Korematsu, *Hirabayashi*, and the Second Monster

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Introduction

It is a trope at least as old as *Beowulf*: the unexpected second monster. Beowulf arrives in Heorot to take on Grendel, the demon who has been terrorizing the Ring-Danes' mead-hall. He bests the monster in battle and Grendel slinks off, one-armed and bloodied, to die. The Ring-Danes honor Beowulf with a great banquet; he has slaughtered their nemesis and there is much to celebrate. Full of mead and a newfound sense of safety, the revelers drift off to sleep. That is when a terrible new monster bursts upon the scene—Grendel's mother, the beast that brought Grendel into the world. The Ring-Danes will suffer further death and havoc until Beowulf can subdue her.

Unexpected second monsters can appear in real life as well, and the Supreme Court's recent opinion in *Trump v. Hawaii*[1] may have set us up for one. In his opinion for the Court, Chief Justice Roberts put the long-enfeebled precedent of *Korematsu v. United States*[2] out of its—and our—misery. Of that notorious decision upholding the mass removal of Japanese-Americans from the West Coast, the Chief Justice said this: it "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.'"[3]

A nemesis has been slaughtered and there is much to celebrate.[4] But this is not a moment for mead and peaceful slumber. Around the corner awaits another monster, a bigger threat than *Korematsu* itself. I am referring to *Hirabayashi v. United States*,[5] the Supreme Court's 1943 decision unanimously upholding the dusk-to-dawn curfew imposed on Japanese-Americans a few weeks before the mass removal orders of *Korematsu*. The *Hirabayashi* decision preceded *Korematsu* by eighteen months and did the doctrinal work necessary to support the military's actions; the Justices in the

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

2. 323 U.S. 214 (1944).

3. *Trump*, 138 S. Ct. at 2423 (quoting Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

4. As will be noted, not everyone's mood has been celebratory. *See infra* note 69 and accompanying text.

5. 320 U.S. 81 (1943).

Korematsu majority made clear that they felt constrained to uphold mass removal "in light of the principles we announced in the *Hirabayashi* case."[6] *Hirabayashi* was *Korematsu*'s progenitor as Grendel's mother was Grendel's.

Yet *Hirabayashi* has gone unnoticed. In the decades after the war, *Korematsu* drew all of the attention, perhaps because the burdens it endorsed were the more extreme, or perhaps because it formulated its legal rule a bit more crisply, or perhaps because it—rather than *Hirabayashi*—was the case that generations of law students encountered in their constitutional law casebooks. Until *Trump v. Hawaii*, we were ominously reminded time and again in the literature that *Korematsu* had "never actually been overruled."[7] We find no such reminder in those pages about *Hirabayashi*. This is troubling on its own, and even more so because judges and lawyers have continued to cite *Hirabayashi* without evident shame.[8]

This Essay is a warning. Some today are celebrating *Korematsu*'s demise; others maintain that *Trump v. Hawaii* actually revived it. But all of that is a distraction. While the debate swirls, the dangerous *Hirabayashi* decision hides in plain sight, its reasoning unexamined and its holding unassailed. We should attend to *Korematsu*'s mother now, lest she attend to us later.

I. Enter the First Monster

Korematsu v. United States was a constitutional challenge to an Army-imposed order on all West Coast people of Japanese ancestry under the authority of President Roosevelt's Executive Order 9066.[9] The order required them to leave military zones the Army established along the coast after the Japanese attack on Pearl Harbor—effectively the whole of the three states bordering the Pacific Ocean along with a slice of Arizona.[10] Fred Korematsu,

6. *Korematsu*, 323 U.S. at 217.

7. *See* COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 239 (Univ. of Wash. Press 1997) (relating to the government's own findings of lack of military necessity); David A. Harris, *On the Contemporary Meaning of* Korematsu*: "Liberty Lies in the Hearts of Men and Women,"* 76 MO. L. REV. 1, 12 (2011) (noting "*Korematsu* remains 'good law'"); Dean Masaru Hashimoto, *The Legacy of* Korematsu v. United States*: A Dangerous Narrative Retold*, 4 ASIAN PAC. AM. L.J. 72, 84 (1996) ("The celebration of the end of *Korematsu*'s reign is premature; *Korematsu* lives."); Sandra L. Lynch, *Constitutional Integrity: Lessons from the Shadows*, 92 N.Y.U. L. REV. 623, 635–36 (2017) (suggesting that a mere "confession of error" by a Solicitor General "does not overrule a case that was wrongly decided"); *see also* United States v. Chalk, 441 F.2d 1277, 1283 (4th Cir. 1971) (citing *Korematsu* to support the proposition that "freedom of travel like freedom of speech may be subject to reasonable limitations as to time and place").

8. *See infra* notes 119–126 and accompanying text.

9. Exec. Order No. 9066, 7 Fed. Reg. 1407, 1474 (Feb. 19, 1942).

10. *See Korematsu*, 323 U.S. at 214, 220 (referencing "Civilian Exclusion Order No. 34" as the order violated by Fred Korematsu).

a twenty-three-year-old American citizen of Japanese ancestry, defied the order by going into hiding in early May of 1942 rather than presenting himself for removal.[11] Later that month he was apprehended on a street in San Leandro.[12] The federal prosecutor charged him with the federal misdemeanor[13] of "knowingly . . . remain[ing] in th[e] . . . [m]ilitary [a]rea . . . which all persons of Japanese ancestry are excluded from."[14] A different Army order required people of Japanese ancestry to submit to detention at what the government euphemistically called "assembly centers,"[15] but the prosecutor did not charge Korematsu with violating that order.[16] A trial in a San Francisco federal district court in September 1942 resulted in his conviction.[17]

After a first trip to the Supreme Court in 1943 on a procedural question,[18] Korematsu's challenge to his conviction went before the Supreme Court in oral argument on October 11 and 12, 1944.[19] Korematsu attacked the constitutionality of not only the order excluding him from his home but also the order requiring him to report for detention; the two, he argued, operated in tandem.[20] Excluded Japanese-Americans could not wander where they wished, he argued; they could only submit to detention.[21] The government, on the other hand, urged the Court to address only the misconduct that was charged in the information—his defiance of the exclusion order.[22]

On December 18, 1944, by a 6–3 vote, the Court upheld the constitutionality of the exclusion order,[23] breaking off the question of detention for resolution in a different case on the same day, *Ex parte Endo*.[24]

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11. PETER IRONS, JUSTICE AT WAR 93–96 (1983).

12. *Id.* at 93.

13. Act of Mar. 21, 1942, Pub. L. No. 77-503, 56 Stat. 173. This statute made it a federal offense for a person to knowingly defy an Army order entered pursuant to Executive Order 9066.

14. Docket Filing 1 at 1–2, United States v. Korematsu, No. 27635W (N.D. Cal. filed June 12, 1942), https://catalog.archives.gov/id/296048 [https://perma.cc/J5KS-6RWB?type=image].

15. Civilian Restrictive Order No. 1, 8 Fed. Reg. 982 (Jan. 21, 1943).

16. *See* Docket Filing 1, *supra* note 14, at 1–2 (charging Korematsu with a violation of a different order, "Civilian Exclusion Order No. 34").

17. IRONS, *supra* note 11, at 152–53.

18. Korematsu v. United States, 319 U.S. 432, 435–36 (1943). The procedural question was whether an order imposing a sentence of probation was "final and appealable." The Court held that it was. *Id.* at 436.

