THE YALE LAW JOURNAL FORUM
JANUARY 30, 2019

Is *Korematsu* Good Law?

Jamal Greene

ABSTRACT. In *Trump v. Hawaii*, the Supreme Court claimed to overrule its infamous *Korematsu* decision. This Essay argues that this claim is both empty and grotesque. It is empty because a decision to overrule a prior case is not meaningful unless it specifies which propositions the Court is disavowing. *Korematsu* stands for many propositions, not all of which are agreed upon, but the *Hawaii* Court underspecifies what it meant to overrule. The Court's claim of overruling *Korematsu* is grotesque because its emptiness means to conceal its disturbing affinity with that case.

INTRODUCTION

In *Trump v. Hawaii*,[1] a five-four majority of the Supreme Court said that *Korematsu v. United States*[2] "was gravely wrong the day it was decided, has been overruled in the court of history, and . . . 'has no place in law under the Constitution.'"[3] In doing so, the Court stated as clearly as it ever has that *Korematsu* is not good law. This Essay argues that this statement is not just empty but also grotesque.

The emptiness of the Court's "overruling" does not result primarily from the fact that it is dicta and therefore not technically binding on lower courts. The statement is indeed dicta—as evidenced by the Court's claim, in virtually the same breath, that "*Korematsu* has nothing to do with this case"[4]—but in practical terms, no lower court would revive a case that a majority of the Supreme Court has clearly said was wrongly decided.

1. 138 S. Ct. 2392 (2018).
2. 323 U.S. 214 (1944).
3. *Hawaii*, 138 S. Ct. at 2423 (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).
4. *Id.*

Rather, the statement is empty because it is underdetermined. As Part I elaborates, when the Court discards a precedent it does not overrule a "case" but rather particular propositions stated in that case's majority opinion. But the propositions a case stands for are often varied and contested. A case may stand for multiple independent propositions, its particular holdings may have been disputed in the moment, and even if that contemporaneous disagreement is sorted out, what a case stands for in modern times might differ from what it actually held at the time of the decision.

As Part II develops in greater detail, each of these qualifications on "overruling" applies in the case of *Korematsu*. The majority in *Hawaii* did not specify which aspect of the case it was overruling. Anticanonical cases such as *Korematsu* are especially vulnerable to these kinds of underdetermined "overrulings" because their legacies have escaped far beyond the control of the deciding Court.[5] It is accordingly obscure what, if anything, the "overruling" of *Korematsu* means.

The Court's statement is grotesque because, as Part III notes, it condemns racism with one hand but deploys tokenism with the other. The statement appears in a case in which the majority blessed transparent religious bigotry on the part of the sitting President while cloaking itself in righteous indignation over a seventy-four-year-old decision whose wrongness is a matter of incompletely theorized consensus. The canary in the coal mine for this incomplete theorization is Justice Thomas's presence in the majority. Justice Thomas's prior favorable statements about *Korematsu* are difficult to reconcile with the claim that *Korematsu* is obviously wrong in all its particulars, and yet he was comfortable joining the *Hawaii* majority. Either Justice Thomas has had a change of heart about *Korematsu* or there is less to this "overruling" than meets the eye.

I. THE UNDERDETERMINACY OF OVERRULINGS

Cases stand for multiple propositions. They often do so in a "horizontal" sense as well as a "vertical" sense. The horizontal sense refers to the different steps that go into discerning the law and applying it to a set of facts. An opinion might use a particular mode of interpretation or construction of legal texts, as for example when a court uses historical analysis — itself conspicuously amenable to multiple usages[6] — or textualism or structuralism or what-have-you.[7] It might apply a particular analytic frame, such as proportionality analysis or "tiers of

5. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

6. *See* Jamal Greene, *Interpretation*, *in* OXFORD HANDBOOK OF THE U.S. CONSTITUTION 887, 888-95 (2015).

7. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE (1982) (describing six modalities of constitutional interpretation).

scrutiny."[8] It might adopt a particular standard of review, whether for determining if a law or executive act should be permitted to stand, such as "strict scrutiny" or "rational basis review,"[9] or for factual or legal determinations by a lower court, such as "clear error" or "abuse of discretion."[10] It might identify particular facts as legally dispositive, or else apply a "totality of the circumstances" test that makes it more difficult to disaggregate the analytic work different facts are performing.[11] It might identify certain aspects of the holding as more "central" than others, as the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[12] did with respect to *Roe v. Wade*.[13] Opinions can also reflect an overlapping consensus around language that is understood differently by different judges. Sometimes these potential differences are highlighted in concurring opinions that specify a reading of the majority opinion that does not itself command a majority.[14]

The vertical sense in which cases can stand for multiple propositions reflects the ways in which a case can change in meaning over time, whether unwittingly or deliberately. For example, *Bolling v. Sharpe*[15] is often cited as inaugurating "reverse incorporation," whereby the Equal Protection Clause applies to the federal government through the Due Process Clause of the Fifth Amendment,[16] but this proposition is not fairly stated within the text of *Bolling*. Similarly, the *Slaughter-House Cases* are often said to preclude incorporation of the Bill of Rights via the Privileges or Immunities Clause of the Fourteenth Amendment, even though Justice Miller's majority opinion suggests that the Clause protects, for example (and not exhaustively), the rights of assembly and petition, which are found in the First Amendment.[17] Or consider Justice Scalia's opinion in *Employment Division v. Smith*, which reimagined the significance of cases such as *Wisconsin v.*

---

8. *See* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015).
9. *See* Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1324 (2018).
10. *See* Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47 (2000).
11. *E.g.*, Thornburg v. Gingles, 478 U.S. 30, 79 (1986).
12. 505 U.S. 833, 860 (1992).
13. 410 U.S. 113 (1973).
14. *E.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785-87 (2014) (Kennedy, J., concurring).
15. 347 U.S. 497 (1954).
16. *See, e.g.*, Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 327 n.15 (2011).
17. 83 U.S. (16 Wall.) 36, 79 (1872); *see* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of* The Slaughter-House Cases, 109 YALE L.J. 643 (2000).

Yoder[18] and *Pierce v. Society of Sisters*[19] as addressing "hybrid" constitutional rights.[20] One searches in vain for even an implicit reference to hybridity in those earlier opinions themselves.

And so overruling almost always requires further specification. If a case is simply overruled without the opinion stating which aspects of the case it is disavowing, the overruling can itself remain subject to contestation. The underdeterminacy of overrulings has implications for the *Hawaii* Court's treatment of *Korematsu*. We cannot make sense of whether *Korematsu* remains good law in light of the *Hawaii* Court's statement without specifying what the *Hawaii* majority took *Korematsu* to mean. This specification turns out to be elusive.

II. THE MANY MEANINGS OF *KOREMATSU*

Korematsu is anticanonical. As I have noted in prior work,[21] anticanonical cases are famous for being wrong. They are repeatedly cited long after being discredited, ostensibly as examples of faulty legal analysis.[22] *Korematsu*'s anticanonical status puts it in the company of other notorious cases such as *Dred Scott v. Sandford*,[23] *Plessy v. Ferguson*,[24] and *Lochner v. New York*.[25] These cases are used as epithets as much as precedents in the usual sense.[26]

Korematsu's status as anticanonical presents an analytic challenge in understanding what the case stands for. If everyone knows a case is wrong, its invocation becomes a potent weapon for attacking one's legal adversary. *Korematsu* has been invoked well beyond the detention context to criticize, for example, affirmative action,[27] birth control laws,[28] drug testing policies,[29] and laws restricting abortion protests.[30] Anticanonical cases are so liberally invoked against opponents that their use can resemble ad hominem attacks. Overruling *Korematsu*—

18. 406 U.S. 205 (1972).
19. 268 U.S. 510 (1925).
20. Emp't Div. v. Smith, 494 U.S. 872, 881, 882 (1990).
21. *See* Greene, *supra* note 5, at 380.
22. *See id.*
23. 60 U.S. (19 How.) 393 (1857).
24. 163 U.S. 537 (1896).
25. 198 U.S. 45 (1905).
26. *See* Greene, *supra* note 5, at 441-42, 446, 453-56.
27. *See* Metro Broad. v. FCC, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting).
28. *See* Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting).
29. *See* Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).
30. *See* Madsen v. Women's Health Ctr., 512 U.S. 753, 814-15 (1994) (Scalia, J., dissenting).

or any anticanonical case—is like a state disavowing "the Nazis." It is worth pressing on what, in particular, is being disavowed.

