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Response

Digital Internment

Margaret Hu†

In Korematsu, Hirabayashi, *and the Second Monster*,[1] Eric L. Muller explores whether *Korematsu v. United States*[2] is dead post-*Trump v. Hawaii*,[3] and whether by failing to strike down *Hirabayashi v. United States*,[4] the "mother"[5] of *Korematsu* and a "second monster"[6] lives on. This brief response Essay contends that answering these questions first demands grasping how *Trump v. Hawaii* failed to fully address the program implemented by the Muslim Ban–Travel Ban: Extreme Vetting. Extreme Vetting can be characterized as a form of "digital internment" through a complex web of cybersurveillance, administrative-imposed restraints, and "identity-management" rationales that are referenced in the text of the

† Associate Professor of Law, Washington and Lee University School of Law. This research benefited greatly from the discussions generated at the Immigration Theory Workshop, hosted by Daniel Morales and the University of Houston Law Center, and the Constitutional Law Schmooze, hosted by Mark Graber and the University of Maryland Francis King Carey School of Law. Many thanks for the excellent research assistance of Sean Moran, Kaya Vyas, Jake Walker, and Matt Wyatt. All mistakes and omissions are my own.

1. Eric L. Muller, Korematsu, Hirabayashi, *and the Second Monster*, 98 TEXAS L. REV. 735 (2020).
2. 323 U.S. 214 (1944).
3. 138 S. Ct. 2392 (2018).
4. 320 U.S. 81 (1943).
5. Muller, *supra* note 1, at 736.
6. *Id.* at 749.

Muslim Ban–Travel Ban Proclamation(s).[7] This Essay concludes that coming to grips with whether *Korematsu* was resurrected by *Trump v. Hawaii*, and exactly how the reasoning of *Hirabayashi* remains a vibrant threat, depends upon confronting the full discriminatory impact of Extreme Vetting.

Trump v. Hawaii, decided in June 2018, upheld the Trump Administration's efforts to deny citizens of seven predominantly majority-Muslim nations visas to the U.S.[8] In a dissenting opinion, Justice Sotomayor invoked *Korematsu*: "Today's holding [in *Trump v. Hawaii*] is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu v. United States*."[9] Chief Justice Roberts denied that any parallel exists: "Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. 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."[10] Chief Justice Roberts reasoned that suspending foreigner entry into the U.S. through denial of an immigration visa document "is an act that is well within executive authority . . . ."[11] The majority opinion then announced that *Korematsu* was overruled: "The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"[12]

Muller's thoughtful analysis advances important claims. He first defends the position that *Korematsu* was explicitly overruled in *Trump v. Hawaii*.[13] He challenges those who argue that "*Korematsu* did not really die, but just shape-shifted" into *Trump v. Hawaii*.[14] In both *Korematsu* and *Trump v. Hawaii*, Muller agrees that insufficient evidence supports the national security justification for the executive action.[15] Muller observes, however, that many national security cases lack conclusive or compelling evidence.[16]

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7. Proclamation No. 9983, 85 Fed. Reg. 6699 (Jan. 31, 2020). For a fuller discussion on the concept and policy application of "identity management" in author's other work, see Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633, 636 (2017); Margaret Hu, *Biometric Cyberintelligence and the Posse Comitatus Act*, 66 EMORY L.J. 697, 724 (2017); Margaret Hu, *Crimmigration-Counterterrorism*, 2017 WIS. L. REV. 955, 973.

8. Trump v. Hawaii, 138 S. Ct. at 2423.

9. *Id.* at 2447 (Sotomayor, J., dissenting).

10. *Id.* at 2423.

11. *Id.*

12. *Id.* (quoting Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

13. Muller, *supra* note 1, at 743.

14. *Id.* Muller cites to multiple scholars and experts to establish this argument. *Id.* at 743 n.69.

15. *See id.* at 746–47.

