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KOREMATSU AS THE TRIBUTE THAT VICE PAYS TO VIRTUE

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I. INTRODUCTION

Mark Killenbeck wants to (partially) rehabilitate the reputation of one of the Supreme Court's most despised legal decisions, *Korematsu v. United States*.[1] He argues that "[w]e should accept and teach *Korematsu* as an exemplar of what the law regarding invidious discrimination on the basis of race, ethnicity, and national origin should be."[2] In both *Korematsu* (and *Hirabayashi v. United States*)[3] the Court asserted that classifications based on race were subject to strict scrutiny.[4] But "[t]he majority," Killenbeck explains, "refused to heed their own mandate. In *Hirabayashi* they held that the government policy was 'reasonable.' In *Korematsu*, . . . they failed to actually utilize" strict scrutiny.[5] "In each instance the Justices glossed over key facts before them, ignored pertinent information, and were, quite possibly, blinded by their own prejudices and precedents."[6]

But the fact that the Court failed at its institutional duty, Killenbeck argues, should not detract from the importance of its doctrinal achievement—the first announcement that courts should apply strict scrutiny to racial classifications.[7] At the same

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1. Korematsu v. United States, 323 U.S. 214 (1944).

2. Mark R. Killenbeck, *Sober Second Thought? Korematsu Reconsidered*, 74 ARK. L. REV. 151, 164 (2021).

3. Hirabayashi v. United States, 320 U.S. 81 (1943).

4. *Korematsu*, 323 U.S. at 216 ("[A]ll 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."); *Hirabayashi*, 320 U.S. at 100 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

5. Killenbeck, *supra* note 2, at 239.

6. *Id.*

7. *Id.* at 189.

time, he insists, we should be deeply concerned about the quality of the legal decision making that sits beneath a precedent. That, he asserts, is the real problem with *Korematsu*, and he spends many pages digging into the history to show how bad the decision-making process really was.

Suppose, Killenbeck asks us to imagine, that we discovered that the Court's work in *Brown*,[8] *Roe*,[9] or *Grutter*,[10] rested on suppressed or fabricated facts, or misconduct by the litigants or the Justices. Perhaps, he suggests, we might now treat these cases as "infamous."[11] In *Korematsu*, Killenbeck argues, "the Court was led down the primrose path by a record that was both incomplete and deceptive. *Korematsu*'s place in the anticanon is based in significant part on these realities. What other cases might we add to that roll of infamy if similar misconduct by the responsible agency or individuals had infected the decision-making process?"[12]

But is Killenbeck correct? Is "*Korematsu*'s place in the anticanon . . . based in significant part" on the fact that the decision-making process in that case was tainted?[13] Killenbeck tries to connect the quality and integrity of advocacy and decision-making by lawyers and courts—or the lack thereof—to the honor we currently bestow (or should bestow) on the decisions they produce. Thus, *Korematsu* is worthy of our scorn today because the process of decision was bad. Otherwise, its statement about strict scrutiny is fine, even laudable.

One is reminded of the old joke: "Other than that Mrs. Lincoln, how did you like the play?"

Killenbeck seems to be making two different claims.

(1) Even if a case reaches a just result, it should not be praised if the result was caused by a decision-making process that was seriously tainted. This is the suggestion he raises about *Brown*, *Roe*, and *Grutter*.

(2) A case can be praiseworthy even if the decision-making process was seriously tainted, causing the result to be unjust, if

8. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
9. Roe v. Wade, 410 U.S. 113 (1973).
10. Grutter v. Bollinger, 539 U.S. 306 (2003).
11. Killenbeck, *supra* note 2, at 228-35.
12. *Id.* at 235.
13. *Id.*

the court states a praiseworthy doctrine. This is his claim about *Korematsu*.

Let's take these claims one at a time.

II. IS THE QUALITY OF THE DECISIONMAKING PROCESS THE KEY TO OUR PRAISE OR BLAME FOR PAST SUPREME COURT DECISIONS?

Killenbeck proposes that the decision-making process is, and should be, very important. Yet results seem to matter—and matter greatly—to how we think about cases in the past. And not just the particular result for the individual litigants in the case—what seems to matter especially is the cultural meaning of a case in later eras. The fact that John Marshall played fast and loose with the text of the Constitution and the 1789 Judiciary Act has not robbed *Marbury v. Madison* of its canonical status.[14] The fact that the Warren Court purported to base its decision in *Brown v. Board of Education*[15] on flimsy social science evidence has not robbed *Brown* of its luster as one of the crown jewels in the tiara of American constitutional law.

