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Korematsu, Hawaii, and Pedagogy

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KOREMATSU, *HAWAII*, AND PEDAGOGY

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I. INTRODUCTION: THE TYRANNY OF SCARCE TIME WHEN "INTRODUCING" CONSTITUTIONAL LAW

I begin with some reflections on my own career in teaching—or, perhaps, attempting to teach—American constitutional law to generations of students from 1975 to the present. Or, more accurately, until about three years ago, when I taught introductory constitutional law for the last time. I am quite happy to no longer be teaching that course, whatever joys it did provide me in the past, for a very simple reason: I became more and more frustrated by the demands of coverage, i.e., the duty to take up a variety of topics—including attendant cases and collateral materials—and the unfortunate certainty that what I was in fact doing was, at best, the barest skimming of rich surfaces. As a matter of fact, I am quite certain that I covered far less material than most of my colleagues, but that did almost nothing to alleviate my constant feeling, freely expressed to the students, that we were in fact "racing" through the material and, therefore, doing genuine intellectual justice to almost nothing that was ostensibly being discussed. I compared the course to a college "mixer" where one engaged in several superficial conversations hoping to elicit just enough information to know whether it might be desirable to seek out further contact.

My ideal course, it turns out, is the one I taught at the University of Texas three years ago in lieu of the introductory course, where we spent the entire semester on four cases and two speeches. I believe I titled the course "Reading Cases Really Closely." The course opened with James Madison's speech on the (un)constitutionality of the proposal to charter the Bank of the United States, on which we spent several days, followed by seven

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full weeks on the case upholding the charter of the Second Bank, *McCulloch v. Maryland*.[1] We spent much of the time reading the speech and case aloud, with frequent stops, sometimes after every sentence, to discuss the argument being presented—or, often, implied without full elaboration. Following spring vacation, we turned to the other cases—*Strauder v. West Virginia*,[2] *Home Bldg. & Loan Ass'n v. Blaisdell*,[3] several of the opinions in *Youngstown Sheet & Tube Co. v. Sawyer*,[4] plus a speech by Frederick Douglass on constitutional interpretation.[5] That was it, and even then, I felt that we were racing through the post-vacation materials, since so much more could have been said (and discussed) than we had time for.

Indeed, I find one of the genuine oddities—perhaps "pathologies" would be the more appropriate term—of the American legal academy to be its pretense that it teaches students how to read and analyze cases. How can that really be, given the remarkable paucity of time spent on any given case—and its actual text—that happens to be assigned? Students almost never read a case in its entirety, and this is true even of the sections of an opinion that follow what are often histories of the procedure of the particular case and how it happened to arrive at the Court at all. There is simply not the time. I often compare the way we "introduce" constitutional law to impressionable students to a course, say, on "The American Novel" that would include two or three chapters from *Moby Dick*—a book some students might believe to be about whaling—before moving on to selected chapters from *Huck Finn* and so on. There might be some value to such a course, but no one should believe that it has much to do with genuinely grappling with what either Melville or Twain wrote—or what they might have thought they were really writing about. In the casebook that I co-edit, *Processes of Constitutional*

1. *See* JAMES MADISON: WRITINGS 480-90 (Jack N. Rakove ed., 1999) (detailing the speech James Madison gave in Congress on Feb. 2, 1791 opposing the National Bank); *see generally* 17 U.S. 316 (1819).

2. *See generally* Strauder v. West Virginia, 100 U.S. 303 (1879).

3. *See generally* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

4. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) [hereinafter *Youngstown Steel v. Sawyer*].

5. *See generally* Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery* (1860), *in* AMERICAN CONSTITUTIONALISM VOLUME II: RIGHTS AND LIBERTIES (Howard Gillman et al. eds., 2013).

Decisionmaking, the one and only case that is reprinted without editing is *McCulloch*.[6] All other cases are significantly edited, even though a feature of our very long casebook is that it includes fewer overall cases than do any of our competitors. Those cases we include are *less* severely edited, but edited they most certainly are. Perhaps it is worth noting that one of the very first seminars I ever gave at the University of Texas Law School, where I have now been teaching for forty years, focused on the editorial process itself. Students were invited to offer their own edits of given cases, with memoranda supporting their decisions as to what to include and what to cut.

I note, incidentally, that in the "Reading Cases Really Closely" course, we spent some significant time comparing how different casebooks presented the cases we were reading and what difference the editorial decisions made to one's understanding of the case. If, as is common, the "factual" background of the "case and controversy" was more-or-less omitted, then that raises obvious questions for students trying to "brief" the case. What, are, for example, the "facts" of *Youngstown Steel v. Sawyer*?[7] Hugo Black, in his majority opinion, barely informs the reader that something called the Korean War is going on, whereas Chief Justice Vinson, in his dissent, spends pages—never presented in casebooks—explaining why that War is in fact the opening battle of World War III.[8]

So, what does this have to do with responding to Mark Killenbeck's truly superb article on *Korematsu* (and, let us not forget, *Hawaii*)?[9] The answer is simple. I know of literally no article better suited to introduce students to the complexities of constitutional analysis, though the caveat is that such an introduction would require spending an extensive amount of time not only on the cases themselves, but also, and just as importantly, on the absolutely crucial questions that Killenbeck asks on almost literally every page. This is not an article to be skimmed. It must be grappled with in just the same way that Killenbeck does for

6. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 39 (7th ed. 2018).