Note as well that, as with the Third Reich, part of why anticanonical cases remain potent examples is not just because of their negative moral valence but also, and more controversially, because of the ways in which modern practices overlap with the practices of discredited historical actors.[31] For example, *Dred Scott* is invoked because many conservatives still—like Chief Justice Taney—promote originalism as a morally neutral methodology[32] and because many liberals still—again, like Chief Justice Taney—invoke substantive due process in the absence of textual specification of a right.[33] *Korematsu* shows up so often in the U.S. Reports, as it did in *Hawaii*,[34] because pleas for judicial deference to the executive's national security determinations remain so familiar. When the Court purports to overrule *Korematsu*, it is not overruling this deference, as the majority opinion applying near-absolute deference in *Hawaii* makes pellucid.[35] So what, exactly, is being overruled?

Trying to get at that question requires a deeper understanding of the decision than has seeped into the popular legal consciousness. *Korematsu* was a criminal case in which Fred Korematsu contested his conviction for refusing to report to a relocation camp established for people of Japanese ancestry living on the West Coast.[36] Korematsu claimed a violation of the Due Process Clause (an early and infrequently acknowledged claim of "reverse incorporation") and the Eighth Amendment.[37] The evacuation order that authorized Korematsu's relocation was promulgated by Army Lieutenant General John L. DeWitt, who was overseeing the West Coast during the war.[38] In justifying relocation, General DeWitt authored a report that painted a deeply biased portrait of the threat to the United States posed by people of Japanese ancestry residing on the West Coast.[39] The report asserted, for example, that "[t]he very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be

---

31. *See* Greene, *supra* note 5, at 462-63.

32. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

33. *See, e.g.*, John Paul Stevens, *Two Thoughts About* Obergefell v. Hodges, 77 OHIO ST. L.J. 913, 913 (2016).

34. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2447-48 (2018) (Sotomayor, J., dissenting).

35. *See id.* at 2417-20, 2423 (majority opinion).

36. Korematsu v. United States, 323 U.S. 214, 215-16 (1944).

37. Korematsu v. United States, 140 F.2d 289, 295 (9th Cir. 1943) (Denman, J., concurring).

38. *See Korematsu*, 323 U.S. at 227 (Roberts, J., dissenting).

39. *See id.* at 235-36 (Murphy, J., dissenting).

taken."[40] The exclusion order also, and pointedly, did not distinguish between U.S. citizens and noncitizen Japanese nationals.[41] In an opinion by Justice Black, the majority held that government racial classifications should receive "the most rigid scrutiny" but that the classification in this case passed muster.[42]

There are many potential answers for what the *Hawaii* Court thought was wrong with *Korematsu* as a matter of legal analysis. One possibility is that the government may never use race as a criterion for detention. The majority in *Hawaii* described *Korematsu*, and its wrongness, along superficially related lines: "The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority."[43] This sentiment seems straightforward enough, but the passage includes a number of qualifiers that dramatically narrow its connection, *if any*, to the actual *Korematsu* decision.

First, the *Hawaii* Court limited the scope of its statement to "U.S. citizens," seeming to imply that a racial classification of noncitizens would not necessarily be "objectively unlawful." The exclusion order at issue in *Korematsu* famously did not distinguish between citizens and noncitizens, and it is not at all clear why government racial bias should be disavowed only with respect to the former.

Second, we can take note of the *Hawaii* majority's use of the term "concentration camps." This pejorative seems awake to the social meaning of Japanese internment but at the same time lessens the scope of whatever is being overruled. Would a race-based house arrest or curfew—along the lines of what the Court blessed the year before *Korematsu* in *Hirabayashi v. United States*[44]—be a live issue for the *Hawaii* majority? Might there be features even of a detention facility, or circumstances surrounding a detention decision, that make the "concentration camp" label inapt?

