Pepperdine Law Review

Volume 39
Issue 1 *Symposium: Supreme Mistakes*

Article 10

12-15-2011

Korematsu v. United States: A Tragedy Hopefully Never to Be Repeated

Erwin Chemerinsky

Korematsu v. United States: A Tragedy Hopefully Never to Be Repeated

Erwin Chemerinsky*

I. INTRODUCTION

Over the course of American history there have been some terrible Supreme Court decisions with disastrous consequences. There is a great deal to learn from studying the mistakes made by the United States Supreme Court—most of all, how to avoid repeating them. Understanding the bad decisions can help increase the likelihood of good ones in the future.

Looking at the Court's mistakes also provides a powerful reminder that the Supreme Court has tremendous discretion. Of course, we shouldn't need a reminder of this. This has been obvious throughout history, and the Legal Realists long ago reminded us of this. But it was only a few years ago that Chief Justice John Roberts, in his confirmation hearings, tried to tell the Senate Judiciary Committee that judges are just umpires who call balls and strikes, implying that there is little discretion.[1] And just a couple years ago, Sonia Sotomayor sat before the Senate Judiciary Committee and told the

* Dean and Distinguished Professor of Law, University of California, Irvine School of Law. This article is part of *Pepperdine Law Review*'s April 1, 2011 *Supreme Mistakes* symposium, exploring the most maligned decisions in Supreme Court history.

1. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

Senators that Justices just apply the law, not make the law.[2] These brilliant individuals should have been ashamed of saying that to the Senate Judiciary Committee.

The cases examined in this symposium are a powerful reminder that the Court has great discretion in deciding constitutional cases and that bad decisions can have devastating effects. We are at a time when there is great judicial arrogance with a Court that shows little deference to the other branches of government or to lower courts. But this arrogance masquerades as judicial humility as the Justices try to portray themselves as having little discretion. The cases examined in this symposium on the worst decisions in history are a powerful reminder of the need for real judicial humility.

In this paper, I make three points. First, I discuss the criteria for assessing what makes a bad decision. Second, I address why *Korematsu v. United States*[3] was a terrible ruling. Finally, I discuss some of the lessons that might be learned from *Korematsu.*

II. HOW TO ASSESS DECISIONS?

This symposium focuses on the worst Supreme Court decisions in history. But that assumes that there are criteria for assessing this. Although many criteria might be suggested and an entire paper might focus on this question, I will suggest three factors that can be used to evaluate decisions. I would think that there could be widespread agreement that these are appropriate criteria to use in evaluating Supreme Court decisions and deciding which are among the worst in history.

One factor to consider is social impact. What was the effect of the decision on human beings and, more generally, on society? In this sense, the decisions in *Dred Scott v. Sandford*[4] and *Plessy v. Ferguson*[5]—discussed elsewhere in this symposium—are obvious examples of Supreme Court decisions that had horrible consequences for people's lives and for society.

A couple years ago, President Obama said that he wanted to appoint to the Supreme Court Justices with empathy.[6] To my surprise, even shock, he was criticized for this. I would think the opposite of somebody with empathy is a sociopath. Surely we don't want sociopaths on the United States Supreme Court, but we do want the Justices to consider the social

2. *Confirmation Hearing on the Nomination of Sonia Sotomayor to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 59 (2009) (statement of Sonia Sotomayor).

3. 323 U.S. 214 (1944).

4. 60 U.S. (19 How.) 393 (1857).

5. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

6. Carrie Dann, *Obama on Judges, Supreme Court*, MSNBC.COM (July 17, 2007, 7:21 PM), http://firstread.msnbc.msn.com/_news/2007/07/17/4439758-obama-on-judges-supreme-court.

impact of their ruling. Without a doubt, *Dred Scott* and *Plessy* were wrong even if those were the results intended by the framers of the Constitution.

In fact, constitutional law requires that the Justices look to social impact and the consequences of their ruling. In assessing whether there is a compelling, an important, or a legitimate government interest—as courts must do in evaluating the constitutionality of government actions infringing rights or denying equality—judges inescapably must look at social impact.

A second criterion that might be considered in evaluating decisions is quality in terms of the craft of judging. Is the opinion well-reasoned? Is precedent accurately cited? Does the opinion adequately address opposing views?

