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Mark Tushnet
Harvard University

A GOVERNMENT OF LAWS THAT IS A GOVERNMENT OF MEN AND WOMEN

Mark Tushnet*

I take Mark Killenbeck's "provocative" article as an occasion for some informal comments about what *Korematsu* and *Trump v. Hawaii* tell us about the saying, "a government of laws, not a government of men and women."[1] My basic thought is that the "not" in the saying has to be replaced "but also." And, in some sense we have always had to have known that the saying was wrong as stated.[2] Whatever the laws are, they don't make themselves.[3] Nor do they administer themselves, nor interpret themselves. Men and women appear at the stages of enactment, application, and adjudication. So, for example, we know that legislators and high-level administrators can adopt policies that say nothing whatsoever about race—regulations about stopping cars to enforce safety regulations, for example—that police officers on the ground can apply discriminatorily.[4]

Korematsu and *Trump v. Hawaii* show us a government of laws that is also a government of men and women can be infected at each stage, in quite complex ways, by the racism of those men and women even when they also acknowledge that the laws to which they are subject (and that they are making and interpreting) condemn racism. Legal actors simultaneously deny and affirm that racism infects the law: deny it when they focus on the "government of laws" part of the saying, affirm it when they focus on the "government of men and women" part.

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* William Nelson Cromwell Professor of Law emeritus, Harvard Law School.

1. *See* Benjamin Barr, *A Government of Laws and Not of Men*, WYLIBERTY (June 12, 2014), [https://perma.cc/PM7U-A75D].

2. *See* Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119 (2020) (examining this proposition in detail with respect to the presidency).

3. Even accounts of law that treat it as an emergent phenomenon of human actions not directed intentionally at law-creation still find its origins in *human* action, and natural law accounts that attribute valid or good law to a non-human Creator treat *that* law as a normative standard that is brought to ground by human action. *See* Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655, 656-59 (1997).

4. *See, e.g.*, Whren v. United States, 517 U.S. 806 (1996).

Here's one version of the problems facing Roosevelt (and his subordinates) and Trump (and his). It is deliberately desiccated, drained of any of the real-world features, including emotions, associated with their decisions. That's going to be important in my overall argument, so I urge readers to set aside for the moment their understandable impatience with this version's lack of realism.

Both Roosevelt and Trump were making decisions under uncertainty, as economists say.[5] Saboteurs and terrorists posed threats of uncertain degrees to United States national security. Neither president could be certain about the identity of those saboteurs or terrorists. The best they could do is assign probabilities to categories (including of course a probability of zero to some), and they could have varying degrees of certainty about the probability assignments. Roosevelt (hypothetically) might have assigned a probability of zero to the category "Swedish-Americans" with a high degree of confidence. He couldn't reasonably be charged with making a bad decision if we later discovered one or two Swedish-American saboteurs.

And "he"—the attribution to Roosevelt rather than others will turn out to be important—might have assigned a high probability to the category "Japanese-Americans" with some confidence. And, again, he might not reasonably be charged with making a bad decision if we later discovered no more than one or two Japanese-American saboteurs.

The situation doesn't change even if Roosevelt had evidence at hand suggesting that rather few saboteurs were likely to be found among that population. He would have to assign a probability to the possibility that the evidence was incomplete or misleading. After all, saboteurs who are effective do a good job of doing what they can to stay out of categories where suspicion reasonably attaches.[6] You can do a formal analysis of decision-making under uncertainty about the risks associated with different

5. I note that the first steps of the argument that follows, and maybe more of them, apply to decision-making about policy responses to the COVID-19 pandemic. Loïc Berger et al., *Rational Policymaking During a Pandemic*, 118 PNAS 1, 2 (2021), [https://perma.cc/QZ6J-W9BG].

6. The television series *The Americans* provides a nice example with embedded Soviet spies working at a travel agency. *The Americans* (FX television broadcast Jan. 30, 2013-May 30, 2018).

categories *and* uncertainty about the quality of the evidence, but I think the point is obvious: Roosevelt was trying to "regulate" the risk of sabotage, and by definition risks and evidence, including evidence about the circumstances under which the risks will be realized, are known only probabilistically.

