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The Banality of Evil (?): The Strange(ly Quiet) Careers of Korematsu and Hirabayashi in the Federal Circuit Courts, 1943-2016

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ABSTRACT

Korematsu v. United States (1944) and *Hirabayashi v. United States* (1943), the most famous Supreme Court cases associated with the tragic internment of Japanese Americans during World War II, now "live in infamy", along with the likes of *Plessy v. Ferguson* and *Scott v. Sandford*, among the worst constitutional law train-wrecks of American legal history. Ironically, American courts and judges also used the two towering internment cases for their resounding language supporting racial equality and non-discrimination. In either guise, the cases came to cast a long shadow over America's legal landscape. Thus, it may be somewhat surprising to discover that these two cases long led rather mundane and limited precedential lives in the federal circuit courts, serving repeatedly as precedents in ordinary cases concerning everyday applications of criminal procedure doctrines and displaying little of the brightly hopeful or darkly ominous power for which they would later be known. Whatever greater potential the two cases held, a careful tracking of all uses of the cases in court opinions shows that federal circuit courts mostly did not explore that potential until after it was "safe" to do so. In particular, although the Japanese Internment was fundamentally a legal and constitutional problem, federal courts proved to be largely unable to confront that problem meaningfully until after some sort of political "solution" was offered by Congress through formal apology and reparations to internment survivors in 1988. Only later did federal circuit judges use the two cases more aggressively, with *Korematsu* suddenly serving as a dire warning of the dangers of judicial reticence in resisting constitutional overreaching by the legislative or executive branches, while *Hirabayashi* was brandished to support strict, color-blind racial equality—long after civil rights progress was already waning.

KEYWORDS

Korematsu; Hirabayashi; Law of the United States; United States Federal Courts; Japanese American Internment

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INTRODUCTION

Korematsu v. United States[2] and *Hirabayashi v. United States*,[3] the best-known, most salient court cases and opinions associated with the tragic and unnecessary internment of 120,000 Japanese Americans during World War II, loom large over America's legal landscape. To paraphrase President Franklin Roosevelt's famous description of the Pearl Harbor attack of December 7, 1941 that initially set the internment tragedy in motion, *Korematsu* and *Hirabayashi* now live in infamy.[4] They are mostly mentioned for rhetorical purposes, often in conjunction with the likes of *Plessy v. Ferguson*[5] and *Scott v. Sandford* (the *Dred Scott* case),[6] as grave warnings to present-day judges against perpetuating the sorts of constitutional law train-wrecks of which the nation and its legal profession are now ashamed.

That dark vision of the internment cases is a relatively new development, though, dating mostly to the period after the United States Congress made its formal apology and reparations to internment survivors in 1988.[7] Earlier, and perhaps somewhat ironically, the cases had a seemingly brighter, nobler role as the sources of resounding language that was used to batter down the walls of segregation and was woven into the Supreme Court's doctrine of strict scrutiny of racial and other constitutionally suspect classifications.

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[*]Readers familiar with the history and historiography of the 1950s may readily recognize "The Strange Career" as a reference to a brief but classic study by the long-time "dean" of U.S. Southern History, C. Vann Woodward, The Strange Career of Jim Crow (1955)—a study that Woodward initially prepared as a series of lectures to challenge the historical basis of de jure segregation in the wake of the 1954 Brown v. Board decision. [And before that, Woodward and other like-minded historical scholars offered similar analysis to the U.S. Supreme Court as a brief in support of the Brown litigation, but that research was largely ignored by the Court]. Woodward set out to demonstrate how, contrary to entrenched assumptions of the 1940s-50s that Jim Crow racial segregation (in the U.S. South and elsewhere) always had been natural and inevitable, it was, instead, very much a product of particular historical developments that could have been avoided. For brief background on the "strange career" of The Strange Career of Jim Crow see, e.g., Howard N. Rabinowitz, More Than the Woodward Thesis: Assessing the Strange Career of Jim Crow, 75 J. AM. HIST. 842 (1988); Jack Pole, On C. Vann Woodward, 32 J. AM. STUD. 503 (1998).

[2] Korematsu v. United States, 323 U.S. 214 (1944).

[3] Hirabayashi v. United States, 320 U.S. 81 (1943).

[4] Although a crucial part of the same massive and tragic course of events, *Hirabayashi* has never yet acquired quite the same symbolic status and name recognition as *Korematsu*—which is why, throughout this study, even though *Hirabayashi* came earlier in time and in the alphabet than the main *Korematsu* opinion of 1944, *Korematsu* is usually listed first. Notably, Microsoft Word recognizes *Korematsu* and leaves it unchallenged as a possible spelling error, unlike *Hirabayashi*.

[5] Plessy v. Ferguson, 163 U.S. 537 (1896).

[6] Dred Scott v. Sandford, 60 U.S. 393 (1857).

[7] *See* Civil Liberties Act of 1988, 50 U.S.C. app. §§ 1989b–1989b9 (current version as amended at 50 U.S.C. §§ 4211–4220 (2012 & Supp. III 2015).

To the extent that the federal courts' by now extensive edifice of strict scrutiny law is a positive outcome, *Korematsu* and *Hirabayashi*, and their numerous precedential progeny, necessarily deserve substantial credit.[8]

That *Korematsu* and *Hirabayashi* ultimately have been harnessed to such powerful if contrasting rhetorical and legal purposes suggests that the potential was always there for them to be so used—they held those possibilities within them.[9] That in turn makes it potentially interesting to explore all the various ways the cases were in fact used, and when, and why the already existing potential uses with which we are now familiar long lay dormant before suddenly switching on and becoming active at particular moments in time.

The following study thus traces all identifiable uses of the two best-known internment cases by the various federal circuit courts of appeal from the 1940s, when the opinions in question first appeared, through the 2010s. It seeks to trace any recognizable and potentially interesting patterns and relationships regarding the several hundred circuit opinions that have cited *Korematsu*, *Hirabayashi*, or both, and thereby to illuminate the entire precedential life cycles of these important and tragic cases at the intermediate appellate level. This study builds upon an earlier, detailed study of all identifiable uses of the cases at the Supreme Court level,[10] the full results of which mostly need not be repeated here, other than to point out ways in which activity at the Supreme Court level appeared to drive or otherwise interact with activity at the circuit level. The overall timing and nature of uses of the opinions also are tracked in close conjunction with wider trends and changes in the evolution of United States political and social history during the post-World War II decades. Among other things, the study monitors whether and to what extent the circuit courts and judges may have taken a lead over the Supreme Court in exploring the potential uses of the cases.

The detailed analysis of just what was happening with the major internment cases in the federal circuit courts, and when, is based upon three relatively large and

[8] Although to the extent that strict scrutiny has gone beyond the appropriate protection of civil rights to be used to systematically suffocate efforts toward addressing systemic structural racism, as some scholars have argued, any such credit is substantially diminished. *See, e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 Stan. L. Rev. 1, 2–3 (1991); Sonu Bedi, *Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny is Too Strict and Maybe Not Strict Enough*, 47 Ga. L. Rev. 301, 303–07 (2013). ; *See e.g.*, Tanya Washington, *Jurisprudential Ties That Blind: The Means to End Affirmative Action*, 31 Harv. J. Racial & Ethnic Just. Online 1. (2015); *see also* David Schraub, *Unsuspecting*, 96 B.U. L. Rev. 361 (2016).

[9] To quote an ancient, allegedly Zen Buddhist (or perhaps Theosophist?) saying that reflects on why wisdom or meaning that was always already there is suddenly discovered: "When the student is ready, the teacher will come". The origins of this pithy observation, sometimes attributed to the Buddha himself, are shrouded in the mists of time and remain discussed and debated on the Internet, as a quick search reveals.