To be sure, a familiar game in constitutional theory is attempting to show that anti-canonical cases like *Dred Scott v. Sandford*[16] and *Plessy v. Ferguson*[17] were badly reasoned according to the theorist's favored approach. Conversely, one tries to defeat opposing theories by showing that they lead directly to *Dred Scott* and *Plessy*.

But bad interpretive theory has little to do with constitutional renown or infamy. The reason *Dred Scott* is widely reviled today is not that it failed to conform to (1) neutral principles of constitutional law; (2) law as integrity; (3) process protection; (4) common law constitutionalism; or (5) the fifty-one flavors of originalism currently in play in the legal academy. No, *Dred Scott* is reviled because of its result—that African Americans could never, ever be citizens of the United States *because of their race*—and because of the meaning of the case in the light of subsequent events, starting with the Civil War and

14. Marbury v. Madison, 5 U.S. 137 (1803).
15. Brown v. Board of Education, 347 U.S. 483 (1954).
16. Dred Scott v. Sandford, 60 U.S. 393 (1856).
17. Plessy v. Ferguson, 163 U.S. 537 (1896).

Reconstruction. Killenbeck wants to argue that the goodness of the decision-making process is, and should be, central to the honor and dishonor we bestow on Supreme Court decisions.[18] But to borrow a phrase from Mae West, goodness had nothing to do with it.[19]

The canon (and the anticanon) are constructed by cultural memory, and cultural memory is largely indifferent to, if not ignorant of, the criteria that Killenbeck is most concerned with. The central reason why *Korematsu* is anticanonical today is that the Court reached a deeply unjust result of which later generations are ashamed. They are ashamed because twenty-first century America treats a commitment to racial equality as central to American values, even if it is a value honored more in the breach than in the observance. That transformation in values occurred in part because of World War II, the very context in which *Korematsu* was decided. Americans had just successfully defeated an overtly racist regime in Nazi Germany (which, ironically, as Jim Whitman explains, had based many of its ideas on the Jim Crow South).[20] In the years that followed, more and more Americans became embarrassed by the country's treatment of African Americans at home, as well as the wartime placement of Japanese-American citizens in concentration camps.

This helps us answer Killenbeck's question about what we would think if we discovered—and fully accepted—that *Brown*, *Roe*, and *Grutter* were based on shoddy decision-making.[21] A lot depends on whether you think the results in these cases are just and important—if not foundational to contemporary constitutional law. Most political liberals think that *Brown*, *Roe*, and *Grutter* reached results that are not only basically just, but important constitutional landmarks. For that reason, liberals would be unlikely to abandon these cases even if we later discovered that "the Court was led down the primrose path by a record that was both incomplete and deceptive."[22] Conversely, if

18. *See* Killenbeck, *supra* note 2, at 228-35.

19. MAE WEST, GOODNESS HAD NOTHING TO DO WITH IT: THE AUTOBIOGRAPHY OF MAE WEST (1981); *see also* NIGHT AFTER NIGHT (Paramount Pictures 1932).

20. JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW 2-5 (2017).

21. *See* Killenbeck, *supra* note 2, at 228-35.

22. *Id.* at 235.

a case reaches a very unjust result, discovering that it was produced by a rotten decision-making process just adds to the obloquy we should heap up on it. That also explains how people think about *Korematsu*. What the Court did was bad; the falsehoods presented to the Court and the faults in the Court's decision-making process just make a bad decision worse.

I have just spoken about what political liberals think. But consider *Roe* and *Grutter* from the perspective of political conservatives deeply opposed to affirmative action or abortion. Suppose it were proved beyond a doubt that the Justices had played fast and loose with the facts or deliberately ignored crucial evidence that completely undermined their arguments, or suppose that the parties defending abortion rights or affirmative action had deliberately misled the Justices. I think that opponents of affirmative action and abortion would be even more convinced that these cases were terrible blots on the Court's reputation. Indeed, even without such proof, Michael Stokes Paulsen has argued that the decision that reaffirmed *Roe*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[23] is the very worst decision of all time—worse than *Korematsu*, worse even than *Dred Scott*.[24] Showing that the decision-making process in *Casey* was defective would simply reinforce that conclusion.

