsuperscript{110} Id. at 588-89.

\textsuperscript{111} Id. at 589.

\textsuperscript{112} Id.

\textsuperscript{113} Id. at 589 n.16.

\textsuperscript{114} Id. at 591.

\textsuperscript{115} Id.

\textsuperscript{116} See id.

\textsuperscript{117} 357 U.S. 116 (1958).

\textsuperscript{118} See id. at 117-18, 130.
Fifth Amendment. To avoid finding the statute unconstitutional, the Court interpreted narrowly the section of the statute that assigned broad discretion to the Secretary of State to issue passports. The Court recognized that Korematsu allowed the government to exclude citizens from their homes and to "restrict their freedom of movement." The Court distinguished Kent from Korematsu in three ways: (1) Congress was not acting jointly with the President; (2) the country was not at war; and (3) there was no imminent danger. These were the kinds of the factors included by Justice Black in the majority opinion.

To the extent that there is a consensus that Korematsu was wrongly decided, using stare decisis to distinguish Kent is an effective way to confine it. This technique fleshes out the essential features of Korematsu and limits its applicability through definition. Thus, the diffuse and unqualified quality of the holding in Korematsu might be clarified, defined, and limited through stare decisis. For example, Justice Frankfurter believed that Korematsu could be confined to the context of the exercise of the war power. Later courts could accomplish this by continually distinguishing it as precedent. Moreover, this technique could result in the eventual overruling "sub silentio" of Korematsu. There is indeed a natural resistance to overruling cases, with courts preferring to accomplish the equivalent result by distinguishing and qualifying the precedent out of existence. The traditional use of stare decisis with respect to Korematsu appears, however, to have been abandoned by the mid-1960s. After this period, the Court used interpretive methods different than those usually associated with stare decisis.

b. Hyperbole

From the mid-1950s to the present day, both a majority and individual Justices have cited Korematsu most frequently for the principle that racial classifications by the government are subject to strict scrutiny. The leading example remains Loving v. Virginia, in which the Court held that a Virginia criminal statute proscribing interracial marriages violated the equal protection clause of the Fourteenth Amendment. The State contended that the statute equally punished the white

119. See id. at 127.
120. Id. at 128.
121. See infra note 341.
122. I place quotation marks around sub silentio because the Court's acts of distinguishing this precedent are explicit. It is silent only in the sense that a case may not be explicitly overruled.
125. 388 U.S. 1 (1967).
126. See id. at 12.
and non-white participants in the marriage and thus, although it employed racial classifications, it did not invidiously discriminate.\footnote{127} The Court disagreed, holding that because the statute established racial classifications, "[t]he mere fact of equal application"\footnote{128} did not excuse it from the "Fourteenth Amendment's proscription of all invidious racial discriminations."\footnote{129} The Court stated that "racial classifications, especially suspect in criminal statutes, should be subjected to the 'most rigid scrutiny.'"\footnote{130} The Court then cited \textit{Korematsu} in support of this claim.\footnote{131}

This interpretation of \textit{Korematsu} is usefully characterized as an example of "hyperbole." The interpretation was not based on any legal principle used in \textit{Korematsu}. Certainly, the Court in \textit{Loving} and other equal protection cases that cite \textit{Korematsu} for this purpose accurately quote language found in that case. But the Court clearly did not impose heightened scrutiny of the government's objectives in \textit{Korematsu}. Thus, the words "especially suspect" and "most rigid scrutiny" do not describe a legal principle actually used in that case. Instead, the logic used when the \textit{Korematsu} Court actually conducted its analysis of the government's avowed objectives indicated near-total deference to the government.\footnote{132} Because the Court's holding in \textit{Korematsu} was consistent with virtually complete deference to the government's conclusion, the more appropriate citation to \textit{Korematsu} should be \textit{but see} rather than \textit{see}.\footnote{133}

Moreover, the Court did not even conduct an equal protection clause analysis in \textit{Korematsu}. The Court devoted its opinion wholly to the issue of whether the government's actions were within the war powers of Congress and the President; it did not address equal protection doctrine. However, even if the Court had done so, \textit{Korematsu} would not belong to the modern jurisprudence of the equal protection clause because it was decided prior to \textit{Brown v. Board of Education}.\footnote{134} The Court did not impose a strict scrutiny analysis prior to \textit{Brown}, relying instead on a rational basis test.\footnote{135} Moreover, the Court did not impose the requirements of the Equal Protection Clause on the federal government until 1954, when it decided \textit{Bolling v. Sharpe}.\footnote{136} Prior to that time, the Court was limited to relying upon a Due Process Clause analysis because the Fifth Amendment, unlike the Fourteenth Amendment, does not contain an equal protection clause.\footnote{137} The Court in \textit{Hirabayashi} concluded that the Fifth Amendment "restrains only such discriminatory legislation by

Congress as amounts to a denial of due process." The Court’s citation of *Korematsu* in *Loving* is a rather extravagant reading of the case. It ignores the context for the language it cites as well as where the case fits with respect to constitutional jurisprudence.

The Court also resorted to hyperbole in *Adarand Constructors, Inc. v. Pena*, in which the majority explicitly stated its reliance on *Korematsu* for overruling recent precedent, *Metro Broadcasting, Inc. v. FCC*. In *Metro Broadcasting*, the Court had applied an intermediate scrutiny standard to determine the legitimacy of federal affirmative action programs. In *Adarand*, however, the Court claimed that strict scrutiny was the more appropriate standard and stated that *Korematsu* taught that “even ‘the most rigid scrutiny’ can sometimes fail to detect an illegitimate racial classification.” The Court assumed in *Adarand* that it had applied a strict scrutiny standard in *Korematsu*, but that it had still been unable to detect the underlying racist motivation. In *Adarand*, the Court concluded that, in light of what happened in *Korematsu*, imposing an intermediate standard of review on affirmative action programs might not be a stringent enough test. It held that strict scrutiny should be applied to federal affirmative action programs because the Court may otherwise lack the capability to distinguish between invidious discrimination and benign promotion of racial diversity.

Those who contend that *Korematsu* is overruled or irrelevant ignore this continuing usage.

c. Present Absence

In the past decade, the language of the Court’s narrative and the surrounding circumstances in several cases have created the clear impression that the Court is relying on *Korematsu*, but refusing to cite the case. *Korematsu* takes on a “present absence” in such cases. In *Reno v. Flores*, for example, the Court held that due process was not violated by a rule presuming that detention was more appropriate than release for juvenile aliens who could only be released to their parents, close relatives, or legal guardians, except in unusual and compelling circumstances. The Court’s strongest precedent in support of justifying detention without an individual showing of risk to the community was *Korematsu*, although the Court failed to cite it for support. The dissenting opinion by Justice Stevens cited a string of nine prior cases in which the Court had indicated that due process normally requires that the government “demonstrate, on an individual basis, that detention in fact serves th[e] interest [of protecting a juvenile’s welfare].” Following this string of citations, Justice Stevens offered a footnote that observed that there is “one notable exception to this long line of cases: *Korematsu v. United States*” and further noted

---

141. *Adarand*, 115 S. Ct. at 2117 (citation omitted).
142. See id.
143. See id.
146. See id. at 303.
147. *Id.* at 343 (Stevens, J., dissenting) (emphasis in original).
148. *Id.* at 344 n.30.
that "[t]he Court today does not cite that case, but the Court’s holding in Korematsu obviously supports the majority’s analysis." Justice Stevens then stated that he understood "the majority’s reluctance to rely on Korematsu" because it had involved a wartime emergency and recently had been publicly recognized as a mistake by Congress in the course of authorizing reparations. The majority failed to respond to this criticism.

Another similar example is United States v. Salerno, in which the Court upheld federal legislation authorizing pretrial detention on the basis of future danger. In reversing the federal court of appeals, the Court quoted this lower court as concluding that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure, without regard to the duration of the detention." In arriving at this conclusion, the federal court of appeals had found it necessary to distinguish Korematsu based on the nature of the criminal activity. The Supreme Court held, however, that the governmental interest in public safety can outweigh an individual’s liberty interest. It stated rather pointedly: "For example, in times of war or insurrection, when society’s interest is at its peak, the Government may detain individuals whom the government believes to be dangerous." The Court did not cite Korematsu. In so doing, it ignored citations to Korematsu, either for support by the Justice Department or to distinguish it in the briefs of the defendant-respondent and by various amici groups.

Thus, the Court reached a position consistent with Korematsu and cited wartime exigencies as a supportive example of the need for occasional curtailment of the liberties of individuals. Yet the majority did not cite Korematsu despite discussion in the briefs and by the federal appellate court below. The technique of present absence thus avoided acknowledging the logically relevant application of the case.

d. Historical

Beginning in the 1980s, the Court and individual Justices have used Korematsu as a history lesson. Under traditional notions of stare decisis, unless the Court has

149. Id.
150. Id.
151. See id.
153. See id. at 755.
154. Id. at 748 (quoting United States v. Salerno, 794 F.2d 64, 71 (2d Cir. 1986).
155. See United States v. Salerno, 794 F.2d at 74.
156. See Salerno, 481 U.S. at 751.
157. Id. at 748.
159. See Brief for Salerno at 27, 33 n.25, United States v. Salerno, 381 U.S. 739 (1987) (No. 86-87), reprinted in 171 LANDMARK BRIEFS, supra note 50, at 89, 123, 129 n.25.
161. See Adarand Constructors, Inc. v. Pena, 115 S. Ct. at 2136 (Ginsburg, J., dissenting); Metro Broadcasting v. FCC, 497 U.S. at 603, 633 (O’Connor, J., dissenting); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989); Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 635 (1988) (Murphy, J.,
overruled a case, it is either cited as positive support for a proposition or distinguished and found to be of no support. The Court has not overruled Korematsu and yet, through historical interpretation, Justices assign negative persuasive weight to the result reached in Korematsu. This approach recognizes that Korematsu is now publicly perceived to have been decided incorrectly. By placing Korematsu in its historical context, the Court therefore is able to use it in a way substantially different from ordinary stare decisis.

The most important use of this historical approach occurs in affirmative action cases. Affirmative action programs remain an important exception to the general prohibition against racial classifications imposed by the government. They share significant similarities to the facts provided by the Court in Korematsu: an important governmental objective, a temporary imposition, and a limited means of accomplishing the government objective. Conservative and liberal Justices therefore have been engaged in an ongoing debate over the historical meaning of Korematsu in light of these similarities. In City of Richmond v. J.A. Croson Co., for example, the Court considered the constitutionality of a city’s affirmative action program that awarded construction contracts to general contractors who gave to minority-owned businesses at least thirty percent of the contract’s total dollar amount. The Court imposed strict scrutiny—not citing Korematsu for this point—and found that the city failed to demonstrate a compelling governmental interest to justify the affirmative action plan. The majority further found that the means were not narrowly tailored to remedy the effects of prior discrimination. Justice O’Connor stated, on behalf of the Court, that a generalized assertion that there has been past discrimination in the entire construction industry could not justify the use of an unyielding quota. She also stated that when the government “chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification’s relevance to its goals” and that race should not be rendered “a legitimate proxy for a particular condition merely by declaring that the condition exists.” Justice O’Connor concluded by citing Justice Murphy’s dissenting opinion in Korematsu: “The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection jurisprudence.”

The Court’s historical use of Korematsu in Croson is different from the distortion of its holding when relying on hyperbole. However, it uses the case in a way consistent with the conventional wisdom that it was wrongly decided. We may disagree among ourselves whether the logical meaning provided by the Court was correct but at least the majority in Croson provided an explanation for its use of Korematsu. The Court interpreted Korematsu as providing a lesson, based on history, that absolute discretion should not be accorded to governmental authorities in relying on racial classifications. The Court’s exercise of historical interpretation defines Korematsu in the modern day.

However, the Court’s use of Korematsu to strike down affirmative action programs may be quite ironic. Although the City of Richmond’s affirmative action

---


163. See id. at 498-99.

164. Id. at 500.

165. Id. at 500-01.

166. Id. at 501.
program benefited minorities (including “Oriental” persons\textsuperscript{167}), the Court held that \textit{Korematsu} supported its holding that such a program was unconstitutional. In vigorous dissent, Justice Marshall argued that there should be an important distinction between invidious racial classifications and those that remedy past discrimination.\textsuperscript{168} This view implied that \textit{Korematsu} was distinguishable because it involved invidious racial discrimination. This debate over the legitimacy of an affirmative action program also illustrates the crux of the modern struggle over what meaning should be attributed to \textit{Korematsu}.

In summary, the Court’s interpretation of \textit{Korematsu}, which began with traditional reliance on \textit{stare decisis}, has evolved to dependence on other interpretive methods. The techniques of hyperbole and present absence allow the Court to match its use of \textit{Korematsu} to a modern public view that recognizes the injustice of the Japanese internment. Historical interpretation also allows the Court to use \textit{Korematsu} consistently with this new public perception and does not depend on gross distortion of its original meaning.

D. The Relationship Between Narrative and Interpretation

The Court’s reliance on evolving interpretive methodologies has mirrored changing public sentiments about the Japanese internment. This observation may be demonstrated by examining a decisionmaking model that describes the interplay between the Court’s choices of (1) when to cite \textit{Korematsu} explicitly, and (2) what legal meaning to attribute to \textit{Korematsu}. This model treats \textit{Korematsu} as a judicial narrative and determines whether the Court uses it in a logical or rhetorical manner. By “logic,” I am referring to analytic reasoning informing interpretation. This kind of logical interpretation may take the form of theory, systematic explanation, example, or empiricism. Such logic should connect the \textit{Korematsu} case with the interpretation and thereby help to define it. Alternatively, the Court could make either of the two determinations based on the persuasive imagery of the \textit{Korematsu} case. By “persuasive,” I mean that the Court bases its determination on using the imagery connected to \textit{Korematsu} to convince and influence the audience who reads its opinions. Logical analysis and persuasive imagery usually go hand-in-hand: strong logic appeals to our sense of rightness and fairness. This linkage is, however, not necessarily required. If the Court relies on the logic found within \textit{Korematsu} to support its legal interpretation, the reader may find this support unpersuasive because of the negative connotations of the \textit{Korematsu} case. Alternatively, a Court’s citation to \textit{Korematsu} may represent reliance on a powerful symbol that defies logical analysis. When the Court cites \textit{Korematsu} for the principle of strict scrutiny, it relies on \textit{Korematsu} for purely persuasive reasons since the case cannot be logically interpreted in this way. In this circumstance, \textit{Korematsu} may not be relevant to the particular legal interpretation made by the Court, but the Court offers a distorted interpretation of \textit{Korematsu} for rhetorical effect.

The Court tends to make determinations about citing to \textit{Korematsu} and giving it meaning based primarily on its persuasive effect. The Court relies on certain forms of interpretation, such as hyperbole and present absence. Also, its interpretation of \textit{Korematsu} tends to reflect the public’s changing perception of the Japanese internment. Moreover, the Court’s silent unwillingness to overrule or explicitly de-

\textsuperscript{167} Id. at 506.
\textsuperscript{168} See id. at 552 (Marshall, J., dissenting).
fine what Korematsu means today perpetuates Korematsu's vitality as precedent in equal protection jurisprudence, criminal law, national security law, and immigration law.