[10] *See* Scott Hamilton Dewey, *Of Loaded Weapons and Legal Alchemy, Great Cases and Bad Law: Korematsu and Strict Scrutiny, 1944-2017*, 3 L. Info. Rev. 43 (2017-2018).

complex spreadsheets[11] that track data from *Korematsu v. United States* (1943),[12] the first iteration of the *Korematsu* litigation to reach the Supreme Court, along with the better-remembered *Korematsu* (1944) and *Hirabayashi*. In addition to the names and citation information of later federal circuit court opinions citing any of these three Supreme Court opinions, the spreadsheets include other information, such as: the date of the citing opinion; which circuit it came from; which judge wrote the opinion; which judges were other members of the panel that issued the opinion; what, generally, the cases that produced citing opinions were about; what particular purposes the *Korematsu* or *Hirabayashi* opinions were used for; whether the internment cases were quoted or not; what depth of use they were given (whether only brief, passing references or more extensive use); whether these uses appeared in main opinions or concurring or dissenting opinions in the later citing cases; whether the citing opinions cited the main opinions or concurrences or dissents from the Supreme Court opinions; and whether the citing opinions also co-cited any from a group of conceptually related cases involving civil rights or the denial thereof or other notable cases involving Japanese Americans from the 1940s. These various categories were tracked to see what, if any, results and patterns they produced over time among several hundred citing opinions. This monitoring of a range of data categories seeks to try to replace an otherwise impressionistic, sporadic, anecdotal overview of the major cases and their circuit-court life-cycles with one potentially revealing larger patterns supported by quantitative evidence. As with various "harder" sciences—such as biological or pharmaceutical research where large and repeated batteries of tests and countless test tubes often only show no noteworthy results—this laborious approach is designed to show when things are not happening as well as when they are, under the reasoning that non-events, or relatively mundane or unexpected developments, are potentially significant parts of the overall story along with those that fit more established legal-historical narratives.

Thereafter, the study turns to the case-specific data. Section 1 concerns the relatively little-remembered *Korematsu* (1943)—the *Korematsu* litigation's first appearance at the United States [hereinafter U.S.] Supreme Court—which never gained the rhetorical clout or notoriety of its better-known companions but wound up being frequently cited on general issues of criminal procedure related to probation as an appealable final judgment. Section 2 discusses *Hirabayashi* (1943), which like *Korematsu* (1943) actually spent most of its life and did the overwhelming majority of its work as a routine opinion involving criminal procedure and concurrent sentences before being discovered for other purposes rather later. During the entire period from 1950-1980, *Hirabayashi* was

[11] [These spreadsheets are available on request].
[12] Korematsu v. United States, 319 U.S. 432 (1943).

only very rarely used for its non-discrimination potential and almost never received more than a very brief, passing reference, instead mostly living in comfortable anonymity. Section 3 follows the best-known of the internment cases, *Korematsu* (1944) [hereinafter simply *Korematsu* unless otherwise specified], which, after appearing in a small flurry of cases cleaning up bits and pieces of the aftermath of the Second World War from 1945-1950, lay entirely dormant in the federal circuits until 1966, when it was mentioned briefly in passing and was confused with *Hirabayashi*. [Notably, the circuits for twelve years ignored the Supreme Court's key invocation of *Korematsu* in the crucial case of *Bolling v. Sharpe* (1954), which represented *Korematsu*'s big debut as a civil rights precedent in the high Court]. From 1966 through 1980, *Korematsu* appeared, usually only in a very brief, passing reference, in a long list of cases usually reciting one or more aspects of the Supreme Court's gradually evolving new strict scrutiny standard. There was almost no whisper of criticism of *Korematsu* or *Hirabayashi* or exploration of their dark rhetorical potential until well into the 1980s, when it (rather suddenly) became safe and fashionable to do so. Section 4 then matches the wider historical timeline with those of the various cases to consider the specific patterns and trajectories associated with the three interment cases in the context of wider observable trends in America's political, social, and cultural history and legal evolution during the postwar era.

The long strings of relatively mundane and briefly passing uses of *Korematsu* and *Hirabayashi*, together with the overall obliviousness to their darker meaning and rhetorical potential before the 1980s, is the basis for the title of this study, which borrows philosopher Hannah Arendt's famous observation about captured fugitive Nazi Adolf Eichmann, principal architect of Nazi Germany's program to exterminate Jews and other "social undesirables" in death camps such as Auschwitz, at his 1961 trial for crimes against humanity in Israel: "The banality of evil"[13] [Or in other words, and to admittedly oversimplify Arendt's much more complex message: Eichmann, who helped to perpetrate so much darkness and horror upon the world, far from being a towering, evil demon, was really just quite a common, unimpressive little man who saw himself as just "doing his job"]. Given all the more recent judicial statements of horror and warning regarding *Korematsu* and *Hirabayashi*, it is perhaps a little surprising and ironic that they

[13] Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil(1963). Full-length biographies of Eichmann are available, including Bettina Stangneth, Eichmann Before Jerusalem: The Unexamined Life of a Mass Murderer(Ruth Martin transl., Alfred A. Knopf ed. 2014). And David Cesarani, Becoming Eichmann : Rethinking the Life, Crimes, and Trial of a "Desk Murderer" (Da Capo Press 1st ed. 2007) (2004). For a very brief, accessible discussion of both the life of Eichmann and Arendt's thoughts regarding the banality of evil, Stephen J. Whitfield, *Hannah Arendt and the Banality of Evil*, 14 Hist. Tchr. 469 (1981). Arendt's book, undertaken as a reporter for the *New Yorker*, is considered an important work of twentieth century philosophy, still much discussed and debated—making it that much more dangerous (and foolhardy?) to try to summarize it in a brief, simple sentence.

so long led relatively commonplace precedential lives, drawing comparatively little specific attention, and almost no attention to the dark potential meaning they represented. The ordinary processes of the law tended to turn them into ordinary-looking, garden-variety cases, so one might not have been especially aware that they were in fact the sorts of "great" cases that make "bad" law.[14]

This study admittedly was undertaken in hopes that there might be more of dramatic interest to discuss earlier in the lives of the cases—but mostly, that was not the case. Yet perhaps this conspicuous absence is a story in itself. In particular, at its outset, this study was partly motivated by curiosity as to whether circuit judges might have shown some degree of leadership in harnessing either or both of the cases to more powerful rhetorical purposes, either on behalf of the forward march of civil rights or as dark warnings regarding the denial of civil rights. Basically, they did not, and instead mostly followed the lead of either the Supreme Court or, later, of Congress at a relatively safe distance—saying what had become the "right" things to say about the cases only after it had become safe to do so. This may be a relatively unsurprising performance from a generally well-disciplined judiciary that mostly expects to receive and follow signals and orders from above and views that as its proper institutional mission. Yet the same sort of professional reticence (or selective blindness?) ironically may also help to illuminate how the whole tragic mess surrounding the internment cases arose in the first place, with first lower federal judges and then ultimately even the Supreme Court marching mostly in step with legislative and executive authority and with the prevailing political mood of the times—in precisely the manner that the present-day rhetoric of *Korematsu* and *Hirabayashi* as constitutional train-wrecks so vociferously warns against.

In short: if the original federal district, circuit, and Supreme Court decisions regarding *Korematsu* and *Hirabayashi* were terrible mistakes, then they were not the only mistakes; so were the prolonged judicial silence and effective sweeping of the matters under the carpet for the next forty years. The historical record suggests that the American judiciary had a chronic inability to fix, or even to confront, any of these mistakes. Much later rhetorical fulminations, long after the fact, against *Korematsu* and *Hirabayashi*—either with or without rhetorical invocations of possibly even heavier rhetorical bludgeons such as *Plessy* and *Dred Scott*—do little to change that record.