7. *See generally* Youngstown Steel v. Sawyer, 343 U.S. 579 (1952).

8. *Id.* at 582-84 (majority opinion); *see also id.* at 668-73 (Vinson, C.J., dissenting).

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

104 manuscript pages. Indeed, my one and only criticism of the essay is that it is too short. I firmly believe that it can—and should—be doubled in size in order to become a truly essential book for students and their professors alike, on what "case analysis" really requires, unlike the desiccated version that professors feel forced to present given the tyrannical demands of "coverage" within a limited amount of time.

A full "commentary" or "response" to the article could easily take up this entire journal, so I will limit myself to offering a few observations. But the main message is to read every page that Killenbeck wrote with the utmost care.

II. WHO GETS TO OFFER AUTHORITATIVE DESCRIPTIONS OF *KOREMATSU?*

It is appropriate to begin literally at the start of Killenbeck's article in order to demonstrate the validity of the previous sentence. The first sentence asks the reader to answer an important question: "How to best describe . . . *Korematsu v. United States*?"[10] One might simply respond saying, altogether accurately, that it is one of the most reviled decisions of the twentieth century. Unlike, say, *Lochner v. New York,* which was presented to several generations of students as a clear abomination before receiving revisionist approval from some contemporary scholars,[11] *Korematsu* has no real advocates, especially in terms of its results, within the legal community. If the "canon" of American constitutional law includes, at its best, those cases we are proud to present to students as models either of legal reasoning or moral sensitivity—and, ideally, both—then the "anticanon," as elaborated by Columbia law professor Jamal Greene, includes cases that are, perhaps, best described as modeling terrible legal reasoning or abject moral obtuseness, often both.[12] Thus, Killenbeck's fourth sentence quotes

10. *Id.* at 151.

11. *See* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 1-3 (2011). Other prominent defenders include Richard Epstein and Randy Barnett. *See generally* Richard A. Epstein, *Of Citizens and Persons, Reconstructing the Privileges or Immunities Clauses of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334 (2005); Randy E. Barnett, *Foreword: What's so Wicked About* Lochner*?*, 1 N.Y.U. J.L. & LIBERTY 325 (2005).

12. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380-82 (2011).

Professor's Greene own description of *Korematsu* as founded "on little more than naked racism and associated hokum," exemplifying "a set of propositions that all legitimate constitutional decisions must be prepared to refute."[13] It is, together with *Dred Scott, Plessy v. Ferguson,* and *Lochner* the leading exemplars of the "anticanon."[14] But Greene is merely a law professor, however distinguished.

Far more important, of course, is the statement found early in paragraph two by Chief Justice Roberts in his opinion for the Court in *Trump v. Hawaii*. Perhaps prodded by Justice Sotomayor, who unkindly (though some of us would say altogether correctly) suggested that Roberts's opinion upholding President Trump's ban on travelers from seven selected countries, all of which happened to be heavily Muslim, was reminiscent of the Court's decision in *Korematsu,* Roberts almost gratuitously took the opportunity not merely to distinguish the two cases, but, more dramatically, to attempt to eviscerate *Korematsu* as part of the Supreme Court's legacy.[15] "*Korematsu,*" he proclaimed, "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.'"[16]

Nothing that could really be described as an argument accompanied this statement. There is no explanation as to why one of the most distinguished Supreme Courts in our history engaged in such an egregious error. Were the Justices in the majority stupid? Or were they out-and-out malevolent, setting aside their duties to the law in order to serve ulterior motives? To describe them as knaves or as fools seems to be the only available option once one describes a decision as "wrong the day it was decided" and, in the words taken from Justice Jackson's dissent, having "'no place in law under the Constitution.'"[17] What a wonderful opportunity to teach students about the rhetoric found in the Supreme Court. And, importantly, *only* in the Supreme

13. *See id.* at 380, 423. My own reflections on Greene's essay can be found at Sanford Levinson, *Is Dred Scott Really the Worst Opinion of All Time? Why Prigg is Worse than Dred Scott (But Is Likely to Stay Out of the "Anticanon")*, 125 HARV. L. REV. F. 23, 32 (2012), https://perma.cc/3PC3-38V3.

14. *See* Greene, *supra* note 12, at 380.

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

16. *Id.*

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

Court, as distinguished, say, from opinions written by judges of what the Constitution is pleased to label "inferior courts."[18] *They* are required, according to the Supreme Court itself, to implement any and all Supreme Court precedents unless and until the Court itself declares that they are no longer "good law."[19] It really doesn't matter if an "inferior" judge believes that a given Supreme Court opinion was "wrong the day it was decided."[20] But Supreme Court justices are different. As Justice Frankfurter explained in a 1939 concurring opinion overruling an 1871 decision of the Supreme Court, justices take an oath to be faithful to the Constitution, *not* to prior cases of the Supreme Court.[21] It appears, though, that as a matter of practice, that is not the correct interpretation of the linguistically similar oath that "inferior" judges take. Indeed, it is worth asking about the meaning of the oath taken by presidents and all other public officials.