1. Korematsu as an Evolving Public Narrative

The Court's use of Korematsu appears to have evolved in ways that reflect changing public attitudes toward civil rights generally and the Japanese internment in particular. In the post-World War II period, the Court routinely cited Korematsu in cases involving economic regulation, immigration law, and national security law. Thus, the Court used Korematsu consistently with traditional notions of stare decisis. The Court's selection of Korematsu for citation as precedent can be analyzed as a two-step decisionmaking process. The first-order determination selects a case from the universe of possible precedents to be included. This decision is usually implicit as the Court has never developed strict criteria as to which precedent must be discussed in the course of its analysis. The Court's second-order determination establishes the meaning of the case with respect to the opinion citing it; it may be used as supportive precedent or it may be distinguished. In the traditional use of precedent described above, the Court in the post-war period relied on both the logical relevance and persuasiveness of the precedent at both orders of determination. This may have reflected the fact that Korematsu's logic and persuasiveness were widely perceived as harmonious. While academic criticism and some public sympathy for the former internees existed, the general public still harbored substantial racial prejudice toward those of Japanese ancestry. The Court's reliance on Korematsu through stare decisis coincided with this public perception that the Japanese internment was justified.

In the 1950s, the Court's interpretation of Korematsu began moving away from this traditional approach. At that time, the Court initiated interpretation of the case in a hyperbolic way and cited it as support for strict scrutiny of racial classifications made by the government that burden minorities. By the 1960s, the traditional use of stare decisis as a technique of interpretation had waned, and the Court used Korematsu most frequently as hyperbole. This usage coincided, of course, with the post-Brown Civil Rights Era when the Warren Court expanded the scope of protections contained within the Bill of Rights. The hyperbolic interpretation of Korematsu created a comforting myth that the Court had tried its hardest by imposing its strictest scrutiny when it validated the racial classifications in the internment cases. Reliance on hyperbole served as a means of justifying the recent past and yet urged caution in the future. The Court's use of Korematsu as hyperbole reflected a decision at both the first- and second-order determinations to use the precedent in a persuasive, rather than logical, manner. In the first-order determination, the Court selected Korematsu for inclusion in its equal protection cases despite the fact that it did not address equal protection doctrine. In the second-order determination, the Court misinterpreted Korematsu as being about the application of strict scrutiny.


170. See PERSONAL JUSTICE DENIED, supra note 4, at 241-43.
The Court’s recent reliance on the techniques of present absence and historical interpretation reflects yet another change—increased political activism of Asian Americans—in the 1980s. *Personal Justice Denied* provided a ringing public declaration that the Japanese internment was unjustified and included a call for reparations. The Civil Liberties Act of 1988\(^1\) constituted firm acknowledgment of the injustice backed by a commitment to make monetary reparations for those who were interned. In the context of these public narratives, a Court’s citation to *Korematsu* as affirmative support for its opinion might be logically correct but not persuasive. The Court thus began to omit reference to the case, even when *Korematsu* was highly relevant to its decision. A present absence represents an interactional relationship between the first- and second-order determinations. The first-order determination to omit reliance on *Korematsu* may have resulted from the potential dissonance created if it were cited by the Court. From a logical perspective, consistency with *Korematsu* may suggest that a later decision is wrong. From a rhetorical perspective, the inclusion of *Korematsu* as support may diminish the persuasiveness of any opinion. Thus, it is conceivable that the dissonance created by facing a second-order determination led the Court to make a first-order determination to omit *Korematsu* despite strong logical relevance.

Finally, the Court’s use of *Korematsu* from an historical perspective allows the Court to refer explicitly to it for support and yet to be consistent with the conventional wisdom that it resulted in tragedy. The historical interpretation allows logic and rhetoric to function hand-in-hand because the technique does not need to distort the holding of *Korematsu* compared to interpretation based on hyperbole. Historical interpretation maintains a logical connection with *Korematsu*’s holding that is consistent with a traditional use of *stare decisis*. It also avoids separating the decision’s logic from its rhetoric, unlike the techniques of hyperbole and present absence.

2. *The Consistency of Korematsu with Current Doctrine*

The Court’s abandonment of *stare decisis* and its reliance on the techniques of hyperbole and present absence suggest that *Korematsu* continues to influence contemporary doctrine. If the Court desired to render *Korematsu* insignificant without overruling it, the Justices would have relied on *stare decisis* to narrow the holding continually to the point of making it *sui generis*. Instead, the Court’s resort to hyperbole and present absence suggests an active attempt to nourish *Korematsu* as precedent.

When the Court cites *Korematsu* approvingly as an example of the application of strict scrutiny, it implicitly takes the position—unless otherwise explicitly stated—that the Court correctly discerned an exception. Although the relitigation of *Korematsu* was successful in showing that the factual basis for the justification of military necessity was deeply flawed, it could not overturn the legal rule upholding the military order.\(^2\) Any standard of review, even strict scrutiny, is essentially de-

---

\(^2\) See *Korematsu*, 584 F. Supp. at 1418-19. Fred Korematsu was not required to prove in the relitigation that the factual mistake would have made a difference in the original result. Judge Patel ruled that the Justice Department’s failure to alert the Court about the conflicting information it held regarding the danger of espionage and sabotage was enough to justify vacating Korematsu’s criminal sentence. See id. Because the Court appeared to rely on a standard of review that was highly deferential, it seems unlikely that even if the Justice Department informed the Court of additional information conflicting with its assessment of risk of espionage, there would have been a different outcome.
fined by its application. Thus, the Court appears to recognize that *Korematsu* is a valid instance in which the Court correctly imposed strict scrutiny and yet found the government's justifications acceptable. The Court's failure to define the standard of review in *Korematsu* means that there is an unknown quantum of flexibility within the strict scrutiny test. Reliance on hyperbole as an interpretive technique is therefore not without potentially damaging doctrinal consequences.

The Court's reliance on the technique of present absence has a similar effect. By not citing *Korematsu*, the Court avoids the possibility of having to distinguish or dismiss its importance explicitly, even if *Korematsu* was indeed not applicable. Alternatively, this technique allows the Court to expand on legal principles contained in *Korematsu* without having to defend its reliance on this precedent.

The Court's reliance on hyperbole and present absence results, ironically, in the expansion of doctrine consistent with *Korematsu*. The continued expansion of related doctrine may indicate the need to keep *Korematsu* as binding as precedent. Overruling *Korematsu* would cast doubt on the substantive wisdom of its continued existence or expansion. Through hyperbole, the Court preserves some undefined discretion in its application of strict scrutiny. Through present absence, the Court can expand the role of judicial deference, as in *Salerno* and *Reno*, without acknowledging that they are among the progeny of *Korematsu*.

3. The Failure to Overrule *Korematsu*

*Korematsu*'s continued vibrancy should not be blamed on the Court's lack of opportunity to diminish or overrule it. The Court has had repeated opportunities to do so, but has instead cited to *Korematsu* for support. In *Bolling v. Sharpe*, the Court could have overturned *Korematsu* when, consistent with *Brown*, it imposed the strict scrutiny requirement on the federal government through the Fifth Amendment. However, instead of properly acknowledging *Korematsu* as an instance in which the Court was highly deferential to the government's justifications, the *Bolling* Court cited *Korematsu* to support the imposition of the strict scrutiny standard. The Court thus legitimized *Korematsu* as an undefined example of the proper application of strict scrutiny despite its burdensome effect on a minority. Any standard of review is most importantly defined by its application. Thus, the Court’s approval of the standard of review in *Korematsu*—despite whatever terminology it assigns to that standard—amounts to an acknowledgment that there is a significant area of discretion in allowing approval of certain racial classifications.

Most recently, in *Adarand Constructors, Inc. v. Pena*, the Court again made a major revision in equal protection doctrine by declaring that strict scrutiny should be imposed on all racial classifications imposed by the federal government, including affirmative action programs. In *Adarand*, the Court invalidated a federal regula-

---

173. See supra notes 152-60 and accompanying text.
174. See supra notes 145-51 and accompanying text.
176. See id. at 499.
177. See id. at 499 n.3.
178. Similarly, in *Loving v. Virginia*, 388 U.S. 1 (1967), the Court expanded the types of racial classifications to include certain race-conscious approaches purporting to treat separate classes equally, which are subject to strict scrutiny under equal protection jurisprudence. But, again, the Court cited *Korematsu* for support, rather than declaring it obsolete. See id. at 11.
180. See id. at 2117.
tion that gave to prime contractors bidding on government contracts for a highway construction project an advantage if they hired subcontractors owned by minority businesses. The Court had applied intermediate scrutiny to a federal affirmative action in a recent decision, thus creating a less stringent level of review than had previously been applied to affirmative action programs sponsored by states. The Court had an opportunity to overrule Korematsu or to render it insignificant by acknowledging that it applied an obsolete standard of review.

Instead the Court predictably relied on Korematsu to overrule the intermediate scrutiny standard. The Court furthermore emphasized that the new strict scrutiny standard that it was requiring was not “fatal in fact,” further implying that it was creating a much more flexible standard of review. The Court then approvingly cited Korematsu for support of its strict scrutiny standard. While it is difficult to believe that Korematsu should serve as a role model for defining the limits of strict scrutiny, the Court’s reliance on hyperbole creates the potential for misunderstanding Korematsu’s continued role in equal protection law.

II. THE NARRATIVES FOUND WITHIN KOREMATSU

The modern Court’s difficulty in properly interpreting Korematsu had its genesis in a deception contained within the original opinion. The Court in Korematsu failed to provide a logical explanation for reaching its result and instead deceptively relied on persuasive rhetoric. The majority in Korematsu ignored narratives provided by the parties most intimately involved: Korematsu and DeWitt. The Court instead relied on narratives that could not provide a logical basis for its decision.

Part II describes how the Court integrated and attributed meanings to the narratives contained within Korematsu. The disjointed quality of the written opinion resulted from the Court’s propensity to choose narratives and assign them meaning based on their persuasive appeal rather than their logical relevance to Korematsu’s interpretation. This practice led to the failure to establish an interpretive-narrative link—a meaningful connection between the narrative and the Court’s rule of law. The Court’s failure to establish this link was the cause for the disharmony among the messages within the opinion about the standard of review imposed. Later courts

181. See id. at 2101-02.
184. See Adarand, 115 S. Ct. at 2117 (noting reliance on Korematsu and Hirabayashi among other cases). The Court repeatedly noted that Korematsu purported to apply strict scrutiny, but concluded that “Korematsu demonstrates vividly that even ‘the most rigid scrutiny’ can sometimes fail to detect an illegitimate racial classification.” Id. at 2117. The Court thus implied that Korematsu correctly applied the strict scrutiny standard, but still failed to find the government’s justification faulty.

In dissent, Justice Stevens also noted the Court’s reliance on Korematsu. See id. at 2125 n.8 (Stevens, J., dissenting). Justice Ginsburg argued in dissent, however, that the Court’s analysis “strongly suggests” that strict scrutiny should be fatal to racial classifications that burden minorities. See id. at 2136 (Ginsburg, J., dissenting). The majority opinion is silent on that point, probably because this conclusion is at odds with its logic. The majority points out that it does not feel that it can reliably distinguish between benign versus invidious discrimination. See id. at 2112. Furthermore, the majority made clear that the strict scrutiny doctrine was not “fatal in fact.” Id. at 2117. Finally, by citing Korematsu as affirmative support, it implied that it correctly applied the standard, but nevertheless was unable to find the government’s justification unsatisfactory. See id. at 2117.

185. Id. at 2117.
186. The Court noted the inexplicable result reached in Korematsu in light of the apparent application of strict scrutiny. See id. at 2106-07. However, the Court stated that the correct standard was applied, yet the wrong result was reached. See id. at 2116.
misinterpret Korematsu because of the way that the Korematsu Court wrote its opinion. Justice Black, writing for the majority in Korematsu, explicitly claimed that he wrote a narrow and unimportant opinion to avoid the “momentous questions not contained within the framework of the pleadings or the evidence in this case.” By making rhetorical appeals that did not articulate the legal basis for the decision, however, he created an opinion that was easily misinterpreted.

A. A Narrative-Based Approach to Interpreting Korematsu

I offer an interpretation of Korematsu based on a narrative approach. This method considers the various narratives available to the Court and the reasons for the Court’s decision to incorporate some, but not all, of the possibilities. Furthermore, this approach attempts to discern the meaning assigned to the narratives placed within judicial opinions. A narrative-based approach to interpreting a judicial opinion is especially useful in a case such as Korematsu because it appears to be a combination of discrete narratives. By tracing the origins of these discrete narratives, it may become possible to understand better what the writer of the majority opinion (Justice Black) was trying to express. This helps to determine whether the Court uses narratives merely in a rhetorical fashion or whether it connects its narratives to its interpretation by indicating the narrative’s logical relevance.

1. The Court’s Non-Reliance on the Narratives of Parties Personally Involved

The Court opinion scarcely refers to the narratives of the two parties personally involved in the Japanese internment itself: the petitioner, Fred Korematsu, and the military commander who ordered the Japanese internment, General John DeWitt. Below I consider why the Court chose not to describe these narratives.

a. Fred Korematsu’s Narrative

When deciding how to write the Korematsu opinion, Justice Black appears to have concluded that the most persuasive approach was to minimize references to Korematsu and his personal story, which were well-documented in the briefs for the petitioner and the government. The identity of Korematsu could be construed as irrelevant from a doctrinal perspective. In order to satisfy legal requirements, Justice Black’s task was to justify deference to the military’s judgment for exclusion en masse rather than to show how the exclusion was justifiable with respect to Korematsu as an individual. Still, the near-total lack of description about “the petitioner,” including the failure even to state his name, is striking. As a matter of ritual, the prefatory portion of judicial opinions contains a recital of the facts to provide a background and to give some explanation and context. Furthermore, it is not uncommon for a judicial opinion to offer some facts, even if irrelevant, because of their persuasive effect. Perhaps the non-inclusion of background facts in Korematsu was a result of a decision that it was the most persuasive way to present the Court’s opinion. Although the foreign-sounding name of the petitioner, Fred Toyosaburo Korematsu, may cause some readers to alienate him based on nationalist and racial attitudes, the Court probably felt that it was more persuasive to keep the petitioner without identity. By leaving the petitioner unidentified, the Court

188. Thus, a key development of a first-year law student’s skill is to decide which facts in the preface of an opinion are relevant when the all-too-familiar question by a professor asks for a restatement of the important facts of a case.
made him a stranger to all readers and rendered him a more universal object of suspicion without overtly appealing to prejudice. 189

The opinion for the Court also failed to relate much about Korematsu's personal narrative. 190 The petitioner's brief contained four pages illuminating who Korematsu was and why he had failed to report to an assembly center as ordered. 191 Even the government's brief provided a synopsis of facts that acknowledged the identity and loyalty of Korematsu. 192 "The petitioner" was not simply an American citizen of Japanese descent whose loyalty had not been questioned; 193 Fred Korematsu was a native-born citizen who had spent the entire twenty-five years of his life in the United States. Nor was he a passive observer of the war whose loyalties were not discernible; he had actually chosen to aid the war by fighting for his country. Korematsu had tried to enlist in the military, but had been informed by his physician that he was not fit to serve because of stomach ulcers. When he reported for the draft, the military rejected him because of this medical impairment. 194

Fired by his employer at the outset of the war because he was of Japanese ancestry, Korematsu desperately wanted to join and be part of the white community. Korematsu refused to leave the designated area because he wanted to stay with his white girlfriend; 195 he underwent surgery to alter his slanted eyes; 196 he changed his name to Clyde Sarah; and he altered his draft card to fit this identity. 197 The Court's opinion, of course, would have been less persuasive if it had included Korematsu's narrative. If the narrative were seen as idiosyncratic, it also emphasized the individuality of Japanese Americans, thereby raising questions about General DeWitt's treatment of persons of Japanese ancestry anchored in his claim that "a Jap is a Jap." 198 On the other hand, if Korematsu were seen as a typical citizen, this would highlight the obvious fact that a large group, who presented little or no national security risk, was being made to endure the anti-Japanese fervor on the West Coast.