[14] A reference to Justice Oliver Wendell Holmes, Jr.'s famous quote in Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

1. *KOREMATSU* (1943): PROBATION AS A FINAL, APPEALABLE JUDGMENT

The first iteration of *Korematsu* at the Supreme Court—in which Fred Korematsu initially was found guilty of remaining in the California Bay Area city of San Leandro in violation of the internment-related executive orders and was given five years' probation[15]—is the briefest and most mundane of the trio of internment opinions addressed in this study and may be of less interest to modern readers who already are aware how the life stories of the cases ultimately turned out. It was cited by federal circuit courts a total of forty-four times between March 1944 and July 2014. The first batch of these uses came when one might usually expect to see most use of a new authority: when the opinion was fresh and had not yet been supplanted by later decisions making similar holdings on related issues (the ongoing process of earlier precedents often becoming buried and invisible in the sediment of later precedents).[16] Of the ten citations of *Korematsu* (1943) during 1944-1950, five of the citing cases appeared in 1944 alone, the other five scattered fairly evenly from 1945-1950. With the sole exception of the first use, which mentioned both *Korematsu* (1943) and *Hirabayashi* as supporting federal war powers, the others all cited *Korematsu* (1943) briefly in passing regarding probation, final judgments, or (more often) both. The case was cited eight more times for the same purposes between 1954 and 1968, with five of those from 1954-1957, the other three, 1960-1968. The 1960 use was the only one to go beyond the usual brief passing reference to offer a substantial quotation from *Korematsu* (1943) regarding the issue at hand. The gradually dwindling visible use of *Korematsu* (1943) from 1944 to 1968 tended to suggest that it was headed toward having a relatively conventional precedential life cycle of being gradually supplanted and forgotten.[17]

But *Korematsu* (1943) had a second act between 1971 and 1985, probably as a result of the visible surges in crime rates and drug use brought by Baby Boomers

[15] *See* Korematsu v. United States, 319 U.S. 432, 432-435 (June 1, 1943). Authored by Justice Hugo Black like the later, main *Korematsu* opinion (1944), *Korematsu* (1943) did not address wider constitutional issues and stayed quite close to the immediate issues of conviction and probation. The exclusion and internment orders at issue are only cited and alluded to and are not discussed at any length.

[16] For examples of the origins of legal doctrines getting buried under later precedents repeating the same or similar points, see, e.g., Scott Hamilton Dewey, *The Case of the Missing Holding: The Misreading of Zafiro v. United States, the Misreplication of Precedent, and the Misfiring of Judicial Process in Federal Jurisprudence on the Doctrine of Mutually Exclusive Defenses*, 41 Valparaiso Univ. L. Rev. 149, 216-18 (2006) [hereinafter Dewey, *The Case of the Missing Holding*]. ; Scott Hamilton Dewey, *How Judges Don't Think: The Inadvertent Misuse of Precedent in the Strange Career of the Illinois Doctrine of Antagonistic Defenses, 1876-1985*, 9 J. Juris. 59 (2011) [hereinafter Dewey, *How Judges Don't Think*].

[17] An earlier example of an authority with a related holding, which appeared in conjunction with *Korematsu* (1943) more than once, is Berman v. United States, 302 U.S. 211 (1937). Examples of various later opinions available to replace *Korematsu* (1943) include Oksanen v. United States, 362 F.2d 74, 80 (8th Cir. 1966); United States v. Stephens, 449 F.2d 103 (9th Cir. 1971); United States v. Bynoe, 562 F.2d 126, 128 (1st Cir. 1977).

approaching (if in some cases perhaps never quite attaining?) adulthood.[18] *Korematsu* (1943) was cited an additional twenty times between 1971 and 1985, eight of those just from 1971-1973. Six of the cases from 1971 to 1980 were federal drug prosecutions, back then known as "narcotics" cases, suggesting that federal courts may have been encountering and experimenting with expanded use of probation in addressing the new wave of drug use. This period also saw some deeper discussion of the issues and considerations involved, with some courts and cases finding situations where the earlier standard brief judicial rubber stamp—probation = final appealable judgment—might not apply so neatly. Particularly in the latter part of that period, from 1977 to 1984, *Korematsu* (1943) saw five out of the nine more substantial quotations it would receive from federal circuits (while three out of the remaining four came from the post-2001 period).

Korematsu (1943) notably vanished from federal circuit court opinions entirely from mid-1985 through mid-2001, likely due to heightened judicial and general public awareness of the whole process that led to both the official exoneration of famous former defendants such as Fred Korematsu and Gordon Hirabayashi and ultimately the formal Congressional apology and reparations to Japanese American internment survivors in 1988.[19] For a time at least, the very name "Korematsu" may have been recognized as sufficiently toxic, even radioactive, that both judges and lawyers may have avoided using it in any form for any normal legal purpose. Yet, perhaps after the novelty of the dramatic developments in the 1980s started to wear off, *Korematsu* (1943) nevertheless began to reappear and was again routinely cited as authority in its usual role regarding probation and/or final judgment six more times from 2001-2014 before again vanishing from federal circuit jurisprudence, perhaps forever.[20]

[18] For discussion and statistics regarding the general and violent crime surges of the 1960s-70s, *See* THOMAS BYRNE EDSALL Mary D. Edsall, Chain Reaction: The Impact of Race, Rights, and Taxes On American Politics 110-13 (1991).

[19] For a brief overview of these developments, see Dewey, *supra* note 10, at 91-94. A fuller discussion of these matters may be found, among other places, in the major cases of the exoneration/reparations era: Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986); Hohri v. United States, 793 F.2d 304 (D.C. Cir. 1986); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Hohri v. United States, 847 F.2d 779 (Fed. Cir. 1988).

[20] *Korematsu* (1943) has continued to have a quite active career in state courts since 2000, however, as a Westlaw search for citations of the opinion readily shows. Korematsu (1943) appears frequently in briefs as well as in state court opinions. *See, e.g.*, People v. Henriques, 828 N.Y.S.2d 86, 88 (N.Y.S. Ap. Div. 2006); State v. Whittle, 145 P.3d 211, Idaho 49, 53 (Idaho Ap. Ct. 2007); Sena v. State, 233 P.2d 993, 999 (Wyoming Sup. Ct. 2010); Arizona v. Watson, 248 Ariz. 208, 218 (Ariz. Ct. Ap. 2020); State v. Craig, 159 Ohio St.3d 398, 409 (Ohio Sup. Ct. 2020) (Kennedy, J., conc.).

1.1. *KOREMATSU* (1943): USE PATTERNS

In the end, *Korematsu* (1943) was used by federal circuits twenty-one times to support the proposition that probation represents an appealable final judgment,[21] along with various other related permutations of the same overall concept (probation alone, fourteen times;[22] final judgment alone, five times;[23] probation = final judgment (without "appealable"), one time[24]). One other opinion used *Korematsu* (1943) in debating the whole issue,[25] while another used *Korematsu* (1943) in finding that probation did not constitute a final judgment, at least not in that case.[26] Only the very first use in 1944 invoked *Korematsu* (1943) for federal war powers.[27]

No particularly clear or distinctive patterns emerge regarding use of *Korematsu* (1943) by particular circuits or individual judges. All circuits that typically review standard federal crime cases (so, all but the Federal Circuit) used *Korematsu* (1943) as precedent, mostly scattered fairly even through time.[28] The Ninth and Third Circuits used *Korematsu* (1943) relatively more (nine times and seven times, respectively); the Sixth and Tenth Circuits barely at all (one time each). The northeastern circuits all used *Korematsu* (1943) more frequently overall than the more "Heartland" circuits, with the exception of the Seventh (five times); this could indicate a greater concentration of uses (and perhaps of drug cases?) in more heavily urban regions, or perhaps a greater openness to making probation available in certain jurisdictions, but it also might just

[21] *See, e.g*, Arbuckle v. United States, 146 F.2d 657, 660 (D.C. Cir. 1945); United States v. Lombardo, 174 F.2d 575 (7th Cir. 1949); Tanzer v. United States, 278 F.2d 137, 139 (9th Cir. 1960); United States v. Corson, 449 F.2d 544, 550 (3d Cir. 1971); United States v. Stine, 646 F.2d 839, 846 n.15 (3d Cir. 1981).