In this sense, it is possible to identify decisions that have been poorly reasoned or that poorly utilized prior decisions. I would pick as an example, *Griswold v. Connecticut*.[7] Although I very much agree with the conclusion that there is a right to privacy under the Constitution, and that this includes the right to purchase and use contraceptives, Justice Douglas's majority opinion is poorly reasoned. Instead of finding privacy in the liberty of the Due Process Clause, Douglas describes it as coming from the penumbras and emanations of the Bill of Rights.[8] This provides a poor foundation for future decisions. Instead of saying that there is a fundamental right of individuals to choose whether to procreate or not, Douglas's opinion focused on the privacy of the marital bedroom, which was in no way involved in the case.

Bush v. Gore[9] is another example of a poorly reasoned judicial opinion. It held that counting uncounted ballots in Florida during the presidential election without preset standards violated equal protection.[10] But none of this counting had occurred yet, and it was quite possible that there would not have been any disparity in counting ballots. The Florida Supreme Court assigned a judge, Terry Lewis, to oversee this process, and he could have applied common standards. The Supreme Court found that the Florida counting was a denial of equal protection as it was applied,[11] but no application had occurred yet. Moreover, the Court ended the counting in Florida based on *Florida* law, but that was for the Florida Supreme Court to decide, not the United States Supreme Court.

---

7. 381 U.S. 479 (1965).

8. *Id.* at 484 ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

9. 531 U.S. 98 (2000).

10. *Id.* at 105–06.

11. *Id.* at 115.

A third criterion that might be used to assess cases is in terms of their doctrinal impact: What was the impact of the decision on the development of the law? In this sense, *Lochner v. New York*[12] belongs in the "Hall of Shame" that is being examined in this symposium. For over thirty years, it led to the invalidation of legislation protecting employees and consumers. It has been thoroughly repudiated since 1937,[13] but there is no doubt that for decades it had a pernicious effect on the law.

There are other examples that can be criticized in terms of their undesirable doctrinal impact. *Washington v. Davis*,[14] in its requirement that there be proof of discriminatory intent in order for there to be an equal protection violation,[15] has limited the scope of the Equal Protection Clause and prevented courts from remedying government actions with significant discriminatory effects based on race and gender. *San Antonio Independent School District v. Rodriguez*[16] is one of the worst decisions of our lifetime, holding that education is not a fundamental right and that discrimination against the poor receives no more than rational basis review.[17]

Throughout this symposium, as the worst decisions in American history are considered, the focus is on their impact on society, the quality of the opinions, and their effects on the law.

III. WHY *KOREMATSU* WAS ONE OF THE WORST DECISIONS IN HISTORY

Applying the criteria described above, there is no doubt that *Korematsu* belongs on the list of the worst Supreme Court rulings. First, in terms of the social and human impact, 110,000 Japanese-Americans, aliens, and citizens—and 70,000 were citizens—were uprooted from their life-long homes and placed in what President Franklin Roosevelt called "concentration camps."[18] For many, if not most of them, their property was seized and taken without due process or compensation. They were incarcerated. The only determinate that was used in this process was race.

William Manchester, in a stunning history of the twentieth century, *The Glory and the Dream*, gives this description:

> Under Executive Order 9066, as interpreted by General De Witt, voluntary migration ended on March 27. People of Japanese descent were given forty-eight hours to dispose of their homes,

12. 198 U.S. 45 (1905).

13. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), is widely regarded as the case ending the *Lochner* era.

14. 426 U.S. 229 (1976).

15. *Id.* at 240.

16. 411 U.S. 1 (1973).

17. *Id.* at 35, 40–41.

18. WILLIAM MANCHESTER, THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA, 1932–1972, at 300 (Little, Brown & Co. 1974).