After reviewing Fred Korematsu's narrative, Justice Black probably understood that it was also potentially inflammatory. If the Court's opinion contained a detailed presentation of Korematsu's narrative, it would invite sympathy or rejection based on what the reader's attitude was toward explicit manifestations of racism. The danger confronting the Court was that if it painted a detailed picture overly disparaging of Korematsu and his plight, it would appear that the Court itself harbored

190. Contrast Justice Black's non-description of Korematsu with his detailed description of an immigrant alien whom he argued should not have been excluded from the United States in his dissent in Shaughnessy v. United States, 345 U.S. 206, 216-217 (1953).
191. See Brief for Appellant at 3-7, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22), reprinted in 42 LANDMARK BRIEFS, supra note 50, at 101-05.
192. See Brief for the United States at 4-5, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22), reprinted in 42 LANDMARK BRIEFS, supra note 50, at 197, 206-07.
193. See id. at 206.
195. See id.
196. See id.; see also Aviam Soifer, Lawyers and Loyalty, 1984 REV. AM. HIST. 575, 581.
bored anti-Japanese sentiment. Justice Black no doubt understood the seriousness of this danger. Just seven years earlier, the Senate’s confirmation of his nomination to the Supreme Court had been in jeopardy because of his past involvement in Ku Klux Klan activities.\(^\text{199}\) As the writer of the Court’s opinion, Justice Black must have understood that both the Court’s legitimacy and his own reputation depended in large measure on how the opinion justified its result.

When the Court finally identified “the petitioner” as “Korematsu” on the next-to-last page of its opinion, the majority carefully de-emphasized the importance of the petitioner’s identity and narrative: “Korematsu was not excluded from the Military Area because of hostility to him or his race.”\(^\text{200}\) Instead of providing factual dicta about the petitioner, the Court provided legal dicta by describing in detail the history of the military order, the Executive Order, and the Act of Congress, all of which was unnecessary to decide the case.\(^\text{201}\) By focusing on these institutional responses to wartime rather than on Korematsu as an individual, the Court’s opinion did not allow the development of reader sympathy or concern for the petitioner. By providing a detailed narrative about the development of the legal structure, the Court provided a context for an intellectualized rationale and could ignore the actual tragedy suffered by an individual.

b. General John DeWitt’s Narrative

The Court also abbreviated its description of narratives by General John DeWitt and his supporters. In fact, the Court’s recitation of these narratives consisted of merely two sentences and a footnote. The footnote contained references to a small fraction of the testimony delivered by supporters of the internment in the hearings before Congress and in General DeWitt’s Final Report.\(^\text{202}\) The two sentences in the text cited the refusal of 5,000 of the 70,000 Japanese American

\(^{199}\) See Irons, Justice at War, supra note 22, at 335.

\(^{200}\) Korematsu, 323 U.S. at 223 (emphasis added).

\(^{201}\) See id. at 216-17.

\(^{202}\) See id. at 219 n.2. The Final Report was a massive document of 618 pages with many tables and diagrams. The document devoted only twelve pages to the justification of the internment. See John L. DeWitt, Final Report, Japanese Evacuation from the West Coast, 1942, at 7-19 (1942). The remainder of the report was simply descriptive of the internment process. The only direct evidence presented on the issue of sabotage and espionage comprised half a page in which the report pointed to the weapons seized from Japanese families and to concerns about signaling Japanese submarines from coastal areas. See id. at 8. The weapons described were guns of small caliber and of a type typically owned by farmers. See Personal Justice Denied, supra note 4, at 62, 88. The episodes of suspected signaling were dismissed by other government agencies of dubious consequence and unrelated to activities by those of Japanese ancestry. See id. at 63. The report’s description of these episodes led to the government’s disavowal of reliance on any specific information in the report other than what the government stated in its own brief. See Brief for the United States at 11 n.2, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22), reprinted in 42 Landmark Briefs, supra note 50, at 213. The remainder of the report devoted to the justification for the internment relied on highly attenuated evidence, including membership in cultural organizations, dual citizenship, the practice by some parents of sending their children to Japan for education, and the attendance by children of Japanese language schools. See DeWitt, supra, at 9-17. The Court’s unwillingness to discuss these justifications may have been based on its prejudicial assumptions that caused it to refuse to make this information relevant. A “mammoth” research effort by the Western Defense Command that began in 1942 after the internment resulted in twelve pages of the report containing justifications for the internment. “The most notable feature of the WDC project was the extraordinarily large effort it devoted to extracting a minimum of useful information. There is no indication that it uncovered evidence of criminal activity, much less espionage or sabotage. The entire project was based on dubious assumptions.” Personal Justice Denied, supra note 4, at 199.
citizens interned to answer "correctly" the two "loyalty" questions on a questionnaire administered to those who were already forced into relocation camps.203

Unlike the stark abbreviation of the petitioner's narrative, the minimization of narratives supporting the Court's position is puzzling from a doctrinal perspective. Although the Court expressed deference to the military judgment, it had claimed to find at least a reasonable basis for the military order.204 Yet the Court presented only a tidbit of information from the congressional hearings and the Final Report. The absence of a systematic presentation of narratives and other evidence to support the internment effort has led commentators to conclude that the Court imposed an extremely weak standard of review.205

Why did the Court not analyze the narratives of General DeWitt and his supporters comprehensively? Professor Eugene Rostow, in his seminal article on the internment, concluded that not only was there insufficient evidence "to satisfy a reasonably prudent judge or a reasonably prudent general[, but also that] there was no evidence whatever by which a court might test the responsibility of General DeWitt's action."206 Rostow observed that the military proclamations in the Final Report contained "conclusions, not evidence,"207 which would explain why the Court disregards DeWitt's narrative in its opinion. Rostow has also said that "General DeWitt's Final Report and his testimony before committees of the Congress clearly indicate that his motivation was ignorant race prejudice, not facts to support the hypothesis that there was a greater risk of sabotage among the Japanese than among residents of German, Italian, or any other ethnic affiliation."208 Perhaps the best way to convey the substance of General DeWitt's narrative is to consider the most "authoritative determination of fact"209 that was offered by the General:

In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted. To conclude otherwise is to expect that children born of white parents on Japanese soil sever all racial affinity and become loyal Japanese subjects, ready to fight and, if necessary, to die for Japan in a war against the nation of their parents. That Japan is allied with Germany and Italy in this struggle is no ground for assuming that any Japanese, barred from assimilation by convention as he is, though born and raised in the United States, will not turn against this nation when the final test of loyalty comes. It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today. There are indications that these are organized and ready for concerted action at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.210

Clearly, the problem confronting Justice Black in writing the majority opinion was how to use the facts located in the record of the case to show that the Court was reasonable and fair in deciding in favor of the military authorities, despite the ra-

203. See infra note 278.
204. See supra notes 68-70 and accompanying text.
205. See, e.g., Rostow, supra note 21, at 508-09.
206. Id. at 520.
207. Id.
208. Id.
209. Id.
210. Rostow, supra note 21, at 520-21 (citing DeWitt, supra note 202, at 34); see also Perea, Ethnicity and the Constitution, supra note 124, at 586.
cially inflammatory nature of their narratives. Justice Black resolved this problem by using only a benign snippet of the record concerning the questionnaire data.\textsuperscript{211}

In fact, in its brief, the Justice Department distanced itself from General DeWitt's narrative in an explicit, but oblique, way. In the famous footnote two of its brief, the Justice Department informed the Court that it was relying on the \textit{Final Report} in a limited way: "for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto."\textsuperscript{212} The Justice Department asked the Court to take judicial notice of only the facts stated in its brief relating to the "justification for the evacuation." The brief further stated that it relied "upon the \textit{Final Report} only to the extent that it relates to such facts."\textsuperscript{213} We now know that the wording of this statement resulted from controversy within the Justice Department over information from other governmental authorities. These authorities questioned the accuracy of the \textit{Final Report} regarding specific instances that allegedly may have involved espionage and sabotage by persons of Japanese ancestry. Because of the cryptic wording of the footnote, however, it was unclear whether the government was uncomfortable with the factual accuracy, the inflammatory tone, or both in DeWitt's narrative. From the vantage point of the Court—assuming that it was unaware of the actual controversy within the Justice Department—the racially inflammatory tone of DeWitt's narrative was the more obvious reason to avoid including the narrative.

This footnote became the centerpiece of the relitigation of \textit{Korematsu}. In earlier drafts of the government's brief, the footnote informed the Court that the recital of facts justifying the evacuation in the \textit{Final Report} "is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signalling by persons of Japanese ancestry, in conflict with information in the possession of the Department of Justice."\textsuperscript{214} The petitioner argued in the 1984 relitigation that the omission of the contradictory reports critically affected the outcome of the Supreme Court's decision in 1944. The district court in 1984 held that although \textit{Korematsu}'s conviction should be set aside because "relevant evidence"\textsuperscript{215} had been withheld, "[w]hether a fuller, more accurate record would have prompted a different decision cannot be determined."\textsuperscript{216}

\textsuperscript{211} The Court's review of the record stood in sharp contrast with the systematic presentation by Justice Murphy. In his dissenting opinion, he devoted over eight pages with sixteen footnotes to reviewing and analyzing the record. \textit{Korematsu}, 323 U.S. at 233-42 (Murphy, J., dissenting). As discussed above, he demonstrated the racist attitudes held by General DeWitt and his supporters, and analyzed their conclusions. The contrast between the comprehensive presentation by Justice Murphy of these facts and the Court's abbreviated discussion of the record has led commentators to conclude that the Court failed to "scrutinize" the record adequately. For example, the congressional report, \textit{Personal Justice Denied}, concluded: "If the Court had looked hard, it would have found that there was nothing there—no facts particularly within military competence which could be rationally related to the extraordinary action taken." PERSONAL JUSTICE DENIED, supra note 4, at 237. Of course, the Court did in fact closely examine and reflect on the record. Indeed, it is my hypothesis that Justice Black closely examined the record and determined that the opinion would be less persuasive if it relied on the facts in the record. Justice Black chose not to rely on the narratives of General DeWitt and his supporters because they were undeniably racist, not because he did not review the record closely.

\textsuperscript{212} Brief for the United States at 11 n.2, \textit{Korematsu v. United States}, 323 U.S. 214 (1944) (No. 22), reprinted in 42 LANDMARK BRIEFS, supra note 50, at 213.

\textsuperscript{213} \textit{Id.}

\textsuperscript{214} \textit{Korematsu}, 584 F. Supp. at 1417 (emphasis in original).

\textsuperscript{215} \textit{Id.} at 1419.

\textsuperscript{216} \textit{Id.}
In a sense, every case before a court demands that a judge choose between and among the narratives of the opposing parties. A judge’s written opinion often echoes the narrative of the party whom he or she deems the winner. In Korematsu, however, Justice Black chose the government as the winning party and yet wrote an opinion that carefully minimized the narratives presented by the two parties most intimately involved in the case. Korematsu’s narrative and even his identity were kept hidden to avoid highlighting the actual individual tragedy and racially inflammatory issues. Similarly, the narratives of General DeWitt and his supporters were minimized because of their inconclusiveness and inflammatory content. The Court’s own narrative minimized the stories told by the parties who were personally part of the Japanese internment. Instead, the majority relied on other kinds of narratives.

2. The Court’s Selection of Its Narratives

The Court basically relied on (1) its narrative in the Hirabayashi opinion (which had upheld a military curfew based on Japanese ancestry), (2) the narrative contained within the Justice Department’s brief, and (3) empirical data.

a. The Hirabayashi Opinion

In Korematsu, the Court cited its factual conclusions within Hirabayashi v. United States. About eighteen months before deciding Korematsu, the Court in Hirabayashi upheld a military order issued by DeWitt that imposed a curfew based on Japanese ancestry. In Hirabayashi, the Court held that Congress and the President, acting together, were within the war power in authorizing military orders, such as the curfew. The Court furthermore held that the curfew order, although discriminating based on race, did not violate due process. Finally, the Court held that the promulgation of the curfew order by General DeWitt was not based on an unconstitutional delegation of legislative power. The Court appeared to give two conflicting messages about the legal basis for its conclusions. First, the Court indicated that there was a “reasonable basis” for the government’s actions and relied on socioeconomic data showing the insularity of the Japanese American community and its location near military-industrial sites. Second, the Court repeatedly emphasized the need to allow military authorities unreviewable discretion in emergent wartime situations.

Throughout its opinion in Hirabayashi, the Court emphasized that the government had a “reasonable basis” and “ample ground” for its belief that the Japanese American community represented a serious threat of espionage and sabotage. For factual support, the Court summarized the socioeconomic data contained in the

---

217. 320 U.S. 81 (1942).
218. See id. at 98-99.
219. See id. at 100-02.
220. See id. at 102-04.
221. Id. at 101.
222. See id. at 96-98.
223. See, e.g., id. at 99 (“Like every military control of the population of a dangerous zone in war time, it necessarily involves some infringement of individual liberty . . . .”).
224. See, e.g., id. at 94 (“That reasonably prudent men charged with the responsibility of our national defense had ample ground . . . cannot be doubted.”); id. at 95 (“reasonable ground for believing . . . .”); id. at 98 (“Congress and the Executive could reasonably have concluded . . . .”); id. at 101 (“the challenged orders and statute afforded a reasonable basis . . . .”).
government's brief. This material was conclusory and result-oriented, but it was also statistical and carefully footnoted. It included speculations, such as that Japanese citizens and aliens had been discriminated against by laws preventing their integration into society generally, which may have caused "irritation" and which could have encouraged "attachments" to Japan; that Japanese American children were sent to Japanese language schools, which may have been sources of Japanese propaganda; that Japan permitted dual citizenship, discouraging the breaking of ties with Japan; that a "large number" of resident Japanese aliens had leadership positions in their communities and posed a possible threat; and that the "association of influential Japanese residents with Japanese Consulates" could serve as a possible means for the communication of propaganda. While the Court appeared to rely on this socioeconomic data as its reasonable basis for supporting the significant risk posed by the Japanese American community, it did not provide any data to support whether the particular means—the curfew—was necessary or reasonable.

Although the Court in Hirabayashi made repeated claims that there was a reasonable basis for the government's actions, it also suggested that military authorities possessed some unreviewable discretion in emergent wartime situations. For example, Justice Black's majority opinion announced that [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 war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs].

The Court also emphasized the need to accord military authorities wide discretion for wartime exigencies. Finally, the Court indicated that so long as there was any evidentiary support, it would not strike down a military curfew on constitutional grounds.