[22] *See generally* Boufford v. United States, 239 F.2d 841, 844 (1st Cir. 1956); United States v. Birnbaum, 402 F.2d 24, 29 (2d Cir. 1968); United States v. Carson, 669 F.2d 216, 217 (5th Cir. 1982).

[23] *See generally* U.S. ex rel. Randall v. U.S. Marshall for Eastern Dist. of New York, 143 F.2d 830, 831 (2d Cir. 1944); James v. United States, 348 F.2d 430, 432 (10th Cir. 1965); United States v. Elkin, 731 F.2d 1005, 1010 n.4 (2d Cir. 1984).

[24] *See* Phillips v. United States, 212 F.2d 327, 335 (8th Cir. 1954).

[25] *See*Jenkins v. United States, 555 F.2d 1188, 1189-91 (4th Cir. 1977) (discussion includes both main opinion and Bryan, J., diss.) (the issue here was complicated by involving a conviction under the Youth Corrections Act and the main opinion's interpretation of statutory language and legislative history in that particular context to contradict the holding in *Korematsu* (1943); the dissent disagreed). Other fuller discussions of the significance of probation in the context of a suspended sentence, and the implications for double jeopardy, multiple probationary periods, and other issues when probation is revoked, appear in United States v. Fultz, 482 F.2d 1 (8th Cir. 1973) and United States v. Lancer, 508 F.2d 719, 737-42 (3d Cir. 1975) (Hunter, J., and Forman, J., separately dissenting).

[26] *See generally* United States v. Gras, 446 F.2d 7, 9 (5th Cir. 1971) (citing in support United States v. Lecato, 29 F2d 694, 695 (2d Cir. 1928), which was expressly disapproved of by the Supreme Court in Korematsu (1943)). [Judge Learned Hand, no less, was the opinion-writer in *Lecato*].

[27] *See* Alexander v. De Witt, 141 F.2d 573, 574 n.2 (9th Cir. 1944).

[28] Cumulative usage rates of *Korematsu* (1943) among the various circuits were as follows: First Circuit: five times; Second Circuit: four times; Third Circuit: seven times; Fourth Circuit: two times; Fifth Circuit: three times; Sixth Circuit: one time; Seventh Circuit: five times; Eighth Circuit: three times; Ninth Circuit: nine times; Tenth Circuit: one time; Eleventh Circuit: two times; D.C. Circuit: two times.

mean that the other circuits were using other authorities for the same purpose. Four of the Ninth Circuit's nine uses came just during 1944-45, when *Korematsu* (1943) was a quite fresh authority that recently had emerged from that circuit, and three of those four opinions were authored by Judge Mathews, while the fourth came from a panel that included Mathews. Five of the Third Circuit's seven total uses all came between 1971 and 1981, two of them authored by Judge Adams (1972, 1980) and one from a panel on which Adams was the senior judge (1981). Two of the First Circuit's five uses involved immigration/deportation cases in the mid-1950s, both authored by Judge Magruder. Judge Tjoflat used the case twice in 1982, first as a member of the Fifth Circuit, later as a new member of the newly established Eleventh Circuit.[29] Only two other judges used *Korematsu* (1943) twice, in both cases widely separated in time (Judge Sloviter, Third Circuit, 1981, 2005; Judge Merrill, Ninth Circuit, 1960, 1971). Six different circuits were among those that belatedly rediscovered *Korematsu* (1943) between 2001-2015 (the First, Third, Sixth, Seventh, Ninth, and Eleventh). Such limited, weak relationships are the closest the data comes to indicating any wider patterns in use of *Korematsu* (1943) between various judges and jurisdictions.

1.2. KOREMATSU (1943): QUOTES

Korematsu (1943) was quoted a total of thirteen times out of the forty-four uses, four of those only brief, passing references, the others more substantial. Only the First Circuit quoted it three times, two of those only quite briefly; the Third and Ninth Circuits twice; the Seventh, Tenth, and District of Columbia [hereinafter D.C.] Circuits never. The most popular quote, appearing six times, characterized probation as "an authorized mode of mild and ambulatory punishment"; three of those opinions added, "intended as a reforming discipline". Two such quotations came relatively early (1950, 1954); four of them appeared later (1982, 1984, 2004, 2005); all were scattered among various different circuits. That particular quote generally was used to establish that probation is indeed a form of punishment, which justifies treating a suspended sentence, with probation, as nevertheless a final, appealable judgment—in other words, no differently from formal imposition of a sentence followed by probation.[30] Three other opinions quoted *Korematsu* (1943)'s language regarding "certainly when discipline has been imposed, the defendant is entitled to review" (1984, 2001, 2014).[31]

[29] On the history of the creation of the Eleventh Circuit out of the former, larger "old" Fifth Circuit, see, e.g., Thomas E. Baker, *A Legislative History of the Creation of the Eleventh Circuit*, 8 Ga. State Univ. L. Rev. 457 (1992).
[30] *See*, e.g., Kennick v. Superior Court of State of Cal., Los Angeles County, 736 F.2d 1277, 1282 (9th Cir. 1984).
[31] *See*, e.g., United States v. Elkin, 731 F.2d 1005, 1010 n.4 (2d Cir. 1984).

Two circuits quoted *Korematsu* (1943) for "the difference to the probationer between imposition of sentence followed by probation [. . .] and suspension of the imposition of sentence [. . .] is one of trifling degree" (1977, 1980).[32] Only three quotations, two quite brief, appeared between 1950 and 1960, while nine surfaced from 1977 onward; this might only tend to reflect the vast overall lengthening of court opinions between the early postwar years and more recent decades.[33]

1.3. KOREMATSU (1943): ISSUES

Regarding issues addressed in the various cases citing *Korematsu* (1943), aside from eight narcotics cases (one in 1960, one in 2014, and the other six from 1971-1980), few patterns are discernable among a wide array of relatively ordinary criminal prosecutions. Next closest to a "cluster" were three bank robbery cases; otherwise, there were various cases involving mail fraud, wire fraud, bank fraud, embezzlement, interstate transportation of stolen cars or other stolen goods known to be stolen, tax evasion, tax bribery, and at least one moonshine liquor case.[34] There were relatively few other, more serious cases, such as a 2005 case concerning the rape/murder of an underage female,[35] or a 1981 case involving illegal receipt of a firearm by a felon.[36] Some cases reflect their particular times: for instance, two cases involved illegal sale of meat contrary to rationing established by the wartime Office of Price Administration to prevent runaway price inflation on scarce commodities during wartime;[37] and one defendant who was convicted under Federal Prohibition laws before the Twenty-First Amendment repealed the Eighteenth Amendment in 1933, and who fled the United States before being sent to prison, was held to still be liable for his Prohibition prison time when he returned years later, notwithstanding his argument that Prohibition had since been repealed.[38] The earliest case, from March 1944, involved violation of the War Department's wartime exclusion order by a non-Japanese American, apparently an Anglo suspected of

[32] United States v. Bynoe, 562 F.2d 126, 128 (1st Cir. 1977); United States v. Johnson, 634 F.2d 94, 95-96 n.4 (3d Cir. 1980).

[33] For a (commendably concise) commentary on this issue, including various lengthening-related statistics, see, e.g., Gerald Lebovits, *Short Judicial Opinions: The Weight of Authority*, 76 N.Y. STATE BAR J. 64 (2004). As Lebovits notes, there were also complaints about this process since 1899 if not earlier. See, e.g., Herbert B. Gregory, *Shorter Judicial Opinions*, 34 Va. L. Rev. 362 (Apr. 1948). To paraphrase "Jazz Singer" Al Jolson: They hadn't seen nothin' yet.

[34] *See* Martin v. United States, 183 F.2d 436, 439 (4th Cir. 1950).

[35] *See* Mickens-Thomas v. Martinez, 2005 WL 1586212 (Slip Copy) (3d Cir. 2005) (Sloviter, J.).

[36] *See* United States v. Stine, 646 F.2d 839, 846 n.15 (3d Cir. 1981) (Sloviter, J.).