III. WHAT CREDIT SHOULD *KOREMATSU* RECEIVE FOR ANNOUNCING THE DOCTRINE OF STRICT SCRUTINY FOR RACIAL CLASSIFICATIONS?

At the end of the day, Killenbeck is not arguing that *Korematsu* should be removed from the anticanon—at least not completely. As we have seen, he argues that we should treat the Court's decision-making process as an object lesson in how not to decide cases. But he wants to bring *Korematsu* back into the positive canon in a different way: as the font (along with *Hirabayashi*) of the test of strict scrutiny in racial discrimination cases.

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23. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

24. Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1001 (2003).

Why should *Korematsu* get any credit—much less respect—as the font of the strict scrutiny doctrine? The United States Supreme Court is generally loath to overturn its cases, and normally tries to make lemonade out of its past lemons. Surely something like that is going on with later citations to *Korematsu* and *Hirabayashi*. But that does not mean that the *Korematsu* Court deserves any credit for striking a blow for racial equality. It's a bit like saying that if a white person burns a cross on a Black neighbor's yard, he should nevertheless get some credit for simultaneously shouting: "Black Lives Matter!"

Before we begin the discussion, we must deal with a threshold problem in Killenbeck's argument. The full name of the doctrine is strict scrutiny for racial *classifications*. That is, the doctrine focuses on whether the state has made an overt or implicit classification, and not on whether a policy subordinates one social group to others. It treats *classification by the state* as both the central vice of White Supremacy and the chief mechanism of contemporary racial injustice in the United States. Needless to say, this is not a very astute diagnosis.

Given its defects, why should we assume that this doctrine has been an unalloyed good, particularly in the last forty years? Frankly, it *hasn't* been all that good for racial justice in the United States. By the end of the 1960s, when *Loving v. Virginia* was decided,[25] states had stopped passing new Jim Crow laws that overtly classified on the basis of race. Since then, the strict scrutiny doctrine has been repeatedly used to make legislative attempts at remedying past societal discrimination unconstitutional (with the Court citing both *Korematsu* and *Hirabayashi* in justification).[26] The doctrine has been employed to turn *Brown v. Board of Education* on its head by holding that

25. Loving v. Virginia, 388 U.S. 1 (1967).

26. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204, 215-16 (1995) (striking down federal contracting program and citing *Korematsu* and *Hirabayashi* in justification); Richmond v. J.A. Croson Co., 488 U.S. 469, 503 (1989) (striking down state affirmative action program for construction contracts and explaining that "[t]here are numerous explanations for th[e] dearth of minority participation [in construction]. . . . Blacks may be disproportionately attracted to industries other than construction."); *Croson*, 488 U.S. at 500-01 (citing *Korematsu* for the proposition that courts should not defer to vague legislative claims about the continued presence of racial discrimination in society); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-76 (1986) (plurality opinion) (holding that there is no compelling state interest in remedying past societal discrimination); *Wygant*, 476 U.S. at 273 (citing *Hirabayashi*).

voluntary plans to prevent school segregation are unconstitutional (with the Court citing *Hirabayashi*).[27] Conversely, because the doctrine focuses on the presence or absence of racial *classification*, courts have used the strict scrutiny rule to legitimate legislative and executive actions that have not classified on the basis of race, even though they have knowingly perpetuated racial disadvantages for African Americans.[28] In the Court's view, the foreseeability—or even the actual knowledge—that a policy will burden racial minorities (or women) is not sufficient. One must show that the policy was adopted because it would harm these groups.[29] Absent that showing, the law is ordinary social and economic regulation. It deserves a presumption of legitimacy and constitutionality, and to impugn it is to disrespect the elected branches of government and attack democracy itself.[30]

One might respond that these results have flowed from who sat on the Supreme Court in the past fifty years, and that another Court staffed with different personnel would have applied the doctrine quite differently. Whether or not that is the case, it reinforces my point. The doctrine of strict scrutiny for racial classifications is *not* a moral principle of racial justice and it should never be confused with one. Rather, it is a doctrinal tool developed at a particular moment in time that soon proved

