Korematsu: A Constitutional Calamity; Equal Protection Versus National Security

Kristopher W Zinchiak, University of Miami
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**Historical Introduction:**

Fred Korematsu was a United States citizen of unquestioned loyalty who had the harsh misfortune of becoming the focal point of one of the darkest eras in our great nation’s illustrious constitutional law history. The core of this disaster arguably began with the fervent racism and xenophobic attitudes that our nation harbored against the Japanese throughout the middle of the 19th century. It was during this time period that many people considered those of Asian descent to be “savage” and “uncivilized,” perpetuating numerous occurrences of racial hostility and violence. This anti-Japanese, “yellow peril” mindset then proliferated exponentially on December 7, 1941 when the Japanese attacked Pearl Harbor. This day that President Roosevelt so famously referred to as “the day that will live in infamy” immediately set the stage for a case that will live in infamy in the chronicles of our nation—the case of Fred Korematsu. The following day, the United States declared war on the Japanese thereby signifying the beginning of our nation’s involvement in World War II. It was at this time that the government began issuing propaganda which displayed the Japanese as a “vile” and “dangerous” race of people. Further propaganda focused on the relocation of Japanese-Americans from the west coast, also known as the Japanese-American internment. The media played on our nation’s political fear of entering another war and our social fear of the Japanese as a group. Needless to say, any efforts to protect the civil rights of Japanese-Americans at this time were far surpassed in both number and spirit by our nation’s collective and

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1 It is imperative to commence any discussion of constitutional law with these appalling details of the historical and factual background leading up to Fred Korematsu’s conviction so that readers may not only understand the foundation of where our nation went wrong during this critical time in our history, but so that they may also be provided with a vivid and powerful example to prevent our nation from ever making the same mistake again when such opportunities (including 9/11) present themselves in the future.
overwhelming anti-Japanese sentiment. The chief justification provided for this rampant racism was national security, and this alluring validation remained unchallenged by many frightened Americans. These were the unbearable circumstances that were stacked against Fred Korematsu as he embarked upon his quest to be treated equally as a United States citizen, a class to which he irrefutably belonged. This was the state of affairs that began in this country long before Fred Korematsu was even born, preventing a United States citizen from rightfully attaining the inalienable rights that the Constitution guaranteed to him. There is a famous maxim which declares that “the truest test of being a man is the resilience displayed when you think you can’t win.” Under this standard, we should all admire and celebrate the example of Fred Korematsu, a true man that fought his own war against an intangible, but hardly invisible enemy.

**Factual Introduction/ Issues Presented:**

Fred Korematsu was born in California in 1919 and was twenty-three years old when Executive Order 9066 was issued by President Franklin D. Roosevelt. This executive order granted broad discretionary powers to military commanders, authorizing them to demarcate “military areas” on the west coast from which anyone could be excluded. In effect, this led to the removal of ethnic groups, Japanese-Americans in particular, from these military areas and resulted in their placement into internment camps, where they were prohibited from leaving without permission. Instead of complying, Korematsu refused to be removed from his Italian-American girlfriend and decided to become a fugitive. He was subsequently arrested and convicted for remaining in his home contrary to the exclusion order. His conviction was affirmed by the Circuit Court of Appeals and the Supreme Court granted certiorari to determine the
constitutionality of the order under which he was convicted. The issue that was to be decided in the case was whether this exclusion order was constitutional. Phrased more generally, the issue facing the Court was whether the United States government could remove a U.S. citizen from his home against his will, relocate him, and force him to remain in an internment camp during a time of war solely on the basis of his national origin. The Court recognized that under normal circumstances, the exclusion of large groups of U.S. citizens from their homes would run contrary to our form of government. However, the Court found that given the warfare conditions at the time and the threat of another hostile attack, the order was constitutional and that it was within the war powers of the United States government to remove a U.S. citizen from his home and force him to remain in an internment camp indefinitely in the interests of national security.