> businesses, and furniture; during their period of resettlement they would be permitted to carry only personal belongings, in hand luggage. All razors and liquor would be confiscated. Investments and bank accounts were forfeited. Denied the right to appeal, or even protest, the Issei thus lost seventy million dollars in farm acreage and equipment, thirty-five million in fruits and vegetables, nearly a half-billion in annual income, and savings, stocks, and bonds beyond reckoning.[19]

Manchester describes what occurred:

> Beginning at dawn on Monday, March 30, copies of General De Witt's Civilian Exclusion Order No. 20 affecting persons "of Japanese ancestry" were nailed to doors, like quarantine notices. It was a brisk Army operation; toddlers too young to speak were issued tags, like luggage, and presently truck convoys drew up. From the sidewalks soldiers shouted, "Out Japs!"—an order chillingly like [what] Anne Frank was hearing from German soldiers on Dutch pavements. The trucks took the internees to fifteen assembly areas, among them a Yakima, Washington, brewery, Pasadena's Rose Bowl, and racetracks in Santa Anita and Tanforan. The tracks were the worst; there, families were housed in horse stalls.
>
> . . . .
>
> The President never visited these bleak garrisons, but he once referred to them as "concentration camps." That is precisely what they were. The average family of six or seven members was allowed an "apartment" measuring twenty by twenty-five feet. None had a stove or running water. Each block of barracks shared a community laundry, mess hall, latrines, and open shower stalls, where women had to bathe in full view of the sentries.[20]

The human impact of the actions of the United States government towards Japanese-Americans during World War II cannot be overstated. It is almost beyond comprehension that our government could imprison 110,000 people solely because of their race.

---

19. *Id.* at 300–01 (describing the conditions in internment camps).
20. *Id.* at 299–300.

In terms of the judicial reasoning, *Korematsu* was also a terrible decision. Interestingly, *Korematsu* is the first case where the Supreme Court used the language of "suspect" classifications.[21] The Court did not use the phrasing of "strict scrutiny," which came later, but the Court certainly was implying that racial classifications warrant what later came to be referred to as strict scrutiny.[22] Strict scrutiny, of course, means that a government action will be upheld only if it is necessary to achieve a compelling government interest.[23]

The central flaw in Justice Black's reasoning in *Korematsu* is that he focused entirely on the ends that the government was seeking to achieve and he completely ignored the means used. It is not new that a government action has to be examined both with regard to the ends and the means that are employed. For example, throughout the *Lochner* era, the Court was striking laws down both on the grounds of inadequately important ends and means that are insufficiently related to the ends. Justice Black expresses that it is wartime, and certainly protecting national security is always a compelling government interest.[24] But the mistake that Justice Black makes is that he too quickly assumes that incarceration without any form of hearing or due process is necessary to achieve the goal. Why couldn't there have been some form of individual screening to determine whether or not particular individuals were in any way a threat to national security? In England, over a very short period of time, there was screening of those who were of German descent.[25] Very few were then evacuated or interned.[26] If England, facing a much greater danger of invasion, was able to do this, there was no reason that the United States could not do this.

---

21. In *Korematsu*, the Court declared:

> [A]ll 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.

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

22. The Court eventually held that all racial classifications—whether helping or hurting minorities—must meet strict scrutiny. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (federal affirmative action programs must meet strict scrutiny); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (state and local affirmative action programs must meet strict scrutiny). For a general background of strict scrutiny as applied to laws discriminating based on race, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 690–748 (3d ed. 2006).

23. *See Adarand*, 515 U.S. at 202.

24. *See Korematsu*, 323 U.S. at 223–24.

25. *See* Eugene V. Rostow, *The Japanese American Cases: A Disaster*, 54 YALE L.J. 489, 494–95 (1945).

26. *See id.*

In the United States, about forty percent of those incarcerated were children or senior citizens.[27] Seventy thousand were American citizens.[28] Many had family members who were serving in the United States military during World War II.[29] By no means could it be said that what the government was doing was necessary to achieve its objective, or was even a reasonable way to accomplish it.

Korematsu also can be criticized in terms of its subsequent doctrinal effects. At first glance, it is not obvious that there was a later doctrinal effect. Thankfully, the United States Supreme Court has not relied on *Korematsu* in subsequent equal protection rulings to allow government actions subjecting minority group to discriminatory treatment. But I would suggest that *Korematsu* is part of a pattern that continued after it and actually preceded it. It is one of the worst aspects of American history. In times of crisis, especially foreign-based crisis, we compromise our most basic constitutional rights only to realize in hindsight that we were not made any safer.