The large literature on racial profiling and social welfare tells us that barring decision-makers from using racial categories as a predicate for risk-regulation doesn't always enhance social welfare. A great deal depends upon what the (real) probability is that actions by people in the racial category will lead to the risk's realization (in *Korematsu*, sabotage), the costs that the realized risk imposes, and the costs imposed by the regulation (removal from homes and confinement in concentration camps, as well as something like a "demoralization" cost to the entire population). In an uncertain world, I doubt that anyone could be confident about his or her own assessment of whether a specific form of racial profiling was welfare enhancing.

As far as I can tell, there are only two ways to deal with all this. You can rule out racial profiling entirely, acknowledging that doing so will sometimes reduce social welfare, or you can assign the decision about whether to allow racial profiling in the situation at hand to someone else and accept as authoritative whatever he or she decides.[7] Whoever makes the decision is going to have to come up with some probabilities about risks and about the quality of the evidence at hand. When judges get the assignment, as they do on constitutional questions in the United States legal system, one piece of evidence they have is the decision made by (in these cases) the President. The familiar standards of review language describes the weight courts are to give to that piece of evidence.

The foregoing offers the "government of laws" perspective on the problems underlying *Korematsu* and *Trump v. Hawaii*. It's full of words like "might" and "could." A government of laws could make the decisions without engaging in racial or religious discrimination. But, as I noted at the outset, the government of

7. This is the enduring legacy of the legal process jurisprudential school, which, despite some long-standing and valid critiques, nonetheless offers important insights into how to go about thinking through both substantive and institutional questions about the law. *See* Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 964 (1994).

laws is also a government of men and women, and that's where problems arise.

As I indicated, we know that facially neutral laws can be adopted for racially discriminatory reasons.[8] Here racism appears at the enactment level. We also know that facially neutral laws not necessarily adopted for racially discriminatory reasons can be administered in a racially discriminatory way.[9] In these cases racism appears at the enforcement stage. And, though courts are unsurprisingly reluctant to acknowledge the fact, facially neutral laws can be interpreted by judges in racially discriminatory ways.[10] Here racism appears at the adjudication and law-application stage. I turn to examining *Korematsu* and *Trump v. Hawaii* using these categories.

How the policies of interning Japanese-Americans and banning Muslim entry into the United States came into being brings out the role of men and women in a government of laws. As a matter of law, both policies were grounded in executive orders issued under the President's signature.

The actual president's role in the two cases was different, though. Roosevelt appears to have had no personal investment in the internment decision. Whatever his subordinates came up with was fine with him: curfew, interments, no internment, ending internment, extending internment, or something else. In one sense we might say that he looked at the issue from the perspective of a government of laws: if the things that might be true were true, the policies were justified, and he engaged in deferential review, so to speak, of what his subordinates did. His subordinates were racists, and that's what generated the policy.

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8. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

9. *See, e.g.*, peremptory challenge decisions such as Batson v. Kentucky, 476 U.S. 79, 82 (1986). *Cf.* Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886), where the discriminatory enforcement led the Court to invalidate the underlying ordinance (perhaps inferring discriminatory motivation at the enactment stage).

10. Clear examples are difficult to come by in the modern era at the United States Supreme Court, but the Alabama Supreme Court's decision reviewed in Patterson v. Alabama, 294 U.S. 600, 607 (1935), applied a state procedural rule in a way that strongly supported an inference that that court was interpreting the rule for the racist purpose of ensuring that Powell's conviction would be insulated from United States Supreme Court review. *See also* Bouie v. City of Columbia, 378 U.S. 347, 356 (1964) (holding, in the context of a civil rights demonstration, that the state supreme court had violated the due process clause by interpreting a state statute too broadly).

In contrast, Trump himself was the racist in *Trump v. Hawaii*; a fact that the Supreme Court struggled with.[11] The challenge to the third executive order failed because the work Trump's subordinates did was enough to cleanse the Order of any constitutional taint.

One disturbing possibility then presents itself. Perhaps the Supreme Court's unstated view is that intentional racial discrimination at one part of the enactment process can be cleansed by actions at another part: General DeWitt's racism eliminated by Roosevelt's indifference, Trump's racism eliminated by the work of the Office of Legal Counsel.