Which of the double messages was the most telling? Scholarly commentators have concluded that the Court required a reasonable basis in Hirabayashi, pointing to the socioeconomic data or to the Court's rhetoric. I believe, however, that

---

226. Hirabayashi, 320 U.S. at 98.
227. Id.
228. Id.
229. Id.
230. See id. But see Pereia, Ethnicity and the Constitution, supra note 124 (pointing out that restricting ethnic affiliations of this sort denies constitutional rights of association). The Court also reviewed the history of the legislative act, executive order, and military order to demonstrate their relationships. See Hirabayashi, 320 U.S. at 98-99. The Court in Korematsu also summarized some of this information. See Korematsu, 323 U.S. at 216-17.
231. See id. at 101; see also id. at 99.
232. See supra note 224 and accompanying text.
233. Id.
234. Id. (noting that war power under the Constitution allows the President and Congress "wide scope for the exercise of judgment and discretion").
235. See id. at 101; see also id. at 99.
236. Professor tenBroek contends that the Court applied a reasonable basis test in Hirabayashi, but allowed military authorities unreviewable discretion in Korematsu out of "convenience." tenBroek, supra note 39, at 318-19. He reasons that the decision to allow a military order requiring exclusion should mandate a greater justification than one requiring a curfew. See id. at 316. But, he argues, it was easier for the Court to avoid providing a greater justification for exclusion by permitting wide military discretion. See id. at 319. Furthermore, he notes that if the Court did perform a substantive review in Korematsu, it was a very weak standard. See id. at 318-19. I agree with his latter conclusion, but disagree that the best explanation is based
the Court in *Hirabayashi* required only a showing of good-faith suspicion or, alternatively, that it acknowledged that there existed a discrete amount of unreviewable discretion. I base this interpretation on the separate opinions of individual Justices in *Hirabayashi* and on an examination of the socioeconomic data the Court inserted into its opinion.

The separate opinions of individual Justices show that the Court was fractured as to the proper standard of review. In his concurrence in *Hirabayashi*, Justice Douglas argued that the Court could not possibly know the facts influencing the military order because it was issued at a time of "dire emergency."238 Furthermore, military authorities should not be expected to wait until investigations or hearings were completed.239 Thus, so long as the military order had "some relation"240 to protecting against espionage and sabotage, the Court should uphold it.241 In a separate concurring opinion, Justice Murphy wrote that the military order was issued in "complete good faith."242 He further emphasized that it was "allowable"243 because the military was confronted with an imminent emergency.244 Finally, Justice Rutledge indicated that courts may possess power to review some actions of military officers in emergency situations but felt that it was unnecessary to define the limits of military authorities in that case.245 Thus, Justices Douglas, Murphy, and Rutledge wrote separately to indicate their belief that there were limits to the discretion the Court granted to military authorities. That these Justices felt a need to write separate opinions in *Hirabayashi* suggests that the Court was giving wide latitude to the military order.246 If there was any substantive review, it was minimal.

Moreover, the Court did not rely on the socioeconomic data to decide whether to uphold the curfew order. Instead, the Court’s decision was guided principally by a more general perception of the importance of preserving flexibility for military authority during the exigencies of war. It appears unlikely that the Court seriously analyzed the socioeconomic data. The Court lifted this information in summary fashion from the government’s brief.247 The Court’s opinion and the government’s brief did not offer details about how the statistical information was calculated, much less its strengths or weaknesses. The socioeconomic data represented a one-sided, after-the-fact justification, and not a thoughtful and careful explication based on empiricism. Even if completely true, the socioeconomic data provided an extremely attenuated link to the actual justification for the curfew order. The Court made an

on the "convenience" of switching the standard of review between *Hirabayashi* and *Korematsu*, which were decided about a year apart on closely related issues.

237. See Rostow, supra note 21, at 505, 508 (acknowledging that the Court ignored the rational basis requirement "for all practical purposes," but nevertheless went through "great lengths" to articulate the importance of its function of protecting against arbitrary military action).


239. See id. at 107 (Douglas, J., concurring).

240. Id. at 106 (Douglas, J., concurring).

241. See id. (Douglas, J., concurring).

242. Id. at 109 (Murphy, J., concurring).

243. Id. at 113 (Murphy, J., concurring).

244. See id. (Murphy, J., concurring). Justice Murphy dissented in *Korematsu* based in part on the non-emergent nature of that decision. See *Korematsu*, 323 U.S. at 234 (Murphy, J., dissenting). He required a reasonable basis in that circumstance. See id. at 235.


246. The separate opinions in *Korematsu*, especially by Justices Frankfurter and Jackson, also suggest that they had joined the Court in *Hirabayashi* based on their belief that the Court was according unreviewable discretion to military authorities in exigencies during war. See infra notes 408.

improbable logical leap in linking Japanese language schools in the United States to the threat of espionage and sabotage. This was not even information General DeWitt considered; even more likely, he would not have found it helpful.

In reality, the Court did not require a documented factual basis for its decision. Since Hirabayashi was decided two-and-a-half years after the bombing of Pearl Harbor, the government could not have used the bombing as an actual reason for the military decision to exclude based on racial ancestry. General DeWitt had not yet published his Final Report. Moreover, the Brief for the United States was totally devoid of any reference to the actual justifications given by General DeWitt.248 The trial record did not indicate the facts actually considered by the military authorities who had imposed the curfew.249 Finally, the government had conceded in the course of the litigation that "no charge of espionage, sabotage or treasonable activity had been made against anyone of Japanese American ancestry at the time of the evacuation order here in question."250 Thus, the Court's inclusion of the socio-economic data was entirely for persuasive, symbolic purposes. Despite its rhetoric to the contrary, the Court in Hirabayashi gave military authorities substantial discretion and did not require any documented factual basis.

The Court in Korematsu cited Hirabayashi and its language indicating that substantial discretion should be accorded to military authorities. Specifically, the Court quoted Hirabayashi as saying, "we cannot reject as unfounded the judgment of the military authorities and of Congress [and that w]e cannot say that the war-making branches of the Government did not have ground for believing that [there was a public necessity for the exclusion]."251 The Court in Korematsu, however, could not merely repeat the narrative containing the socioeconomic data found in Hirabayashi. The exclusion order, reviewed in Korematsu, was a far greater deprivation of liberty than the curfew order.252 Thus, even though the curfew order was justified, the Korematsu Court could not necessarily justify the exclusion order on the same basis. Because the actual justifications for the military order were available, the government was required to rely on the real reasons for the curfew rather than on conceivable justifications as it had in Hirabayashi.253 Thus, the Court turned to the narrative offered by the Justice Department in its brief.

b. The Justice Department's Narrative

The Justice Department faced a difficult problem as to the factual basis for the imposition of the exclusion order. It could and did rely on the conclusions reached

248. See generally brief cited supra note 225.
250. Id. at 370.
252. The Court in Korematsu acknowledged this point. See id. However, the Court also stated that the government authorities concluded that the curfew order "provided inadequate protection" in "defending our shores," thereby legitimizing the exclusion order. See id. The Court did not offer any specific information why this was true.
253. The only information before the Court in Hirabayashi about General DeWitt's actual reasons for his actions was a report published in a newspaper which contained a snippet of his testimony before the House Naval Affairs Subcommittee: "A Jap's a Jap and it makes no difference whether he is an American or not." Petition for Writ of Certiorari at 32-33, Korematsu v. United States, 323 U.S. at 214 (1944) (No. 22), reprinted in 42 LANDMARK BRIEFS, supra note 50, at 39-40. See Dembitz, supra note 47. It was the appellant, of course, and not the government who provided the only available information concerning General DeWitt's actual justifications.
by the Court in *Hirabayashi.*\(^{254}\) Yet, the government must have been aware that the socioeconomic data that had provided the factual basis in *Hirabayashi* could not serve to legitimate exclusion because the actual justification for the military order had subsequently become known.\(^{255}\) General DeWitt’s *Final Report* was published after the Court decided *Hirabayashi,* but prior to the Court’s decision in *Korematsu.* Because of information obtained during the course of the relitigation of *Hirabayashi* and *Korematsu* in the 1980s, we now know that the War Department was quite upset\(^{256}\) upon learning that General DeWitt was publishing his *Final Report* and had complained because of its tone and substance.

Although DeWitt resisted wholesale changes, the War Department suggested approximately fifty-five changes to correct the final draft.\(^{257}\) An example of a resulting change in tone\(^ {258}\) was the deletion of a portion that contended that it was not feasible to separate the “sheep from the goats,”\(^ {259}\) replacing it with the phrase, “a positive determination could not have been made.”\(^ {260}\) An important change in substance was the deletion of General DeWitt’s original position that the reason for the internment was that it would never be possible to separate the loyal from the disloyal.\(^ {261}\) General DeWitt had contended that this meant that the internment of all those of Japanese ancestry would be required for the entire duration of the war.\(^ {262}\) Although General DeWitt’s believed that individual hearings could have been conducted in a timely manner, he nonetheless believed it impossible to determine the loyalty of those of Japanese ancestry.\(^ {263}\) The War Department revised DeWitt’s position to the view later adopted by the Court in *Korematsu*—there was not enough time to separate the loyal from the disloyal prior to the internment.\(^ {264}\) Because DeWitt resisted the complete revision of the *Final Report,*\(^ {265}\) the government was still left to explain a document that had a racially inflammatory tone and conclusions based merely on DeWitt’s suspicions. Thus, it was not surprising that the government’s brief did not rely on the *Final Report,*\(^ {266}\) while the petitioner’s brief repeatedly referred to it to show racist motivation.\(^ {267}\)

---

255. See supra note 202 (discussing the only direct evidence presented on the issue of sabotage and espionage).
256. John McCloy, Assistant Secretary of War, was “more than a little exercised because the Final Report had been printed in final form and distributed without any prior consultation by the Western Defense Command with the War Department about its contents.” *Hirabayashi* v. United States, 627 F. Supp. 1445, 1450 (W.D. Wash. 1986), aff’d in part, rev’d in part, 828 F.2d 591 (9th Cir. 1987).
257. See *Hirabayashi,* 627 F. Supp. at 1451. The Justice Department was apparently unaware of the War Department’s intervention. See id. at 1454.
258. Id. at 1451.
259. Id. at 1452. (Emphasis in original)
260. Id. (Emphasis in original)
261. See id.
262. See id.
263. See id.
264. See id. at 1453.
265. See id. at 1450.
266. See Brief for the United States at 11 n.2, *Korematsu* v. United States, 323 U.S. 214 (1944) (No. 22), reprinted in 42 LANDMARK BRIEFS, supra note 50, at 213 (asking the Court to rely on the *Final Report* only to the extent relied on in the brief for facts concerning the “actual evacuation and the events that took place subsequent thereto”); see also id. at 224-26 (failing to mention *Final Report* in description of justification for exclusion and internment).
267. See Brief for Appellant at 56-77, *Korematsu* v. United States, 323 U.S. 214 (1944) (No. 22), reprinted in 42 LANDMARK BRIEFS, supra note 50, at 154-75. The petitioner described the *Final Report* as a “fantastic colored report.” Id. at 154.
Although it did not reiterate the socioeconomic data presented in *Hirabayashi*, the government's brief in *Korematsu* relied heavily on the *Hirabayashi* Court's conclusions. In addition, the Justice Department created its own narrative by essentially "washing" DeWitt's narrative of its inflammatory details and specific examples. This resulted in the conclusory, non-specific language in the government's brief.\(^{268}\) Furthermore, in a now-famous footnote in the government's brief, the Justice Department asked the Court to rely on its factual justifications rather than those in the *Final Report*.\(^{269}\) The government avoided references to the *Final Report*. In fact, for factual support, the government only cited generally to two articles written by an anonymous intelligence officer published in popular magazines.\(^{270}\)

The Court relied on the government's brief, although it did not explicitly cite it. The government's brief contained a narrative that lacked factual specificity. The Court appeared to rely on the government's brief when it stated: "The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion."\(^{271}\) The Court also appeared to refer to this narrative when it concluded that the factual basis for the means used rested on the impossibility of segregating the loyal from the disloyal immediately.\(^{272}\) There is an air of mystery surrounding the Court's unexplained announcement that "an unascertained number of disloyal members [existed in the Japanese American community.]"\(^{273}\) This high degree of ambiguity may have led Justice Black to cite to empirical data obtained in a questionnaire survey of interned citizens over a year after the internment had been initiated.\(^{274}\) In a sense, this data provided the appearance of specificity and empiricism otherwise lacking in *Korematsu*.

c. Symbolic Reliance on Empirical Data

The Court stated that the exclusion of all those of "Japanese origin."\(^{275}\) was based on a military imperative rather than on group punishment. The military imperative resulted from the inability to separate immediately the loyal from the disloyal. As evidence for the need for exclusion based on Japanese ancestry, the Court stated that some of those who were interned "retained loyalties to Japan."\(^{276}\) It then offered the empirical support that "[a]pproximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees re-

---


\(^{269}\) See *id.* at 213 n.2.

\(^{270}\) See *id.* at 12 n.3 (citing to articles published in HARPER'S and FORTUNE magazines).


\(^{272}\) See *Korematsu*, 323 U.S. at 219. The Court referred to its factual conclusion on this issue in *Hirabayashi* and then stated that the factual basis was the same for the exclusion order. The government's brief offered this same conclusion. See Brief for the United States at 22-23, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 22), reprinted in 42 LANDMARK BRIEFS, *supra* note 50, at 224-25.

\(^{273}\) *Korematsu*, 323 U.S. at 218. The Court appeared to be repeating what was contained in the government's brief. See Brief for the United States at 22-23, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 22), reprinted in 42 LANDMARK BRIEFS, *supra* note 50, at 224-25.

\(^{274}\) See *Korematsu*, 323 U.S. at 219.

\(^{275}\) *Id.* at 218.

\(^{276}\) *Id.* at 219.
quested repatriation to Japan."

At first glance, this statistical evidence appears impressive. The possibility that thousands of Japanese American citizens were disloyal was a powerful statement. The quantification of large numbers created a feeling that the Court was objective. Because of the powerful image these statistics created, the Court deliberately chose this particular empirical "fact" out of the universe of facts and narratives from the congressional hearings and the Final Report.

The Court clearly offered this quantitative evidence to persuade rather than to describe how it decided the case. Granted, the empirical information had limited relevance. For example, if the Court were requiring a good-faith suspicion of a risk of espionage and sabotage, this questionnaire might have been germane. The most striking feature of the empirical facts, however, is their inaccessibility to analysis. Surely the Court would have offered more detail about what questions were asked and the methodology of the questionnaire study if it considered this to be important evidence. On closer analysis, the statistical evidence was extremely weak for what the Court wanted to prove. The Court relied upon a questionnaire administered approximately a year after the incarceration began. Thus, military authorities did not rely on this evidence when they decided to impose the exclusion order. Furthermore, the questionnaire was hardly a valid means of determining risk of espionage or subversive activity. Many refused to swear unqualified allegiance to protest the conditions of the internment camps or to avoid military service. However, even if this evidence were relevant, the underlying premise must have been that the questionnaire was a valid instrument in separating the loyal from the disloyal. If that were true, it could have been administered in the eleven-month interval between the bombing of Pearl Harbor and the completion of the internment. Moreover, other empirical data were more relevant. The most telling post-internment statistic was that not a single person of Japanese ancestry in the United States was ever convicted of sabotage or espionage. The petitioner's brief in Korematsu noted this to be true at the time the case was being decided—approximately two-and-a-half years after the military order was issued. Clearly, the Court's use of the questionnaire data was not based on an objective search for the most relevant empirical facts.