Korematsu was an instance where the government infringed on the most basic liberties of Japanese-Americans, solely on the basis of race, without in any way making the nation safer. During World War II, not one Japanese-American was ever accused, indicted, or convicted of espionage or any crime against national security.[30] There is no basis for believing that the country was made safer by virtue of interning the Japanese-Americans during World War II.

This pattern of reacting to crises by restricting liberties began early in American history.[31] The Alien and Sedition Acts that were adopted in 1798 might be seen as part it.[32] President Lincoln suspending the writ of habeas corpus during the Civil War and people being incarcerated just for criticizing the Civil War are examples of it. The cases during World War I where individuals were imprisoned for criticizing the draft or the war effort is

27. WAR RELOCATION AUTHORITY, U.S. DEP'T OF THE INTERIOR, WRA: A STORY OF HUMAN CONSERVATION 198 (1946), *available at* http://www.archive.org/stream/wrastoryofhuman c00unit#page/n5/mode/2up.

28. PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 149–50 (1983).

29. MANCHESTER, *supra* note 18, at 301–02.

30. PETER IRONS, JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES 105 (1989).

31. For an excellent discussion of this pattern through American history, see GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIMES FROM THE SEDITION ACT OF 1789 TO THE WAR ON TERRORISM (2004).

32. The Alien and Sedition Acts constitute of four separate laws. *See* Naturalization Act, ch. 54, 1 Stat. 566 (1798); Alien Act, ch. 58, 1 Stat. 570 (1798); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798); Sedition Act, ch. 74, 1 Stat. 596 (1798).

another part of it.[33] The cases during the MacArthur era, like *Dennis v. United States*,[34] where individuals were being imprisoned just for teaching works of Marx and Lenin, are additional examples of this pattern. Most recently, in June 2010, the Supreme Court held in *Holder v. Humanitarian Law Project*[35] that American citizens could be convicted of material assistance of foreign terrorist organizations just for advising foreign groups how to use international law for peaceful resolution of disputes, or how to apply for humanitarian assistance.[36] The Court required no showing of any likelihood that the speech would increase terrorist activity, or even the possibility of it.

In this sense, *Korematsu* is part of, and reinforced, a very bad doctrinal aspect of American constitutional law. It is a powerful example of the government violating basic constitutional principles in a time of crisis without making the country any safer.

Thus in terms of all of the criteria identified earlier—human and social impact, judicial reasoning, and doctrinal impact—*Korematsu* is a tragically bad and wrong decision.

IV. THE LESSONS

What lessons might be learned from *Korematsu*? One important lesson is that no individual ever should be detained by the government without individualized suspicion that he or she has committed a crime. The only basis for detaining individuals during World War II was they were of Japanese ancestry. There was no individualized suspicion; there was no probable cause about any person. This mistake is one that never should be repeated again.

Congress recognized this and tried to help prevent it from happening again by adopting a law in 1971, the Non-Detention Act, which says that no person can be detained, "except pursuant to an Act of Congress."[37] The legislative history makes it clear that it is about preventing a *Korematsu*-like situation from ever happening again.[38] Unfortunately, we have seen over the

33. For a thorough review of these cases, see ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1941).

34. 341 U.S. 494 (1951).

35. 130 S. Ct. 2705 (2010).

36. *Id.* at 2729–31.

37. Non-Detention Act, 18 U.S.C. § 4001 (1971).

38. *See* 117 CONG. REC. 31541 (1971) ("But the committee believes that it is not enough merely to repeal the Detention Act. . . . Repeal alone might leave citizens subject to arbitrary executive action with no clear demarcation of the limits of executive authority. It has been suggested that repeal alone would leave us where we were prior to 1950. The committee believes that imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an act of Congress, exists. This will assure that no detention camps can be established without at least the acquiescence of the Congress.").

last decade that despite this statute, the mistake of *Korematsu*, though on a smaller scale, has been repeated. Hundreds of individuals who have never had any meaningful factual hearing or any due process remain in Guantanamo Bay, Cuba.[39] The Bush Administration claimed the ability to detain even American citizens without providing due process or showing to any court individualized suspicion or probable cause.[40] Individuals were held as "material witnesses" as a pretext to investigate them with no actual plan or desire to use them as material witnesses.[41] To this day, neither the Bush nor Obama Administrations have disclosed how many people are being held or have been held as part of the war on terrorism.