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27. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 731-33 (2007) (plurality opinion) (holding that voluntary desegregation programs are unconstitutional racial balancing); *Parents Involved*, 551 U.S. at 743 (citing *Hirabayashi* for the proposition that voluntary attempts at racial integration should be subject to strict scrutiny, and that any suggestion to the contrary "is fundamentally at odds with our precedent"); *Parents Involved*, 551 U.S. at 751-52 (Thomas, J, concurring) (citing *Hirabayashi* and explaining that "[t]he Constitution does not permit race-based government decisionmaking simply because a school district claims a remedial purpose and proceeds in good faith with arguably pure motives"); *Parents Involved*, 551 U.S. at 758 n.10 (Thomas, J., concurring) (citing *Korematsu* for the proposition that all racial classifications must be subjected to the "most rigid scrutiny").

28. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1143, 1146-47 (1997).

29. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

30. *See* Siegel, *supra* note 28 at 1137-38 (arguing that the intent standard is premised on deference to legislative majorities and an unwillingness to impugn their motivations); *see also* Washington v. Davis, 426 U.S. 229, 247-48 (1976) (arguing for the relatively high bar of the intent standard because Title VII's disparate impact analysis "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed").

unequal to the forces of racial retrenchment that began in the 1970s and have continued to this day. It confuses classification with equality and constitutionality with justice. In the hands of courts unsympathetic to the principle of anti-subordination, the doctrine of strict scrutiny for racial classifications has often proved to be a tool for preserving racial *inequality*.[31]

But suppose we grant that the doctrine of strict scrutiny is, all other things being equal, something to celebrate. Why should *Korematsu* get any kudos for merely saying the words? In justifying the Nixon Administration's racial policies, Attorney General John Mitchell is supposed to have said, "watch what we do, not what we say."[32] What *Korematsu* says is that racial classifications are subject to the "most rigid scrutiny."[33] What it does is quite another thing.

Suppose the Supreme Court held that torture violated the Eighth Amendment and then proceeded to uphold torture in a series of cases. It could do this in any number of ways. It could (1) redefine torture so that what the government did was constitutional; (2) create a series of excuses (that is, "compelling interests narrowly tailored") for torture; or (3) throw up a series of procedural obstacles—for example, limitations on judicial remedies, or invocation of state secrets privileges—so that later courts would be unable to hold unlawful future acts of torture. If a court did any of these things, why is its statement that torture violates the Eighth Amendment particularly worthy of praise rather than an apology (or a cover-up) for justice denied? Why does saying one thing and doing the opposite deserve any reward?

Killenbeck's point seems to be a constitutional version of La Rochefoucauld's maxim that "[h]ypocrisy is a tribute vice pays to virtue."[34] When courts say the virtuous thing, even in an unjust cause, their statements become part of doctrine, and these statements can be the basis of future virtuous decision making.

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31. *See* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 139, 141 (2011) (arguing that the modern law of equality is also the law of inequality); Siegel, *supra* note 28, at 1146-47 (arguing that current equal protection doctrines help preserve racial inequality).

32. KEVIN L. YUILL, RICHARD NIXON AND THE RISE OF AFFIRMATIVE ACTION: THE PURSUIT OF RACIAL EQUALITY IN AN ERA OF LIMITS 145 (2006).

33. Korematsu v. United States, 323 U.S. 214, 216 (1944).

34. *See* FRANÇOIS, DUC DE LA ROCHEFOUCAULD, MAXIMS 21 (John Heard trans., Dover Publications 2006) (1665), https://perma.cc/WT54-CUSS .

So we should thank the courts for speaking in the first place. By paying tribute to constitutional virtue, courts reinforce it, even when they act hypocritically and unjustly.

But the argument depends on a suppressed premise. Two, actually. The first is that courts will eventually do the virtuous thing. The second is that the reason they will do the virtuous thing is in some way *because* of the initial hypocritical statement. That is, hypocrisy at Time One somehow helps produce virtue at Time Two. But if the causation is lacking, all we have is hypocrisy.