Why though might the Court take this position? We might want to think of two forms racism can take, personal and systemic or institutional, and we could define systemic or institutional racism in two ways. Personal racism is straightforward: someone takes an action because he or she is motivated by racism.[12] Systemic racism might occur when a significant number of actors with influence over social outcomes are individually racist.[13] This is a purely subjective account of systemic racism. An alternative is to say that systemic racism occurs when material and other social goods are distributed in such a way that a racial (or religious) minority receives an unjustifiably low proportion of them, without regard to the causal mechanisms producing that distribution.[14] Subjective motivations might play a role, but they aren't essential to the story. I would describe the alternative as offering an objective account of systemic racism.

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11. For my more detailed explanation for that assertion, *see* Mark Tushnet, Trump v. Hawaii*: "This President" and the National Security Constitution*, 2018 SUP. CT. REV. 1, 1-19 (2018).

12. I think it's not important for present purposes to define precisely what the subjective state of mind is. It could be a desire to do something for the very purpose of causing disadvantage to the Black community, or for the purpose of causing more disadvantage to the Black community than to others; or a lack of interest in the question of what the action's impact on the Black community will be; or (what might be the same thing) "selective indifference" to effects on the Black community. *See* Ian H. Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1726 n.28 (2000) (quoting STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 4-5 (1967)).

13. *See id.* at 1799-1801 (considering "pick your friends" racism in grand jury selection).

14. *See* Thomas Kleven, *Systematic Classism, Systematic Racism: Are Social and Racial Justice Achievable in the United States?*, 8 CONN. PUB. INT. L.J. 37, 37 (2009).

With objective accounts, we can have a systemically racist government of laws because individual motivation doesn't matter. I've suggested that by cleansing the policies in *Korematsu* and *Trump v. Hawaii* of the racist motivations of General De Witt and President Trump, the Court vindicated the idea that we have a government of laws but in a way that allows critics to continue to fairly describe the policies as objectively systemically racist.

At the same time though, we are a government of men and women. In such a government, racism at the individual level will inevitably occur. That's clearest at the level of enforcement, when a police officer stops a motorist in part because the driver is Black. There's no reason to think that it can't occur at the level of enactment or adjudication as well.[15]

Now, though, we have to worry about the possibility that we have a systemically racist government in the first, subjective sense. That occurs when lots and lots of decision-makers are individually racist. And, in my view, that's what we have in the United States.

As it turns out, that's also a view the Supreme Court once came quite close to expressing openly (and that view, I believe, lies near the surface of other Supreme Court opinions). *Washington v. Davis* rejected statutory and constitutional challenges to the District of Columbia's use of a reading test for its police officers.[16] Job applicants who failed the test argued that its use deprived them of equal protection because using the test had a more substantial adverse effect on the class of Black applicants than on the class of white applicants.[17] The Court rejected the argument, holding that disparate effects that didn't result from intentional (that is, subjective) racial discrimination were insufficient to establish a constitutional violation.[18]

One reason Justice Byron White gave for this holding, though, might have implications for our understanding of the subjective version of systemic racism—that it occurs in a

15. The simplest version would be where a majority of a legislature or a supreme court's members were individually racist and acted on those views. For an extensive analysis of this and other possibilities, *see* Fallon, *supra* note 7.

16. Washington v. Davis, 426 U.S. 229, 232 (1976).

17. *Id.* at 232-33.

18. *Id.* at 245-46.

government of men and women where racism is widespread. Justice White wrote that a pure disparate impact test "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[19]

There are two important and related moves here. The first accurately notes that race is correlated with wealth. In a nation where that's true, a pure disparate impact test amounts to characterizing the nation as systemically racist in the second, objective sense. What aspect of a test makes subjective motivation relevant though? This is where the second move can be seen. Such a test will also "raise serious questions about . . . a whole range of" policies when subjective, individual racism is pervasive.[20]

We can see this concern at work in some reactions to the Black Lives Matter (BLM) movement. BLM begins by directing attention to the implementation stage within the criminal justice system and, in particular, to the way individual police officers deal with Black citizens.[21] These seem to be acts of intentional discrimination. They are so pervasive, though, that BLM expands its vision to encompass subjective, systemic racism (widespread individual, intentional discrimination). It further expands its vision to encompass the objective when it brings the already existing challenges to mass incarceration into its purview.[22] And at some point in this process—and probably before the final expansion—critics of BLM say, echoing Justice White, that the movement raises doubts about a whole range of criminal justice policies.