[37] *See* Rosensweig v. United States, 144 F.2d 30, 33 (9th Cir. 1944); United States v. Beekman, 155 F.2d 580, 583 (2d Cir. 1946).

[38] *See* United States ex rel. Randall v. U. S. Marshall for Eastern Dist. of New York, 143 F.2d 830, 831 (2d Cir. 1944) (Augustus N. Hand, J.).

radicalism who lived near the various important U.S. naval stations at San Diego and the Marine base at Camp Pendleton.[39] A 1973 case involved a Vietnam draft-dodger.[40] Two cases, both from the mid-1950s and from the First Circuit, involved immigration, one concerning a false statement made under oath to immigration authorities, the other the deportation of an Italian national with a criminal record.[41]

Viewing this laundry list of mostly unrelated and relatively insignificant cases and opinions, readers might (appropriately) be inclined to dismiss it as much ado about nothing,[42] or perhaps as the dog that didn't bark.[43] Whatever its wider possible legal and rhetorical potential, *Korematsu* (1943) basically remained narrowly limited in its precedential role as a relatively routine judicial rubber stamp regarding the specific criminal procedure issues of probation and final judgment. Grinding through the (perhaps unnecessary and unwelcome) details of quantitative analysis on *Korematsu* (1943), however, provides a preliminary illustration of the same processes that were used on its more "interesting" relatives, *Korematsu* and *Hirabayashi.*

[39] *See* Alexander v. De Witt, 141 F.2d 573, 574 n.2 (9th Cir. 1944).
[40] *See* United States v. Teresi, 484 F.2d 894, 899 (7th Cir. 1973).
[41] *See generally* Pino v. Nicolls, 215 F.2d 237, 242 (1st Cir. 1954); Boufford v. United States, 239 F.2d 841, 844 (1st Cir. 1956). Judge Magruder wrote both these opinions.
[42] William Shakespeare, Much Ado About Nothing (written in 1598 or 1599, first published in 1623).
[43] Arthur Conan Doyle, *Silver Blaze*, in The Memoirs of Sherlock Holmes (Penguin, 2011).

2. *HIRABAYASHI*: JUST ANOTHER ROUTINE CRIMINAL PROCEDURE PRECEDENT (?)

With more than 300 citations,[44] *Hirabayashi*—concerning Gordon Hirabayashi's deliberate (civil disobedience) violation of early wartime exclusion and internment orders[45]—has been cited by the federal circuit courts substantially more often than both *Korematsu* (1943) and *Korematsu* (and probably all other 1940s Japanese American cases) put together.[46] However, more than two thirds of these were usually brief, passing citations used to rubber-stamp a tool for judicial efficiency in criminal procedure: the doctrine of concurrent sentences, holding that an appellate court may generally ignore arguments on appeal regarding particular counts and sentences in multi-count criminal prosecutions, if other, equal or greater sentences would remain standing regardless.[47] This doctrine was increasingly called into question during the 1970s-80s as being perhaps too quick and facile in dismissing or ignoring the issues that might still remain significant for appeals, criminal records, and potential collateral adverse impacts on defendants.[48] Yet from 1949 through 1981, out of 229 citations of *Hirabayashi* during that

[44] Cases citing *Hirabayashi* include some historically special cases that, by their very nature, were likely to address the case and holding at much greater length in a manner quite different from most "ordinary" citing cases. These include Toyosaburo Korematsu v. United States, 140 F.2d 289 (9th Cir. 1943), the circuit-court iteration of what would become *Korematsu* (1944), and the various major cases of the 1980s relating to Japanese American official exoneration and reparations: Hohri v. United States, 782 F.2d 227 (D.C. Cir., January 1986); Hohri v. United States, 793 F.2d 304 (D.C. Cir., May 1986); Hohri v. United States, 847 F.2d 779 (Fed. Cir. 1988); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987). Because these fall in a rather special category, they, and similar cases that cite *Korematsu* (1944), have been excluded from the statistical data concerning more "ordinary" cases. That leaves 301 separate citing cases, with five of those including situations where both the majority opinion and a dissent or a concurrence/dissent cite Hirabayashi.

[45] *See* Hirabayashi v. United States, 320 U.S. 81.

[46] Although this data likely would be better communicated in a chart or graphic, the annual usage rate of *Hirabayashi*, in cases, is as follows: 6x, 1943; 8x 1944, 10x 1945, 7x 1946, 3x 1947 & 1948 & 1950, 7x 1949, 5x 1951 & 1952, 2x 1953 & 1955, 3x 1954, 6x 1956, 4x 1957, 9x 1958, 10x 1959, 3x 1960, 8x 1961, 12x 1962, 5x 1963, 11 x 1964, 9x 1965, 3x 1966, 8x 1967, 11x 1968, 16x 1969, 15x 1970, 10x 1971, 13x 1972, 11x 1973, 5x 1974, 6x 1975, 9x 1976, 3x 1977 & 1979, 8x 1978, 5x 1980, 2x 1981, 1x 1983, 0x 1982 & 1984 & 1986 & 1988 & 1992, 2x 1985 & 1989 & 1991, 1x 1987 & 1990 & 1993 & 1994 & 1995 & 1996 & 1997, 2x 1998, 1x 1999, 0x 2000, 3x 2001 & 2002 & 2003, 2x 2004 & 2006, 0x 2005 & 2007-2014, 1x 2015 & 2016. Because of the five situations where there were two opinions citing *Hirabayashi* in the same case, in 1949, 1957, 1964, 1967, and 1978, to count opinions per year, each of those years should be elevated by one: i.e., 8x 1949, 5x 1957, 12x 1964, 9x 1967, and 9x 1978. Again, because the original Ninth Circuit iteration of Korematsu (1944) and the various reparations/exoneration cases of the 1980s are in a somewhat different category, those five cases and seven opinions are excluded from these statistics.

[47] The doctrine of concurrent sentences continues to exist today, though only in a diminished state and in particular jurisdictions, while other jurisdictions have rejected the doctrine. *See* Wayne R. LaFave et al., *The Concurrent Sentence Doctrine, in* Criminal Procedure (2003). Regarding the doctrine as it stood through much of the period under discussion, see *The Federal Concurrent Sentence Doctrine*, 70 Colum. L. Rev. 1099 (1970). For the history of the doctrine, see Anne S. Emanuel, *The Concurrent Sentence Doctrine Dies a Quiet Death—Or Are Reports Greatly Exaggerated?*, 16 Florida St. U. L. Rev. 269 (Summer 1988).

[48] See LaFave et al., *supra* note 47 ; Emanuel, *supra* note 47, regarding this reconsideration of the doctrine, which began with a Supreme Court opinion from the heyday of Supreme Court liberalism—Benton v. Maryland, 395 U.S. 784, 789-90 (1969).

period, 202 concerned concurrent sentences—a nearly unbroken string, with other issues appearing only sporadically. After early inklings in 1950 and 1956, *Hirabayashi* established a comparatively modest presence as a cited authority regarding civil rights and non-discrimination arguments starting in 1968, with ten additional such citations, usually brief and in passing, through 1979.

The nature of use of *Hirabayashi* changed abruptly during the 1980s and after. Of thirty-six total circuit opinions mentioning *Hirabayashi* from 1983-2016, four were reparations-related (including four of the five uses from 1986-88), and thus were in a different category from the other cases due to being inherently more likely to discuss the facts and issues associated with the Japanese American internment at greater length and depth and are excluded from the general population of cases and opinions for analysis as such. Of the remaining thirty-two cases, twenty-seven either invoked the ringing anti-discrimination language in *Hirabayashi* that federal circuit courts mostly had ignored before 1983 or included ostentatious hand-wringing over the constitutional train-wreck *Hirabayashi* and *Korematsu* had finally been recognized to be. The vast majority of these latter uses came after the Congress issued its apology and reparations to the Japanese American internment survivors in 1988.