Suppose that after the Court decided *Korematsu*, it continued to uphold various forms of racial discrimination in a series of cases, each time citing the same formula from *Korematsu*: "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[35] In case after case, the Court decides, for various reasons, that none of the challenged policies violate the Constitution. Would we then view *Korematsu* with pride? No. We would denounce it as the beginning of an odious program of hypocrisy, all the more odious because of the Court's sanctimonious pronouncements.

What actually happened, of course, is quite different. *Korematsu*'s and *Hirabayashi*'s statements reappear in cases striking down racially discriminatory laws and practices: first in *Oyama v. California*[36] in 1948, and then once again in *Hernandez v. Texas*[37] (decided shortly before *Brown*), then in *Bolling v. Sharpe*,[38] then in *McLaughlin v. Florida*[39] in 1964, and then again in *Loving v. Virginia* in 1967.[40] By that point it appears settled that racial classifications are presumptively unconstitutional.

Should we conclude from this, however, that *Korematsu* and *Hirabayashi* had some influence on the results in these cases? Why shouldn't we rather say that these later cases actually begin

35. *Korematsu*, 323 U.S. at 216.
36. Oyama v. California, 332 U.S. 633, 646 (1948).
37. Hernandez v. Texas, 347 U.S. 475, 478 n.4 (1954).
38. Bolling v. Sharpe, 347 U.S. 497, 499 n.3 (1954).
39. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).
40. Loving v. Virginia, 388 U.S. 1, 11 (1967).

the doctrine of protecting racial equality through the strict scrutiny test, and that they merely cribbed convenient language from *Korematsu* and *Hirabayashi* to achieve this goal? In these later decisions, courts were making lemonade from lemons, as courts often do. Indeed, what one might take away from Killenbeck's article is not that we should rehabilitate *Korematsu*. It is that we should promote the first of these cases, *Oyama v. California*, into the pedagogical canon. Indeed, if we want to canonize any part of *Korematsu*, it should be the dissents, not the majority opinion—as we now do with Holmes and Brandeis' famous dissents in the early First Amendment cases.

So consider another example. The test of "clear and present danger" appears first in Justice Oliver Wendell Holmes' 1919 opinion in *Schenck v. United States*.[41] It is an application of an older approach that asked whether speech had a "bad tendency" to produce undesirable results.[42] Later that year, Holmes came to the conclusion that the Court's doctrine was wrong. He began to dissent in First Amendment cases like *Abrams v. United States*[43] and *Gitlow v. New York*.[44] He continued to employ the language of clear and present danger from *Schenck* but turned it into a libertarian doctrine.

Should we say that the birth of modern First Amendment jurisprudence is *Schenck*, because it first uses the words "clear and present danger," or *Abrams*, because it actually uses that language to protect free speech rights? I would say that the modern tradition begins with the dissent in *Abrams*, not the majority opinion in *Schenck*, and that Holmes cleverly employed language from a case about bad tendency to build an intellectual case for a very different conception of freedom of speech in the future.[45]

In the *Civil Rights Cases*, Justice Bradley argued that Congress has the power, under Section Two of the Thirteenth Amendment, to eradicate the badges and incidents of slavery.[46]

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41. Schenck v. United States, 249 U.S. 47, 52 (1919).

42. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 248, 285 (1997).

43. Abrams v. United States, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting).

44. Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting).

45. *See* RABBAN, *supra* note 42, at 7-8 (arguing that Holmes used the phrase "clear and present danger" in *Abrams* to reject the bad tendency test and create a new theory of free speech without having to admit that he had departed from previous precedents).

46. Civil Rights Cases, 109 U.S. 3, 20-21 (1883).

But Bradley interpreted this language very narrowly, holding that the Civil Rights Act of 1875 was unconstitutional.[47] The same language was then taken up, almost a hundred years later, by Justice Stewart in *Jones v. Alfred Mayer Co.*,[48] to justify Congress' power to reach private racial discrimination under the Thirteenth Amendment.[49] Shall we say that the origins of this doctrine lie in the *Civil Rights Cases*, which denied Congress the power, or *Jones v. Alfred Mayer*, which recognized it?

