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Symposium: Giving Korematsu v. United States A Sober Second Thought

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SYMPOSIUM: GIVING KOREMATSU V. UNITED STATES *A SOBER SECOND THOUGHT*

Arkansas Law Review Editorial Board

INTRODUCTION

We are elated to present Professor Mark Killenbeck's thought provoking article, *Sober Second Thought? Korematsu Reconsidered*. Killenbeck dives into the *Korematsu* opinion and its history with great care to determine whether it truly "has no place in law under the Constitution" as Chief Justice John Roberts declared in *Trump v. Hawaii*.[1] While *Korematsu*'s result provides an understandable "impulse to condemn" it, Killenbeck shows us that focusing solely on the case's result "stands apart from and in stark contrast to its most important place in the constitutional order: articulation of precepts and terminology that provide the foundations for strict scrutiny."[2]

Killenbeck also shows us that the result-oriented viewpoint which has led many to consider *Korematsu* and *Trump* "as two peas in the same pod does not do justice to either."[3] The seemingly obvious parallels between the two cases are in fact superficial.[4] While the "record is quite clear regarding *Korematsu* and the Japanese . . . we simply do not have the facts necessary to reach similar conclusions about *Trump*."[5]

Killenbeck's article is "intentionally provocative," and he acknowledges there will be many who will disagree with the argument he puts forward in the pages that follow.[6] Killenbeck welcomes the challenge and has invited several of the most

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[1] 138 S. Ct. 2392, 2423 (2018) (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting).
[2] Mark R. Killenbeck, *Sober Second Thought?* Korematsu *Reconsidered*, 74 ARK. L. REV. 152, 156 (2021).
[3] *Id.*
[4] *Id.*
[5] *Id.* at 157.
[6] *Id.* at 235.

prominent constitutional scholars in the legal academy to offer their thoughts, endorsements, and critiques of his work.

Professor Jack M. Balkin distills Killenbeck's argument down to two points—and takes issue with each.[7] First, Balkin criticizes the notion that the quality of the Supreme Court's decision-making process "should be central to the honor and dishonor we bestow on Supreme Court decisions."[8] To Balkin, the impact of a decision is more important because the "canon (and the anti-canon) are constructed by cultural memory, and cultural memory is largely agnostic, if not ignorant, of" the Court's underlying decision-making process.[9]

Second, Balkin is skeptical that *Korematsu* deserves "any credit—much less respect—as the font of the strict scrutiny doctrine."[10] Where *Korematsu* paid mere lip service to strictly scrutinizing racial classifications, later Courts took *Korematsu*'s "sanctimonious pronouncements" and gave them value by striking down racially discriminatory laws and practices.[11] For Balkin, it is these cases, such as *Oyama v. California*, that deserve canonical status—not *Korematsu*.[12]

Professor Sanford Levinson implores you to read "Mark Killenbeck's truly superb essay . . . with the utmost care."[13] Levinson's response illustrates the value of Killenbeck's work by diving into the lessons—good and bad—that *Korematsu* teaches us. The good side of *Korematsu* is found in its role as an "origin story" of strict scrutiny.[14] Levinson praises Killenbeck's "treatment of *Korematsu*" for offering "a splendid introduction" to the Equal Protection Clause's journey from "the 'last resort' of desperate lawyers" to "one of the linchpins of American constitutional argument."[15]

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[7] Jack M. Balkin, *Korematsu as the Tribute that Vice Pays to Virtue*, 74 ARK. L. REV. 255 (2021).
[8] *Id.* at 258.
[9] *Id.*
[10] *Id.* at 260.
[11] *Id.* at 263.
[12] Balkin, *supra* note 7, at 263.
[13] Sanford Levinson, *Korematsu, Hawaii, and Pedagogy*, 74 ARK. L. REV. 269 (2021).
[14] *Id.* at 277.
[15] *Id.*

The bad side of *Korematsu* is exemplified by the case's holding and "the legal process that produced it."[16] Levinson describes Killenbeck's "portrayal of the lawyers who defended Order 9066 in front of the Supreme Court" as "devastating."[17] This devastating portrayal is not only valuable in explaining the outcome of *Korematsu*. It is also "important that students know all of this in order to understand that the law does not always 'work itself pure,' that the process itself can be gravely defective, with attendant costs both to the fabric of the law and, more importantly, to the victims of given decisions."[18]

Professor Darrell A.H. Miller reflects on the nature of "tainted precedent" within our judicial system.[19] These precedents offer "reasonable, even valuable" legal principles but are "buried deep within problematic or even odious opinions."[20] Sometimes the taint is a result of the author,[21] other times because the Court's justifications for its decision are discredited,[22] and other times precedent is tainted because the valuable legal principle is not applied "to the ends of justice or is mired in problematic or offensive reasoning on other issues."[23] Then there are cases which are "so tainted that their citation for any proposition other than condemnation is typically considered intolerable."[24] *Korematsu* is one such "anticanonical" case.[25]

Miller praises Killenbeck's treatment of the tainted precedent dilemma presented by *Korematsu*. Miller acknowledges that *Korematsu* is "contaminated with racism" but that shameful history "is not sufficient to sap it of its utility."[26] Burying *Korematsu*'s valuable legal proposition solely because it "comes out of a racist past" is to follow a rule that "would leave us with precious little of the public good left."[27] Instead, Miller implores us to be "circumspect" and "vigilant" about how the law is made,