Third, the *Hawaii* Court was careful to limit its finger wagging to the detention of U.S. citizens effected "solely and explicitly" on the basis of race. This is a very large qualifier indeed. "Explicitly" seems to confine the "overruling" to facial racial classifications, which are far less common than the use of racial proxies. "Solely" appears to contemplate detention for which race is the only criterion, rather than one among others. It is difficult to imagine a government policy of any kind for which the *sole* criterion is race, and the *Hawaii* Court did not exclude the possibility that race might be the predominant criterion for a policy that is

40. *Id.* at 241 n.15 (quoting J.L. DEWITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST, 1942 (1943)).

41. *See id.* at 229 (Roberts, J., dissenting).

42. *Id.* at 216-18 (majority opinion).

43. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

44. 320 U.S. 81 (1943).

nonetheless lawful. The exclusion order at issue in *Korematsu* came as close as any government decision in modern times to pure race-based detention, and even there it was not clear that the case would fit what the *Hawaii* Court considered "objectively unlawful."

For one thing, the labels "Japanese" and "of Japanese descent" do not describe a "race" in the usual sense. They do describe a national origin, and they do rely on bloodlines, which we might believe morally or constitutionally equivalent to racial distinctions. But the *Hawaii* Court did not tell us how it understands race as a social category. For another thing, we can put to one side the definition of "race" and note that what the *Korematsu* majority claimed to find interesting about the targets of the exclusion order was not their "race" but the fact that they or their family members were presumptively loyal to Japan. As Justice Black wrote, in conclusory fashion:

> 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, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders — as inevitably it must — determined that they should have the power to do just this.[45]

Of course, the *Hawaii* Court singled out *Korematsu*, and so it seemed to believe that the case's facts qualified as detention "solely" on the basis of race. But either of two competing readings of *Korematsu* could support this belief. Racial profiling, and racial discrimination in general, can be condemned as either wrong on the facts, wrong independent of the facts, or both. That is, we might believe that racial discrimination is wrong because the decisionmaker is mistaken (or unacceptably likely to be mistaken) empirically about the relationship between race and an undesirable behavior or trait. We might worry, for example, that a cop who stops black drivers because he thinks they might have incriminating evidence in their cars is engaged in bad policing because he is ignoring or sidelining more reliable indicators of criminality than race. Alternatively, we might believe that, regardless of whether race is a reliable indicator of bad behavior, engaging in racial discrimination is itself so offensive that we do not permit it notwithstanding its rationality or effectiveness.

Either of these critiques is available in *Korematsu*. As noted, the military in *Korematsu* relied on false information, as did the Department of Justice in

---

45. *Korematsu*, 323 U.S. at 223.

presenting the case to the Court.[46] And so when the *Hawaii* Court associated *Korematsu* with the proposition that forcible relocation to concentration camps should never rely "solely" on race, it could be saying that (1) relying on false information about racial tendencies meant internment was in fact solely about race, or (2) even the use of true information about racial correlations would have impermissibly counted as sole reliance on race. These two possibilities have vastly different implications for the permissibility of government acts, and *Hawaii* gives us no resources for evaluating which might be "objectively unlawful."

Further, it is notable that *Hawaii*'s statement about *Korematsu* is limited to race. Understanding *Korematsu* in racial terms not only has the confounding consequence noted above regarding the definition of "race," but it also suggests that the Court does not view the case in terms of national origin, leaving open the possibility that national origin may yet form the basis for a detention or exclusion decision. In contrasting *Korematsu* and the travel ban, the *Hawaii* Court also pointedly implied that decisions based on religion — which are at least as likely — might be categorically different than those based on race.

Finally, the *Hawaii* majority referred to the forcible relocation of U.S. citizens to concentration camps solely and explicitly on the basis of race as falling outside "Presidential authority."[47] Notably, although the exclusion order at issue in *Korematsu* was authorized by an executive order, the decision to take race-based actions as to relocation was not the President's but rather had been delegated to the military. Justice Jackson's *Korematsu* dissent objected to the intermingling of constitutional adjudication with orders taken in the name of purported military necessity.[48] We can assume, but can't say for sure, that the *Hawaii* Court meant to include the military's decision within the scope of "Presidential authority," but it is difficult to read the Court's statement as applying to Congress.