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

20. Brief for Appellant at 30–31, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22).

21. *Id.* at 28–30.

22. Brief for the United States at 28–29, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22).

23. *Korematsu*, 323 U.S. at 219.

24. 323 U.S. 283 (1944). The *Endo* Court held that the War Relocation Authority had no statutory power to continue to detain loyal Japanese-Americans in the camps. *Id.* at 297. Though one often hears it said that the Supreme Court upheld the "internment" of Japanese-Americans in

Justice Black's opinion for the Court opened with the words that would ensure its spot in generations of law school case books: "It should be noted . . . that all 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."[25] This was something new, at least in linguistic formulation—the first appearance of what would come to be called "strict scrutiny." One might see this as the moment when the Court made good on its famously footnoted hint of six years earlier that a "more searching judicial inquiry" might be appropriate in cases challenging government action "directed at particular . . . racial minorities."[26]

But it was all downhill from there. Korematsu argued, among other things,[27] that Congress had not "authorize[d] the military commander to select citizens upon an ancestral basis for removal from military areas, to segregate and quarantine them and to detain them in concentration camps,"[28] that the exclusion order did not provide even the rudiments of fair process,[29] and that the order embodied racial discrimination barred by the equality norms of due process.[30] He pointed out to the Court that there were no Army orders excluding American citizens of German or Italian ancestry from any zone, even though the nation was at war with Germany and Italy.[31] And he emphasized that there was no valid reason to cast indiscriminate suspicion of disloyalty and subversiveness on every Japanese-American.[32]

The "most rigid scrutiny" promised by the Court turned out to be anything but. Justice Black could not find a government assertion about the necessity of the exclusion order that he would not credit. There was, according to military authorities, "an unascertained number of disloyal members of the group"[33] along the coast, and "it was impossible to bring

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Korematsu v. United States, that is mistaken. *Korematsu* said nothing about the constitutionality of detention, and when the Court did address detention, it disapproved of it on non-constitutional grounds. *Korematsu*, 323 U.S. at 222–23.

25. *Korematsu*, 323 U.S. at 216.

26. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

27. Korematsu's attorney unleashed a barrage of constitutional claims in his brief, most of which were spurious. *See* Brief for Appellant, *supra* note 20, at 46–50 (arguing, among other things, that the exclusion order amounted to slavery and cruel punishment in violation of the 8th and 13th Amendments).

28. Brief for Appellant, *supra* note 20, at 42.

29. *Id.* at 49.

30. *Id.* at 48. The "reverse incorporation" of the equal protection clause—making it applicable to the federal government through the Due Process Clause of the Fifth Amendment—was still ten years away. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("[R]acial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.").

31. Brief for Appellant, *supra* note 20, at 57, 64.

32. *Id.* at 65.

33. Korematsu v. United States, 323 U.S. 214, 218 (1944).

about an immediate segregation of the disloyal from the loyal."[34] "[B]ecause the properly constituted military authorities feared an invasion of our West Coast,"[35] Black reasoned, the "exclusion of the whole group was . . . a military imperative."[36] "[W]ere [*Korematsu*] a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice," he said, the Court's "task would be simple" and its "duty clear."[37] But the case was about exclusion, not detention, and "Korematsu was not excluded . . . because of hostility to him or his race."[38] Rather, said Justice Black, he was excluded because we were at war with Japan, military authorities "feared an invasion of our West Coast," and "military urgency . . . demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily."[39]

It was a blunt syllogism: Race implied danger; time was short; danger and time pressure permitted exclusion, or, as Justice Jackson put it in dissent, "transplanting American citizens."[40] If the peril in the majority's reasoning was lost on any reader of Black's opinion, Jackson's dissent remedied that quickly. Racial discrimination and mass uprootings, he pointed out, were things that the Court "validated" not just for the specific moment but "for all time."[41] Thus endorsed, "The principle [would] lie[ ] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[42]

Thus did the first monster strike.

II. The First Monster Is Slain

As things turned out, the monster would not strike again. The reasoning supporting *Korematsu*'s endorsement of the mass exclusion of Japanese-Americans never served as the foundation for any future Supreme Court judgment.[43] The likely reasons are many. The most obvious is that the

34. *Id.* at 219.
35. *Id.* at 223.
36. *Id.* at 219.
37. *Id.* at 223.
38. *Id.*
39. *Id.*
40. *Id.* at 246 (Jackson, J., dissenting).
41. *Id.*
42. *Id.*
43. The most it received was mentions in passing. *E.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1884 (2017) (Breyer, J., dissenting); Grutter v. Bollinger, 539 U.S. 306, 351 (2003) (Thomas, J., concurring in part and dissenting in part); Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring); Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting); Greene v. McElroy, 360 U.S. 474, 516 (1959) (Clark, J., dissenting); Trop v. Dulles, 356 U.S. 86, 107 (1958) (Brennan, J., concurring); Kent v. Dulles, 357 U.S. 116, 128 (1958); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 222 n.5 (1953) (Jackson, J., dissenting); Youngstown Sheet &

government never again uprooted and relocated a racial group, so no case "on all fours" ever materialized. Scholarly assessment of the *Korematsu* decision started out critical—in 1945, Eugene Rostow called it "a disaster" in the *Yale Law Journal*[44]—and it only grew worse from there.[45] The excesses of the Second Red Scare eroded public support for the arrest and detention of American citizens on national security grounds.[46] A 1980s congressional commission examining the wartime removal and detention of Japanese-Americans harshly condemned the *Korematsu* ruling.[47] And of course the whole fabric of equal protection law was rewoven and tightened in the decades after the war, leaving the *Korematsu* Court's oddly lenient application of strict scrutiny ever more peculiar.[48]

Another blow came late in 1983, when a federal district court granted Fred Korematsu a writ of error *coram nobis* invalidating his 1942 conviction.[49] Intrepid archival work by activists and historians revealed that in litigating the case in the Supreme Court, the Department of Justice suppressed information casting doubt on some of its evidence that Japanese-Americans posed a security risk.[50] In particular, a key government report justifying exclusion alleged that Japanese-Americans had been involved in ship-to-shore signaling with Japanese submarines; the Justice Department

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Tube Co. v. Sawyer, 343 U.S. 579, 661 n.3 (1952) (Clark, J., concurring in judgment); Harisiades v. Shaugnessy, 342 U.S. 580, 589 n.16 (1952); Terminiello v. Chicago, 337 U.S. 1, 34 (1949) (Jackson, J., dissenting).

44. Eugene V. Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945); *see also* Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's* Korematsu *and* Endo *Decisions*, 45 COLUM. L. REV. 175, 183 (1945) (calling *Korematsu* a "dangerous opinion . . . not in fact justified by considerations of sound policy lying either within or without the issues of the case").

45. *See generally* ROGER DANIELS, THE JAPANESE AMERICAN CASES (2013) (discussing how the Supreme Court neglected its duty to interpret the Constitution, thereby allowing racism and fear to fuel a national tragedy); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933 (2004) (exploring the Judiciary's role in the imprisonment of Japanese-Americans and its failure to accept responsibility for that tragic mistake); Jonathan M. Justl, Note, *Disastrously Misunderstood: Judicial Deference in the Japanese-American Cases*, 119 YALE L.J. 270 (2009) (suggesting that the Supreme Court exercised little perception deference and complete means deference with regard to the Japanese-American cases).