16. *Id.*

By dismissing *Korematsu* in a highly conclusory manner, the Supreme Court failed to explain exactly why *Korematsu* should be overruled.[17] According to Muller, *Korematsu*'s most grievous error was failing to properly apply strict scrutiny to the race-based classification of those targeted for internment.[18] Muller argues that *Korematsu* was both overinclusive (mass forced relocation of 112,000 Japanese residing in the U.S. during WWII, of which an estimated 66% were U.S. citizens) and underinclusive ("leaving American citizens of German and Italian ancestry untouched").[19] Muller explains that by failing to offer this clarification, the Court missed an important opportunity to rectify the wrongs of *Korematsu*. "The Court's crucial error in *Korematsu* was to tolerate racial line-drawing where it should have been—and pretended to be—demanding. The error was promising to test racial action in the name of national security with vigor and then doing it with indulgence."[20]

After concluding the "first monster"—*Korematsu*—is "slain,"[21] Muller trains his scholarly lens on a "second," "new monster"[22]—*Hirabayashi*. Muller posits: "Still alive and on the prowl, *Hirabayashi* can do real damage."[23] *Hirabayashi*, decided in 1943, the year prior to *Korematsu*, upheld the constitutionality of a military-imposed, dusk-to-dawn curfew that had been imposed on all Japanese, citizens and noncitizens, residing on the West Coast.[24] The curfew was implemented pursuant to Executive Order 9066, the same Executive Order relied upon to support the executive action of Japanese internment.[25] Muller states that, "[u]nlike *Korematsu*, which by the 1980s had become a case that no judge would mention in polite company, *Hirabayashi* has retained a modicum of vitality as precedent."[26] Muller carefully catalogues how the case has been relied upon for the proposition that the Executive is owed a high level of deference on national security fact-finding matters.[27]

What if Muller is correct in his analysis, however, and we still end up with a racist national security policy? Muller argues that *Korematsu* was overinclusive and underinclusive, and that the Court, in upholding the internment, failed to apply strict scrutiny to a race-based classification program. Yet, both *Hirabayshi* and *Korematsu* allowed for racist policy to

17. *Id.*
18. *Id.* at 747–48.
19. *Id.* at 751, 755.
20. *Id.* at 749.
21. *Id.* at 743.
22. *Id.* at 749.
23. *Id.* at 753.
24. Hirabayashi v. United States, 320 U.S. 81, 88, 104 (1943).
25. Muller, *supra* note 1, at 736, 749.
26. *Id.* at 752.
27. *Id.* at 752–53.

masquerade as a national security program. In other words, Muller is correct that strict scrutiny should provide the type of test that prevents the racism that led to the Court's findings in *Hirabayashi* and *Korematsu*. The problem is that national security deference may preclude the application of strict scrutiny, never allowing for an inquiry into the suspect classification in the first instance.

Even if the Court had applied the highest level of scrutiny in *Korematsu*, a searching inquiry into the underinclusiveness or overinclusiveness of the race-based classification would have still led to mass internment and indefinite detention. If the Court had determined that the race-based classification was underinclusive, would the federal government have expanded mass internment to U.S. citizens of German and Italian ancestry? If the Court had determined that the race-based classification was overinclusive, would the federal government engage in the types of "enemy combatant" and "unlawful combatant" classifications and military tribunals that led the Court to question whether due process and habeas corpus rights had been violated in post-9/11 decisions such as *Hamdi v. Rumsfeld*,[28] *Hamdan v. Rumsfeld*,[29] and *Boumediene v. Bush*?[30]

Because of the national security framing of the issue, the Court in *Trump v. Hawaii* focused on the wrong question. It asked whether the President can take necessary action to defend the nation by preventing foreigner entry into the United States. The Court in *Korematsu* also answered the wrong question. It asked whether the military could take necessary action to defend the nation by preventing sabotage through the containment of potential enemy sympathizers and spies through mass evacuation. In *Korematsu*, the real question was whether the animating force behind this drastic measure was truly one of national security. Like internment, the real question in *Trump v. Hawaii* was whether the executive action was based upon prejudice and xenophobia, economic populism and protectionism, and white nationalism. Justice Murphy's dissent in *Korematsu* explains:

> Special interest groups were extremely active in applying pressure for mass evacuation. See House Report No. 2124 (77th Cong., 2d Sess.) 154–6; McWilliams, Prejudice, 126–8 (1944). Mr. Austin E. Anson,

28. 542 U.S. 507, 509, 538 (2004) (holding that a U.S. citizen with "enemy combatant" designation cannot be indefinitely detained without due process as guaranteed by the Fifth Amendment and recognizing right to petition detention under habeas corpus).