The Court could not have seriously believed that the questionnaire data was a reasonable justification for the exclusion of over 100,000 people from their homes. Without providing any individual or categorical exemptions, much less individual

277. Id.
278. See Personal Justice Denied, supra note 4, at 188-97. The two questions regarding loyalty were part of a long list of questions. Question 27 asked whether the draft-age males would serve in combat, wherever ordered, and asked others whether they would join some other part of the military. Question 28 asked:

Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attack by foreign or domestic forces, and forswear any form of allegiance or obedience to the Japanese emperor, or any other foreign government, power or organization?

Id. at 192.

Some of the internees did not answer "yes" to both questions, because living conditions were poor and their lives outside the camps were disrupted. The internees did not know how their answers would be used. Many were afraid that if they answered "yes" they would be placed in the segregated army units and separated from their families. Others thought that Question 28 was a trick question so that if they answered in the affirmative they would be admitting prior allegiance to the emperor. Of the 77,957 internees who were surveyed, less than ten percent (5,300) answered "no" to Question 28, the loyalty question. See id. at 192-95.


determinations of risk, General DeWitt’s military orders excluded even the physically handicapped, mentally retarded, psychologically disabled, young children, disabled elderly, and other traditionally “vulnerable” groups from their own home. \(^{281}\)

Prior to the internment, the Federal Bureau of Investigation (“FBI”) had already conducted a sweep with summary arrests of individuals, including those of Japanese, Italian, and German ancestry, who were suspected of being disloyal. \(^{282}\) Thus, the Court was seeking to justify the exclusion of the remaining Japanese American populace whom even the FBI, directed by J. Edgar Hoover, did not find a need to detain or arrest.

The Court presented the questionnaire data not to show how it arrived at a decision but as a symbolic reference to the latent record of the case. The Court chose this empirical fact to avoid referring to the inflammatory overtones of the narratives by General DeWitt and his supporters. The Court’s reference to quantitative evidence created an impression of objectivity. Logically, the evidence may have had some relevance in establishing mere suspicion. Yet the Court did not present the questionnaire data in a manner that allowed for logical analysis. The evidence was presented as a metaphor rather than relevant empirical fact. Therefore, the factual basis for the exclusion order in *Korematsu* rested primarily on the narrative contained in the government’s brief.

### 3. The Court’s Narrative About Its Standard of Review

The text of the *Korematsu* opinion appears analytically muddled because it contains both explicit and implicit references to several different standards of judicial review. These include requirements of (1) strict scrutiny, (2) reasonable basis, (3) reasonable suspicion, and (4) unreviewable discretion. \(^{283}\) An additional peculiarity is that while the most rigorous standard of review—strict scrutiny—was stated dramatically, the less rigorous standards better fit the actual basis of the Court’s decision. As discussed above, the actual factual basis for the exclusion order rested primarily on the Justice Department’s narrative rather than on the justification offered by General DeWitt. The *Korematsu* Court’s willingness to rely on conclusory and derivative narratives could be consistent with a standard of review based on reasonable suspicion or unreviewable discretion. However, the Justice Department’s “suspicion” would not satisfy strict scrutiny, nor would it provide a reasonable basis.

**Strict Scrutiny:** The Court most visibly pronounced its standard of review in the preface to its analysis. The preface contained the Court’s now-renowned declaration...
that when the government creates racial classifications that infringe on the civil liberties of a racial group, these restrictions are "immediately suspect,"284 and the Court will impose the "most rigid scrutiny."285 The Court further observed that while "[p]ressing public necessity may [serve as a valid government objective,] racial antagonism never can."286 The Court went on to require a "definite and close [means-ends] relationship"287 and to declare that only the "apprehension by the proper military authorities of the gravest imminent danger to the public safety"288 could have justified the exclusion order.289

Was the Court announcing its standard of review or was it merely protesting as it sought to provide reassurance that it was trying to be fair? Clearly, the Court was involved in the latter. The Court did not actually strictly scrutinize the government’s objectives. It did not provide any specific evidence supporting the military necessity for the exclusion beyond the cursory allusion to the questionnaire data; nor was there any effort to explain or discredit the racist narratives supporting the military order. Furthermore, the Court did not explain why less restrictive alternatives, such as individual hearings or exemptions for those who represented an extremely low risk of espionage or sabotage, were not feasible.

Contextually, the prefatory paragraph declaring the appropriateness of strict scrutiny has the appearance of an apology. In actuality, the Court applied "the principles [it] announced in the Hirabayashi case."290 In Hirabayashi, the Court held that "it [was] enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made."291 The Court thus abruptly changed its language and approach in Korematsu once it began to analyze the government’s justifications. Justice Black probably inserted the prefatory paragraph to deflect criticism of the Court’s refusal to oppose the hysteria and racism motivating the Japanese internment.292 Confronted with overtly inflammatory and racist narratives by General DeWitt and his supporters, Justice Black reacted by emphasizing that he was being fair even though he was siding with them.

Although the Court did not in fact impose the "most rigid scrutiny,"293 or require a "definite and close [means-ends] relationship,"294 these terms were carefully selected for their symbolism.295 The phrase, "most rigid scrutiny,"296 closely

284. Korematsu, 323 U.S. at 216.
285. Id.
286. Id.
287. Id. at 218. Similarly, the Court stated that only "circumstances of direst emergency and peril" could justify the government’s reliance on exclusion orders. Id. at 220.
288. Id.
289. Id. at 218. Similarly, the Court stated that only "circumstances of direst emergency and peril" could justify the government’s reliance on exclusion orders. Id. at 220.
290. Id. at 217.
292. Apparently, the prefatory paragraph was inserted only in the last draft that Justice Black circulated to court members after he read the strong dissents written by Justices Murphy and Robert. See Irons, Justice Delayed, supra note 9, at 340.
293. Korematsu, 323 U.S. at 216.
294. Id.
295. Professor Paul Brest concluded that "Mr. Justice Black chose the word 'suspect' advisedly." Brest, supra note 135, at 7. He believes that the reason for this standard of review is based on lessons from "our history and traditions [which] provide strong reasons to suspect that racial classifications ultimately rest on assumptions of the differential worth of groups." Id. Thus, Professor Brest believed that the word "suspect" was a term-of-art tied to heightened scrutiny. He noted that Professor John Kaplan instead believed that the
tracks the “more searching judicial inquiry” suggested by Justice Stone in footnote four of Carolene Products, when the Court considered statutes that harmed “discrete and insular minorities.” The Court’s lack of seriousness about imposing strict scrutiny manifested itself in several ways, however. Because Korematsu was decided prior to Brown v. Board of Education, the Court still examined statutes that imposed racial classifications according to a rational basis requirement. Imposing strict scrutiny would have been a significant departure from this established standard of review. Yet, in declaring this to be the standard, the Court did not suggest how it would be applied to the facts nor did it give any reasons to justify the suggested new standard. It did not even cite to Carolene Products’ footnote four for support. Clearly, the Court’s use of this language was basically a rhetorical gesture rather than an effort to provide a new analytical framework.

**Reasonable Basis:** The Korematsu Court’s apparent reliance on a reasonable basis test was not explicitly stated anywhere in the opinion. But its crucial implied presence is derivable from the Court’s reliance on the Hirabayashi case, which the Court acknowledged, gave “serious consideration” to similar matters. The Court in Hirabayashi explicitly applied a reasonable basis test. In Korematsu, the Court also suggested that it was applying a reasonable basis requirement. For example, the Court pointedly noted that authorities had concluded that the curfew order, by itself, was “inadequate,” and called the exclusion order “necessary.” Furthermore, the Court contended that the individual hardships were outweighed by the exigencies of war, and thus implied a reasonable balancing of interests.

However, as noted above, the Court did not supply enough specific information to support a reasonable basis for an exclusion order or to demonstrate a reasonable relationship between the chosen means and ends. Certainly the passing reference to the questionnaire data did not satisfy a rational basis requirement, especially given the Court’s unwillingness to analyze this empirical information in a meaningful way. A reasonable basis requirement had before been used to strike

---

296. Korematsu, 323 U.S. at 216.
298. Id.
300. See Korematsu, 323 U.S. at 217.
301. See Hirabayashi, 320 U.S. at 94-95. Professors tenBroek and Rostow separately concluded that Hirabayashi applied a reasonable basis test, although Professor Rostow was highly critical of the weakness of its application. See tenBroek, supra note 39, at 183; Rostow, supra note 21, at 505.
303. Id.
304. See id. at 219.
down every governmental classification based on race perceived to be unequal.\textsuperscript{305} A reasonable basis requirement was not satisfied in \textit{Korematsu}.\textsuperscript{306}

\textit{Reasonable Suspicion:} The \textit{Korematsu} Court’s explicit declaration that it was applying “the most rigid scrutiny”\textsuperscript{307} and relying on \textit{Hirabayashi}, which in turn purportedly relied on a reasonable basis requirement, created the appearance that the standard of review required more than mere suspicion by military authorities. Some of the language and the logic in the Court’s opinion implied that it was applying a reasonable suspicion requirement. The Court cited language from \textit{Hirabayashi} that was more consistent with a reasonable suspicion requirement rather than a reasonable basis test. This language included the phrases, “we cannot reject as unfounded”\textsuperscript{308} and “[w]e cannot say that the war-making branches of the government did not have ground for believing.”\textsuperscript{309} Moreover, the Court’s insistence that “racial antagonism”\textsuperscript{310} could never justify the exclusion suggested that the government’s suspicion must at least be reasonable. The Court’s emphasis on the temporary, emergent nature of the decisionmaking at issue supports the view that military authorities had no time to create a record showing a reasonable basis. The Court could then permit decisionmaking based on suspicion that “an unascertained number of disloyal members of the group”\textsuperscript{311} could not be identified in the requisite time.\textsuperscript{312}

As discussed above, the questionnaire data may have had some relevance if reasonable suspicion were the standard of review. It could show that military authorities had a suspicion that was not wholly based on racial antagonism. Similarly, the government’s narrative in its brief had relevance, even though it excluded the racial inflammatory details of General DeWitt’s narrative. On the other hand, General DeWitt’s narrative comprised the most important information under a reasonable suspicion requirement. It proclaimed the decisionmaker’s actual reasons for imposing the exclusion order. If the Court had logically analyzed General DeWitt’s narrative, it would have acknowledged the narrative’s inflammatory tone and substance and pointed out that the exclusion could—or could not—be justified by a separate non-racist rationale. The Court’s lack of articulateness makes it impossible to know if the Justices were requiring a reasonable suspicion or establishing a zone of unreviewable discretion held by military authorities.

\textit{Unreviewable Discretion:} The implications of the Court’s logic, rather than its specific language,\textsuperscript{313} suggest that the Court may have accorded unreviewable discretion to DeWitt and other military authorities. The Court’s analysis centered around

\textsuperscript{305} Thus, \textit{Hirabayashi} and \textit{Korematsu} were the first, and to this day, only cases in which the Court upheld racial classifications created by the government despite their perceived egregious effects. See \textit{Hirabayashi}, 320 U.S. at 111 (Murphy, J., concurring) (“Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry.”); \textit{Fullilove v. Klutznick}, 448 U.S. 448, 507 (1980) (Powell, J., concurring) (noting that only twice, in modern equal protection jurisprudence, has racial classification been allowed as an appropriate means to serve a compelling governmental interest).

\textsuperscript{306} Professor Rostow concluded that the Court did “not pretend to review even the possible foundations of such a judgment.” \textit{Rostow, supra} note 21, at 509. Professor tenBroek believed that the Court in effect concluded that the Constitution was “suspended.” \textit{tenBroek, supra} note 39, at 184.

\textsuperscript{307} \textit{Korematsu}, 323 U.S. at 216.

\textsuperscript{308} \textit{Id.} at 218 (quoting \textit{Hirabayashi}, 320 U.S. at 99).

\textsuperscript{309} \textit{Id.} (quoting \textit{Hirabayashi}, 320 U.S. at 99).

\textsuperscript{310} \textit{Id.} at 216.

\textsuperscript{311} \textit{Id.} at 218.

\textsuperscript{312} \textit{Id.} at 218-19.

\textsuperscript{313} In comparison, the Court in \textit{Hirabayashi} made statements which explicitly supported non-reviewable discretion. It announced that
whether DeWitt’s actions were within the war powers of the government, implying that the Court was not making a substantive judgment about the correctness of these actions.\textsuperscript{314} The Court stressed the emergency character of the military action and hinted at the limits of the Court’s review to avoid displacing military judgment. The opinion contained language such as: "when, under conditions of modern warfare, our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."\textsuperscript{315} This passage implies that the Court focused simply on whether the means were consistent with the war power held by Congress and the President.

If the Court were in fact recognizing unreviewable discretion, this would explain why Justice Black found it unnecessary to review General DeWitt’s narrative. Therefore, the Court’s reliance on the questionnaire data and the Justice Department’s account can be explained by their persuasive appeal rather than logical relevance. Because of the Court’s failure to provide factual support for its holding, some commentators who have closely analyzed Korematsu have concluded that the Court found that the discretion held by military authorities was unreviewable.\textsuperscript{316}

**Summary:** The language of the Court’s narrative in Korematsu most explicitly and dramatically highlighted its application of strict scrutiny, while lesser levels of review were accorded decreasing explicit reference. The Court’s reliance on unreviewable discretion held by military authorities was the least explicit. The unreviewable discretion standard could only be inferred from the opinion’s logic. Yet the factual basis of the Court’s decision discloses that the standards of review most likely to have been actually relied upon were the two most deferential levels: either reasonable suspicion or unreviewable discretion.

### B. The Relationship Between Narratives and Interpretation

The Court’s inclusion and exclusion of various narratives in Korematsu may seem puzzling. The selection of narratives does not appear to be based on how the narratives are logically related to the Court’s interpretation. There appears to be no logical interpretive-narrative link. By “interpretive-narrative link,” I mean the description given by the Court of the relationship between a given narrative and the Court’s interpretation. Why include the narrative cryptically describing questionnaire data while at the same time exclude the detailed narrative by General DeWitt? An interpretive-narrative link requires an answer to this question. This section considers the possibility that the choice of inclusion and exclusion was not to underscore their logical relevance but to highlight what the Court perceived to be the most persuasive presentation.

\[\text{[w]here, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.}\]

Hirabayashi, 320 U.S. at 93.

\textsuperscript{314} See Korematsu, 323 U.S. at 217-18.

\textsuperscript{315} Id. at 219-20; see also id. at 217 (quoting executive order which states that "the successful prosecution of the war requires every possible protection against espionage and against sabotage"); id. (not beyond the war power to exclude).

\textsuperscript{316} See, e.g., tenBroek, supra note 39, at 184; Rostow, supra note 21, at 508-09.
1. A Decisionmaking Model of Narrative Selection

In order to discern the role of logic and persuasion in the selection and interpretation of narratives in a judicial opinion, it is fruitful to consider a decisionmaking model that describes an interplay between two different levels of allocation. The first-order determination selects a subset of narratives from the universe of available narratives. The Court included such a subset of narratives in its opinion. The selection of this subset may be based on various criteria. To illustrate the criteria used in Korematsu, for example, we can see that the Court could have relied on the logical relevance or, in the alternative, the persuasiveness of the narratives. Once such a decision is made, a second-order determination still has to be made. This determination requires a decision as to what meaning should be attributed to a specific narrative. The narrative may be used to show logical consistency with the Court's interpretation or, alternatively, it may be used in a persuasive manner. The criteria used in the second-order determination may be the same or different from what we used in the first-order determination.