46. By passing the Non-Detention Act in 1971, 18 U.S.C. § 4001(a), which repealed the McCarran Internal Security Act of 1950 and forbade the federal detention of a citizen except pursuant to an Act of Congress, legislators invoked the memory of the removal and imprisonment of Japanese-Americans. 117 CONG. REC. 31, 541 (1971).

47. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 7, at 237–39.

48. *See* DONALD W. JACKSON, EVEN THE CHILDREN OF STRANGERS: EQUALITY UNDER THE U.S. CONSTITUTION 83 (1992) (noting that "[t]he wartime Japanese-American cases aside," the Supreme Court was coming to view race as an "inappropriate basis for treating people differently"). This was the case even before *Brown v. Board of Education*, 347 U.S. 483 (1954).

49. Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

50. IRONS, *supra* note 11, at 202–06.

had evidence that this was erroneous but did not alert the Supreme Court.[51] As well, the government failed to inform the Court that an anonymously published intelligence report asserting that Japanese-Americans were overwhelmingly loyal was actually a product of the Office of Naval Intelligence.[52] On the strength of these deceptions, Judge Marilyn Hall Patel of the U.S. District Court for the Northern District of California concluded that Korematsu's conviction must be set aside.[53] The government did not appeal. Of course, the *coram nobis* writ could wipe away only Fred Korematsu's criminal conviction from 1942, not the Supreme Court's 1944 decision affirming it. But there is little doubt that the disclosures of government misconduct underlying the *coram nobis* writ had the effect of further sapping the Supreme Court opinion of vitality.

Korematsu's authority continued to wane in the 1990s and the early 2000s. In 1998, President Bill Clinton awarded Fred Korematsu the Medal of Freedom.[54] Senators on the Judiciary Committee regularly began probing Supreme Court nominees for their views on whether *Korematsu* was still good law.[55] And in 2011, Acting Solicitor General Neal Katyal issued a "Confession of Error" owning up to the deceptions practiced by the wartime Solicitor General's Office in the Japanese-American cases.[56]

The death blow to *Korematsu* finally came in June 2018 when the Supreme Court decided *Trump v. Hawaii*, the challenge to the so-called "travel ban" on entry to the United States that the Trump Administration imposed on noncitizens from certain mostly Muslim-majority nations. After

51. *See id.* at 282–84, 286.

52. It is often said that the government "suppressed" the report itself, but that is misleading. The report was published as an article in Harper's in October of 1942 as the work of an anonymous intelligence officer who had permission from the military to go public with it. *The Japanese in America: The Problem and the Solution*, HARPER'S MAG., Oct. 1942, at 489–90. Two amicus curiae briefs brought the Harper's article to the Supreme Court's attention, so the report itself was not in any meaningful sense "suppressed." Brief for the ACLU as Amicus Curiae Supporting Petitioner at 23 n.11, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22); Brief of Japanese American Citizens League as Amicus Curiae Supporting Petitioner at 107–08, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22). The Solicitor General failed to alert the Court that the report was authentic and the work of a well-regarded officer in the Office of Naval Intelligence, Kenneth Ringle. IRONS, *supra* note 11, at 202, 205–06.

53. *Korematsu*, 584 F. Supp. at 1420.

54. Neil A. Lewis, *President Names 15 for Nation's Top Civilian Honor*, N.Y. TIMES (Jan. 9, 1998), https://www.nytimes.com/1998/01/09/us/president-names-15-for-nation-s-top-civilian-honor.html [https://perma.cc/W64R-QLV9].

55. *See* Adam Liptak, *Path to Supreme Court: Speak Capably, Say Little*, N.Y. TIMES (July 11, 2009), https://www.nytimes.com/2009/07/12/us/politics/12judge.html [https://perma.cc/6P9C-GNSU] (reporting that the "basic script" for Justice Sotomayor's confirmation hearing would involve rebuking *Korematsu*).

56. Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases* (May 20, 2011), https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases [https://perma.cc/X7PV-8XPG].

a campaign featuring frequent unabashed calls to end immigration by Muslims, President Trump signed an Executive Order banning entry into the United States by, among others, all noncitizens arriving from seven Muslim-majority countries.[57] A massive public outcry and a federal district court decision enjoining the enforcement of the order on Establishment Clause and other grounds led government lawyers back to the drawing board.[58] Over the succeeding months, they placed revised orders and proclamations on the president's desk to supplant the original order. These added several non-Muslim-majority countries to the list, removed an exception for members of Christian minorities in majority-Muslim lands, and otherwise enhanced the surface neutrality of the program.[59]

A five-Justice majority upheld the revised program over objections that it exceeded presidential statutory powers and violated the First Amendment. The majority, emphasizing the enormity of the President's powers over immigration and the facial neutrality of the program, rejected the idea that President Trump's actions warranted strict judicial scrutiny.[60]

The four dissenters questioned the correctness of applying only "rational basis" scrutiny to the President's actions, either explicitly in the case of Justices Sotomayor and Ginsburg[61] or implicitly in the case of Justices Breyer and Kagan.[62] Justice Sotomayor went further, waking the sleeping monster of *Korematsu*, at least for purpose of display. The majority's holding, she argued, was "troubling given the stark parallels between [its] reasoning . . . and that of *Korematsu*."[63] She ticked off a list of those parallels: (a) approving

57. Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Michael D. Shear & Helene Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html [https://perma.cc/5NKY-KEDC].

58. Eli Rosenberg, *Protest Grows 'Out of Nowhere' at Kennedy Airport After Iraqis Are Detained*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/28/nyregion/jfk-protests-trump-refugee-ban.html [https://perma.cc/89CJ-Z5HY]; *see* Washington v. Trump, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. 2017) (holding that the States showed that they were "likely to succeed on the merits of the claims that would entitle them to relief"); Motion for Temporary Restraining Order at 5, 11, 14, *Washington v. Trump*, 2017 WL 462040 (No. 2:17CV00141) (arguing that the States were likely to succeed on the merits of their claim on a combination of Equal Protection Clause, Establishment Clause, and Due Process Clause grounds).

59. Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017); Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017); Proclamation No. 9723, 83 Fed. Reg. 15937 (Apr. 10, 2018); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2436–38, 2442 (2018) (summarizing the revised orders and proclamations that supplanted the original order).

60. *Trump*, 138 S. Ct. at 2418–20 (discussing how Supreme Court precedent mandates the use of a rational basis standard of review when an executive action is facially neutral).

61. *See id.* at 2441 (Sotomayor, J., dissenting) (noting that in other Establishment Clause cases the Court has imposed a higher level of scrutiny than rational basis).

62. *See id.* at 2429–33 (Breyer, J., dissenting). While the Breyer dissent does not speak the language of scrutiny levels, the analysis to which it subjects the immigration program under review has all the markings of heightened scrutiny.