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[16] *Id.* at 276.
[17] *Id.* at 282.
[18] *Id.* at 277.
[19] Darrell A.H. Miller, *Tainted Precedent*, 74 ARK. L. REV. 291 (2021).
[20] *Id.*
[21] *Id.* at 292.
[22] *Id.* at 293.
[23] *Id.*
[24] Miller, *supra* note 19, at 294.
[25] *Id.*
[26] *Id.* at 295.
[27] *Id.*

applied, and enforced.[28] In this regard, Miller sees Killenbeck's article "as providing a valuable service."[29]

Professor Eric L. Muller advises us not to mistake the Court's opinion in *Korematsu* "for an exhaustive account of the relevant history."[30] By broadening the scope of consideration, one is able to appreciate the historical importance of people and events not covered in the Court's opinion.[31] Muller illustrates this "*Korematsu* myopia" by noting the history of this very journal.[32] Robert A. Leflar—Dean of the University of Arkansas School of Law when the *Arkansas Law Review* was founded—served as Regional Attorney and Assistant Solicitor in the War Relocation Authority from 1942 to 1944.[33]

Muller remedies this common myopic view of *Korematsu* by diving into the historical record leading up to the enactment of Order 9066, concluding that despite the order's neutral language there was an invidious purpose embedded within it.[34] This is in stark contrast to Killenbeck's argument that Order 9066 itself was neutral but that invidious purpose and disparate impact arose due to "a racially motivated enforcer."[35] To Muller, *Korematsu* myopia has led to Killenbeck grounding his argument "in an error of historical fact."[36] Thus, *Korematsu* and *Trump*'s factual foundations "are not the reverse of each other, but the same."[37]

Professor Robert L. Tsai appreciates Killenbeck's "thoughtful and contrarian paper," but remains unsold that *Korematsu* deserves saving.[38] Tsai does agree with Killenbeck that *Korematsu* has pedagogical value as "an object lesson in bad faith."[39] He disagrees, however, that *Korematsu* should be seen as a foundation of strict scrutiny and questions the value of the strict scrutiny

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[28] *Id.*
[29] Miller, *supra* note 19, at 296.
[30] Eric L. Muller, *There Was Nothing "Neutral" About Executive Order 9066*, 74 ARK. L. REV. 297 (2021).
[31] *Id.*
[32] *Id.* at 298.
[33] *Id.* at 298, n.9.
[34] *Id.* at 301-03.
[35] Muller, *supra* note 30, at 300.
[36] *Id.* at 301.
[37] *Id.* at 304.
[38] Robert L. Tsai, *A Proper Burial*, 74 ARK. L. REV. 307, 307 (2021).
[39] *Id.* at 308.

doctrine in general.[40] Tsai, much like Balkin, believes that anything valuable lurking within *Korematsu* "can be found in less tainted form elsewhere."[41] Moreover, Tsai argues that reflexive use of strict scrutiny "could even be counterproductive, by promoting an unthinking refusal to grapple with the serious stakes of a constitutional dispute."[42] Thus, *Korematsu* simply doesn't offer anything worth saving.

Tsai likens Killenbeck's discussion of *Trump v. Hawaii* to "damage control."[43] While Tsai agrees "that the ruling on the merits is defensible,"[44] he asks us to consider what "might start to approach the ideal [and] on that score, *Trump v. Hawaii* falls woefully short."[45] Instead, considering *Korematsu* and *Trump* together shows that "a president's ability to inflict mass suffering has grown exponentially,"[46] while "making it easier for government officials to disregard their obligations."[47]

Professor Mark Tushnet takes Killenbeck's article as a chance to consider the saying that we are "a government of laws, not a government of men and women."[48] This view, however, ignores that "men and women appear at the stages of enactment, application, and adjudication."[49] According to Tushnet, the saying should really go "a government of laws *but also* a government of men and women."[50]

Korematsu and *Trump* provide Tushnet an opportunity to examine the human element's role in our legal system. While both cases involved a facially neutral executive order, both involved people with racially discriminatory motivations at the enactment and application stages.[51] Tushnet goes on to show that at the interpretation stage of both cases, the Supreme Court possibly established "that intentional racial discrimination at one part of the

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[40] *Id.*
[41] *Id.*
[42] *Id.* at 309.
[43] Tsai, *supra* note 38, at 312.
[44] *Id.* at 313.
[45] *Id.*
[46] *Id.* at 317.
[47] *Id.* at 322.
[48] Mark Tushnet, *A Government of Law that is a Government of Men and Women*, 74 ARK. L. REV. 323, 323 (2021)
[49] *Id.*
[50] *Id.*
[51] *See generally id.*

enactment process can be cleansed by actions at another part."[52] While this approach may vindicate "the idea we have a government of laws" by "cleansing" individual government actors' personal racism from our laws, it still "allows critics to continue to fairly describe the policies as objectively systemically racist."[53]

On behalf of the *Arkansas Law Review*, we would like to express our sincerest gratitude to each of the incredible scholars who so generously contributed to this series. Specifically, we would like to thank Professor Mark R. Killenbeck for publishing his insightful article in our journal and for bringing together this prestigious group of commentators. By doing so, Professor Killenbeck has made yet another significant contribution to both the legal discourse and the *Arkansas Law Review*.[54]

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[52] *Id.* at 327.

[53] Tushnet, *supra* note 48, at 328.

[54] In 2019, our journal published a series debating *McCulloch v. Maryland*—a series made possible by Professor Killenbeck and appropriately dubbed a "scholarly birthday party for *McColloch*" by David S. Schwartz. *See* 72 ARK. L. REV. 1, 1-163 (2019). Last year, Professor Killenbeck assembled a similarly prestigious group of scholars to discuss Schwartz's book, *The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of* McCulloch v. Maryland. *See* 73 ARK. L. REV. 69, 69-133 (2020).