Based on the prior discussion, the Court was confronted with five narratives when it wrote Korematsu: (1) Korematsu's narrative about his identity and how he got arrested, (2) General DeWitt's narrative, (3) language from the Hirabayashi opinion, (4) the Justice Department's narrative, and (5) the questionnaire data. The Court included only the last three narratives in the Korematsu opinion. This decision was consistent with a first-order decision based on persuasiveness as the controlling criterion for selection. The Court's exclusion of the narratives of Korematsu and General DeWitt because of their racially inflammatory nature was consistent with a persuasive presentation. Alternatively, it was consistent for the Court, in order to persuade, to include references to the Hirabayashi opinion, the Justice Department's narrative, and the questionnaire data.

However, the Court's selection of narratives did not reflect a logical nexus between narratives and interpretation. Because there are at least two possible interpretations of the Court's opinion—a standard of review based either on reasonable suspicion or unreviewable discretion—we can consider each in turn. First, we can consider the possibility that the Court's interpretation in Korematsu was that military authorities should be accorded unreviewable discretion in certain emergency wartime situations. If the Court in Korematsu made a first-order determination based purely on the logical relevance to selected narratives, then we would expect inclusion of only the narrative relating to the Hirabayashi opinion. The Hirabayashi opinion is logically relevant because it could be construed to be consistent with the holding that military authorities should be accorded unreviewable discretion. The other narratives are not logically relevant to support this holding because the justifications for the exclusion order are unnecessary to decide the case.

We can consider the alternative possibility that the Court's interpretation was that military authorities should be required to show that they held a reasonable suspicion of public necessity. Arguably, Korematsu's narrative was the only narrative

317. Of course, the Court could also rely on some balanced mixture of both criteria, or consider other criteria, such as dignitary concerns which may require the recognition of the narratives of the major parties involved in the litigation. The models are discussed in their pure forms to show the Court's prioritization of persuasive quality over logical relevance.

318. See supra notes 269-71 and accompanying text.

319. The other narratives may, however, provide persuasive support that giving unreviewable discretion was a reasonable decision.
that should have been excluded because it was irrelevant to the reasonableness of the military authorities' suspicions. All the other narratives have some logical relevance to this determination because they address how consistent the justifications were with reasonable suspicion. Among these narratives, General DeWitt's narrative provided the most probative evidence. General DeWitt’s racially inflammatory narrative was highly relevant because it signalled the danger that the commander was ordering the exclusion based on racial prejudice. Incorporating the narrative in the government's brief in a selectively summarized account was hardly an adequate substitute.

The Court's exclusion of the narratives of Korematsu and General DeWitt and its inclusion of narratives derived from Hirabayashi, the Justice Department, and the questionnaire data are most consistent with a criterion based on persuasiveness. Thus, the actual written opinion of Korematsu is consistent with a first-order decision based on the persuasive quality of the narratives rather than their logical relevancy.

In the second-order determination, the Court similarly emphasized persuasive appeal over logical relevancy in its presentation and explanation of the meaning of the published narratives. The Court's assignment of meaning to the narratives it chose to include was consistent with a second-order determination based on the criteria of persuasiveness. None was portrayed as casting any doubt on the Court's determination.

First, we might ask if the second-order determination were based on logical relevance to a holding that the military authorities had unreviewable discretion. Only the Court's treatment of the Hirabayashi opinion was plausibly consistent with this criterion. The Court did not explain how the Justice Department's narrative or the questionnaire data was relevant to the standard of unreviewable discretion. If unreviewable discretion served as the basis for the Court's decision, the Court used these two narratives in a persuasive, rather than logical, manner.

Next, we can consider if the second-order determination was based on logical relevance to a holding that required a showing of reasonable suspicion. The Court's reliance on Hirabayashi and the Justice Department's narrative may be consistent with this criterion. However, the Court's use of the questionnaire data in a persuasive manner confirmed that it again chose to rely on persuasiveness and not logical relevance as the criterion. Although the questionnaire data had some potential relevance to showing the reasonableness of the suspicion held by military authorities, the Court did not provide this logical explanation in its opinion. In the second-order determination, the Court used the questionnaire data in a symbolic way rather than as part of a logical analysis. Rather than explaining the meaning of the empirical data, the Court brandished the limited empiricism in a grandiose manner without serious analysis. Thus the Court's handling of this particular narrative was most consistent with its reliance on persuasiveness as a criterion for both first- and second-order determinations. Furthermore, the fact that the Court had a choice of relying on either a logical or rhetorical approach at the second-order determination is consistent with the view that there were two levels of decisionmaking. That is, if the

320. Korematsu's narrative might have become relevant if he had taken the position that the government could have easily identified him as a loyal individual and excused him from the exclusion order. However, his position was that the exclusion order was unconstitutional with respect to the entire class of Japanese Americans. I believe, however, that it would have been better to dignify Korematsu by identifying him and at least summarizing his narrative. Thus, "dignity" could serve as yet another criterion for including narratives.
initial decision to include the narrative was based on either logical relevance or persuasiveness, the Court had to make a second decision about what meaning should be assigned to the questionnaire data.

In *Korematsu*, the Court emphasized persuasiveness over logic in making its first- and second-order determinations about which narratives to include and how to treat these narratives within its opinion. The first-order determination based on the persuasiveness test resulted in the exclusion of General DeWitt's narrative despite its strong logical nexus with an interpretation based on reasonable suspicion. Alternatively, a first-order determination based on persuasiveness resulted in the inclusion of the Justice Department's narrative and the questionnaire data despite the lack of a logical nexus with an interpretation based on unreviewable discretion. The second-order determination, also based on the persuasiveness test, resulted in the Court's use of the questionnaire data in a persuasive manner not logically connected to either possible standard of review. Thus, there was an absence of a logical interpretative-narrative link in both first- and second-order determinations.

The omission of General DeWitt's narrative demonstrated a possible interactional relationship between the first- and second-order determinations. The decision to base the first-order determination on persuasiveness—and thus to delete General DeWitt's narrative—may have turned on the potential dissonance that would have been created if General DeWitt's narrative had been included in the Court's opinion. If the first-order determination had permitted General DeWitt's narrative to be included in the Court's opinion, then the second-order determination would have been whether to present the narrative in either a logical or a persuasive manner. Justice Black may have concluded that neither method was as effective as omitting General DeWitt's narrative altogether. From a logical perspective, General DeWitt cast serious doubt that there was even a reasonable suspicion or, alternatively, that it would be irrelevant if military authorities had unreviewable discretion. From a rhetorical perspective, the inclusion of General DeWitt's narrative would have greatly diminished the persuasiveness of the opinion because of its racially inflammatory content. Thus, the potential dissonance at the second-order determination was likely to have led Justice Black to make a first-order determination to exclude General DeWitt's narrative.321

The most important observation is that the Court opinion in *Korematsu* failed to explain in a logically coherent way the reasons for including narratives and assigning them meaning. I acknowledge that there may be legitimate reasons to include or exclude narratives not necessarily based on a "logically relevant"

321. In a different context, Guido Calabresi and Philip Bobbitt observed that in situations of resource scarcity where tragic choices must be made, society sometimes does change the criterion for first-order determinations to avoid tragic second-order determinations. They called this phenomenon, "the first-order sufficiency paradox." See Guido Calabresi & Philip Bobbitt, Tragic Choices 134-136 (1978). The determinations relating to the treatment of narratives in *Korematsu* were, however, not "tragic choices." Id. at 17-18. Tragic choices result from irresolvable clashes of fundamental values when forced to make distributonal decisions of finite and scarce resources. Id. What is striking about *Korematsu* was that the Court made an incorrect choice which conflicted with fundamental societal values, but which furthermore was avoidable by the alternative. True, the Court's decision may not have been favorably received as a political matter, but clearly in the long haul it could have been seen as a heroic decision consistent with our culture's values. It is a myth that the wartime situation made the Court's decision too difficult. Indeed, the internment was being disbanded, and the Court's decision in *Korematsu* had little practical impact, especially given that the Court declared the internment illegal based on statutory interpretation in *Endo*. See *Endo*, 323 U.S. at 298-304. The fact that the Court still made a mistake despite the lack of extreme exigency is why it may be thought of as one of the worst decisions that the Court has ever made.
explanation. Furthermore, there are certainly many kinds of logic other than logic based on legal relevance. Explicitly stating such reasons could have assured that the presence or absence of these narratives would not be misconstrued. For example, although Fred Korematsu's identity and personal narrative were not logically relevant to the Court's interpretation, the Court could—and indeed, should—have included them and explained the inclusion as a recognition of the petitioner as a person deserving dignity and respect.

I am sensitive to the fact that the difference between logic and persuasion is often quite indistinct. But even if one believed that the Court had logical explanations for including or excluding each of these narratives, its failure to state these reasons explicitly created an unnecessarily muddled and confusing opinion. The Court could have stated, for example, that it was not relying on General DeWitt's narrative because it had a racially inflammatory tone. Furthermore, the Court could have indicated that it was relying instead on the narrative in the government's brief—which abstracted the non-racist justifications from General DeWitt's report—because it contained an adequate, although minimal, justification for the military order. Similarly, the Court could have been forthright in acknowledging that it was applying a reasonable basis test that recognized the importance of allowing military authorities discretion when imposing restraints short of detention in emergency situations during war. The Court could also have explained that its ruling in Korematsu was extremely narrow and that in future situations, racial classifications would be subject to "the most rigid scrutiny." Indeed, one might argue that these explicit descriptions about the interpretive-narrative link would be both logical and persuasive. But the salient point is that the Court did not do this. The Court apparently was overconcerned with the persuasiveness of its opinion as opposed to the importance of exposing its central logic when faced with what was a difficult choice. Defining and explaining the interpretive-narrative link, would have clarified the opinion's holding and prevented misleading future application through exaggeration.

2. The Explicit/Inexplicit Nature of the Standard of Review

The failure of the Court to describe the relationship between its standard of review and the factual basis for its decision resulted from rhetorical tendencies of over- and under-emphasis. First, the Court escalated its rhetoric relating to the highest standard of review. Second, the Court deemphasized the standards of review comporting with the factual basis of its decision. The Court appeared to allow virtually unreviewable discretion by military authorities, yet this conclusion could be reached only through careful, if not laborious, implication.

The Court exaggerated in proclaiming that it was imposing the most rigid scrutiny. This may be called "hyperbole" because it represents an escalation of rhetorical far in excess of reality. The Court proclaimed it was imposing strict scrutiny

---

322. I reject this conclusion because the facts stated by the Court and found in the government briefs are mere conclusions without specific factual support. Justice Murphy in his dissent provided a concise criticism of these conclusions. See Korematsu, 323 U.S. at 235-238 (Murphy, J., dissenting).

323. Korematsu, 323 U.S. at 216. But the Court appeared to be implying quite the opposite. It stated that "all" racial classifications made by the government are subject to "the most rigid scrutiny." Id. Presumably, this included the case at issue.

324. Professor Robert Cover examined a similar phenomenon with respect to the writings of abolitionist judges who were faced with the enforcement of slavery statutes. He described the tendency of judges to accede to formalist requirements and to enforce the slavery statutes, although it appeared to be contrary to
but, at the same time, avoided discussing the actual justifications offered by General DeWitt. The rhetorical technique of hyperbole represents a way for the Court to show that it was highly sensitive to the factual circumstances of the case but nevertheless claim that the Justices had no choice. This claim implied that the Court should not be held morally culpable for its decision. By making this declaration and by not acknowledging the inflammatory nature of General DeWitt’s narrative, the Court created its own narrative that avoided linking racially inflammatory overtones of the actual justification with the Court’s decision.

However, the Court exercised an impulse in the opposite rhetorical direction when it described the standard of review actually imposed. The majority failed to articulate explicitly their reliance on a highly deferential standard of review, although the lack of factual record strongly implied as much. This approach may be called a “present absence.” The reader of the opinion becomes acutely aware of what the Court is implicitly communicating. Thus, scholarly commentators who have parsed the Korematsu opinion have concluded that it either acknowledged unreviewable discretion or formed its decision on negligible justification. The rhetorical purpose of present absence is to avoid the appearance of unfair treatment. If the Court were allowing unreviewable discretion, only the narrative alluding to Hirabayashi would have been logically relevant. Thus, the Court’s explicit statement of its high degree of judicial deference may have reduced the persuasiveness of an opinion that contained other rhetorical justifications for the exclusion order.

While hyperbole and present absence represent techniques of exaggeration in opposite directions, they share a common purpose. Their use results in a rhetorical distancing of the Court’s moral responsibility from the interpretation made. Through an analogous over- and under-emphasis, the Court escaped defining its interpretation and taking responsibility for its moral consequences. However, this perceived advantage goes hand-in-hand with the disadvantage of a poorly defined interpretation. We are left to guess the contours of the standard of review. The Court failed to define the degree of judicial deference and the scope of allowable military power. The technique of present absence causes the central meaning of the opinion to be inaccessible because of its lack of explicit description. The Court’s use of hyperbole makes its exaggerated language both quotable and subject to misinterpretation by future courts. Thus, the Court’s reliance on present absence and hyperbole demonstrated on another level the failure to establish an interpretive-narrative link.

In summary, the Court’s interpretative approach created a rift between rhetoric and logic. This discontinuity did not invite—indeed, it rebuffed—discussion or analysis of the opinion’s legal meaning. As a result, the intuition that guided the Court’s selection of narratives and assigned meaning to them remained unexamined. Readers of these narratives have failed to grasp where the Court’s logic ends and why. By failing to be forthright, the Court created a muddled opinion, which has been subject to misinterpretation and even to manipulation. Many courts and scholars later claimed that Korematsu was the first case to apply strict scrutiny to their personal morality. Professor Cover noted that the judges in their opinions tended to “elevate the formal stakes” to reduce this cognitive dissonance between formalism and the immorality of the result. See Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 227-29 (1975).

325. See, e.g., Rostow supra note 21, at 508-09; tenBroek, supra note 39, at 184.

racial classifications created by the government.\textsuperscript{327} The opinion also did nothing to refute the notion that the very initiation of the internment was unjustified or was not motivated, at least in a significant way, by racial prejudice. Indeed, the Court needlessly gave legitimacy to the military orders at a time when the internment itself was beginning to be disbanded and recognized as a mistake.\textsuperscript{328} Finally, the ambiguity of the opinion made it more likely that judicial deference would be legitimized in other remote situations because of the opinion’s chameleonic meanings.

If there was any hope of confining the holding of \textit{Korematsu} to the wartime context, it was squandered by the Court’s unwillingness to define in detail the limits of the war power. Without doctrinal definition, \textit{Korematsu} potentially has innumerable applications outside of the sphere of war making. In the absence of a precise explanation of the basis for federal government authority, the opinion invites interpretation based on its result alone. If the federal government could legitimately exclude over 70,000 citizens from their homes based on their racial ancestry, it may be possible for future courts to conclude \textit{a fortiori} that the federal government has authority to encroach upon the liberties of individual criminal defendants,\textsuperscript{329} resident aliens,\textsuperscript{330} or others\textsuperscript{331} who lack traditional due process.