2.1. HIRABAYASHI: USE IN GENERAL

In the first phase of H's life, from July 1943 through May 1949, out of forty-one citations of the case, thirty (73.2% of forty-one) largely or entirely concerned the federal government's power to wage war. Six other citations concerned the general federal powers or delegation of legislative or executive authority outside the strict military/wartime context and typically construed those powers liberally (1943, 1944, 1945, twice in 1948, 1949). Concurrent sentences doctrine made a tentative appearance during these early years, either alone (twice in 1945, once in 1946) or associated with federal power to wage war (1946, twice in 1947). The question of the constitutional relationship between the Fifth and the Fourteenth Amendments with regard to the issues of equal protection under the Fourteenth, versus due process and quasi-equal protection under the Fifth Amendment—arguably among the most significant legal/constitutional issues raised by the *Hirabayashi* and *Korematsu* litigation, especially in light of later developments in civil rights law during the 1950s-60s—made a first brief appearance in December 1947. During the later years of U.S. participation in the Second World War as well as the rest of the 1940s, the nation and its judiciary were still busy with mopping up after the vast and often horrific international and domestic mess that

remained, and use of *Hirabayashi* was primarily associated with such purposes—such as disciplining or punishing those who had cheated on wartime rationing, those who had been disloyal, those who had challenged federal defense material procurement on traditional (non-wartime) business contract grounds, those who claimed to be conscientious objectors but failed to report for alternate duty, and so on.

As already noted, during the main period of its precedential life cycle, *Hirabayashi* was used overwhelmingly regarding the criminal procedure doctrine of concurrent sentences, which accounted for 214 out of 306 total uses (nearly 70%). Starting in February 1945, and especially from June 1949 to December 1981, use of *Hirabayashi* for that purpose was almost unbroken: out of 229 federal circuit cases citing *Hirabayashi*, 1949-1981, 202 (88.2%, or roughly seven-eight of the 1949-1981 total) concerned concurrent sentences; five concerned federal power to wage war (three of those between 1949-1951, others in 1959 and 1969); twelve (5.2%) concerned non-discrimination and/or civil rights (1950, 1956, two in 1968, 1969, 1971, two in 1972, 1975, two in 1976, 1979); three concerned nationality (1951, 1979, 1980); only four additional cases concerned the still uncertain relationship between the Fifth and the Fourteenth Amendments (1956, 1958, 1962, 1968) after the first discussion of that issue came in December 1947; and others concerned other such matters as the warrant requirement for search and seizure (1975), restrictions on travel during emergencies (1971), and preventive detention (1969).

Again, and after a brief gap in uses between 1981 and 1983 which (non-coincidentally?) happened to coincide with the 1982 release of the initial Congress-commissioned study first officially finding that the Japanese American internment had been a huge and tragic mistake based largely upon racial animus,[49] there were an additional thirty-six uses of *Hirabayashi* from 1983-2016 (11.8% of 306). Subtracting the three different versions of the *Hohri* reparations litigation (two in 1986, one in 1988) and the reappearance of *Hirabayashi* as a reparations case in 1987 leaves thirty-two uses, 1983-2016. Of these, one concerned general judicial efficiency (1991),[50] two addressed the old topic of concurrent sentences for the last times (1991, 1994),[51] and two others involved the even older topic of the federal power to wage war, this time in the context of the post-2001 "War on Terror" (2003, 2004).[52] All others were sanctimonious hand-wringing of one sort or another: two regarding nondiscrimination

[49] Comm'n On Wartime Relocation and Internment of Civilians, Personal Justice Denied 18 (1982), https://www.archives.gov/research/ japanese-americans/justice-denied [readers accessing the website from a country different than the U.S.A. might experience automatic redirection to the homepage of the National Archives website].

[50] *See* Hing Tin Ngai v. U.S.I.N.S., 937 F.2d 612 (9th Cir. 1991).

[51] *See* United States v. Barel, 939 F.2d 26 (3d Cir. 1991); United States v. McHatton, 16 F.3d 401 (1st Cir. 1994).

[52] *See* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003); El-Shifa Pharmaceutical Industries Co. v. United States, 378 F.3d 1346 (Fed. Cir. 2004).

generally,[53] two bemoaning the Constitutional train wreck,[54] one using the somewhat famous "loaded weapon" quote and passage from Justice Jackson's *Korematsu* dissent in conjunction with *Hirabayashi* to similar effect,[55] and twenty-two others all repeating what became a kind of standard mantra making use of ringing language from *Hirabayashi* regarding strictly color-blind non-discrimination—what rather suddenly became the widely used and oft-repeated, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality".[56] The latter twenty-two opinions accounted for 68.8% of cases citing *Hirabayashi* from 1983 onward; the expanded group of twenty-seven represented 84.4%. The "distinctions/odious" quote was used only a total of five times before 1983 (two early appearances in 1949 and 1950, both from Judge Edgerton of the D.C. Circuit, then 1972, 1975, and 1979). By contrast, either the full quote or recognizable fragments of it appeared twenty-three times between 1983 and 2016. To further rhetorically buttress the hand-wringing/odious distinctions theme, *Plessy v. Ferguson* (another rather famous constitutional train-wreck) increasingly was rolled out as a companion for *Hirabayashi*, appearing five times in the period from 1998-2015 (after only four sporadic earlier appearances from 1950-1971).[57]

That *Plessy* was used three times within four years (1998, 1999, 2001), then once in 2006 and in 2015, suggests that at a certain point, there may have been a sense that the *Plessy* rhetorical meme was being overused. Similarly, after a long run from 1993 through 2006 in which *Hirabayashi* and the "odious distinctions quote" appeared at least once in almost every year (and two or three times each year from 2001-2003), after 2006 there was a notable lull before their re-emergence in 2015 and 2016.

[53] *See* Scott v. Pasadena Unified School Dist., 306 F.3d 646 (9th Cir. 2002); Rothe Development, Inc. v. United States Department of Defense, 836 F.3d 57 (D.C. Cir. 2016).

[54] *See* McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (Lay, J., conc./diss.); Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015).

[55] *See* Hamdi v. Rumsfeld, 337 F.3d 335 (4th Cir. 2003) (Motz, J., diss.) ("As Justice Jackson recounted, despite the Supreme Court's careful efforts to limit the scope of its holding in *Hirabayashi*, to the specific facts of that case, the Court later determined that *Hirabayashi* dictated the holding in *Korematsu*". See *id.* at 247 (Jackson, J., dissenting) ("The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding").

[56] See, *e.g.*, Ohio Contractors Ass'n v. Keip, 713 F.2d 167 (6th Cir. 1983) (Engel, J., diss.); Steele v. F.C.C., 770 F.2d 1192 (D.C. Cir. 1985); United States v. Borrero-Isaza, 887 F.2d 1349 (9th Cir. 1989); Sylvia Development Corp. v. Calvert County, Md., 48 F.3d 810 (4th Cir. 1995); Morrison v. Garraghty, 239 F.3d 648 (4th Cir. 2001); Kohlbek v. City of Omaha, Neb., 447 F.3d 552 (8th Cir. 2006); Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237 (6th Cir. 2006).

[57] The even more infamous Dred Scott v. Sandford, 60 U.S. 393 (1856) made only two appearances, both before 1981 (1969, 1980).

2.2. *HIRABAYASHI*: USE PATTERNS BY JURISDICTION

Out of curiosity, this study checked uses of *Hirabayashi* by both jurisdiction, court panel, and opinion-writing judge over time, in detail. Particular jurisdictions—the Fifth, Ninth, and D.C. Circuits—accounted for more than half of all the citation "traffic" concerning *Hirabayashi.* Perhaps one of the more interesting findings, observable sometimes among lesser as well as heavier users, was a pattern of "pulses" of higher use activity at certain moments in time separated by periods of non-use or sporadic use; these periods did not always exactly coincide from one circuit to another. Certain circuits also tended to mostly abandon use of *Hirabayashi* earlier than others—some even before the events of the 1980s.