29. 548 U.S. 557, 567 (2006) (concluding that the military commission established to review conspiracy charge against a noncitizen "enemy combatant" violated the Uniform Code of Military Justice and Geneva Conventions, as it failed to allow the detainee to hear and contest adversarial evidence).

30. 553 U.S. 723, 732–33 (2008) (holding that "enemy combatant" designation or detention in Guantanamo outside of U.S. territory does not preclude habeas corpus petition right, and Military Commission Act cannot be read to suspend writ of habeas corpus).

> managing secretary of the Salinas Vegetable Grower-Shipper Association, has frankly admitted that "We're charged with wanting to get rid of the Japs for selfish reasons. . . . We do. It's a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work, and they stayed to take over. . . . They undersell the white man in the markets. . . . They work their women and children while the white farmer has to pay wages for his help. If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either." Quoted by Taylor in his article "The People Nobody Wants," 214 Sat. Eve. Post 24, 66 (May 9, 1942).[31]

It is imperative for the Court, therefore, to assess whether the national security justification is pretext. If compelling evidence is not offered in support of executive action, deference to national security rationales should not be at its height. Confronting the question of race-based or religion-based discrimination is of critical importance. In the fog of war and in the face of executive insistence of facially neutral policies, is it realistic that the evidence would exist to sufficiently establish it? Historically, discrimination questions have not been fully confronted when the Executive invokes a national security objective. Just like in *Hirabayashi* and *Korematsu*, the question of discrimination in *Trump v. Hawaii* was disposed of as a distraction.[32] But, as the overruling of *Korematsu* in the "court of history" makes clear, those same concerns were the basis of striking down *Korematsu* with the benefit of several decades of hindsight. Is there a way to allow for national security jurisprudence to come to grips with discrimination without waiting three-quarters of a century for an admission that a gross injustice had occurred?

Similarly, is it possible that explicitly striking down *Hirabayashi* in the future may prove to be an empty action? After all, Justice Sotomayor observed that expressly overruling *Korematsu* is meaningless if the Court is

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31. Korematsu v. United States, 323 U.S. 214, 239 n.12 (1944) (Murphy, J., dissenting).

32. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2420–21 (2018); *Korematsu*, 323 U.S. at 223; Hirabayashi v. United States, 320 U.S. 81, 98–99 (1943). *See also* ERIC K. YAMAMOTO, IN THE SHADOW OF KOREMATSU (2018); Lorraine K. Bannai, Korematsu *Overruled? Far from It: The Supreme Court Reloads the Loaded Weapon*, 16 SEATTLE J. SOC. JUST. 897 (2018); Robert S. Chang, *Whitewashing Precedent: From the* Chinese Exclusion Case *to* Korematsu *to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183 (2018); Mark Tushnet, *Trump v. Hawaii: "This President" and the National Security Constitution*, 2018 SUP. CT. REV. 1; Khaled A. Beydoun, *The Korematsu Moment for Muslim Americans*, AL JAZEERA (June 28, 2018), https://www.aljazeera.com/indepth/opinion/korematsu-moment-muslim-americans-180628093048161.html [https://perma.cc/RB4H-X7FN]; Harold Hongju Koh, *Symposium:* Trump v. Hawaii—Korematsu*'s Ghost and National-Security Masquerades*, SCOTUSBLOG (June 28, 2018, 11:00 AM), https://www.scotusblog.com/2018/06/symposium-trump-v-hawaii-korematsus-ghost-and-national-security-masquerades/ [https://perma.cc/KP8Z-5UWM].

willing to deploy the same logic and national security deference without sufficient evidence.[33] What if the racism that animated Executive Order 9066 in 1942 and its implementation is the same racism that animates the Muslim Ban–Travel Ban and Extreme Vetting? What would a mass internment program look like in the twenty-first century, where twenty-four hour surveillance of racial or religious groups is possible without the need to physically intern those surveilled in camps? Erin Murphy asks: with technological innovation, are "paradigms of restraint" switching from physical restraint (prison) to virtual forms of restraint (surveillance)?[34] Under new "paradigms of restraint," how would the Court review "digital internment" or mass surveillance under Extreme Vetting?