Roberts' sentence, precisely because it is unaccompanied by genuine argument, is perhaps a perfect example of what the English philosopher of language J. L. Austin labeled a "performative utterance."[22] Its very declaration by an authorized speaker—in this case the Chief Justice writing for a majority of the Court—is enough to establish it as true.[23] As one might infer, it might be worth taking some class time both to discuss the nature of performative utterances and how it is that only some people are authorized to make them. Professors fulminate against decisions with some frequency, and students quickly learn that whatever they say about the professor, the denunciations have no legal authority whatsoever. It is as if a best friend, without any authority from the state, attempted to declare that A & B are now "lawfully married." Unless the state has invested authority to do so, perhaps because it recognizes the validity of a certificate issued by the Universal Life Church, that declaration has no more binding force than my own statement that a given decision of the Court is an unreasoned abomination (which I have been known to

18. U.S. CONST. art. III, § 1.

19. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994).

20. *See id.*; *see also Trump*, 138 S. Ct. at 2423.

21. *See* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

22. *See* J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 6-7 (1962).

23. *See id.* at 8-9.

offer). But that may be only to say that Professors Greene and myself are merely law professors, while John Roberts is authorized to make law, at least if he has the concurrence of four colleagues, which includes casting into judicial purgatory—if not outright Hell—an almost seventy-five-year-old case without briefing or argument before the Court itself.[24]

One might well be curious where Roberts' authority to make such performative legal utterances comes from. Crucially, is it a product exclusively of the office that he inhabits—i.e., being a justice of the United States Supreme Court—or does it have anything at all to do with any personal characteristics he might have? This invites a discussion of what qualifications, if any, someone must have in order to serve on the United States Supreme Court. (One might begin by reading the text of the Constitution itself and comparing it, perhaps, with the text of some other national constitutions with regard to stating who is qualified to become a member of its apex court.)

As a matter of fact, there is only one current member of the Supreme Court who is officially "learned in the law." That is Elena Kagan, and the reason is that in order to become Solicitor General of the United States, the office she inhabited prior to her appointment to the Court in 2011, she had to be officially judged to be "learned in the law."[25] (Perhaps it helped that she was Dean of the Harvard Law School!) Indeed, one might well ask students if they in fact know *anything at all* about the nine members of the Supreme Court. Who exactly are Samuel Alito or Stephen Breyer? Or, if one really wants to be cruel, who *were* Sherman Minton, Harold Burton, Fred Vinson, and Tom Clark, Harry Truman's four appointees who were distinguished principally by being friends of the President?

What might it say about the American legal system that we take on faith, as it were, the binding nature of pronouncements by people about whom we often know almost nothing at all save for their occupying the relevant office? Perhaps this would be an appropriate occasion for quoting one of the most terrifying passages in all of Shakespeare, from *King Lear*: "Thou hast seen a farmer's dog bark at a beggar?" Lear asks the blinded Earl of

24. *Trump*, 138 S. Ct. at 2423.
25. 28 U.S.C. § 505.

Gloucester.[26] Upon Gloucester's agreement, Lear then observes, "And the creature run from the cur? There thou might'st behold the great image of authority: a dog's obeyed in office."[27] Is this seditious, or simply a powerful truth about political authority, including the authority attached to judicial pronouncements?

III. *KOREMATSU* AS PART OF THE CANON (AND ANTICANON)

We are only at the beginning of page six, and we have not yet even mentioned what Killenbeck himself regards as his main argument. That argument, in fact, is that we ignore *Korematsu*—or exile it from our syllabi—at our peril; he believes that it very much deserves to be part of what Jack Balkin and I once labeled the "pedagogical canon"[28] that should be taught to all students because of the importance of the lessons it teaches. Killenbeck demonstrates that the lessons are (at least) twofold, running in absolutely opposite directions. It amply deserves its status as part of both the canon and what Greene labeled the "anticanon."[29] So unlike Mark Antony with Julius Caesar, Killenbeck comes both to praise and to condemn *Korematsu,* which is why his article is so important and worth closely reading. He is no admirer of the actual holding of the case. Indeed, he is harshly critical of the legal process that produced it, and by that he is referring not only to the arguments articulated in Justice Black's Opinion for the Court, but also the lawyering of the Department of Justice, which almost certainly transgressed certain basic lines of legal ethics, discussed more below.[30] He thinks it important that students know of all of this in order to understand that the law does not always work itself pure, that the process itself can be gravely defective, with attendant costs both to the fabric of the law and, more importantly, to the victims of the given decisions.[31] But, as

26. WILLIAM SHAKESPEARE, THE TRAGEDY OF KING LEAR act 4, sc. 6.

27. *Id.*

28. *See* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 975 (1998).