- First Circuit: The First used *Hirabayashi* less than most other circuits, only eight times (2.8% of the total of 306 opinions) between 1943 and 1994. The first five uses all occurred 1943-50 (so, chiefly clean-up after the war); the latter three were spaced widely apart and show little if any pattern in time (1967, 1980, 1994). The latter three cases were all standard crime/concurrent sentences cases, so the First Circuit avoided the reparations and hand-wringing eras entirely, at least regarding use of *Hirabayashi*.

- Second Circuit: The Second used *Hirabayashi* a substantial number of times (twenty-four, or 7.8%), though less than half the uses in either the Fifth, Ninth, or D.C. Circuits. The Second saw ten uses spaced fairly evenly during the wartime and early Cold War years from 1944-1952. There were separate small clusters of five cases from 1956-59, three cases (one per year) from 1962-64, four cases spaced almost evenly and yearly from 1967-71, a case in 1975, and a late stray in 2003. All ten cases from 1958-71, and three of the four from 1951-56, were the usual concurrent sentences cases. The late case, *Padilla v. Rumsfeld* (2003),[58] was an enemy combatants case in the "War on Terror". The Second mostly stopped citing *Hirabayashi* already in 1975 after dwindling use long before then, and, at least regarding *Hirabayashi*, largely missed the whole flurry of hand-wringing from the 1980s onward.

- Third Circuit: The Third used *Hirabayashi* modestly (15, 4.9%), with a pronounced pulsing pattern in various decades: five uses, 1943-45; three uses, 1953-55; two uses, 1965 and 1967; three uses, 1977-79, plus late strays in 1991 and 2015. All seven cases from 1953 to 1978 were standard concurrent sentences cases, as was the 1991 case; the very late 2015 case arose from the "War on Terror" and targeted the

[58] *See* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003).

surveillance of Muslims, and included significant hand-wringing. With limited exceptions, similarly to the Second Circuit, the Third already had largely ended its use of *Hirabayashi* in the 1970s.

- Fourth Circuit: The Fourth was another modest user (eleven, 3.6%) that featured a pulsing pattern tilted towards later decades. After a single initial use in 1945, there were no more until four during the Civil Rights period from 1967-71, another in 1980, then two from 1993-95 and another three from 2001-2003. Unlike the First, Second, and Third Circuits, the Fourth was a relatively active participant in the hand-wringing of the post-1980s.

- Fifth Circuit: The Fifth was a heavy user of *Hirabayashi* (59, 19.3%). Like the (originally) neighboring Fourth Circuit, it had one initial early use in 1945, then did not rediscover the opinion until fourteen years later. Judges of the Fifth Circuit used *Hirabayashi* eight times already from 1959-1965, roughly once a year, already including some early civil rights exposure,[59] but then vastly expanded that use during the late Civil Rights era, with forty-five uses from 1968-1978, including a peak of eight uses in 1969 alone and notable concentrations of five uses in 1972, 1976, and 1978. Then the Fifth saw one use a year from 1979-1981, and two final uses in 1996 and 1998—both penned by Jerry E. Smith, a conservative judge and Reagan appointee who used the color-blind rhetoric of *Hirabayashi* against affirmative action or equal protection claims. Aside from those two late strays, the Fifth's use of *Hirabayashi* basically already had ended before the sea change of the 1980s.

  Here it may be worth mentioning the special and peculiar history of the Fifth Circuit in the postwar era. Prior to the creation of the Eleventh Circuit in 1981,[60] carved out of territory formerly in the Fifth, the Fifth Circuit had included most of the original Confederate South and basically the entire Deep South, including hard-core segregationist states such as Georgia, Alabama, and Mississippi that became the particular "problem children" of the desegregation era (though that's not to let other states, including Arkansas, Texas, Louisiana, Virginia, the Carolinas, and many others, North, South, and West, off the hook).[61] Some judges of the Fifth Circuit were perceived, and respected, as relatively bold national

[59] *See e.g.*, Gomillion v. Lightfoot, 270 F.2d 594 (5th Cir. 1959) (Brown, J., diss.); Boson v. Rippy, 285 F.2d 43 (5th Cir. 1960) (Rives, C.J.) (an early school desegregation case involving plans for a gradual desegregation of the public schools of Dallas, Texas).

[60] *See* Baker, *supra* note 29.

[61] For a disturbing, tastefully done, partly fictionalized but largely accurate historical vignette of Mississippi, the worst of the problem children, during the tumultuous Freedom Summer of 1964, see, e.g., *Mississippi Burning* (1988), a feature film starring Willem Dafoe and Gene Hackman and directed by Alan Parker.

leaders on civil rights and desegregation, partly due to the Eisenhower administration's appointment of various Republican federal judges[62] who were not political prisoners of the traditional, post-Confederate, pro-segregationist southern wing of the Democratic Party that effectively controlled nearly all other state or federal elective or appointive offices throughout what was traditionally labeled the "Solid South".[63] At any rate, judges such as Elbert Tuttle, John Brown, and John Minor Wisdom, among others, periodically issued pro-civil rights opinions that were closer in outlook to that of the Warren Court than to that of most of their neighbors within the old Fifth Circuit. They also received death threats for their efforts. For the same reason, Judge J. Skelly Wright, a federal district judge in Louisiana who issued locally unpopular opinions regarding school desegregation and other matters, was given a safer seat on the D.C. Circuit.[64] This peculiar and somewhat heroic role of the federal judges of the Fifth Circuit likely accounts for some of its particularly heavy traffic in *Hirabayashi* during the Civil Rights years. However, as with most other circuits, the vast majority of uses of *Hirabayashi* in the Fifth Circuit (forty-nine of fifty-nine) involved the usual concurrent sentences doctrine—although many of these criminal cases also involved civil rights/equal protection arguments, and the Fifth was fairly prominent in starting to call aspects of the concurrent sentences doctrine into question during the 1970s.[65]

- Sixth Circuit: The Sixth used *Hirabayashi* twenty times (6.5%), with some notable pulsing or clustering: four times, 1944-47; five times, 1958-62; three times in 1965 and another four times, 1966-68; plus sporadic later uses in 1974, 1978, 1983, and

[62] Conservative Fifth Circuit Judge Jerry E. Smith, mentioned earlier, was a post-Nixon Republican appointed by President Reagan, unlike the moderate and pro-civil rights Eisenhower Republican appointees of the Old Fifth.

[63] Regarding the Fifth Circuit judges, sometimes called the "Fifth Circuit Four," who often took a stand for civil rights in what were then relatively hostile surroundings, *See*, e.g., Jack Bass, Unlikely Heroes: The Dramatic Story of the Southern Judges of the Fifth Circuit who Translated the Supreme Court's Brown Decision Into a Revolution for Equality (1981); Jack Bass, *The "Fifth Circuit Four": How Four Federal Judges Brought the Rule of Reason to the South*, Nation, May 3, 2004, *available at* https://www.thenation.com/article/archive/fifth-circuit-four/ [hereinafter Bass, *The "Fifth Circuit Four"*]; Joel W. Friedman, *John Minor Wisdom: The Noblest Tulanian of Them All,* 74 Tul. L. Rev. 1, 24 (1999). Regarding the history of the recognition of the phenomenon of the one-party Democratic "Solid South," *See*, e.g., Marian D. Irish, *The Southern One-Party System and National Politics*, 4 J. Pol. 80 (1942). *See also* Gerald R. Webster, *Demise of the Solid South*, 82 Geographical Rev. 43 (1992). For longer, book-length treatments of the overall topic, see, e.g., Kari Frederickson, The Dixiecrat Revolt and the End of the Solid South 1932-1968 (2001).

[64] *See* Marjorie Hunter, *Judge J. Skelly Wright, Segregation Foe, Dies at 77*, N.Y. Times, Aug. 8, 1988, available at https://www.nytimes.com/1988/08/08/obituaries/judge-j-skelly-wright-segregation-foe-dies-at-77.html.