Then-presidential candidate Donald J. Trump first announced the "Muslim Ban" from the campaign trail in 2015. He later elaborated that it was synonymous with "Extreme Vetting." Specifically, by October 9, 2016, at the second presidential debate in St. Louis, Missouri, he explained: "The Muslim ban is something that in some form has morphed into a(n) extreme vetting from certain areas of the world."[35] In several media revelations and other Department of Homeland Security (DHS) disclosures—including DHS Federal Register Notices,[36] DHS Privacy Impact Assessments,[37] DHS

33. Trump v. Hawaii, 138 S. Ct. at 2448 (Sotomayor, J., dissenting).

34. Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1325–27 (2008).

35. Alan Gomez, *What President Trump Has Said About the Travel Ban*, USA TODAY (June 11, 2017, 10:42 AM), https://www.usatoday.com/story/news/politics/2017/06/11/what-president-trump-has-said-about-muslims-travel-ban/102565166/ [https://perma.cc/7FS8-EZE5].

36. *See, e.g.*, FAIZA PATEL, RACHEL LEVINSON-WALDMAN, SOPHIA DENUYL, & RAYA KOREH, BRENNAN CTR. FOR JUSTICE, SOCIAL MEDIA MONITORING 11, 13 (2019); Margaret Hu, *The Ironic Privacy Act*, 96 WASH. U. L. REV. 1267, 1272 n.14 (2019) (citing multiple federal register notices announcing the expansion of social media data collection as part of immigration and vetting procedures: Privacy Act of 1974; System of Records, 82 Fed. Reg. 43,556 (Dep't of Homeland Sec. Sept. 18, 2017); Privacy Act of 1974; DHS/CBP-024 Intelligence Records System (CIRS) System of Records, 82 Fed. Reg. 44,198 (Sept. 21, 2017); 60-Day Notice of Proposed Information Collection: Application for Immigrant Visa and Alien Registration, 83 Fed. Reg. 13,806 (Dep't of State Mar. 30, 2018)); and 60-Day Notice of Proposed Information Collection: Application for Nonimmigrant Visa, 83 Fed. Reg. 13,807 (Dep't of State Mar. 30, 2018)).

37. U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT UPDATE FOR THE ANALYTICAL FRAMEWORK FOR INTELLIGENCE (AFI) DHS/CBP/PIA-010(a) 1–4 (Sept. 1, 2016, appendix updated Mar. 2020), https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-afi-march2020.pdf [https://perma.cc/2KAN-SN4W].

contracts and solicitations,[38] and testimony by DHS officials[39]—it appears that the Muslim Ban–Travel Ban has evolved and continues to evolve into a complex cybersurveillance program.[40] Although DHS denies that Extreme Vetting is an algorithmic-based screening/database-driven vetting system,[41] other evidence appears to call these denials into question.[42]

Operationally, the presidential proclamations authorizing the Muslim Ban–Travel Ban are a bit of a blank check, much like Executive Order 9066. Once Executive Order 9066 was in place, it allowed for myriad discriminatory executive actions to flow from it—from curfews[43] and theft of property[44] to mass internment and indefinite detention without due process.[45] In this way, *Trump v. Hawaii* should be viewed as a precursor case, much like *Hirabayashi*. *Hirabayashi*'s precedent was subsequently expanded in *Korematsu* to justify the constitutionality of mass evacuation and relocation. In other words, the Court focused its attention in *Trump v. Hawaii* on the Executive's authority to police the nation's border through its immigration policy.[46] The Court did not answer in *Trump v. Hawaii* whether the apparatus of Extreme Vetting, a cybersurveillance regime that impacts U.S. citizens and noncitizens alike,[47] is constitutional or within the scope of