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

odious racial discrimination in an executive order; (b) accepting stereotypes about a minority group's supposed inability to assimilate; (c) permitting the government to rely on a vaguely stated national security threat without revealing the intelligence supporting it; and (d) ignoring "strong evidence that impermissible hostility and animus motivated the Government's policy."[64] The majority, she asserted, was "redeploy[ing] the same dangerous logic underlying *Korematsu* and merely replac[ing] one 'gravely wrong' decision with another."[65]

This provocative attack led Chief Justice Roberts to take out a sword to finish off the monster of *Korematsu*. The Chief Justice parried Sotomayor's analogy of the travel ban to the military orders affecting Japanese-Americans. *Korematsu*, he argued, was a case about "forcibl[y] relocat[ing] . . . U.S. citizens to concentration camps, solely and explicitly on the basis of race," an action that was "objectively unlawful and outside the scope of Presidential authority."[66] *Trump v. Hawaii*, by contrast, was a case about "a facially neutral policy denying certain foreign nationals the privilege of admission" to the United States, an act "well within executive authority."[67] Despite the dissimilarities, though, the Chief Justice seized the opportunity to "make express what is already obvious": the *Korematsu* decision 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.'"[68]

Thus was the monster slain, without a hint of hesitation from any of the Court's four other conservatives who joined the Chief Justice's opinion.

III. Yes, the First Monster Is Dead

When Grendel was slain, the Ring-Danes burst into feasting and celebration. One might have expected the same reaction to *Trump v. Hawaii*—that after decades of decrying the fact that *Korematsu* had never been overruled, critics would thrill at its overruling. Oddly, the reaction to the death of *Korematsu* has not been joyful. In fact, many critics maintain that *Korematsu* did not really die, but just shape-shifted to a new form in *Trump v. Hawaii*.[69]

64. *Id.*

65. *Id.* at 2448 (quoting the majority's admission that *Korematsu* is "gravely wrong").

66. *Id.* at 2423 (majority opinion).

67. *Id.*

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

69. *See* Neal Kumar Katyal, Trump v. Hawaii*: How the Supreme Court Simultaneously Overturned and Revived* Korematsu, 238 YALE L.J. F. 641, 648 (2019), https://www.yalelawjournal.org/forum/trump-v-hawaii [https://perma.cc/4YD3-BMGZ] ("Taken together, the opinions in *Hawaii* read like a modern-day adaptation of *Korematsu*."); Quinta Jurecic, *The Travel Ban Decision and the Ghost of* Korematsu, LAWFARE (June 28, 2018, 8:19 AM), https://www.lawfareblog.com/travel-ban-decision-and-ghost-korematsu [https://perma.cc/KZW7-9KEC] ("Now that the opinions are written, however, the connection is clear enough, and both the majority

This is not a fair characterization of either *Trump v. Hawaii* or *Korematsu*. The *Korematsu* decision now stands overruled. Perhaps the best evidence for this proposition comes from Justice Sotomayor, who woke the monster in the first place. She had every opportunity to contradict the majority's assertion that it had successfully overruled *Korematsu*. Yet she did not. She did the opposite. "Today," she wrote, "the Court takes the important step of finally overruling *Korematsu*."[70] "This formal repudiation of a shameful precedent," she added, "is laudable and long overdue."[71] Those are not the words of someone who doubts the death of *Korematsu*.

More importantly, there are just too many differences between President Trump's 2017 immigration orders and Lieutenant General John DeWitt's 1942 exclusion orders to characterize *Trump v. Hawaii* as a stealth revival of *Korematsu*. The *Korematsu* case was about the power of the federal government over citizens;[72] *Trump v. Hawaii* was about the power of the

and the dissenters draw it."); Anil Kalhan, Trump v. Hawaii *and Chief Justice Roberts's "*Korematsu *Overruled" Parlor Trick*, ACSLAW: EXPERT FORUM (June 29, 2018), https://www.acslaw.org/acsblog/trump-v-hawaii-and-chief-justice-robertss-korematsu-overruled-parlor-trick/ [https://perma.cc/2DA2-V58V] ("Instead, Roberts engaged in a cheap parlor trick: purporting to 'overrule' a narrow, distorted version of *Korematsu* while simultaneously embracing and replicating that decision's actual logic and reasoning in the course of his own decision-making."); Anita Sinha, *The Supreme Court's Travel Ban Ruling—Replacing, Not Overruling* Korematsu, HILL (July 1, 2018, 4:00 PM), https://thehill.com/opinion/judiciary/395087-the-supreme-courts-travel-ban-ruling-replacing-not-overruling-korematsu [https://perma.cc/7VYX-KGD5] ("The Court in *Trump v. Hawaii* ultimately extended this good faith presumption of truth to accept the executive's contention that, despite evidence suggesting the travel ban is a discriminatory policy motivated by animosity, the government ordered the ban in the name of national security.").

70. *Trump*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting). Sotomayor might have quibbled with the majority's statement in a different way; she might have argued that the majority's "overruling" of *Korematsu* was ineffective because it was dictum. This would have been an obvious point for her to make. Chief Justice Roberts could not have been clearer that he did not see the travel ban case as presenting the same constitutional issue as *Korematsu*, which makes his words about *Korematsu* dictum by definition. *Id.* at 2423 (majority opinion). That neither Justice Sotomayor nor any other Justice raised this concern implies that they all view the blow inflicted on *Korematsu* as genuinely lethal.

71. *Id.* at 2448 (Sotomayor, J., dissenting).

72. Jamal Greene, Eric Yamamoto, and Rachel Oyama note that the exclusion order in *Korematsu* applied to citizens and noncitizens alike. *See* Jamal Greene, *Is* Korematsu *Good Law?*, 128 YALE L.J. F. 629, 634 (2019), https://www.yalelawjournal.org/forum/is-korematsu-good-law [https://perma.cc/29SU-Y5BN] ("The exclusion order also, and pointedly, did not distinguish between U.S. citizens and noncitizen Japanese nationals."); Eric Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J. F. 688, 714 (2019), https://www.yalelawjournal.org/forum/masquerading-behind-a-facade-of-national-security [https://perma.cc/8NY4-PYTN] ("Second, the forced removal, like Trump's exclusion orders, targeted foreign nationals, too. *Korematsu* was not only about abuse of 'U.S. citizens.'"). They appear to suggest that the *Trump* Court, in casting *Korematsu* as a case about the exclusion just of citizens, may have misapprehended the reach of the *Korematsu* holding and implicitly left the door open to the racial classification of noncitizens. But if that door is open, it is not *Korematsu* that opened it. *Korematsu* was plainly about the exclusion of people in the position of Fred Korematsu—citizens—and not about noncitizens, even though the military order applied to both. In his opinion for the Court, Justice Black said:

federal government over noncitizens. *Korematsu* was about what the government can do to people who are lawfully within United States territory; *Trump v. Hawaii* was about what the government can do to people who are outside the United States. *Korematsu* was about government orders whose plain language singled people out because of their ancestry, making their invidious motivation well-nigh uncontestable; *Trump v. Hawaii* was about government orders whose language did not mention any religious group, and insofar as they mentioned specific nations, specified only a relatively small subset of those around the globe with sizable Muslim populations.[73] The orders in *Korematsu* inflicted the upheaval and trauma of forced uprooting and relocation on each and every person they touched; *Trump v. Hawaii* was about a bar to entering the United States from abroad that applied equally to

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> [W]e are not unmindful of the hardships imposed by [the military order] upon a large group of American *citizens*. Cf. *Ex parte Kawato*, 317 U.S. 69, 73. But hardships are part of war, and war is an aggregation of hardships. All *citizens* alike, both in and out of uniform, feel the impact of war in greater or lesser measure. *Citizenship* has its responsibilities as well as its privileges, and in time of war the burden is always heavier.