BLM seems onto something, of course, especially at the implementation stage. Individual, intentional discrimination there seems quite widespread. That would mean that the reasons

19. *Id.* at 248.

20. *Id.*

21. *See About*, BLACK LIVES MATTER, [https://perma.cc/MM38-59U2] (last visited Mar. 5, 2021).

22. By this I mean that most accounts of mass incarceration don't attribute it to individual acts of racial discrimination.

for refusing to accept a disparate impact test apply to an intentional discrimination test as well.[23]

We can now understand why courts might try to develop the doctrine that individual discriminatory acts are unconstitutional in a way that accommodates Justice White's concerns. And that, I suggest, is what the "cleansing" approach does. Overstating, but I think only a bit, if a court can tell the story about a challenged policy in which *some* actor with influence on the account didn't have the prohibited intention, the action is constitutionally permissible.

Reflect for a moment, though, on this. Justice White's concern has been criticized on the ground that it rests on the concern that, properly interpreted, the Constitution requires more justice than the United States can deliver.[24] We are now at the third stage of the "government of laws." Judges—men and women—interpret the law. They know that individual, intentional racial discrimination is pervasive, but they can't acknowledge that fact because it would be too destabilizing.

That's why *Korematsu* was so disturbing to Chief Justice Roberts in *Trump v. Hawaii*; it showed that individual, intentional, racial discrimination could occur at the interpretation stage. The problem, that is, wasn't that General DeWitt was a racist, though he was. The problem was that enough of the Supreme Court's Justices were racists to generate *Korematsu* as a precedent.[25] Repudiating *Korematsu* means either that *all* of the Justices were racists or that for some reason you can't cleanse the opinion by locating some Justices who weren't racist.

Once that possibility is raised, though, you—that is, a Justice—need only a minimal level of self-awareness to begin to

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23. I note that a similar analysis seems appropriate in discussing the suggestion that the responses of the United States Capitol Police to the events of January 6, 2021, were racially discriminatory in that the police wouldn't have responded similarly to a BLM demonstration that ended up seeking to invade the Capitol building.

24. Justice Brennan used the phrase "too much justice" in his dissent in McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting) ("The Court . . . states that its unwillingness . . . is based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing. . . . Taken on its face, such a statement seems to suggest a fear of too much justice." (citations omitted)).

25. I put it this way rather than saying that "the Court" was racist because we're dealing with individual-level intentions. Professor Killenbeck provides direct evidence of some of the Justices' racism. *See generally*, 74 ARK. L. REV. __, __ (2021).

worry about the possibility that as then, so now.[26] Maybe, you think nervously, what I'm doing now is affected by my own not-yet-acknowledged racism or, only a bit less disturbing, by the racism of the colleagues I work with every day.[27] That thought has to be pushed out of consciousness, of course. That's where all the doctrinal maneuvers in *Trump v. Hawaii* come in: cleansing, focusing on the scope of presidential power over entry into the United States, emphasizing that the policy's targets were non-citizens.

The thought lingers, though; put all the things the Court has built into the doctrine, especially Justice White's worries about "too much justice," and perhaps we can see the Court as a participant in constructing systemic racism in its second variant, where racist outcomes occur even though not enough people are themselves intentionally racist.[28] Or, even more troubling, we can see the Justices as participants in constructing systemic racism in the first, widespread intentional discrimination variant.[29]

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26. *Galatians* 4:29 (Common English Bible) ("But just as it was then, so it is now also . . . ."). I must note that not all of the Justices actually do have a minimal level of self-awareness.

27. For what it's worth, I report my sense that Thurgood Marshall, an extraordinary personality, managed to deal with this phenomenon in a completely mature way.

28. *McCleskey*, 481 U.S. at 339 (1987) (Brennan, J., dissenting)

29. For my earlier presentation of reasons for this conclusion, *see* Tushnet, *supra* note 11, at 7-12.