38. DHS granted Palantir a $41 million contract in 2014 to build ICM, a "vast 'ecosystem' of data" to assist ICE agents in discovering potential deportation cases through access to multiple intelligence databases managed by several agencies. Spencer Woodman, *Palantir Provides the Engine for Donald Trump's Deportation Machine*, INTERCEPT (Mar. 2, 2017, 12:18 PM), https://theintercept.com/2017/03/02/palantir-provides-the-engine-for-donald-trumps-deportation-machine/ [https://perma.cc/ZJ7C-7Q5Y].

39. *Ending the Crisis: America's Borders and the Path to Security: Hearing Before the H. Comm. on Homeland Sec.*, 115th Cong. 83 (2017) (statement of John F. Kelly, DHS Secretary).

40. *See* Hu, *supra* note 36, at 1292. *See also* Hu, *Algorithmic Jim Crow*, *supra* note 7, at 635; Hu, *Crimmigration-Counterterrorimsm*, *supra* note 7, at 962.

41. Drew Harwell & Nick Miroff, *ICE Just Abandoned its Dream of 'Extreme Vetting' Software that Could Predict Whether a Foreign Visitor Would Become a Terrorist*, WASH. POST (May 17, 2018, 12:33 PM), https://www.washingtonpost.com/news/the-switch/wp/2018/05/17/ice-just-abandoned-its-dream-of-extreme-vetting-software-that-could-predict-whether-a-foreign-visitor-would-become-a-terrorist/ [https://perma.cc/X8BE-6Y3B].

42. *Id.*; *see also* Hu, *supra* note 36, at 1300.

43. *See* Hirabayashi v. United States, 320 U.S. 81, 101–02 (1943) (holding that the implementation of a curfew against all persons of Japanese ancestry was within the constitutional authority of Congress and the President).

44. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED PART 2: RECOMMENDATIONS 5 (1983), https://www.archives.gov/files/research/japanese-americans/justice-denied/part-2-recommendations.pdf [https://perma.cc/2P6M-TEM4] (adjusted for inflation, the Commission concluded the "total losses of income and property fall between $810 million and $2 billion in 1983 dollars.").

45. Korematsu v. United States, 323 U.S. 214, 219 (1944).

46. Trump v. Hawaii, 138 S. Ct. 2392, 2403 (2018).

47. *See* Trump v. Hawaii, 138 S. Ct. at 2420–22.

presidential authority. This allows *Trump v. Hawaii* to reach its conclusion without interrogating the full impact of the overarching program.[48]

In the meantime, the ever-widening reach of Extreme Vetting continues to extend, and communities of color targeted for disfavor are especially hard hit. On January 31, 2020, the Trump White House added six new nations to the Muslim Ban–Travel Ban through presidential proclamation, justifying the expansion:

> [B]ecause each of the six additional countries identified in the January 2020 proposal has deficiencies in sharing terrorist, criminal, or identity information, there is an unacceptable likelihood that information reflecting the fact that a visa applicant is a threat to national security or public safety may not be available at the time the visa or entry is approved.[49]

For each of the six countries—Burma, Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania—the proclamation states that although the degrees of compliance might vary, each country was added in part because the country "does not comply with the established identity-management and information-sharing criteria assessed by the performance metrics."[50] An estimated 320 million Muslims globally are now affected by the Muslim Ban–Travel Ban, including 25% of all Africans.[51] The "identity-management" and "information-sharing" rationales allow the federal government to execute many "facially neutral" objectives through technological means within a highly bureaucratized structure where the discrimination is obscured. [52]

In the event of another terrorist attack, Muller warns that *Hirabayashi* could be used to justify a range of discriminatory executive actions. The parade of horribles could include: "an array of race- or religion-based government intrusions and impositions that are an order of magnitude milder than mass exclusion. Mass surveillance; mass registration; mandatory