**Standard of Review:**

There are two main levels of review that a court may use to determine whether a statute is constitutional. First, the higher level of review that a court may apply is called strict scrutiny. Courts will apply strict scrutiny either where the statute involves a suspect class or impairs a fundamental right. The three most recognized examples of suspect classes as determined by the Supreme Court are race, national origin, and alienage. Common characteristics that lead a court to determine the existence of a suspect class include the immutability of the trait, the frequency and falsity of stereotypes, and the

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2 For there to be an equal protection problem, the issue must be whether the government has behaved reasonably in setting up the classes in the first place.

3 Interestingly, thousands of Italian-Americans were placed in internment camps without so much as a hearing as well during this time period. In fact, Joe DiMaggio’s father, who was living in San Francisco at the time, had both his house and his boat confiscated. One official boldly remarked that had he not been the father of such a famous sports icon, he would have been placed in an internment camp as well.

4 Several arguments have been asserted for the justification of strict scrutiny in racial classifications; in my opinion, the strongest of which being the fact that there are very few, if any, legitimate government purposes for which race is relevant. (Textbook at 534) Furthermore, of the three examples provided, alienage is the most tenuous.
historical political powerlessness of the class. It is significant to note that strict scrutiny will only apply in cases where the court determines that the government’s disparate treatment of the class was both purposeful and invidious. In order to satisfy the strict scrutiny standard, the government must show that they have a compelling objective (which is the highest standard known to constitutional law), and that their means are necessary for achieving their objective. The latter refers to the means-ends connection; i.e. whether the goals have a legitimate connection to the means.\footnote{This is an expression of process theory which will be elaborated upon later in the essay.} Thus, there must be a tight narrowly tailored fit between the means and the ends. If less restrictive/discriminatory alternative means exist that would accomplish the objective as well or almost as well, then the means that the government chose are not necessary.

Conversely, the lower level of review by a court is the rational basis review test. This test is applied to statutes that do not involve a suspect class and do not impair a fundamental right. This is a much easier test to satisfy since the government must only show that they are pursuing a legitimate governmental objective and that there is some rational relation between that objective and the classification at hand. Furthermore, the court does not even have to believe that the two requirements have been satisfied; they must only find that it is conceivable that the government satisfied the two requirements.

Since the classification in \textit{Korematsu v. United States} was on the basis of national origin, and national origin is a suspect class, the Court appropriately used a strict scrutiny standard of review and placed the burden on the government. The utilization of strict scrutiny was also warranted in this case since it was clear that the use of national origin as a suspect classification was purposeful by the government and more than just an incidental effect of the order. Furthermore, this attempt by the government to treat
Japanese-Americans in a stigmatizing manner also fulfills the requirement of being invidious since this class was treated less favorably than other classes. Once the strict scrutiny standard of review was employed, it became the Court’s job to strike down the statute unless the government was able to show the existence of a compelling objective and a necessary means. The compelling justification that the government asserted in this case was national security. In my opinion, the Court appropriately accepted this argument since the safety of our nation is unquestionably an imperative objective. But since the means are only necessary if there are no less discriminatory alternatives that will accomplish the objective as well or almost as well, the government was also required to convince the Court that the means they chose to implement were the least discriminatory means available to accomplish their objective. In an effort to comply with process theory, the Court found that the means were necessary in order to accomplish the government’s stated objective of national security. However, our country did not need to implement internment camps and remove U.S. citizens from their homes in order to feel safe and best achieve the interests of national security. Other alternatives such as consensual interviews, background checks, and document inspections would have been just as effective for keeping our nation safe and clearly would have been a more appropriate reflection of our Constitution than the means that were chosen in this situation. Thus, the application of strict scrutiny in this case should have served to strike down the order and render it unconstitutional, as opposed to the endorsing outcome that the Court selected. Yet instead, *Korematsu v. United States* unfortunately became historic for its controversial holding, making it significant among constitutional law
scholars for being the final occasion where the Supreme Court upheld a race-specific statute which disadvantaged a racial minority.