Korematsu's meaning, then, and what exactly made it wrong by the *Hawaii* Court's lights, is unclear. As noted, there were many potential reasons for concern in *Korematsu*, ranging from the targeting of U.S. citizens, to relying on faulty information, to using race for particularly injurious purposes, to using race *at all*, to delegating the decision to the military in the absence of martial law, to delegating it to the President as opposed to passing a statute. It so happens as well that *Korematsu* has been cited *positively* on numerous occasions, including

46. *See* Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 FORDHAM L. REV. 3027, 3032-36 (2013).

47. *Hawaii*, 138 S. Ct. at 2423.

48. *See Korematsu*, 323 U.S. at 244-46 (Jackson, J., dissenting); *id.* at 246 ("A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.").

many times by the Court itself, as an early statement of the proposition that strict scrutiny attends racial classifications.[49] A Court that overrules "*Korematsu*" presumably is not overruling this aspect of the case. And since it is quite unlikely that a case whose facts precisely mirror the facts of *Korematsu* will arise again, it would be helpful to know what beyond a decision on the precise facts of the case has been disavowed.

Of course, a Court that distances itself from a prior decision may simply do so rhetorically, without necessarily meaning to refer to a particular, technical holding. But if that was what the Court meant to do, we might expect it to do so in a case whose spirit sits in tension with the earlier decision.

III. THE TOKENISM OF *TRUMP V. HAWAII*

Which brings us to the disturbing role *Korematsu* played in *Hawaii*. There is good reason to believe that the Court's curious claim about *Korematsu* was not just underdetermined but also intentionally narrow. As such, claiming to overrule the decision conceals its affinity with *Hawaii* while doing nothing to move the law.

The majority "overruled" *Korematsu* as part of its defense against Justice Sotomayor's invocation of the case in her dissent.[50] President Trump's multiple concessions that the travel ban was a pretext for anti-Muslim bigotry were remarkably transparent. During his presidential campaign, candidate Trump promised repeatedly, including in a statement on his campaign website, to ban the entry of all Muslims into the United States.[51] His reason, in his own words, was that "Islam hates us" and "Muslims 'do not respect us at all.'"[52] Later in the campaign, he began to characterize the policy as a ban on people from countries with ties to terrorism, explaining that he was not in fact pulling back from his Muslim ban but that "[p]eople were so upset when [he] used the word Muslim."[53] President Trump signed the executive order implementing the first version of the travel ban one week after taking office.[54] It was titled "Protecting the Nation from Foreign Terrorist Entry into the United States," but when President Trump read the title at the signing, he looked up and said, "We all know what that means."[55] After signing the second version of the executive order, President

---

49. *See* Greene, *supra* note 5, at 456.

50. *See Hawaii*, 138 S. Ct. at 2423; *id.* at 2447-48 (Sotomayor, J., dissenting).

51. *See id.* at 2435 (Sotomayor, J., dissenting).

52. *Id.* at 2436.

53. *Id.*

54. *Id.*

55. *Id.*

Trump declared that it represented the fulfillment of a campaign promise.[56] He later said that the Executive Order had been "tailor[ed]" because of "the lawyers" and that it was a "watered down, politically correct version" of the "original Travel Ban."[57]

The *Hawaii* majority did not deny that the travel ban was in fact a pretext for discrimination against Muslims. Rather, in the face of the evidence just described, it chose to refuse to look beneath the President's (or we should say, "the lawyers[']"[58]) facial justification for his executive order. The parallel between this deferential posture and the Court's performance in *Korematsu* is nearly impossible to ignore and makes it especially difficult to discern what about *Korematsu* the *Hawaii* majority meant to overrule.

What's more, there's an additional "tell" that the Court didn't mean to overrule very much at all. The majority included Justice Thomas. Justice Thomas has in multiple opinions indicated some openness to the view that *Korematsu* was correctly decided. Most recently, in *Fisher v. University of Texas (Fisher I)*, which considered the school's limited use of race in its admissions process, Justice Thomas favorably cited *Korematsu* in his solo concurrence, writing as follows:

> The Court first articulated the strict-scrutiny standard in *Korematsu v. United States*. There, we held that "[p]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can." Aside from *Grutter*, the Court has recognized only two instances in which a "[p]ressing public necessity" may justify racial discrimination by the government. First, in *Korematsu*, the Court recognized that protecting national security may satisfy this exacting standard. In that case, the Court upheld an evacuation order directed at "all persons of Japanese ancestry" on the grounds that the Nation was at war with Japan and that the order had "a definite and close relationship to the prevention of espionage and sabotage."[59]

Justice Thomas had also cited *Korematsu* favorably in his dissent in the Court's then-most-recent race-based affirmative action case, *Grutter v. Bollinger*, writing that *Korematsu*'s "lesson" is that "national security constitutes a pressing public necessity,' though the government's use of race to advance that objective must be narrowly tailored."[60] Justice Thomas had earlier, in *Missouri v. Jenkins*,

---

56. *Id.* at 2437.