One could multiply examples, but the central point is this: Courts engage in all sorts of high-toned language all the time. They make promises of justice that they have no intention of keeping. What makes this language valuable is what *later courts* actually do with this language. What makes the clear and present danger test important is not *Schenck*—it is Holmes' dissents that pave the way to cases like *Brandenburg v. Ohio*.[50] What makes *Korematsu*'s language about strict scrutiny valuable is not the decision in *Korematsu* itself. What makes it valuable is the later cases—*Oyama*, *Hernandez*, *Bolling*, *McLaughlin*, and *Loving*—that cribbed the language *for the opposite purpose*—to further racial equality.

But one might object: surely *Korematsu* should get *some* credit for coining the phrase, even if it was later used for a contrary purpose. If the phrase had never been coined, later courts would have been at loss to come up with ways to protect racial equality. I find this argument unpersuasive. The Court was hardly lacking in legal materials. The concept of strict scrutiny was already invented during the *Lochner* era as a way of protecting economic liberty, although the phrase itself was not used.[51] And if one wants previous language that would help the Court actually protect racial equality, one might consider the following, written sixty years before:

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47. *Id.* at 24-25 (holding that private racial discrimination "has nothing to do with slavery or involuntary servitude").

48. 392 U.S. 409, 439-41 (1968).

49. *Id.* at 441-43.

50. Brandenburg v. Ohio, 395 U.S. 444 (1969).

51. RICHARD H. FALLON, JR., THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY 14 (2019); David E. Bernstein, *The Conservative Origins of Strict Scrutiny*, 19 GEO. MASON L. REV. 861, 861 (2012).

> [The Fourteenth Amendment] declar[es] that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color[.] The words of the amendment . . . contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.[52]

A doctrine founded on the language of *Strauder v. West Virginia*, which actually did protect racial equality, might be at least as valuable today as one based on *Korematsu*'s language of strict scrutiny. In fact, starting with *Strauder* might be even better. *Strauder* asserts that the law "shall be the same for the black as for the white,"[53] but it also forthrightly acknowledges that the deeper problem of racial equality is one of social subordination—the reduction of Blacks "to the condition of a subject race"[54]—and that the positions of whites and Blacks are not always symmetrical. If we want language that furthers justice, we might look to cases that actually did a bit of justice, and not to cases where judges merely mouthed the words.

IV. CONCLUSION

The point I take from Killenbeck's article is a bit different from the one that he proposes. What a decision means—and therefore the honor bestowed or withheld from it—is not decided the day it is handed down. Like any historical artifact, its meaning is decided later on by what it means to later generations and what

52. Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880). *Cf.* Sanford Levinson, *Why* Strauder v. West Virginia *Is the Most Important Single Source of Insight on the Tensions Contained Within the Equal Protection Clause of the Fourteenth Amendment*, 62 ST. LOUIS U.L.J. 603, 614 (2018) (arguing that a close reading of *Strauder* contains all students need to know about race and the Fourteenth Amendment).

53. *Strauder*, 100 U.S. at 307.

54. *Id.* at 308.

they use it for. That is especially true in a system of common law decision-making. Lawyers and judges have multiple ways of seizing on particular language or characterizing past holdings in different ways—in order to make earlier cases mean different things over time. What we make of *Korematsu* and how we use it is based in large part on the events that came after it. Its place in history is shaped by what we, living in that history, want to use it for.

Nothing stops us from giving credit to *Korematsu* for first announcing a doctrine that is useful to us today. But nothing requires it either. The larger question is this: what should *Korematsu* mean to us today, that we find it (partially) worthy of praise or blame?

Killenbeck has a distinctive answer to this question. He argues that we should honor good legal process and dishonor bad legal process, and, moreover, that we should honor doctrinal phrases useful to us today, no matter the results in the particular case that spawned them. The lessons he wants to draw from *Korematsu* are lessons about the quality of legal decision-making, and the importance of lawyers and judges adhering to professional norms in good faith.

These are indeed important lessons, and it is no accident that Killenbeck draws them at a historical moment in which the rule of law seems ever more threatened by the day. But the sad fact is that good legal decision-making, however desirable, is not the same thing as justice. And, for better and for worse, what we tend to remember years later about the work of courts—if we remember it at all—is not judges' professional skill, their attention to the factual record of cases, their scrupulousness about procedural niceties, and their devotion to craft. Rather, it is whether, in the eyes of later generations, they did justice in their time.