29. Greene, *supra* note 12, at 386.

30. Killenbeck, *supra* note 9, at 180; *see also infra* Part IV.

31. *See* Killenbeck, *supra* note 9, at 180-89.

already suggested, that is not the only reason that Killenbeck wants *Korematsu* to be taught.

In addition, he applauds the decision for its formal doctrine, even if not for the application of the doctrine. That is, *Korematsu* is a major source of the "strict scrutiny" doctrine with regard to the use of racial or national origin classifications in the law.[32] The Equal Protection Clause, described in 1927 as the "last resort" of desperate lawyers unable to come up with a genuine legal argument,[33] became, in part because of *Korematsu,* one of the linchpins of American constitutional argument following World War II.[34] It would have been unthinkable seventy-five years ago to have a full-semester course on "The Equal Protection Clause;" indeed, one wonders if the Clause would even have supported two weeks of interrogation. Today, on the other hand, the only question is whether a semester is long enough to handle all of the intricacies of doctrine produced by the movement of the Clause to center state. Students ought to be aware of this aspect of American constitutional development, and Killenbeck's treatment of *Korematsu* offers a splendid introduction to that development.

So *Korematsu* is intensely interesting to doctrinalists, partly as an origin story, but, I want to suggest, also as a demonstration of the complexities of the doctrine itself. Return to Professor Greene's dismissal of *Korematsu* as exemplifying "naked racism" and little else.[35] Chief Justice Roberts' overruling of the case is congruent with this understanding: "The forcible relocation of U.S. citizens to concentration camps, *solely and explicitly on the basis of race*, is objectively unlawful and outside the scope of Presidential authority."[36] But is that in fact a correct description? What, after all, is the "racial category" that is the basis of the lamentable detention in what Roberts accurately calls "concentration camps?"[37] The answer is deceptively simple: it is membership within the Japanese nation, whether by birth, as with

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32. *Id.* at 189-201.

33. Buck v. Bell, 274 U.S. 200, 208 (1927).

34. *See* David A. Harris, *On the Contemporary Meaning of* Korematsu*: "Liberty Lies in the Hearts of Men and Women"*, 76 MO. L. REV. 1, 14 (2011).

35. Greene, *supra* note 12, at 423.

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

37. *Id.*

those Japanese nationals who were in fact prohibited from becoming American citizens by dreadfully discriminatory naturalization laws,[38] or, even if American citizens by virtue of having been born here, were nonetheless suspected of retaining a dangerous degree of national loyalty to their parents' "homeland." And, of course, *Korematsu* takes place against the background that the political authorities claiming to represent that nation—including an Emperor who further claimed a Divine mandate to rule—had attacked the American fleet at Pearl Harbor, with devastating consequences, on the day that President Roosevelt proclaimed would "live in infamy," December 7, 1941.[39] Presidential Order 9066 was a response to Pearl Harbor and the perceived dangers coming from the organized Japanese nation.[40]

When I used to teach *Korematsu,* one of my points is that it might force us to acknowledge the practical difference between mere "minimum rationality," as a justification for governmental policy, and a "heightened" degree of scrutiny that would demand more than acknowledging the possibility that a non-lunatic might believe that a given policy "made sense."[41] That is, was it, at the beginning of 1942, truly "irrational" to believe that Japanese nationals, even if resident aliens within the United States, and even the children of those nationals, might be sufficiently torn in their loyalties to present potential dangers to American national security should, for example, Pearl Harbor be simply the forerunner to an attack on the continental United States itself? We know now that that notion was fanciful, but was it necessarily so at the time? But my point was that it might not be enough simply to concede that what might well be perceived as rank bigotry against Japanese nationals and their American-citizen children was not, for that reason, completely "irrational."

After all, as I pointed out, American policy for many decades was replete with what can only be described as such rank bigotry,

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38. Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153, *repealed by* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

39. Franklin D. Roosevelt*, "December 7, 1941—A Date Which Will Live in Infamy"—Address to the Congress Asking That a State of War Be Declared Between the United States and Japan* (Dec. 8, 1941), *in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 514, 514 (Samuel I. Rosenman ed., 1941).

40. *See* Hirabayashi v. United States, 627 F. Supp. 1445, 1448 (W.D. Wash. 1986).

41. *See generally* Korematsu v. United States, 323 U.S. 214 (1944).

which, as a general matter, might well deserve to be described as "racist." After all, Fred Korematsu's parents were not citizens because American law at the time prohibited *all* Asians from becoming citizens.[42] That was modified in 1943 to allow Chinese immigrants to become citizens, no doubt because it was embarrassing to continue our traditional bigotry at a time when we were allied with the Republic of China in the great struggle against Japan in the Pacific theater of World War II.[43] But it would not be until the 1950s that the ban against Asians in general would be lifted.[44]

Killenbeck demonstrates beyond doubt that the detention of Japanese resident aliens and their American-citizen children was tainted by abject bigotry.[45] All one needs to do is to read the comments of General DeWitt in that regard.[46] But even if we agree with Killenbeck's assessment—and one of the achievements of his powerful essay is its elaboration of the depth of the bigotry behind the policy—the question remains, at least for me, as to whether Killenbeck is correct in writing of "*Korematsu*'s embrace of naked racial stereotyping."[47] Should we not at least acknowledge that "national origin discrimination" is analytically distinguishable from "racial stereotyping" and, therefore, must be taken on its own terms, even if we end up condemning both. (Similar questions, of course, might be raised, as in *Hawaii,* by anti-Islam bigotry. Still, I assume that no one would describe Muslims as a "race." All forms of discrimination might be lamentable, but that does not lead to the conclusion that all forms are necessarily alike or can be neatly collapsed into one another without paying some genuine analytical costs.)