57. *Id.* (alteration in original).

58. *Id.*

59. 133 S. Ct. 2411, 2422-23 (2013) (Thomas, J., concurring) (alterations in original) (footnote omitted) (citations omitted).

60. 539 U.S. 306, 351 (2003) (Thomas, J., dissenting).

written that strict scrutiny is "fatal in fact" except for decisions "rendered in the midst of wartime," a proposition for which he cited both *Korematsu* and *Hirabayashi*.[61]

Perhaps most telling is Justice Thomas's solo dissent in *Hamdi v. Rumsfeld*.[62] In *Hamdi*, the Court held that the government owed some due process to a U.S. citizen who had been picked up in Afghanistan, declared an enemy combatant, and placed in a brig in South Carolina.[63] Justice Thomas disagreed, writing that deference to the decisions of the executive in a time of war "extends to the President's determination of all the factual predicates necessary to conclude that a given action is appropriate."[64] His dissent cited favorably to *Hirabayashi*.[65]

No modern Justice other than Justice Thomas has ever cited either *Korematsu* or *Hirabayashi* for the correctness of their substantive legal analysis.[66] In light of this evidence, it is hard to believe Justice Thomas thinks *Korematsu* was "gravely wrong" except at a frustratingly high level of specificity—that is, only when limited to its precise facts.

CONCLUSION

The majority in *Trump v. Hawaii* said it was overruling "*Korematsu*" without saying in which of many possible ways it was doing so, all while holding the vote of a Justice whose opinions have implied substantial agreement with the decision. Everyone knows that something about the case was rotten. But so long as this consensus remains incompletely theorized,[67] the Court can, without spending any capital whatsoever, try to earn some plaudits for overruling *Korematsu*.[68]

Of course, the majority's disclaimer notwithstanding, there are disturbing resonances between *Korematsu* and *Hawaii*.[69] In both cases, decisions plainly

---

61. 515 U.S. 70, 121 (1995) (Thomas, J., concurring).

62. 542 U.S. 507, 579 (2004) (Thomas, J., dissenting).

63. *Id.* at 509-11 (majority opinion)

64. *Id*. at 584 (Thomas, J., dissenting).

65. *Id*.

66. It is common for *Korematsu* to be cited favorably for its incantation of what has become the strict scrutiny standard. *See* Greene, *supra* note 5, at 456-57.

67. *See generally* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

68. Even Justice Sotomayor's dissent called the majority's purported overruling of *Korematsu* "an important step" and "laudable." *See* Trump v. Hawaii, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., dissenting).

69. *See* Neal Kumar Katyal, Trump v. Hawaii*: How the Supreme Court Simultaneously Overturned and Revive*d Korematsu, 128 YALE L.J.F. 641 (2019).

motivated by group-based animus were justified by and received near-absolute deference on the basis of specious invocations of national security.[70] *Korematsu*'s overruling has been in the works for decades. It was meant for better things.[71]

Jamal Greene is the Dwight Professor of Law at Columbia Law School, where he teaches constitutional law, comparative constitutional law, the law of the political process, First Amendment, and federal courts. His scholarship focuses on the structure of legal and constitutional argument. Professor Greene is the author of numerous articles and book chapters and is a frequent media commentator on constitutional law and the Supreme Court. Prior to joining Columbia's faculty, he was an Alexander Fellow at New York University Law School. Professor Greene served as a law clerk to the Hon. Guido Calabresi on the U.S. Court of Appeals for the Second Circuit and for the Hon. John Paul Stevens on the U.S. Supreme Court. He earned his J.D. from Yale Law School and his A.B. from Harvard College.

---

70. *See* Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J.F. 688 (2019).

71. *Cf.* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting) ("The First Amendment was meant for better things.").