48. Several cases challenging aspects of the Extreme Vetting are in active litigation. *See, e.g.*, Wagafe v. Trump, No. C17-0094-RAJ, 2017 WL 2671254, at *1–2 (W.D. Wash. June 21, 2017); Complaint at 9–16, Doc Soc'y v. Pompeo, No. 19-3632 (D.D.C. Dec. 5, 2019). *See also* HARSHA PANDURANGA, ET AL., BRENNAN CTR. FOR JUSTICE, EXTREME VETTING AND THE MUSLIM BAN 12, 21 (2017); Hu, *Algorithmic Jim Crow*, *supra* note 7, at 637; Peter Margulies, *Bans, Borders, And Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 MICH. ST. L. REV. 1, 79; Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1481 (2018), for fuller discussions on the various legal and interpretive issues arising from the Muslim Ban–Travel Ban and Extreme Vetting.

49. Proclamation No. 9983, 85 Fed. Reg. 6699, 6702 (Jan. 31, 2020).

50. *Id.* at 6703–05.

51. Sam Levin, *'Trump is Deciding Who is American': How the New Travel Ban is Tearing Families Apart*, GUARDIAN (Feb. 16, 2020), https://www.theguardian.com/us-news/2020/feb/16/trump-is-deciding-who-is-american-how-the-new-travel-ban-is-tearing-families-apart [https://perma.cc/4GWD-MNW9].

52. Hu, *Algorithmic Jim Crow*, *supra* note 7, at 673.

identity cards; mass federal job layoffs; mass loyalty inquests . . . ."[53] He cautions that these programs may "have a potential constitutional pedigree in a world where *Korematsu* is dead but its mother, *Hirabayashi*, survives."[54] Muller argues forcefully that *Hirabayashi*, *Korematsu*'s progenitor, must be explicitly overruled. What if, however, the cybersurveillance apparatus of Extreme Vetting, combined with the highly complex and opaque administrative structure under which the Muslim Ban–Travel Ban is executed, ensures that we have already started the process of implementing complex forms of "mass surveillance," "mass registration," "mandatory identity cards," and "mass loyalty inquests" under the umbrella of the Muslim Ban–Travel Ban?

After the national shame of *Korematsu*, it is unlikely that the federal government would implement mass internment in the exact same manner as it did in 1942. Yet, how would a "national surveillance state,"[55] with the most sophisticated cybersurveillance tools at its disposal, animate similar objectives to those embodied by Executive Order 9066? The long and shameful shadows cast by *Hirabayashi* and *Korematsu* will continue to haunt *Trump v. Hawaii*. In Professor Muller's excellent essay, he argues that *Hirabayshi* must be explicitly overruled alongside *Korematsu*.[56] He contends that *Hirabayshi* allows for the government to justify a wide range of potentially discriminatory initiatives under the justification of national security.[57] Unfortunately, the wide range of discriminatory actions may already be taking place, even with the overruling of *Korematsu* in *Trump v. Hawaii*, and even if *Hirabayashi* is overruled in the future.

Are there critical distinctions between the mass internment of *Korematsu* and the mass surveillance of Extreme Vetting? Yes. But the national security pretext is the same. Justice Sotomayor stated: "Today, the Court takes the important step of finally overruling *Korematsu* . . . ."[58] She explained:

> This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable

53. Muller, *supra* note 1, at 754.

54. *Id.*

55. *See, e.g.*, Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 12 (2008); Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 520–21 (2006) (characterizing the "National Surveillance State" as representing "a significant increase in government investments in technology and government bureaucracies devoted to promoting domestic security and (as its name implies) gathering intelligence and surveillance using all of the devices that the digital revolution allows").

56. Muller, *supra* note 1, at 755.

57. *Id.* at 753.

58. Trump v. Hawaii, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., dissenting).

> or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another.[59]

The Court's recent disavowal of *Korematsu*, although unelaborated, implies recognition that the mass detention of the Japanese Americans and those U.S. residents of Japanese ancestry had been driven by racial animus based upon the verdict of history. We now need a test that is not dependent upon the verdict of history.

59. *Id.*