So I will confess that in the past I was inclined to describe Presidential Order 9066 as meeting the test of "minimum rationality," but, nonetheless, to affirm the validity of Justice Murphy's eloquent dissent; that it was so draconian in its implications for the lives of the roughly 120,000 fellow

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42. JAPANESE AM. CITIZENS LEAGUE, THE JOURNEY FROM GOLD MOUNTAIN: THE ASIAN AMERICAN EXPERIENCE 9-10 (2006).

43. K. Scott Wong, *The Opening of the Law in the Pursuit Asian American History*, 13 J. GENDER RACE & JUST. 325, 325 (2010).

44. *Id.* at 326 n.2.

45. Killenbeck, *supra* note 9, at 167-76.

46. *Id.*

47. *Id.* at 156.

Americans (citizens or not) subjected to it that it should have been assessed by higher standards.[48] Killenbeck demonstrates beyond doubt that it was indefensible under stricter scrutiny.[49] There was simply no evidence of perfidy by enough persons of Japanese descent that it should have been regarded as acceptable to subject them as a collectivity to curfews and then detain and exile them into concentration camps far away from their homes. Of course, there turned out to be no evidence of *any* perfidy by what might be termed the target population. One might accurately take this as evidence of the remarkable loyalty of those rounded up to the United States, a conclusion only strengthened by the achievements of the famous 442nd Nisei regiment, composed of second-generation Japanese-Americans, that, while fighting in the European theater of operations, became the most decorated regiment in American military history, including twenty-one Medal of Honor winners.[50] One of the reasons I regard this as "remarkable" is precisely that persons of Japanese ancestry had so many good reasons to feel angry—and perhaps even disloyal—to a country that had systematically discriminated against them and refused to accept even the possibility that a Japanese immigrant might become part of the American political community.

In this sense, *Dred Scott* lived well after its formal overruling by the Fourteenth Amendment.[51] It might have made Fred Korematsu a citizen, but his parents remained permanently tainted. To be sure, one might in fact describe that, at least prior to World War II, as evidence of "naked racism," insofar as *all* non-Caucasians (other than immigrants from Africa, thanks to the 1870 modification of the original, thoroughly racist immigration act of 1790 that Taney, of course, cited in *Dred Scott),* were barred from citizenship.[52] But by 1942, the "naked racism" had surely been joined with an animosity based on ascribed membership in the particular Japanese community that had

48. Korematsu v. United States, 323 U.S. 214, 235 (1944) (Murphy, J., dissenting); JAPANESE AM. CITIZENS LEAGUE, *supra* note 42, at 29.

49. Killenbeck, *supra* note 9, at 180-89.

50. JAPANESE AM. CITIZENS LEAGUE, *supra* note 42, at 14, 31.

51. U.S. CONST. amend. XIV, § 1.

52. Dred Scott v. Sandford, 60 U.S. 393, 419 (1857); JAPANESE AM. CITIZENS LEAGUE, *supra* note 43, at 4.

chosen to attack the United States. If one looks around the world at the history of ethnic- and nationality-based conflict, one finds all too often that deep animosities endure through decades and even centuries. For starters, look at Northern Ireland, the South Balkans, or the unending conflicts in the Middle East. It is often "rational" to expect the worst, even as visionary political leadership—think of Nelson Mandela—is willing to take a leap of faith and hope for the best. I'm quite willing to argue that the Constitution requires such leaps, at least on occasion, but, surely, others disagree. In any event, it seems clear that whatever the rhetoric adopted by Justice Black about "strict scrutiny," the majority certainly did not apply it.[53] It *did,* one might argue, apply a "compelling interest" test, but that is only to say that anything presented as relating to national security, especially during time of war, will in effect be rubber-stamped by the judiciary, exactly the situation that Justice Jackson warned against in his somewhat cryptic dissent.[54]

Killenbeck, like many others, argues that whatever might rationally have been believed in the days after Pearl Harbor was disconfirmed by what was unequivocally known at the time of argument before the Court, which should have led the justices to invalidate 9066.[55] This, of course, raises the general problem of the relevance of after-acquired information in evaluating policies determined at an earlier date, a subject that Killenbeck discusses at some informative length late in his article. Much could be said about this general problem, but I will leave that for another day.