Korematsu v. United States, 323 U.S. 214, 219 (1944) (emphasis added).Justice Black's "cf." citation to his opinion for the Court in the 1942 *Kawato* decision is significant because it concerned the wartime rights of Japanese aliens; the citation signals that the *Korematsu* Court understood the situation of noncitizens to present distinct issues. Later, continuing his emphasis on citizenship, Justice Black added that the Court's "task would be simple, our duty clear, were this a case involving the imprisonment of a loyal *citizen* in a concentration camp because of racial prejudice." *Id.* at 223 (emphasis added). The dissenting opinions of Justice Roberts and Justice Jackson similarly focus closely and repeatedly on the order's application to citizens. *See, e.g.*, *id.* at 229 (Roberts, J., dissenting) ("The obvious purpose of the orders made, taken together, was to drive all *citizens* of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution.") (emphasis added); *id.* at 242 (Jackson, J., dissenting) ("Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a *citizen* of the United States by nativity . . . .") (emphasis added). That the Court treated the case as posing a question about the exclusion of citizens and not noncitizens is not surprising; that is exactly how Korematsu's attorney framed it. *See* Brief for Appellant, *supra* note 20, at 5–6 ("[Korematsu] has *no dual citizenship*. He is a loyal *citizen* who has exercised the rights and performed the duties of *citizenship*. . . . More could not be asked or expected of any *citizen*.") (emphasis added). The *Trump* Court should not be faulted for understanding *Korematsu* as a case about the rights of citizens because that is what it was. This is not to say that the question of the rights of noncitizens is unimportant or that classifying them on racial lines is or should be permissible. It is simply to note that the holding of *Korematsu* does not resolve that question.

73. To be sure, Donald Trump said reprehensible things about Muslims on the campaign trail and after becoming President, things that leave little doubt about his own invidious sentiments. *See, e.g.*, Jenna Johnson & David Weigel, *Donald Trump Calls for "Total" Ban on Muslims Entering United States*, WASH. POST (Dec. 8, 2015), https://www.washingtonpost.com/politics/2015/12/07/e56266f6-9d2b-11e5-8728-1af6af208198_story.html?noredirect=on&utm_term=.9bbe702e8ddc [https://perma.cc/B5FN-FMW7]. The Executive Order that the Court considered, however, was neutral on its face, and the Supreme Court has a long history of drawing sharp distinctions between laws that draw explicit racial or religious lines and laws that do not. Indeed, the Supreme Court even has a history of setting aside concerns about invidious motivation for facially neutral actions. *See* Palmer v. Thompson, 403 U.S. 217, 225 (1971) ("It is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators.").

a person arriving for crucial medical care and a person arriving for a vacation.[74] Each of these is a meaningful distinction.[75]

In short, it is easy to imagine a world that rationally distinguishes the government's ability to push a citizen from place to place inside the country from its ability to prevent a noncitizen from entering the country. We can differentiate the two without relying on *Korematsu*'s endorsement of the mass exclusion of American citizens from the West Coast.

If there is a disturbing point of connection between *Korematsu* and *Trump v. Hawaii*, it lies not in the language of the challenged orders or the nature of the burdens the orders impose, but in the Court's trusting posture toward the Executive on national security matters.[76] There is a troubling credulity to the majority opinions in both cases. In *Korematsu*, the government offered none of its own surveillance data on the supposed dangers Japanese-Americans posed and no actual military data about the nature of the looming military threat to the U.S. mainland. Instead, the government simply asked the Court to take judicial notice of a range of public records and statements purporting to document those things.[77] And the Court agreed—something it would later come to regret when archival research a generation later revealed that the Justice Department had not been candid.[78] Similarly, in *Trump v. Hawaii*, the Court looked only at the veneer of neutrality that government lawyers tacked on to the President's oft-stated and oft-tweeted confessions of animus against Muslims.[79]

In this one way, *Trump v. Hawaii* does extend the spirit, if not the letter, of *Korematsu*. But that is not the same thing as saying that the former fails to

74. This is not to say that a bar to entry does not cause harm to individuals—even great harm to those kept from joining family in the United States. It is simply to say that all Japanese-Americans experienced a baseline of extreme harm by being kicked out of their homes, whereas the harms suffered by those excluded by the travel ban were variable, and in some cases, such as those seeking to enter the United States for tourism, comparatively minor.

75. Aziz Huq rejects the idea of a meaningful distinction between the impact of the military orders in *Korematsu* and the impact of the travel ban on a person seeking entry to the United States. *See* Aziz Huq, *Article II and Antidiscrimination Norms*, 118 MICH. L. REV. 47, 90–93 (2019). Both, he points out, eventuated in detention, or at least were capable of doing so, which makes the distinction "less crisp than first appears." *Id.* at 91. The key trouble with this position is that by focusing on the fact or risk of detention, it significantly underdescribes the impacts of the orders. The military order in *Korematsu* forced people to abandon their homes and displaced them by hundreds of miles to places they never wanted to be. The ban in *Trump v. Hawaii* applies to people who choose to leave their homes and choose to travel to a place they do want to be. Of course, in neither context did or do the impacted people choose the detention at the end of the line. But the only way to avoid a meaningful distinction between the overall impact of the government's actions in the two contexts is to ignore everything about the affected person's experience before detention.

76. Neal Katyal makes this point comprehensively. Katyal, *supra* note 69, at 649–55.

77. Brief for the United States, *supra* note 22, at 11 n.2.

78. IRONS, *supra* note 11, at 202–06.

79. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2409–10, 2420–21 (2018) (justifying the travel ban on rational basis grounds).

overrule the latter. On this point—credulity in the face of cursory and unsubstantiated allegations of threats to national security—*Korematsu* does not stand alone. Far from it. In many cases the Supreme Court has accepted government representations about national security threats rather than demanding the underlying data.[80] In national security contexts the executive often cannot open its records to scrutiny and its agents to examination without endangering people, strategy, tactics, and even the well-being of the country itself.[81] The majority's credulity in *Trump v. Hawaii*, however blinkered it may be, has roots in many cases, not just *Korematsu*.

So yes, the first monster has been slain.[82] *Korematsu* has been overruled. Never again can a government lawyer cite it to support a decision to force a racial, ethnic, or religious group away from the place it calls home.[83]

There is, however, something odd—and importantly so—about the way in which Chief Justice Roberts went about the task of overruling *Korematsu*. Yes, the Chief Justice said that *Korematsu* was gravely wrong the day it was decided. But why? What exactly was wrong with it?

If one were to ask this question to any law school graduate of the last forty or fifty years, she would say that the Court's error was to promise a rigorous form of scrutiny of the military's exclusion orders and then use a tepid one. "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect," said Justice Black right out of the gate; "courts must subject them to the most rigid scrutiny."[84] This form of judicial review insists that the government can draw racial lines to address only the most pressing of public problems and to affect only those people who are

80. *See* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1363 (2009) (examining national security fact-deference claims).

81. *See* United States v. Reynolds, 345 U.S. 1, 7 (1953) (establishing the evidentiary state-secrets privilege); Totten v. United States, 92 U.S. 105, 107 (1875) (establishing the categorical state-secrets bar to suit); United States v. Abu Ali, 528 F.3d 210, 225 (4th Cir. 2008) (demonstrating the use of the "silent witness" rule to protect classified information); *see also* Classified Information Procedures Act, 18 U.S.C. app. III §§ 1–16 (2018) (codifying procedures regarding classified information).