**Competing Theories of Equality:**

Two levels of equality exist within the realm of constitutional law. The first is the process theory which fits hand in hand with the two-tiered level of scrutiny discussed above. The definition of equality under the process theory is treating people the same. Thus, the emphasis is placed on principles of neutrality and the analogy is often drawn to the anti-differentiation principle where it is considered inappropriate to treat individuals differently on the basis of race. There are no absolutes in process theory, but instead the focus is on the rights of the individuals and the intent of the state or government in promulgating the statute or order. The value of historical considerations is outweighed by the examination of the formal meaning in the social context. Perhaps most significantly, race is not a consideration at all under process theory. Process theory is never categorized as result-oriented because judicial activism is strongly discouraged. Therefore, under process theory, the court should not substitute its judgment for that of the legislature’s judgment with respect to value opinions. Post-1973, this approach has firmly entrenched itself as the constitutional model.

On the other hand, the substantive theory of equality focuses on groups instead of individuals, while placing the importance on differences as opposed to similarities. Therefore, the analogy here can be drawn to the anti-subordination principle which considers it inappropriate to discolor certain groups in society with the smear of a subordinated status. The substantive theory also takes into consideration the purpose of the government’s legislation as opposed to intent, while placing an emphasis on historical
experience as well. It is designed to be more of a realist approach rather than a formalist approach, thereby deliberating upon the outcome or result as part of the decision-making process. This theory proscribes limitations on what the government can do, often times creating a class of impermissible ends. In other words, this theory stands for the proposition that there are simply things that the majority should not be able to do merely because they are the majority.6 This class of impermissible ends often times leads to the creation of norms, a principle that, along with liberty, finds a home in the expansive notions of the substantive theory. Even the prohibition of race as a consideration by a state is arguably an example of the substantive theory, since the usage of race (or lack thereof) is playing a role in the decision-making process.7

In theory, equal protection contains no substantive norms. It is supposed to be all about process. However, this fails to explain some of the greatest cases of our time which exemplify the substantive theory of equality.8 These cases demonstrate the ability and desire of our judicial system to go beyond process theory toward the pursuit of justice in certain instances. It is in these instances that the court declares that there are particular ideologies, values, and morals that are simply wrong, regardless of whether they are able to be reconciled with the often oppressive and shortsighted boundaries of process theory.9 Korematsu v. United States was an opportunity for our nation’s judicial system to recognize and deplore the existence of one of these instances. By identifying

6 By dealing in absolutes, the Court in Romer v Evans 517 U.S. 620 (1996) illustrated this principle, declaring that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare… desire to harm a politically unpopular group cannot constitute a legitimate government purpose.” Romer at 634.
7 This example stems from the case of Loving v. Virginia, 388 U.S. 1 (1967).
9 This lends credence to the argument asserted in the textbook that the use of “racial classifications violates a fundamental moral norm.” (Textbook at 535)
that the rationale behind the underlying ideology consisted of nothing more than racial animosity which no governmental objective can justify, the Court could have implemented its substantive tools to achieve the result that our Constitution demands. Yet, despite the Supreme Court’s statement that “pressing public necessity may sometimes justify the existence of such regulations; racial antagonism never can,” little was done in terms of the Court’s actual holding to support these words, demonstrating how process theory was used to overlook the long history of hostility against Americans of Asian descent. Whether the Court wanted to admit it or not, race did play a major role in the creation of this order, and thus a substantive theory of equality should have been employed to examine its constitutionality. Nevertheless, in adhering to the stringent structure of process theory, the Court in effect declared that any substantive factual basis would be heavily outweighed, if not become irrelevant, under the application of strict scrutiny. Ironically, these metaphorical confines within the spectrum of constitutional law directly resulted in the actual confinement of thousands of United States citizens. The resulting stain from this judicial decision will be forever imprinted on our nation’s history books, illustrating the momentous weight of disparity between these two theories in a far greater manner than mere definitions could ever describe.