IV. LAWYERS AS TECHNICIANS

The last topic I want to take up in these brief comments involves the pictures of lawyering depicted by Killenbeck, particularly in his attempt to contrast *Korematsu* with *Hawaii.* With regard to the former, I think it is fair to say that he presents a devastating portrayal of the lawyers who defended 9066 in front of the Supreme Court.[56] They were fully aware of the unbridled

53. *See Korematsu*, 323 U.S. at 216; *id.* at 247 (Jackson, J., dissenting).
54. *See id.* at 218; *id.* at 244 (Jackson, J., dissenting).
55. Killenbeck, *supra* note 9, at 180-82.
56. *See id.* at 176-80.

bigotry of General DeWitt, the architect of the detention policy.[57] More to the point, they were also fully aware that by the time the case was before the Court, there was literally no real evidence to support the policy. That fact was brought to the attention of those in charge of litigation, and they basically did nothing. They basically chose the role of zealous advocate, determined to justify the policy adopted by President Roosevelt in 1942. The lawyers involved were not "nobodies," as it were. They included, among others, Charles Fahy and Herbert Wechsler.[58] Fahy was Solicitor General of the United States from 1941 until 1945 and would later serve for many years as a member of the United States Court of Appeals for the District of Columbia.[59] Wechsler, who joined the Columbia Law School faculty immediately after clerking for Justice Harlan Fiske Stone in 1931, served in the Department of Justice during the War and argued several cases before the Court.[60] He would go on to serve as the long-time president of the American Law Institute. It is safe to say that neither paid any professional price for the decisions they made in effect to suppress relevant evidence that might have conceivably been interesting to the Justices.

Killenbeck is highly critical of the way that *Korematsu* was presented to the Court, precisely because there was solid evidence of the government's overreach and, not to put too fine a point on it, bigotry as part of the explanation for that overreach.[61] He is, however, far less critical of the lawyers for the Trump administration, who were equally successful in vindicating a highly controversial policy that its opponents viewed as equally overreaching and equally motivated by bigotry. He emphasizes that the professionals in the Justice Department exercised their considerable legal skills in effect to denude the travel bans of the bigotry that were earlier attached to them, based in part on comments by Candidate Donald Trump and comments by his personal attorney, former New York Mayor Rudolph Giuliani.[62]

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57. *See id.*

58. *See id.*

59. *Solicitor General: Charles Fahy*, U.S. DEP'T OF JUST. (Oct. 31. 2014), https://perma.cc/JJ94-9GV5.

60. *See* Dara E. Purvis, *Herbert Wechsler*, THE FIRST AMENDMENT ENCYCLOPEDIA, https://perma.cc/FFA8-LQ53 (last visited Mar. 17, 2021).

61. *See* Killenbeck, *supra* note 9, at 176-80.

62. *See id.* at 201-16.

Killenbeck acknowledges his suspicion that he is "in a distinct minority within the academy in believing that a respectable [albeit not totally convincing] argument can be made that by the third iteration of the Trump immigration order [the one before the Court], the adults in the room had purged the actual policy—and hopefully its implementation—of the childish promises that Candidate Trump had made as he pandered to his base."[63] He notes that Giuliani emphasized that Trump had appointed a "commission" that was charged to "do [what Trump wanted] legally."[64] What this meant, among other things, was to present "neutral" arguments that never once mentioned that the seven targeted countries were overwhelmingly Muslim. Instead, the lawyers focused on the fact that the Obama Administration itself had expressed reservations about those seven countries and that there were reasons to believe that potential travelers from those countries needed more "extreme vetting" than is true of other potential entrants to the United States.

I am not particularly interested in exploring whether one should in fact be so generous either to the lawyers or, even more to the point, the justices, led by Chief Justice Roberts, who endorsed the policy in terms of its fidelity to constitutional norms.[65] Rather, in line with my general belief that the article provides an almost unparalleled entryway into grappling with what it means "to think like a constitutional lawyer," I want to suggest that deep and profound issues are raised by how we choose to evaluate the lawyers in *Hawaii.*

Consider in this context an op-ed published in the December 20, 2020 *New York Times* with the remarkable title ***I'm Haunted by What I Did as a Lawyer in the Trump Justice Department***.[66] It was written by Erica Newland, a graduate of the Yale Law School who had served in the Office of Legal Counsel ("OLC") from 2016-2018, i.e., the last year of the Obama Administration and the first full year of the Trump Administration.[67] The OLC, of course, is one of the most prestigious divisions of the Department

63. *Id.* at 201.

64. *Id*.

65. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2417-21 (2018).

66. Erica Newland, *I'm Haunted by What I Did as a Lawyer in the Trump Justice Department*, N.Y. TIMES (Dec. 20, 2020), https://perma.cc/JU7N-5BK5.

67. *Id.*

of Justice. In many ways, it is more important than almost any federal court, including the United States Supreme Court, inasmuch as it is treated as offering dispositive opinions about many issues relating to presidential power.