82. I do not mean to suggest that the *Trump v. Hawaii* decision is not itself a monster of a different sort—a dangerous precedent in *immigration* law, perhaps a revival of the troubling-but-never-overruled decision of *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), also known as the Chinese Exclusion Case. This is a point that many are making in the literature. *See* Michael Kagan, *Is the Chinese Exclusion Case Good Law? (The President Is Trying to Find Out)*, 1 NEV. L.J. F. 80, 80 (2017), https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1002&context=nljforum [https://perma.cc/S26Q-QS4Z] (drawing parallels between the two cases); Garrett Epps, *The Ghost of Chae Chan Ping*, ATLANTIC (Jan. 20, 2018), https://www.theatlantic.com/politics/archive/2018/01/ghost-haunting-immigration/551015/ [https://perma.cc/3DA4-L6VF] (raising concerns about the revival of the Chinese Exclusion Case). That, however, is not what this Essay is about.

83. *But cf. infra* note 134 and accompanying text (discussing *Korematsu*'s surprising resilience in intra-governmental policy discussions in the post-9/11 era).

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

causing them. This, surely, was the Court's error in *Korematsu*. Protecting the country from an invasion by hostile forces was, of course, a pressing need.[85] But even if we stipulate that some American citizens of Japanese ancestry posed a threat of espionage or sabotage,[86] we can be confident that they did not include the ill Japanese-Americans transported to the camps on stretchers from West Coast hospitals[87] or Japanese-American soldiers serving with distinction in the armed forces.[88] Neither, we can say with confidence, did they include the Japanese-American children who were shipped from Los Angeles orphanages to the so-called "Children's Village" at the Manzanar Relocation Center.[89] In the jargon of strict scrutiny, the exclusion orders were outrageously *overinclusive*: they touched people they didn't need to touch.

They were also outrageously *underinclusive*. If we are to stipulate that some Americans of Japanese ancestry posed a threat of espionage or sabotage, we must also stipulate that some American citizens of *German* or *Italian* ancestry posed a similar threat. Yet the Army never ordered the mass exclusion of American citizens of German or Italian ancestry from one square inch of U.S. territory.

If one were now to ask the same law student to read Chief Justice Roberts's language overruling *Korematsu* in *Trump v. Hawaii*, she would end up scratching her head. The problem in *Korematsu* was that "[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, [was] *objectively unlawful and outside the scope of Presidential authority*."[90] This contrasted with President Trump's action, which was "well within executive authority and could have been taken by any other President."[91] The Chief Justice made no mention of strict scrutiny and no mention of fatal overinclusion or underinclusion. He transformed

85. *But see infra* note 116 and accompanying text (noting that the Solicitor General misrepresented the threat of invasion in presenting the *Hirabayashi* case to the Supreme Court).

86. This is arguably a counterfactual assumption, as the government never arrested an American citizen of Japanese ancestry on charges of espionage or other forms of subversion. *See* DAVID COLE, ENEMY ALIENS 97 (2003) ("None of the interned Japanese was ever charged with, much less convicted of, espionage, sabotage, or treason."). *But see* Eric L. Muller, *Betrayal on Trial: Japanese-American "Treason" in World War II*, 82 N.C. L. REV. 1759, 1794 (2004) (relating the story of the prosecution of three Japanese-American sisters for treason for assisting the escape of German prisoners of war in Colorado in 1943).

87. See, for example, a photograph of a physician examining an elderly patient in a War Relocation Authority emergency hospital for evacuees of Japanese ancestry, Clem Albers, *Manzanar, Calif.—Dr. James Goto*, ONLINE ARCHIVE OF CAL. (Apr. 2, 1942), https://oac.cdlib.org/ark:/13030/ft0580021n/?brand=oac4 [https://perma.cc/YW3B-KYXV].

88. *See generally* C. DOUGLAS STERNER, GO FOR BROKE (2008).

89. Renee Tawa, *Childhood Lost: The Orphans of Manzanar*, L.A. TIMES (Mar. 11, 1997, 12:00 AM), http://articles.latimes.com/1997-03-11/news/mn-37002_1_manzanar-orphans [https://perma.cc/P2WM-EZBV].

90. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (emphasis added).

91. *Id.*

Korematsu into a case—and a mistake—about the boundaries of the powers of the President. The Chief Justice did not explain *why* presidential power does not extend to relocating racial, ethnic, or religious groups of American citizens during wartime. He merely asserted it.

The trouble is not that that proposition is erroneous; in fact it seems quite salubrious. The trouble is that the proposition misses what decades of analysis suggested was the point. 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. The reason to overrule *Korematsu* was to correct that mistake, to make clear that strict scrutiny means strict scrutiny even in a national-security context involving racial distinctions.[92]

IV. Enter the Second Monster

To the Ring-Danes, it mattered little exactly how Beowulf killed Grendel—with which blade, or with what sort of swing of the arm. What mattered was that Grendel was dead. In that spirit, this parsing of Chief Justice Roberts's rationale for overruling *Korematsu* in *Trump v. Hawaii* might seem like pointless perseveration: *Korematsu* has been overruled, and that is all that really matters.

But it matters a great deal. There is a second monster out there, a Grendel's mother, just as menacing as *Korematsu*, perhaps more. It has been in the shadows since World War II, but we have paid it no mind. If it should strike—and there is reason to fear it could—we will want to know that *Korematsu* was overruled for the right reasons. Those reasons might prove our only protection.

The new monster facing us is *Hirabayashi v. United States*. *Hirabayashi* was a constitutional challenge to another army order entered against Japanese-Americans pursuant to Executive Order 9066.[93] It imposed a dusk-to-dawn curfew on all people of Japanese ancestry along the West Coast—citizens and noncitizens alike—and came a few weeks before the exclusion order that Fred Korematsu fought.[94] It imposed no such curfew on American citizens of German or Italian ancestry.[95] At the time the Army imposed the order, Gordon Hirabayashi was a twenty-four-year-old American citizen of

92. Jamal Greene's thoughtful and detailed elaboration of this and related ideas about the ambiguities of what in *Korematsu* the *Trump* Court might have overruled is valuable. *See generally* Greene, *supra* note 72 (discussing how the Supreme Court's claim that the infamous *Korematsu* decision was overruled is "both empty and grotesque").

93. Hirabayashi v. United States, 320 U.S. 81, 83, 85–86 (1943).

94. Proclamation No. 3, 7 Fed. Reg. 2543 (Mar. 24, 1942).

95. *See id.* (declaring and establishing that the order applies to "all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry").

Japanese ancestry living in Seattle.[96] He defied the curfew and refused to report for exclusion and was prosecuted in federal court for the two acts of defiance in separate counts, one for the curfew violation and one for the exclusion violation.[97] He was tried and convicted in federal district court in Seattle in October 1942 and challenged his conviction up to the Supreme Court. Due to a quirk of appellate criminal procedure,[98] the Court addressed only Hirabayashi's challenge to the curfew, leaving the challenge to exclusion for another day.[99]

The Supreme Court unanimously affirmed Hirabayashi's conviction in June 1943. The Court began its analysis of his equal protection challenge with an even harsher indictment of racial discrimination than it would pen a year and a half later in *Korematsu*: "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."[100] Such distinctions, said Chief Justice Stone, had "often been held to be a denial of equal protection"—and would be such a denial in *Hirabayashi* were it not for the fact that "the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas."[101]

The Court undertook a lengthy account of "the conditions with which the President and Congress were confronted in the early months of 1942, many of which . . . were then peculiarly within the knowledge of the military authorities."[102] Those conditions were both external—the threat facing the country from without—and internal—the threat facing the country from within. Relying on information fed to it by the Solicitor General, the Court reported that at the time the Army imposed the curfew, it was "fac[ing] the danger of invasion"[103] of the West Coast by the Japanese military, an area

96. *See* IRONS, *supra* note 11, at 89–90 (stating that Hirabayashi, at the age of twenty-four, had just started his senior year at the University of Washington in Seattle when the curfew became effective).