**Factual Basis for Detention and Strict Scrutiny:**

The factual basis for the detention of the Japanese-Americans was solely based on their national heritage, a foundation that was constitutionally neglected in the interests of national security. Yet, for most detainees, and Korematsu in particular, there were no specific facts that prosecutors could raise to support the exclusion of these Japanese-

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Americans from their homes and their placement in internment camps. Acknowledging that the group was over-inclusive and no doubt contained members who were loyal to our country, the military asserted that it was impossible at the time to “bring about an immediate segregation of the disloyal from the loyal.”\footnote{Korematsu at 218-219.} Aside from this component, there was no substantial factual basis for the detention of many of these Japanese-Americans.\footnote{Any substantive factors that did exist weighed heavily in favor of Korematsu and his fellow Japanese-Americans. However, this did not matter under the strict scrutiny standard employed by the Court, which was enveloped within the confines of process theory.} It was this obviously overbroad correlation between the national heritage of these U.S. citizens and our country’s national security interest that the government relied upon to satisfy their strict burden of proof. Yet, unbeknownst to the Court at the time, it was later determined that government prosecutors knowingly presented fictitious information to the Supreme Court in an effort to attach fraudulent credibility to their constitutionally tenuous correlation; an action which admittedly had a significant impact on the Court’s decision.\footnote{This was the basis for a federal district court’s 1984 decision to overturn Korematsu’s conviction.} Thus, the government had succeeded in creating the perfect storm of moral panic, providing the Court with the means to justify a ruling in their favor. The fact that the circumstances of the case occurred during war-time conditions did not reduce the level of strict scrutiny, but if anything, only factored into the analysis for how narrowly tailored the means were to the ends. The Court stated that Korematsu was not excluded because of his race, but that he was excluded because our nation was at war. However, Justice Murphy’s dissent suggests that in order to justify this, a showing that all individuals of Japanese descent are dangerous would have had to have been made. Knowing that this was not the case, the Court instead focused on the alleged impossibility of separating the faithful from the unfaithful, as mentioned above. As a result, the Court
agreed that given the wartime circumstances, this exchange of constitutional value for safety was warranted.

**Substantive Dimension of the Means-Ends Question:**

In light of the discussion above, whether national security will ever be able to justify the use of race or ethnicity as the *sole or primary* factor in arresting, detaining, or imprisoning members of a racial or ethnic group depends upon the theory of equality being utilized. Under a substantive theory of equality, national security will never survive as a justification for using race as the sole or primary factor. Instead, it is appropriately placed within the class of impermissible ends that the government cannot achieve since it cannot co-exist with our most fundamental notions of liberty. However, under the process theory, *Korematsu* demonstrates that this justification is a very viable and legitimate possibility, thereby illustrating the inherent perils of process theory. Process theory is incapable of recognizing that our nation will never benefit from trading constitutional value for safety. Without striving to keep this core foundation firmly entrenched, our system of government is no different than some of the dictatorships that we condemn. Racism can never make us safer; but instead only serves to erode the protection that our nation provides, while simultaneously undermining the foundation of what makes America unique: our Constitution, our freedom, and our democratic form of government. Therefore, it is imperative that our judicial system does not forget these hallmarks of our nation when determining whether the means used are truly justified by the ends.
The Role of History:

Often referred to as the “most celebrated footnote in constitutional law,” Justice Stone suggested in footnote 4 of his opinion in *United States v. Carolene Products* that courts should apply a heightened standard of review to statutes which use race as the basis for governmental action.\(^{14}\) Assuming that this is true, courts cannot then be expected to change their level of scrutiny to fluctuate with the arguments of the parties before them. Therefore, a claim of national security by one party as a viable objective does not change the fact that under strict scrutiny, a means-ends analysis should be conducted to test whether the means used for achieving that objective are necessary. This heightened level of scrutiny directly leads to the presumption that when race is used as a basis for government action, that action is usually irrational.\(^{15}\) Although this presumption should not result in an absolute prohibition of race-based statutes, it should remain steadfast and viable in the context of a claim of national security. By determining the constitutionality of race-based statutes on a case-by-case basis, courts are granted the flexibility to allow for the extremely rare instances where the use of race can benefit a certain group of people without harming or excluding other groups.\(^{16}\) However, national security claims are not one of these instances. It is difficult to conceive any plausible scenario where the implementation of a discriminating race-based statute would serve to make our nation as a whole safer. Furthermore, failing to take into consideration the significance of historical circumstances directly relevant to the group of individuals at