\section*{III. Privileging Adjudication Based on the Interpretive-Narrative Link}

The Court’s silent avoidance of confronting the question concerning whether to overrule \textit{Korematsu} is, of course, a kind of present absence. As described above, the Court has had several opportunities to banish \textit{Korematsu} from the domain of equal protection jurisprudence, but has silently allowed those possibilities allow its consequences to continue. The history of \textit{Korematsu}’s formulation and its subsequent influence as precedent shows how silence is an important form of expression. The Court’s refusal to acknowledge General DeWitt’s narrative had a profound effect on the form and substance of the \textit{Korematsu} opinion. The silencing of narratives about the internment in the households of issei and nisei families after the war delayed their coming to terms with this tragedy. The government bolstered the silence when it opposed \textit{Korematsu}’s request for a public hearing and published opinion about the relitigation of his case. The same time that silence about the internment in issei and nisei families was being displaced by conversations, the Court’s express interpretations of \textit{Korematsu} were being displaced by its reliance on silence.

This recurrent silence represents an oppressive anxiety and also signifies a belief in the futility of trying to resolve it. Most families of the internment were silent because of their inability to cleanse themselves of this wrongdoing and their need for extrinsic recognition of the injustice. The government opposed a public hearing and judicial opinion because it feared public disfavor when the oppressive silence was lifted. Similarly, the Court’s reliance on silence as an interpretive method is an implicit recognition that there is a need for judicial abstention in certain emergency situations.

\textsuperscript{327} See \textit{Perea, Ethnicity and the Constitution, supra} note 124, at 583 (noting that \textit{Korematsu} “is widely accepted to stand for the proposition that racial or national origin classifications warrant strict judicial scrutiny”).

\textsuperscript{328} See \textit{supra} note 77.


\textsuperscript{330} See, \textit{e.g.}, \textit{Zemel v. Rusk}, 381 U.S. 1, 15 n.13 (1965).

\textsuperscript{331} See, \textit{e.g.}, \textit{Lichter v. United States}, 334 U.S. 742, 767 (1948) (federal post-war economic regulation).
situations. Moreover, the concept that the government can in some future emergency exclude civilians from their homes and place them in camps without due process of law is justifiably frightening. But the Court's silence is implicit recognition of the necessity of keeping such a future option.

The history of *Korematsu* is also a story about a recurrent tendency toward exaggeration. Justice Black exaggerated the strength of the government's justifications by including seemingly impressive empirical information of little actual relevance. Furthermore, like Justice Holmes' declaration of "clear and present danger," Justice Black incorporated a bold statement declaring that the Court was being especially attentive. In light of the Court's recurring references to *Korematsu's* strict scrutiny standard, it appears to be oblivious to the conclusion reached by scholarly commentators that the Court was falsely describing what happened in that case. Moreover, I believe that the latest claim that *Korematsu* is for all practical purposes overruled represents a similar kind of exaggeration, no matter how well-meaning.

This exaggeration represents a deep-felt wish that justice has been completely achieved, despite the tacit understanding that this has not happened. Exaggeration fills the empty space left unoccupied by sound reason. The empirical questionnaire data occupied an empty niche in the Court's logic. Similarly, the Court's declaration of strict scrutiny in *Korematsu* balanced out, in a rhetorical sense, the subsequent analysis which resulted in virtual judicial abstention. Declarations that *Korematsu* is insignificant is ultimately part of this same tradition based on wishing that justice has, at last, been achieved. The Court's continued use of *Korematsu* in a hyperbolic way serves to comfort us into assuming that the Court tried its best in the past and will continue to do so in the future.

The failure to overrule *Korematsu* reflects an inability to move analytically from a point of consensus toward issues in which there is a lack of consensus. There is a modern consensus that it was wrongly decided. There is, however, uneasiness and uncertainty about what meaning to attribute the case. In other words, once *Korematsu* is overruled, what then? We should guard against oversimplification of *Korematsu's* meaning. Indeed, even the *Korematsu* Court stated: "Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice." While we all would agree with the *Korematsu* Court on this bare statement, our disagreement results from defining the appropriateness of the degree and place for judicial deference. The complicated issue in *Korematsu* involves deciding what amount of deference, if any, should be accorded by the Court to government authorities in times of perceived emergency.

There are two basic approaches to answering this difficult problem. The first approach relies on judicial deference to government authorities rather than on substantive judicial review. For example, Justice Jackson favored the creation of an unreviewable zone of discretion for military authorities in emergent wartime situations. Justice Jackson advocated that this should be achieved by declaring wartime actions by military authorities to be nonjusticiable. A different approach relying on a per
se rule could forbid all racial classifications imposed by the government. Those favoring avoidance of substantive judicial review point to judicial inexpertise, practicality, and the otherwise distorting effect of wartime precedent on constitutional law.

A second approach favors judicial review. For example, although Justices Roberts and Murphy emphasized that the judgment of military authorities should not be "overruled lightly," they still insisted on a significant role for substantive judicial review of judgments made by military authorities in emergencies. Justice Roberts emphasized the importance of the Court's definition of when conditions actually constitute an "emergency" and in ensuring that the means are "temporary."

guage in Hirabayashi which indicated that the Hirabayashi Court was limiting its inquiry into whether the curfew order "was within the boundaries of the war power." Id. at 247.

Justice Jackson asserted his view that civilian courts should refrain completely from making substantive assessments of military judgments based on concerns about expertise, practicality, and the distorting effect on constitutional law. Justice Jackson believed that, as a practical matter, civil courts lacked expertise to evaluate the reasonableness of military actions. See id. at 244-45 (Jackson, J., dissenting). Furthermore, this military judgment will often rest on information which may not be admissible in court or which may not be publicly disclosed because it may compromise national security. Thus, courts may be likely to accept the bare conclusions of military authorities, taking their word that there is adequate underlying information. In Korematsu, there was "no evidence" which had been introduced in "any" court on whether the military order was reasonable. Id. at 245 (Jackson, J., dissenting). Instead, the Court had to rely on "General DeWitt's own unsworn, self-serving statement, untested by any cross-examination . . . ." Id.

Because he felt that this was likely to be a common situation in these kind of cases, he concluded that military judgment is "not susceptible of intelligent judicial appraisal." Id. Justice Jackson also contended that it was "impracticable and dangerous idealism" to believe that every military order should "conform to conventional tests of constitutionality." Id. at 244 (Jackson, J., dissenting). After all, "[t]he armed services must protect society, not merely its Constitution." Id. (Jackson, J., dissenting). The actions of the military in wartime cannot be practically limited by the same constraints which are imposed on civilian authority in peacetime. Justice Jackson noted that a reasonableness standard should not be imposed because a military commander to be successful in wartime "may be unreasonably cautious." Id. (Jackson, J., dissenting).

Finally, Justice Jackson warned of the danger of subjecting military orders to a constitutional evaluation, given that courts were likely to uphold these orders because of inexpertise and practicality. A military order, even if mistaken, does not have the same longevity as a judicial constitutional opinion. By validating the military order as constitutional, a precedent has been set which sanctions "racial discrimination in criminal procedure" as well as justifying the "transplanting of American citizens" when an urgent need has been shown. Id. at 246 (Jackson, J., dissenting). Once established, "[t]he principle lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." Id. (Jackson, J., dissenting). With each reuse as precedent, the principle becomes more deeply imbedded in constitutional law and more expansive in its scope.

Justice Jackson expressed concern about the future effects of Korematsu as precedent in terms of its logic and image. He expressed concern for the effects of its logic when he quoted Judge Cardozo in warning that there was "the tendency of a principle to expand itself to the limit of its logic." Id. (Jackson, J., quoting Judge Cardozo). Justice Jackson believed that this danger to logic outweighed the harm to individual liberties if it declared the case nonjusticiable.

Not only was Justice Jackson concerned about the danger of Korematsu's logic, but he also expressed sensitivity to the effects of the imagery of its rhetoric. Indeed, he felt that it would "wholly delusive" if people did not understand that their only protection against the imposition of an unfair military order was for people to prevent the "command of the war power fall into irresponsible and unscrupulous hands . . . ." Id. at 248 (Jackson, J., dissenting). Thus, from the perspective of Justice Jackson, it was better in the long run to allow a military order to be issued and remain unexamined by civilian courts than for courts to "review and approve" the order. Id. at 246 (Jackson, J., dissenting). To do so, transforms "a passing incident [into a] doctrine of the Constitution" which "has a generative power of its own, and all that it creates will be in its own image." Id. Justice Jackson believed that it was ultimately harmful to the Court for the public to perceive that the Court's review was a mere pretense. 334. See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 531-32 (Stuart, J., dissenting) (interpreting the equal protection clause as prohibiting all racial discrimination).

335. See supra note 333 (Justice Jackson's viewpoint on judicial review of military judgments).

336. Hirabayashi, 320 U.S. at 234 (Murphy, J., dissenting). See id. at 231 (Roberts, J., dissenting).

337. Id. at 231 n.8
Justice Murphy contended that it was important to require a reasonable and necessary relationship between the means used and the fears of sabotage and espionage. He also emphasized that “we must not exact a too high or too meticulous standard,” given the expertise of the military and the emergency of the crisis. Similarly,

338. Id. (Roberts, J., dissenting). Justice Roberts agreed with Justice Frankfurter that it was too artificial to consider the exclusion separately from the forced detention since it was part of the same overall plan. Id. at 231 (Roberts, J., dissenting). The Court misconstrued the facts so that they mirrored those in *Hinabayashi*: the temporary “exclusion from a given area of danger [was] made necessary by a sudden emergency.” Id. (Roberts, J., dissenting). Indeed, Justice Roberts conceded that, if these were the facts, he “might agree with the court’s disposition of the hypothetical case.” Id. (Roberts, J., dissenting). However, he conditioned his agreement “on the definition and application of the terms ‘temporary’ and ‘emergency.’” Id. at 231 n.8 (Roberts, J., dissenting). Furthermore, he emphasized that military orders should always be subject to judicial review to determine if an emergency existed and if it remained at the time of the restraint. Id. (Roberts, J., dissenting).

Because Justice Roberts believed that the Court was confronted with the issue of the constitutionality of the forcible detention itself, he argued that the internment was unconstitutional. He believed that the military issued to conflicting orders which were “a cleverly devised trap ... to lock [Korematsu] up in a concentration camp.” Id. at 232 (Roberts, J., dissenting). Because the Court was holding that the internment was not based on lawful statutory authority in the *Endo* case—which was issued on the same day as *Korematsu*—Justice Roberts concluded that it violated due process for the military to have subjected Korematsu to the “two diametrically contradictory orders.” Id. at 232-33 (Roberts, J., dissenting).

339. See 320 U.S. at 234 (Murphy, J., dissenting).

340. Id. at 235 (Murphy, J., dissenting). Justice Murphy stated that the appropriate legal standard, when individuals are deprived of constitutional rights, was whether the governmental action was reasonably related to the military necessity. Thus, in *Korematsu*, the government must show that the exclusion based on racial ancestry was reasonably related to the “immediate, imminent, and impending” dangers of sabotage and espionage. Id. at 234 (Murphy, J., dissenting). But he concluded that this relationship was lacking because military authorities could not show that “all persons of Japanese ancestry both alien and non-alien” had a tendency to commit sabotage or espionage. Id. at 234 (Murphy, J., dissenting) (italics in original). Justice Murphy then conducted a systematic and detailed review of the military information—especially General DeWitt’s actual justifications stated in his Final Report—which was before the Court.

At the outset of his factual analysis, Justice Murphy noted that the commanding General DeWitt had expressed a particular “attitude toward individuals of Japanese ancestry.” Id. at 236 n.2 (Murphy, J., dissenting). This attitude was expressed in the General’s narratives in his Final Report on the evacuation as well as his testimony before a congressional committee. General DeWitt had labelled all persons of Japanese descent, regardless of citizenship, as “subversive,” as belonging to “an enemy race” whose “racial strains are undiluted,” and as constituting “over 112,000 potential enemies.” Id. at 236 (Murphy, J., dissenting) (quoting *Final Report*, supra note 238, at 34).

General DeWitt’s “blanket condemnation” failed to provide any reliable evidence which showed that individuals of Japanese descent were “generally disloyal.” DeWitt’s prejudice toward Japanese was ultimately expressed by his explanation of why there had been no evidence of any sabotage or espionage by persons of Japanese descent following Pearl Harbor: “The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.” Id. at 241 n.15 (Murphy, J., dissenting) (quoting *DeWitt*, supra note 202, at 34).

In other words, General DeWitt believed that the total lack of actual subversive activity indicated how highly orchestrated the community of Japanese Americans were in their inactivity. Finally, the special interest groups who were supporters of General DeWitt included white farmers who were in competition with Japanese American growers. Justice Murphy quoted a leader of a white grower-shippers association as testifying before Congress:

"We're charged with wanting to get rid of the Japs for selfish reasons . . . . We do. It's a question of whether the white man lives on the Pacific Coast or the brown man . . . . They undersell the white man in the markets . . . . They work their women and children while the white farmer has to pay wages for his help. If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either."

Id. at 239 n.12 (Murphy, J., dissenting) (quoting Taylor, *The People Nobody Wants*, 214 SAT. EVE. POST 24, 66 (May 9, 1942)).

After considering the “attitude” of General DeWitt and his supporters as expressed in these narratives, Justice Murphy then turned to the specific evidence presented in the *Final Report* which was provided by military authorities to justify the evacuation and internment. He characterized the evidence in the *Final Report* as being based "mainly upon questionable racial and sociological grounds not ordinarily within the
Justice Frankfurter offered a lesser role for judicial review when he contended that satisfactory review should be achieved by defining what means are appropriate to conducting war and then allowing military authorities discretion as long as they did not exceed the defined means.  

The questioned practices included “emperor worshipping ceremonies,” dual citizenship, attendance by children of Japanese language schools, and the sending of some children to Japan for education. Id. at 237-38 (Murphy, J., dissenting) (quoting DEWITT, supra note 202, at 10-11). Justice Murphy pointed out the lack of connection between these practices by some members of the Japanese community and the likelihood of participation in espionage and sabotage. Id. at 238 (Murphy, J., dissenting). Instead, he showed how these practices were tied to traditional customs and the history of immigration law governing Japanese immigrants. Id. at 237 n.4, 6 (Murphy, J., dissenting). The insularity of the Japanese community was created by the unavailability of non-agricultural jobs and lack of social acceptance. These factors encouraged their geographic concentration in farming areas along the Pacific Coast, near military and industrial areas. Id. at 238 n.9 (Murphy, J., dissenting).

The Final Report also concluded that “protective custody” was necessary for those of Japanese ancestry because the American public “was ready to take matters into its own hands.” Id. at 238 (Murphy, J., dissenting) (quoting DEWITT, supra note 202, at 8-9).

In response, Justice Murphy noted the dangerousness of this forced paternalism to civil liberties of minorities and pointed out that there was no significant factual support of this view. He observed that these reasons echo “an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices.” Indeed, he concluded that those who had in the past expressed their prejudices in this way were “the same people who have been among the foremost advocates of the evacuation.” Id. (Murphy, J., dissenting).