I think a second important lesson to learn from *Korematsu* is always to remember the role of race in decisions by government in American history. It was long ago that Alexis de Tocqueville wrote about race being the tragic flaw of American society.[42] It is impossible to consider *Korematsu* without focusing on the racial aspect of it. Again, William Manchester's book, *The Glory and the Dream*, powerfully describes this component:

> The Nevada Bar Association resolved, "We feel that if Japs are dangerous in Berkeley, California, they are likewise dangerous in the State of Nevada," and Governor Chase Clark of Idaho told the press that "Japs live like rats, breathe like rats, and act like rats." Governor Homer M. Adkins from Arkansas followed by announcing, "Our people are not familiar with the customs or peculiarities of the Japanese, and I doubt the wisdom of placing any in Arkansas."[43]

But perhaps worst of all was General De Witt, who was responsible for carrying out the internment. He said, "'A Jap's a Jap!' . . . 'It makes no difference whether he's an American or not.'"[44]

---

39. *See generally* Mark Denbeaux & Joshua W. Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data* (Seton Hall Pub. L. Research, Working Paper No. 46, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885659.

40. *See, e.g.*, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (where the government claimed the authority to detain an American citizen, Jose Padilla, without providing due process).

41. Ashcroft v. Al-Kidd, 131 S. Ct. 2074 (2011) (holding that a person detained on a material witness warrant as a pretext could not recover money damages from the Attorney General).

42. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Phillips Bradley ed., 1945). In a chapter entitled "The Present and Probable Future Condition of the Three Races That Inhabit the Territory of the United States," Tocqueville discussed the racial mistreatment of African-Americans. *See generally id.* at 331–434.

43. MANCHESTER, *supra* note 18, at 298.

44. *Id.*

There is a long history of racism directed at Japanese-Americans in California, and it very much manifested itself in what occurred in *Korematsu*. It is telling that thankfully neither German-Americans nor Italian-Americans were subjected to similar treatment on the east coast.

Finally, I think the lesson that we should draw from *Korematsu* is to not suspend the Constitution in times of war and times of crisis. The Court should not abdicate its responsibility to enforce the Constitution, even in wartime. The Court should always be careful of being too trusting of government claims. Thanks to the work of Peter Irons, we know that the United States very much exaggerated the threat to national security in its briefs and arguments to the Supreme Court in *Korematsu v. United States*.[45] Many years later, because of the work of Peter Irons, a federal judge in San Francisco granted a writ of *coram nobis* to Korematsu and overturned his conviction.[46]

One of the troubling things that is easy to overlook about *Korematsu v. United States* is the date of the decision; it was decided in 1944. Perhaps in the days right after World War II in early 1942 there was a reasonable threat of a Japanese invasion. And even that would not have justified what the government did, which was determining that an entire race of people were dangerous and needed to be evacuated and interned. But certainly that threat was over by 1944. Yet Justice Black says war is about hardship, so that the government's actions were justified.[47]

Korematsu is thus a powerful reminder that the Constitution is most needed in times of crisis like wars because that is when popular pressure will be greatest to lose sight of and compromise our most precious values. The decision in *Korematsu* shows that there must be limits to the Judiciary's deference to the government, even in wartime and other times of crisis. The Court has to be there to enforce the Constitution for all Americans at all times.

V. CONCLUSION

I am not making the strong case that *Korematsu* is the worst decision in all of American history. There is no need for a ranking of bad decisions. My point is that there should be a "Hall of Shame" of bad decisions and that *Korematsu* belongs there. Looking at tragically wrong decisions like *Korematsu* hopefully can help prevent the Court and the country from making these mistakes again.

---

45. *See generally* IRONS, *supra* note 28.

46. Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (granting writ of *coram nobis*, vacating conviction based on government concealment of critical contradictory evidence in *Korematsu v. United States*, 323 U.S. 214 (1944)).

47. *Korematsu*, 323 U.S. at 219–20.