\(^{14}\) *United States v. Carolene Products*, 304 U.S. 144, 153 (1938)

\(^{15}\) This is supports the argument advanced in the textbook that “rare is rarely, if ever, relevant to any legitimate governmental purpose,” justifying the usage of strict scrutiny for racial classifications. (Textbook at 534)

\(^{16}\) For example, the promulgation of statutes which recognize that certain ethnic groups are medically more susceptible to certain health problems without excluding or diminishing the rights of less susceptible groups. However, even the execution of this example is difficult to conceptualize without disadvantaging someone. (Textbook at 534)
hand is equivalent to arbitrarily choosing which facts to bring into evidence for evaluation. In a case like Korematsu with such an long and extensive historical record of xenophobia, not only would the court be perpetuating a great disservice to the Japanese-American class of U.S. citizens, but our nation as a whole would be considerably less safe if this evidence were to go overlooked. Courts cannot ignore the various complexities that accompany race simply because they do not fit neatly into a process theory philosophy. The role of history is indispensable for the very reason that it provides insight into these complexities. Ignoring this powerful insight is comparable to ignoring the existence of the murder weapon during a murder trial. For in the end, it does not matter whether the devastating destruction occurs on the outside or the inside. The result is the same in terms of how these individuals are recognized and viewed in our society. If the court begins disregarding the very instrument that perpetrates the demise of an individual or group of individuals, it has chosen to position itself as an adversary to the principles upon which our nation stands.

**Conclusion:**

Writing with a sizeable dose of optimism, it is my hope that our nation has learned its lesson by never forgetting the inequitable hardships that were imposed on Fred Korematsu and those similarly situated. Yet, as Justice Jackson admonished in his Korematsu dissent: “Once a judicial opinion…rationalizes the Constitution to show that

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17 This is supported by another argument advanced in the textbook which illustrates that “defects in the political process make it especially likely that racial classifications will be based on ‘hostility’ or inaccurate stereotypes.” (Textbook at 535)

18 Ironically, the suppression of these historical arguments lends as much opportunity for the victims of racial discrimination to be heard as the victim in the murder trial.

19 It can be argued here that the victims of racism suffer an even lower social standing than the deceased since often times, their political and social credibility is viewed as negative as opposed to simply nonexistent.

20 The lesson here is illustrated by the old adage: “Stand for nothing and you will fall for anything.”
the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination… (and) the principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”\textsuperscript{21} Thus, my fear equally persists that our nation will be tempted to resort to similar behavior during parallel times of moral panic in the future. The evils of the world will always present challenges to our democracy. However, we must remember that the greatest opportunities lie within the greatest challenges, and that it is the collective responsibility of our nation to remain the “shining city on the hill” in order to provide inspiration to people of all races and national origins across the world. The application of strict scrutiny to racial classifications in our judicial system is but a stepping stone to this responsibility. We must also implement a greater usage of the substantive theory of equality so that the values upon which our nation was founded can continue to serve for the protection of our citizens through the establishment of a class of impermissible ends.\textsuperscript{22} Furthermore, we must never discount the crucial role that historical arguments play when applying the presumption that race, when used as a basis for government action, usually renders the action irrational. Actively applying these constitutional law principles were serve to ensure that all United States citizens, regardless of race or national origin, can rest assured that the dream of equality remains alive and that the ghosts of \textit{Korematsu} forever remain in the internment of our past.

\textsuperscript{21} \textit{Korematsu} at 246.
\textsuperscript{22} With all due respect to Judge Nevius, we cannot ask the judges of this country to be more than men, for it is their pragmatism that affords them the ability to attain greatness.