However important the OLC is as an empirical matter, it confounds standard explanations that law professors often give for the importance of Article III as establishing a truly "independent" judiciary, signified, among other ways, by life tenure. *No one* at OLC has life tenure; the head of the OLC—analogous to the Chief Justice of the Supreme Court—is a political appointee of the President (as is, one might argue, the Chief Justice, for that matter) who, unlike the Chief Justice, serves completely at the President's pleasure. Any "independence" of OLC attorneys is guaranteed only by the strength of their own characters and professional commitments, not by the institutional protections we generally believe necessary to protect such a separation from raw political pressure. It perhaps should occasion no surprise that the OLC generally, even if not always, is an ally of the President when asked to opine on matters dealing with presidential authority. It is, for example, only an opinion of the OLC and nothing else that has led to the debatable insistence that a president cannot be indicted for criminal misconduct during his administration, i.e., that impeachment (or electoral defeat) is the only remedy for such behavior.[68] (This, of course, was the basis of Robert Mueller's failure to indict Donald Trump as part of his own inquiries as Special Prosecutor). To be sure, not all decisions participated in by the OLC are basically immune, at least empirically, from judicial review, and one of them involved Trump's travel ban.

So it is worth quoting Ms. Newland at some length:

> My job was to tailor the administration's executive actions to make them lawful—in narrowing them, I could also make them less destructive. . . .
>
> But there was a trade-off: We attorneys diminished the immediate harmful impacts of President Trump's executive orders—but *we also made them more palatable to the courts.*

68. Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Off. Legal Couns., *Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office* (Sept. 24, 1973).

> This burst into public view early in the Trump administration in the litigation over the executive order banning travel from several predominantly Muslim countries, which my office approved. The first Muslim ban was rushed out the door. It was sweeping and sloppy; the courts quickly put a halt to it. The successive discriminatory bans benefited from more time and attention from the department's lawyers, who narrowed them but also made them more *technocratic* and therefore harder for the courts to block.[69]

Ms. Newland is ruthlessly forthright in her description of many of the lawyers who gathered around candidate Trump (and, one might add, around President Trump, especially after his defeat by Joe Biden in the November 2020 election). The Trump campaign had "relied on second-rate lawyers who lack[ed] the skills" necessary to defend his actions before federal courts staffed with capable judges (even including, one might say, judges that he had appointed).[70] She notes, for example that Trump appointee Matthew Braun basically eviscerated an oral argument offered by Giuliani, describing it as "strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence."[71] Thus, she writes, "[e]ven judges appointed by Mr. Trump have refused to throw their lots in with lawyers who can't master the basic mechanics of lawyering."[72] To put it mildly, professional career attorneys at the Department of Justice, especially the OLC, *have* mastered those skills.

So, what's the problem? I think it is captured by Ms. Newland's use of the term "technocratic" in describing the difference between the semi-competent coterie of lawyers surrounding Trump and the dedicated professionals at the DOJ.[73] What does that term mean in this context. I think a full answer requires us to go all the way back to Plato's dialogue *Gorgias,* which examines the arts of rhetoric, of sophistry, taught by the titular character, the most esteemed teacher of sophistry.[74] What

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69. Newland, *supra* note 66 (emphasis added).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *See* Steven Randall, *Dialogue, Philosophy, and Rhetoric: The Example of Plato's "Gorgias"*, 10 PHIL. & RHETORIC 165, 165 (1977).

is the measure of a successful sophist? It is the ability to make "the lesser appear the greater," that is, to present what *should* be a losing argument in such a way as to persuade the audience, including the judge, that it should in fact prevail.[75] Socrates is not impressed, since he is committed to the importance of both truth and justice, neither of which is central to the perspective of the sophist.[76] Indeed, Socrates is appalled that Gorgias makes no attempt, before admitting students to his school, to discern whether or not they are aware of the difference between justice and injustice or, for that matter, committed to the priority of truth over falsehood even when that might be costly to achieving success in one's argument.[77]

So, for Ms. Newland, the "technical" prowess of her fellow lawyers at the DOJ, perhaps within the Office of the Solicitor General as well, is revealed by their ability to gain judicial acceptance of policies that less skilled advocates might have failed at achieving. Perhaps one might want to compare this to "putting lipstick on a pig." The pig might be more glamorous, but, after all, it remains a pig. She no longer finds that admirable, and she therefore left her position and, presumably, her hopes to spend her career as a proud defender of the policies of the United States government.

Students should read her column and address her worries. Is she simply being self-servingly melodramatic? Should we really wish the Department of Justice to be staffed by inferior lawyers who will be less successful at defending policies that, on political grounds, we object to? Or should we instead adopt the reigning ideology of "adversarialism" that dictates that all sides in a legal conflict are entitled to the very best legal representation possible, which also seems to entail that one refrains from attributing to lawyers the moral or political positions that might be identified with their client. Just as a doctor should use all of her professional skills to save Hitler, so, under this view, a lawyer should basically be indifferent to the actual consequences attached to victory or defeat for her client.

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75. *See* CHRISTOPHER W. TINDALE, REASON'S DARK CHAMPIONS: CONSTRUCTIVE STRATEGIES OF SOPHISTIC ARGUMENT 21-22 (Thomas W. Benson ed., Univ. of S.C. Press 2010).