97. *See id.* at 91–92 ("[T]he federal grand jury in Seattle returned an indictment that charged Hirabayashi with two violations of Public Law 503, the first for failure to report for evacuation and the second for curfew violation.").

98. The quirk of criminal appellate procedure is called the "concurrent sentence doctrine." It says that a federal court will decline to consider questions on counts of conviction if it finds at least one valid count of conviction resulting in a concurrent sentence. *See* Benton v. Maryland, 395 U.S. 784, 787–89 (1969) (discussing the history of the Court's "concurrent sentence doctrine" jurisprudence); *see also* Kang, *supra* note 45, at 944–45 (indicating that Chief Justice Stone utilized the concurrent sentence doctrine to avoid the exclusion issue in *Hirabayashi*).

99. That day would turn out to be *Korematsu v. United States* in December 1944.

100. Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

101. *Id.*

102. *Id.* at 93–94.

103. *Id.* at 94.

densely dotted with military bases and war manufacturing plants.[104] Along the coast, Chief Justice Stone noted, were some 112,000 people of Japanese ancestry, two-thirds of them U.S. citizens, a group purportedly marked by their "solidarity" and their failure to assimilate.[105] Noncitizen parents sent their citizen children to Japanese language after-school programs where, according to the Court, they imbibed "Japanese nationalistic propaganda" that "cultivat[ed] allegiance to Japan."[106] The noncitizens maintained contacts with Japanese consulates, which, the Court related, had "been deemed a ready means for the dissemination of propaganda and for the maintenance of the influence of the Japanese government."[107] All of this left the Japanese—citizens and noncitizens alike—cut off from the white population, and probably "irritat[ed]" by the isolation they felt.[108] This, in turn, "may well have tended to increase . . . their attachments to Japan and its institutions."[109]

Having drawn this bleak landscape of possibly imminent invasion and this cloak-and-dagger caricature of isolated and bitter Japanese-Americans, the Court made quick work of Hirabayashi's equal protection claim. The government, "in the crisis of war and of threatened invasion," had adopted public safety measures—including a curfew—"based upon the recognition of facts and circumstances which indicate[d] that a group of one national extraction may menace that safety more than others."[110] That curfew was "not wholly beyond the limits of the Constitution and [was] not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant."[111]

The *Hirabayashi* opinion had little chance to reverberate because *Korematsu* came along promptly and, in a sense, supplanted it. There was little reason to pay attention to a case permitting the military to confine people *to* their homes once there was a case allowing it to drive people *from* their homes. There was irony in *Hirabayashi*'s disappearance from the scene, because *Korematsu* itself leaned all over it. It was "[i]n the light of the principles we announced in the *Hirabayashi* case"[112] that the *Korematsu* Court validated mass exclusion. Fred Korematsu sought to contest the various factual assumptions that animated the Court's opinion in

104. *Id.* at 95.
105. *Id.* at 96.
106. *Id.* at 97.
107. *Id.* at 98.
108. *Id.*
109. *Id.*
110. *Id.* at 101.
111. *Id.*
112. Korematsu v. United States, 323 U.S. 214, 217 (1944).

Hirabayashi, but the Court simply repeated and readopted them.[113] Justice Frankfurter, "unable to see how the legal considerations that led to the decision in *Hirabayashi* . . . fail[ed] to sustain the military order"[114] commanding mass racial exclusion, confirmed *Hirabayashi*'s status as *Korematsu*'s progenitor.

As the decades passed and the criticisms of *Korematsu* piled up, *Hirabayashi* slipped by virtually unnoticed. Gordon Hirabayashi saw his conviction vacated on a *coram nobis* petition in 1986[115]—much like Fred Korematsu had in 1984, and on much the same grounds—but that impugned only his criminal conviction. It did not—indeed, could not—invalidate the Supreme Court's decision approving the curfew. Acting Solicitor General Neal Katyal included *Hirabayashi* alongside *Korematsu* in his "Confession of Error" in 2011, which made clear that the deceptions marring the litigation of *Korematsu* infected the *Hirabayashi* litigation too.[116] But that has been the extent of the criticism.[117]

It is actually more worrisome than that. Unlike *Korematsu*, which by the 1980s had become a case no judge would mention in polite company, *Hirabayashi* has retained a modicum of vitality as precedent. In 2004, Justice Thomas cited the case in his dissent in *Hamdi v. Rumsfeld*[118]—and not for a salutary idea like the "odious[ness of racial classifications] to a free people,"[119] but for the darker notion that courts owe extreme deference to executive factfinding.[120] That such deference had run the Court aground in *Hirabayashi* itself seemed not to faze him. Other Justices cited the case

113. *Id.* at 218.

114. *Id.* at 224 (Frankfurter, J., concurring).

115. Hirabayashi v. United States, 627 F. Supp. 1445, 1457 (W.D. Wash. 1986), *aff'd*, 828 F.2d 591 (9th Cir. 1987).

116. Katyal, *supra* note 56. Katyal might have gone even further in condemning *Hirabayashi*, as then-recent research had established that the Solicitor General's Office committed even more misconduct in that case than it later did in *Korematsu*. In *Hirabayashi*, the Solicitor General repeatedly insisted that in March 1942 the Army was preparing specifically for a "Japanese invasion" of the West Coast, but archival evidence demonstrates that the Army was in fact preparing for no such thing and Justice Department lawyers almost certainly knew it. Eric L. Muller, Hirabayashi *and the Invasion Evasion*, 88 N.C. L. REV. 1333, 1336–38 (2010).

117. Dennis Hutchinson's careful excavation of Justice Jackson's unpublished concurring opinion in the *Hirabayashi* case is illuminating, but it does not address the merits or demerits of the Court's *Hirabayashi* opinion. Dennis J. Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 SUP. CT. REV. 455.

118. 542 U.S. 507 (2004).

119. Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

120. *Hamdi*, 542 U.S. at 584 (Thomas, J., dissenting).

without evident disdain in 1963,[121] 1967,[122] 1971,[123] and 1978.[124] The Solicitor General cited *Hirabayashi* approvingly in a merits brief defending preventive pretrial detention in the Supreme Court in 1986.[125] And as recently as June of 2018, the case materialized in a brief filed by Department of Defense lawyers in a case pending before a military commission at Guantanamo Bay.[126]

Still alive and on the prowl, *Hirabayashi* can do real damage. Compared to wholesale ouster from an entire chunk of the continent, a curfew is a pretty modest imposition. *Korematsu* was about the trauma of departure: rapacious buyers pawing through their departing Japanese neighbors' belongings at hastily arranged "evacuation sales," panicked families trying to fit their lifetimes into a few pieces of luggage, farmers leaving their crops unattended to rot in the fields, anxious parents calming frightened children, tearful children saying goodbye to family pets. *Hirabayashi*, by contrast, was about making it home before dark and not leaving the house too early in the morning. The intrusion on people's lives *Korematsu* ratified was among the greatest imaginable: a forced internal mass exile of a kind unseen in America since perhaps the Trail of Tears. Curfews, on the other hand, happen all the time, at least comparatively speaking; they're enforced in the wake of natural disasters and civil unrest. Many local governments have juvenile curfew laws on the books.[127]

This is not to say that the curfew on Japanese-Americans did not inflict indignities on all, or grave harms on some—for example, night shift workers, or people suffering nighttime health crises who had to defy the law to go to the hospital. It is simply to say that a huge gulf of suffering and trauma separates curfew from exclusion. The cases are, as we like to say, distinguishable. It is not difficult to mentally sketch out a brief that would argue the distinction, or a judicial opinion that would endorse it.