Finally, Justice Murphy examined the reasons given by military authorities regarding their failure to conduct individual hearings to separate the loyal from the disloyal. He observed that the military’s claim that “time was of the essence” did not comport with reality because nearly eleven months passed before completion of the internment. Id. at 241 (Murphy, J., dissenting) (quoting H.R. Doc. No. 2124, 77th Cong., 2d Sess. 247-52 (1943)). During a six-month period, the British had conducted individual hearings on approximately 74,000 German and Austrian aliens. Id. at 242 n.16 (Murphy, J., dissenting). The fact that a country under greater duress from direct attack was able to conduct individual hearings on a similarly sized group in a shorter time period provided a strong indication that a comparable procedure could have been established in this country. Furthermore, given the apparent absence of a need to declare martial law and the “[l]eisure and deliberation” which seemed to characterize the internment schedule, Justice Murphy believed that “factors of time and military necessity” were not decisive on this issue. Id. at 241 (Murphy, J., dissenting). The Justice concluded that it would seem “incredible” to claim, as military authorities did, loyalty hearings at least for the 70,000 American citizens of Japanese descent were impossible. Id. at 241-42 (Murphy, J., dissenting). The fact that the military authorities did not even exempt children and the elderly from detention indicated that the program was based on a finding of racial guilt rather than concerns about sabotage and espionage. Id. at 242 (Murphy, J., dissenting).

Thus, Justice Murphy took the position that the Court should conduct a substantive review of whatever information was provided by military authorities and subject it to the “reasonableness” standard. Id. at 234 (Murphy, J., dissenting). By conducting a review of the evidence made available by the military, Justice Murphy demonstrated that such a review was at least possible to accomplish in this case. Id. at 239-40 (Murphy, J., dissenting). See Richard Delgado & Jean Stefancic, Norms and Narratives: Can Judges Avoid Serious Moral Error?, 69 Tex. L. Rev. 1929, 1945-46 (1991) (discussing how the Korematsu Court ignored Justice Murphy’s narrative).

341. At the outset of Justice Frankfurter’s concurrence, he made it clear that he agreed with Justice Jackson’s premise that it was important to construe broadly the war powers of Congress and the President to permit them “to wage war successfully.” Korematsu, 323 U.S. at 224 (Frankfurter, J., concurring) (quoting Hirabayashi, 320 U.S. at 93). So only if the military order “does not transcend the means appropriate for conducting war,” the courts should not deem it unconstitutional. Id. at 225 (Frankfurter, J., concurring). Thus, for Justice Frankfurter, the Korematsu and the Hirabayashi cases were relatively easy cases to decide. Indeed, this explains his willingness to construe the military order as requiring both exclusion and detention. It made no difference from Justice Frankfurter’s perspective. The war power gave military authorities expansive discretionary power to win the war.
The central lesson we learn from Korematsu appears to be that there is an important role for judicial review of substantive decisions by military authorities, even if this judgment involves action labelled "temporary" and "emergency." Because there is a consensus that Korematsu was wrongly decided, it represents the easy case. But the lack of consensus stems from indecision regarding how to proceed. For example, does it necessarily follow that the Court should impose strict scrutiny on federal affirmative action programs, as the Court concluded in Adarand, because of distrust of all governmental racial classifications? What if anything does Korematsu teach us about the merits of constitutional doctrine which relies heavily on the doctrine of judicial deference in the areas of national security and immigration?

I, for one, cannot offer definitive and detailed answers on this issue without hearing public conversations about the advantages and dangers of alternative judicial approaches. The existence of a current consensus that Korematsu was wrongly decided serves as an opportunity to begin our public conversations in agreement, but we should move forward to make Korematsu relevant to the modern day. We need to connect our narratives with what we think Korematsu means. The Court should undertake this difficult task and no longer silently avoid it. By advocating the privileging of the interpretive-narrative link, I mean that the Court should rely on interpretive approaches that demonstrate a connection with the meaning of Korematsu. Thus, we need to acknowledge that Korematsu is living precedent.

I urge rejection of reliance on hyperbole and present absence because they serve as a means of avoiding the elucidation of Korematsu's logical meaning. Privileging those interpretive techniques which rely on the interpretive-narrative link means that the Court should depend on traditional stare decisis and historical interpretation. These interpretive techniques require the Court to assign some logical meaning to

---

Justice Frankfurter believed, however, that the Korematsu precedent would be confined to the process of defining the war powers. He noted that "the validity of action under the war power must be judged wholly in the context of war." Moreover, military authorities operated in their own separate "sphere[] of action." Id. at 224 (Frankfurter, J., concurring). Thus, Justice Frankfurter implied that Korematsu as precedent could be contained within the scope of defining the war powers of government. Justice Frankfurter did not appear to share the same fear of Korematsu's precedential impact on issues not related to national security and hence was willing to validate the military order as constitutional under a highly deferential standard of review.

Justice Frankfurter expressed concern about what he thought was unfair imagery concerning judicial deference to military authorities. In essence, he believed that the Court's holding should not raise questions of legitimacy based on image, because the decision was logically correct. Justice Frankfurter pointed out the separateness of the "spheres of action" of military authorities and of judges, and argued that the legitimacy of action under the war power must be judged in the context of war. Id. at 224-25 (Frankfurter, J., concurring). Thus, "[t]hat action is not to be stigmatized as lawless because like action in times of peace would be lawless." Id. at 224 (Frankfurter, J., concurring)(emphasis added). In either instance the orders must be subject to the bounds of the Constitution and thus are legitimate. He felt that Justice Jackson's reasoning unfairly cast "an atmosphere of unconstitutionality" onto actions by military authorities because these were logically legitimate. Finally, he concluded by emphasizing that just because "the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours." Id. at 225 (Frankfurter, J., concurring). By expressing substantial deference to Congress and the President, Justice Frankfurter believed that the Court should not be tarnished because it was not expressing social "approval" of their actions. Justice Frankfurter believed, therefore, that as long as the Court was acting logically, it need not be concerned about imagery.

342. A different possibility would be a per se rule against all racial classifications created by the government. This is unlikely to be a view shared by many because it departs radically from equal protection jurisprudence. The strict scrutiny doctrine presumes that some government racial classifications will pass muster even under the highest level of scrutiny. Such a per se rule would ban all affirmative action programs. It would also prohibit government from relying on racial classifications in a truly temporary and emergent way. Justice Black believed that prison authorities could separate persons by race in order to stop an outbreak of disorder based on racial conflict within a prison. See Lee v. Washington, 390 U.S. 333, 334 (1968).
Korematsu and to explain why it followed or, alternatively, failed to follow the precedent. Instead of ignoring Korematsu in Reno and Salerno, the Court should explain the meaning that Korematsu has with respect to its holdings. Similarly, the Court should recognize that Korematsu stands for the principle of judicial abstention, and ought to define the circumstances, if any, in which this should be allowable with respect to racial classifications created by the government. This may require the Court to acknowledge that current doctrine is consistent with Korematsu. It may also lead the Court to distinguish Korematsu or to overrule it. The Court should also rely on historical interpretation as a legitimate means of explaining Korematsu’s historical relevance to the modern day.

If the Court adopts an approach that relies on the interpretive-narrative linking, Korematsu will be overruled or narrowed considerably. I speculate that constitutional law which is relevant to national security and immigration law could change considerably because Korematsu was derived from and continues to inform these doctrines. In any event, I believe that clarity, itself, is an important outcome which would result if the Court offered fuller explanations about what Korematsu means in the modern day.

The Court’s failure to initiate this discussion has its costs. Judge Harry T. Edwards recently criticized the Court’s failure to “overrule or repudiate Korematsu.” He points out two problems created by this predicament from the standpoint of a judge sitting on a federal court of appeals. First, “[t]he case stays with us, ‘an evil blotch upon our national legal conscience and our law,’ and each subsequent generation’s perceptions of the judicial system, its competence and its integrity, are undoubtedly shaped accordingly.” Second, he believes that Korematsu continues to have “quite tangible effects on the decisionmaking of lower courts.” For example, a federal appellate court stated, “litigants do not have the academic luxury of insisting that the Supreme Court does not really mean what it says, or that a peace-

343. The Court could distinguish Korematsu from many cases in at least four important ways. First, the case still raised important issues about the relationship between the Court and the other branches of government during wartime. The Jackson-Frankfurter debate in the Korematsu opinion raised difficult issues over the judicial role in deciding issues involving the war powers. These issues include the need for national security secrecy, the lack of the Court’s expertise, and the flexibility required by the other branches to be effective in temporary wartime emergencies. Second, the military order was promulgated not only in wartime, but also in time of great and impending emergency. The West Coast was thought by military authorities to be under imminent danger of attacks. Third, the Court furthermore noted the temporary nature of the exclusion. The Court assumed that the exclusion would last only as long as necessary. Thus, it rested its holding in part on the finding that, given the perceived emergency, there was insufficient time “brings about an immediate segregation of the disloyal from the loyal . . . .” Id. at 219. Fourth, the means used by the government were limited to the curfew and exclusion orders. The Court contended that the Hirabayashi precedent which validated the curfew was highly relevant to the issue of exclusion. According to the Court, both the exclusion and the curfew bore the same “definite and close relationship to the prevention of espionage and sabotage.” 323 U.S. at 218. See also supra note 250. Because the Hirabayashi case was directly on point, the Court found no need to provide additional justification for the military order. Although the Court may have indeed been closing its eyes to reality, the Court took the position that it was not creating new precedent, but simply reiterating a principle enunciated in Hirabayashi. Most important, the Court clearly avoided ruling on the constitutionality of the internment, including the detention and incarceration at assembly and relocation centers.


345. Id. (quoting Arval A. Morris, Justice, War, and the Japanese-American Evacuation and Internment, 59 Wash. L. Rev. 843, 843 (1984)).

346. Edwards, supra note 344, at 843.
time Court should not hesitate to repudiate a wartime Court for ignoring the Constitution's requirements.\footnote{347} Thus, Judge Edwards concludes that in cases dealing with issues as varied as pretrial preventive detention, questioning of nonimmigrant aliens during times of international tension, mass arrests of anti-war protestors, conscription under the Selective Service Act, and warrantless searches during declared emergency, the [lower federal] courts are required to address \textit{Korematsu}, distinguishing it where possible and following it when necessary. On doctrine as well as on judicial status, \textit{Korematsu} continues to exert its adverse influence.\footnote{348}

The Court's reliance on the techniques of hyperbole and present absence preserves the ambiguity created by \textit{Korematsu} and leaves it to some future Court to create its meaning. In doing so, the Court fails to provide those future Courts any guidance as to how to approach the difficult and complex tasks of reviewing the government's actions in time of crisis. It avoids initiating public discussion of critical issues that define the limits of judicial intervention. It leaves to a future Court to formulate its answer to a highly complex issue without the benefit of prior public discussion. Instead, \textit{Korematsu} may remain the most important precedent on which to rely.

\section*{Epilogue}

Just as I favor of narratives which are connected to interpretation, I am more responsive to narratives connected to experience, rather than abstract instruction. I suppose this is why I find Justice Black's opinion for the Court in \textit{Korematsu}, with its emphasis on the abstract, so much less compelling than Justice Murphy's careful examination and rejection of the actual narratives of General DeWitt and his supporters. Indeed, this was why I ultimately did reject the conclusory language of my high school textbook and teacher's glib remark. Both narratives were blunt and unrelated to life experiences. I wish that my high school teacher could have listened to the stories told by those who experienced the persisting racial hatred even after the Japanese internment was abandoned.

An important role of government is to teach by its actions what we stand for as a society. Because governmental action has such vital symbolic force, our Constitution forbids certain federal and state activities while it permits some of those very same activities if done by private parties. In this light, the official imprimatur given to General DeWitt's actions by a President, Congress, and the Supreme Court—acting in concert under a banner proclaiming the importance of national unity—gave the internment legitimacy in the eyes of many citizens. Long-lasting harm resulted from the public's perception of the internment as a confirmation of their ugliest fears and prejudices about Japanese Americans. A newspaper clipping in my father's scrapbook described a poll of Californians just after the war. The poll found that more than ninety percent of Californians did not want Japanese Americans from the internment camps to return to their state. "NO JAPS IN CALIFORNIA" was a common slogan. In effect, the government's forced segregation of Japanese Americans branded us unfit for society.

The racism that persisted after the war created, for example, terrible employment problems for Japanese Americans. My father's experience was somewhat typi-
cal. He described his difficulties in obtaining employment as a teacher during the early 1950s:

During that period, there was a tremendous shortage of teachers. Some districts in California were recruiting teachers from all parts of the Midwest and South. Some teachers were hired by school personnel departments just on the basis of long-distance phone calls. Housewives without credentials or degrees were pressed into teaching duties with emergency credentials.

I traveled up and down the northern California area, seeking a teaching job, and applied at dozens of school districts and was interviewed by scores of superintendents, but was not offered a single job. This grueling ordeal has been my real nightmare because I have had repeated dreams about it from time to time.\(^{349}\)

Despite having two graduate degrees from ivy-league schools, a teaching credential and three years of teaching experience in Hawaii, my father was able to obtain his single offer of employment at a junior high school in Merced, California, only after having to go before the local school board for approval of his “character.” To his knowledge, no other teacher in that school system ever had to go before that board for such approval.

The heightened prejudice against Japanese Americans resulting from the internment endured for decades. My own childhood memories of the early 1960s are infected with recollections of residual racial hatred from the war. When I was attending first and second grades in Merced, I remember every morning having to run as fast as I could to my classroom because I was greeted by taunts of “dirty Jap” from a group of boys waiting for me at the school yard gate. These were the sons of Air Force personnel at a nearby base. As a child and adolescent I tried to ignore this kind of baiting because this was what my parents did.

Racist epithets like “dirty Jap” are especially frustrating because they invite a fight, not rational conversation. They represent a mean, ugly catharsis by the speaker without leaving room for constructive discourse. One response to racist epithets, I suppose, is the slinging back of epithets. While this response may be cathartic, such counter expression does not invite conversations that may lead to change. Based on similar reasoning, I advocate privileging those interpretive methods used by judges that create the possibility of conversation and reflection—exchanges that may lead to change. This means privileging Justice O’Connor’s interpretation in *Croson* because it was based on *Korematsu*’s historical meaning. Her court opinion in *Croson* held that the City of Richmond’s affirmative action program, which encouraged racial diversity in the construction industry, is analogous to what the government did in *Korematsu*.\(^{350}\) I think that the interpretation should be privileged, not because it is necessarily the correct one, but because it should be debated. I am eager to begin discussions about what the Japanese internment should mean in the modern day. I am confident that such a discussion will prove that Justice O’Connor in *Croson* derived the wrong lesson from history. Maybe I am wrong. But let us learn from history by openly and honestly debating it.

In declaring *Korematsu* to be living precedent, I recognize that my view is at odds with the position taken thus far by leaders of the Japanese American community. I understand their wishes and desires to declare *Korematsu* dead, especially after the successes of the restitution movement and the *coram nobis* litigations. But I fear that there is a great danger in forgetting what should not be forgotten. I believe

---

350. 488 U.S. at 501 (O’Connor, J., dissenting).
that it is safer to be honest and recognize Korematsu’s continued perpetuation as doctrine than to prematurely declare the conclusion of a noble cause. Korematsu’s persistence, as legal precedent and as a memory of the internment itself, must serve to remind us to be vigilant in protecting our civil liberties.

More than fifty years later, the internment of Japanese Americans may seem like ancient history to many Americans. In some ways it is. But I cannot help recalling the conversation I had with Justice William Brennan when I clerked for him after law school. The Justice was preparing a speech to deliver to a group of Israeli officials who had asked him to comment on the preservation of human liberties during America’s wars. I asked Justice Brennan what he planned to say. He answered in the gravest tones, saying that he was going to tell them that he hoped Israel learned from the American experience not to emulate it.