76. *See id.*

77. PLATO, GORGIAS 20-22 (E. M. Cope trans., Cambridge Univ. Press 1864).

Killenbeck offers interesting contrasts between the *Korematsu* lawyers and those defending the Trump Administration's travel ban in *Hawaii*.[78] The former basically suppressed important factual evidence quite crucial to the overall case. It is not merely that, like most lawyers, they offered only the most favorable readings of precedents or otherwise engaged in debatable readings of "the law." Instead, they failed in a basic duty of truthful representation of the facts before the Court. With regard to defending the travel ban in *Hawaii,* however, no one was really ignorant of the bigotry that had been part of the Trump campaign or even the suggestion by Giuliani that the purpose of the "commission" was to supply legalistic rationalizations for a policy adopted for quite different reasons from those presented by the lawyers. After all, isn't it highly relevant that the Obama Administration could be cited for engaging in what was arguably at least somewhat similar concerns about travelers from the given countries?

Mark Graber and I have in fact argued that judges should take into account the fact—and we treat it as a fact—that Donald J. Trump was uniquely unqualified to be President of the United States, not only on grounds of inexperience, but also, and more importantly, because he possesses such grievous character flaws.[79] It is safe to say, however, that relatively few of our professional colleagues agree with us and that the legal academy, perhaps still in thrall to Herbert Wechsler, is committed to a notion of "neutral principles" that focuses almost exclusively on the institutional nature of the presidency and, therefore, not at all on the specific pathologies that might be present in a particular President.[80] This is why a would-be career attorney like Ms.

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78. *See* Killenbeck, *supra* note 9, at 222 (explaining how the *Korematsu* lawyers focused on suppression of important factual evidence to advance their goals while, in contrast, those defending the travel ban in *Hawaii* blatantly exposed their goals, as well as the reasons behind those goals long before *Hawaii.*).

79. *See* Mark A. Graber & Sanford Levinson, *The Constitutional Powers of Anti-Publian Presidents: Constitutional Interpretation in a Broken Constitutional Order*, 21 CHAP. L. REV. 133, 138, 140 (2018). Our doubts about his fitness were, of course, amply confirmed by his indefensible conduct following his clear defeat by Joseph R. Biden in the November elections, culminating in his instigation of an insurrectionary occupation of the Capitol by those who seemingly accepted his absolutely false narrative about election fraud depriving him of his rightful victory.

80. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

Newland can remain in the Department of Justice as the presidency shifts from Barack Obama to Donald Trump. As she put it, "I joined the department during the Obama administration, as a career attorney whose work was supposed to be independent of politics," and she initially saw no real problems in remaining to work for the Trump Administration.[81] She now says she was wrong.

But wherein was her actual error? Is it possible that she didn't pay sufficient attention to the fact that attorneys representing the United States are always in effect committing themselves to the political goals of a particular administration? One suspects that she had little difficulty doing this with regard to Obama. Obviously, that proved ultimately impossible only two years later. How much leeway should we give any lawyer who is basically behaving as a sophist in the service of clients engaged in dubious behavior? One might be hesitant to go too far down that road. I myself certainly believe that even the most vicious among us are deserving of zealous representation when the state brings its awesome power to bear on them by attempting deprivation of liberty or even, as with capital punishment, their very lives. But does the latitude I am willing to give the criminal defense attorney necessarily carry over into all legal representation?

I am not really sure what I think the answer should be. The one thing I am certain about, though, is that this is a question very much worth bringing to the attention of students embarking on the path to becoming lawyers. They should be aware that lawyers—and lawyering—have been the objects of criticism as well as praise throughout the millennia. Complementing the Socratic critique of "the-lawyer-as-sophist" is Jesus' expression of "Woe unto you, lawyers!"[82] Surely all of us can name lawyers we regard as heroes, worthy of emulation. Many Americans clearly developed a special relationship with Ruth Bader Ginsburg, "RBG." But surely it is worth asking how we

81. Newland, *supra* note 66.

82. *See Luke* 11:46 (King James) ("And he said, Woe unto you also, [ye] lawyers! for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers."); *Luke* 11:52 (King James) ("Woe unto you, lawyers! for ye have taken away the key of knowledge: ye entered not in yourselves, and them that were entering in ye hindered.").

distinguish between our judicial heroes and those we might regard as villains, such as the author of *Dred Scott,* Chief Justice Roger Brooke Taney. Is Taney's opinion in *Dred Scott* demonstrably worse, save in its moral repugnance, than many other opinions of the Supreme Court that we treat with far greater respect—and do not assign to the anticanon?[83]

V. CONCLUSION: READ KILLENBECK CLOSELY

So much more could be said, but I have gone on long enough. I hope, though, that I have demonstrated my central point. This is one of the most important articles ever published in any law review about the actuality of "doing" constitutional law. It should be read closely and genuinely grappled with, and not only in one's capacity as an isolated reader. No article more deserves to become the subject of genuine discussion and, perhaps, even heated argument.

83. *See* MARK. A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 4 (Cambridge Univ. Press 2006) (rebutting the case that it is easy to demonstrate the deficiencies of Taney's opinion, whatever may be our own favorite approach to "constitutional interpretation.").