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121. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 n.12 (1963); *id.* at 213 (Stewart, J., dissenting).

122. United States v. Robel, 389 U.S. 258, 270 (1967) (Brennan, J., concurring in the judgment).

123. N.Y. Times Co. v. United States, 403 U.S. 713, 722 (1971) (Douglas, J., concurring).

124. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978); *cf.* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 214 (1995) (referencing *Hirabayashi*'s "most unfortunate results").

125. Brief for the United States at 17, United States v. Salerno, 481 U.S. 739 (1986) (No. 86-87), 1986 WL 727530, at *17.

126. Nicole Goodkind, *Trump Administration Uses Japanese Internment Example to Deny Rights to Detainees*, NEWSWEEK (June 15, 2018, 5:14 PM), https://www.newsweek.com/guantanamo-bay-donald-trump-japanese-internment-980049 [https://perma.cc/3NNY-W93A].

127. For just one example, see DALLAS, TEX., CODE § 31-33(b) (2019), http://library.amlegal.com/nxt/gateway.dll/Texas/dallas/cityofdallastexascodeofordinances/volumeii/chapter31offenses-miscellaneous/articleigeneral2?f=templates$fn=default.htm$3.0$vid=amlegal:dallas_tx$anc=JD_31-33 [https://perma.cc/XS28-V8FA].

The consequences of that thought experiment are concerning. One can imagine 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 identity cards; mass federal job layoffs; mass loyalty inquests—the list can expand to the limits of a person's ability to imagine the fear and anger of a nation reeling from a terror attack. All of these would have a potential constitutional pedigree in a world where *Korematsu* is dead but its mother, *Hirabayashi*, survives.

V. Slaying the Second Monster

When Grendel's mother appeared at the mead hall to avenge her son's death, the Ring-Danes were sleeping off the aftereffects of their banquet revelry. Assuming the mead hall safe, Beowulf had departed and was slumbering elsewhere. This gave Grendel's mother the chance to wreak havoc, killing a Danish prince and making off safely to her underwater lair. Beowulf had no choice but to dive into the lake and challenge her on her turf, with a blade forged for a giant. Only after an epic struggle did Beowulf kill Grendel's mother.

Hirabayashi is still on the prowl, and we have been sleeping. If the case is to be overruled, how might it be accomplished?

Speedily, one hopes. When the Supreme Court overruled *Plessy v. Ferguson*'s[128] separate-but-equal doctrine in *Brown v. Board of Education*,[129] the only thing that was clear was that the Equal Protection Clause would no longer tolerate racial segregation in public education. Segregation by law, though, was a pervasive practice across the American South. Uncertainty briefly reigned, as people puzzled over whether segregation at other public facilities might survive. The Court put the matter quickly to rest, condemning segregation at golf courses[130] and beaches[131] in per curiam opinions that did nothing more than cite *Brown*. The message was clear: *Brown* did not state a rule about public education only. It stated a broad legal principle about the categorical invalidity of state-sponsored racial segregation wherever it cropped up.

In the follow-through to overruling *Korematsu*, the Supreme Court would do well to follow the *Plessy* example by announcing that *Hirabayashi* is also dead. The Court should make clear that *Korematsu* wasn't just wrong on its facts but embodied a broadly illegitimate rule.

And what is that rule? This is where the oddity of Chief Justice Roberts's language in *Trump v. Hawaii* really matters. The Chief Justice said that

128. 163 U.S. 537 (1896).

129. 347 U.S. 483 (1954).

130. Holmes v. Atlanta, 350 U.S. 879 (1955) (per curiam).

131. Mayor of Baltimore City v. Dawson, 350 U.S. 877 (1955) (per curiam).

Korematsu was wrong because the mass exclusion order was "outside the scope of Presidential authority."[132] But that is not why *Korematsu* was wrong, or at least it is not the most important reason. *Korematsu* was wrong because it upheld a government order that cavalierly and needlessly impacted Japanese-American orphans, tubercular patients in sanitaria, and soldiers in the U.S. Army, while leaving American citizens of German and Italian ancestry untouched. It was wrong because it made a mess of strict scrutiny, tolerating absurd over- and under-inclusion when it ought to have tolerated none, or almost none.

Hirabayashi is wrong for just the same reasons. The orphans and the hospital patients and the soldiers were just as needlessly placed under curfew as they were later excluded, while American citizens of German and Italian ancestry remained free to stroll the nighttime streets. The essential problem of *Hirabayashi*, just as with *Korematsu*, is not that the orders against Japanese-Americans fell outside the scope of presidential power. To frame the problem as a flaw of government structure, a president straying outside the boundaries of his authority, is to imply that the other branch—Congress—could do what the president could not. But that cannot be right; surely a *statute* directing racial curfew and exclusion would have had the same constitutional defects as an executive or military order. No, the problem in the cases is not one of transgressed powers in branches of government; it is one of individual rights.

There is reason to believe that the Court that decided the two Japanese-American constitutional cases of World War II would agree that overruling one entails overruling the other. Justice Black worked hard to tie *Korematsu* to the earlier *Hirabayashi* case, essentially adopting the *Hirabayashi* Court's findings about the internal threats posed by Japanese-Americans and the external threats posed by the Japanese military. Justice Black thought he was doing no new doctrinal work in *Korematsu*; he was simply upholding exclusion "[i]n the light of the principles we announced in the *Hirabayashi* case."[133] One could therefore argue that the overruling of *Korematsu* in *Trump v. Hawaii* forcefully implied the overruling of *Hirabayashi*.

But we do not have a doctrine of silent overruling by inference. The Court has to come out and say it, and it should do so. Regrettably, the fate of *Hirabayashi* is uncertain in the wake of *Trump v. Hawaii.* We are living in a time when a domestic terror attack—another September 11—might at any moment be seconds away. That is an inauspicious moment for uncertainty about whether racial or religious discrimination short of internal exile violates equal protection. We recently learned that in the immediate wake of the September 11 attacks, high-ranking Justice Department lawyers debated

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

133. Korematsu v. United States, 323 U.S. 214, 217–18 (1944).

reviving *Korematsu* in service of racial profiling at airports.[134] That frightening fact alone should prompt action on *Hirabayashi*.

The first monster is dead, but the second one lives. At any moment she might be upon us as we slumber. The time to strike is now.

134. *See* Email from Helgard C. Walker, Assoc. White House Counsel, to Alberto Gonzales, White House Counsel (Jan. 17, 2002, 10:12 AM), https://www.judiciary.senate.gov/imo/media/doc/08-21-18%20GWB%20Document%20Production%20-%20Leahy,%20Coons,%20Blumenthal,%20Booker%20(Released%2009-06-18).pdf [https://perma.cc/GA8L-XRPZ] (theorizing that racial profiling at airports could be legal under principles derived from *Korematsu*).