[65] *See, e.g.*, United States v. Carter, 491 F.2d 625 (5th Cir. 1974); United States v. Windom, 510 F.2d 989 (5th Cir. 1975) (Rosenn, J., conc.); United States v. Crockett, 534 F.2d 589 (5th Cir. 1976); United States v. Evans, 572 F.2d 455 (5th Cir. 1978).

2006. All twelve uses from 1960 to 1978 involved concurrent sentences; the final two, post-1980 hand-wringing.

- Seventh Circuit: The Seventh used *Hirabayashi* relatively little and briefly (only sixteen uses, 5.3%, all between 1943 and 1980) with some degree of pulsing: after an early initial use in 1943, there were five uses during the early Cold War years (1948-52), two uses, 1958-59; three uses in 1964 alone; four uses from 1970-75; and a final use in 1980. All the eleven cases from 1949-73 involved ordinary crimes and concurrent sentences.

- Eighth Circuit: The Eighth used *Hirabayashi* even less (thirteen, 4.2%). There were three uses, 1945-46, one use in 1952, five uses from 1956-64, then sporadic later strays in 1970, 1980, 1987, and 2006. All eight cases from 1952-1980 involved crimes/concurrent sentences; the final two, hand-wringing.

- Ninth Circuit: The Ninth, with sixty-two uses of *Hirabayashi*, accounts for 20.3% of the total 306 uses. That the *Hirabayashi* litigation originated in the Ninth likely increased that level of traffic; federal circuit and district courts often tend to favor Supreme Court opinions arising from their own circuits, even though they apply to everybody.[66] The Ninth saw very high use levels during the late wartime and early Cold War years as wartime messes were being cleaned up—nine uses from 1943-47 (four in 1946 alone), with another five from 1949-51. Despite an overall high use level, the Ninth saw some pulsing activity, with eleven uses from 1958-1966 (over half of those just in 1962 and 1963), twenty-two uses from 1969-73 (sixteen of those just from 1970-72), then a dwindling level of activity, with two uses in 1976 and single uses in 1978 and 1981. Thirty-eight of the Ninth Circuit uses of *Hirabayashi* involved crimes and concurrent sentences. Perhaps predictably, given that the majority of Japanese Americans continued to live along the West Coast in the 1980s as they had in the 1940s,[67] the Ninth was a particularly active user in the post-1980 reparations era, with *Hirabayashi* reappearing in 1985, 1987, 1989, and 1991 plus seven additional uses just between 1997 and 2004. Except for one immigration case in which a *per curiam* panel used *Hirabayashi* for general judicial efficiency[68] and

[66] Although this claim admittedly may be impressionistic and anecdotal, it is based upon extensive observations over many years. Possibly the most striking example of this phenomenon is federal circuit courts citing cases from their home circuit on which the Supreme Court denied certiorari, sometimes where the certiorari decision was based on issues entirely separate from those for which the case later is being cited.

[67] According to the 2010 U.S. census, Japanese Americans remain by far most heavily concentrated in the states of California and Hawaii—as was also true in the 1940s—with an additional substantial community in Washington State. *Japanese Americans*, Wikipedia,https://en.wikipedia.org/wiki/Japanese_Americans (accessed December 23, 2020).

[68] *See e.g.*, Hing Tin Ngai v. U.S.I.N.S., 937 F.2d 612 (9th Cir. 1991).

another affirmative action/education case where it was used for general non-discrimination,[69] all other later uses involved hand-wringing, mostly by conservative judges on behalf of strict color-blindness.

- Tenth Circuit: The Tenth made little use of *Hirabayashi* (ten, 3.3%), with two uses from 1950-51, one in 1954, two in 1958-59, then sporadic uses in 1965, 1968, 1973, and two in 1976. The Tenth sat out the reparations era and the hand-wringing flurry, at least as far as *Hirabayashi* was concerned.

- Eleventh Circuit: The Eleventh didn't even exist for most of the time before the 1980s reparations era began, and it used *Hirabayashi* only once, in a 2001 hand-wringing opinion.[70]

- District of Columbia Circuit: The D.C. Circuit joined the Ninth as the heaviest user of *Hirabayashi* (sixty-two, 20.3%), with somewhat lighter use in the earlier years followed by very heavy use between 1956 and 1972 in particular. After an initial use in 1946 and six uses from 1949-54, the D.C. Circuit saw thirty uses from 1956-66, including four uses each in 1957, 1959, and 1961, and five in 1964, followed by seventeen additional uses between 1967 and 1972 (including five just in 1969). Activity then dwindled, with one use in 1975, but picked up again in the 1980s, with three uses from 1985-86 (including the first two mid-appellate-level iterations of *Hohri*, the key reparations case, in 1986), two more from 1989-90, and, after a twenty-six-year gap, a very late stray affirmative action case in 2016. Like the Fifth Circuit, and even more than the Ninth, the D.C. Circuit made very heavy use of *Hirabayashi* as a precedent regarding the concurrent sentences—forty-seven of the sixty-two cases. It is possible that D.C. judges might have used *Hirabayashi* somewhat more heavily as a local authority for the District of Columbia, whereas some other jurisdictions, even if they invoked the concurrent sentences doctrine, might have turned to some later, local circuit opinion on the same issue for authority—though that would not explain the Fifth Circuit's relatively heavy use of *Hirabayashi* for the same purpose.[71]

[69] *See e.g.*, Scott v. Pasadena Unified School Dist., 306 F.3d 646 (9th Cir. 2002).
[70] *See, e.g.*, Johnson v. Board of Regents of University of Georgia, 263 F.3d 1234 (11th Cir. 2001).
[71] As examples of potential alternate authorities addressing the same issue, see, e.g., United States v. Darnell, 545 F.2d 595, 598-99 (8th Cir. 1976) (including a relatively eloquent notice that, although they would have liked to consider all the merits of any claim submitted to them, "[t]he luxury of time is denied us. We are, even now, overdrawn on this resource"); United States v. Moore, 452 F.2d 576 (9th Cir. 1971); United States v. Gaines, 460 F2d 176 (2d Cir. 1972). For an example of where the U.S. Supreme Court called the doctrine of concurrent sentences more into question—and a dissent sharply challenged the majority for doing so—see, e.g., Benton v. Maryland, 395 U.S. 784 (1969).

- Federal Circuit: The Federal Circuit got into the act, also, late and in a limited way, not usually having to hear the sorts of cases that produced citations of *Hirabayashi* in other circuits. The Federal Circuit heard the last iteration of *Hohri* before Congress's apology and reparations in 1988, followed by cases in 2002 and 2004 involving a U.S. Air Force gender affirmative action program[72] and extra-territorial designation of enemy property,[73] respectively.

- United States Emergency Court of Appeals: Most readers, like the author, may have been previously unaware that there ever was such an entity, but it existed from 1942 onward[74] and is yet another reminder that in 1942, the nation found itself in the worst national crisis since the American Civil War. The Emergency Court, which sat nationwide to hear cases concerning the wartime Office of Price Administration, saw Judge Calvert Magruder of the First Circuit working with Fred Vinson, later Chief Justice of the Supreme Court, along with Judge Albert Maris of the Third Circuit among others. The Emergency Court cited *Hirabayashi* in two July 1943 opinions, both concerning rent control under the Emergency Price Control Act of 1942.[75]

[72] *See, e.g.*, Berkley v. United States, 287 F.3d 1076 (Fed. Cir. 2002).

[73] *See also* El-Shifa Pharmaceutical Industries Co. v. United States, 378 F.3d 1346 (Fed. Cir. 2004).

[74] An obituary tribute to Third Circuit Judge Albert Branson Maris, who was for a time Chief Judge of the Emergency Court of Appeals, suggests that said court, which had "exclusive jurisdiction to review orders and regulations of the Office of Price Administration," continued to sit all the way until 1962, though that's somewhat hard to imagine (but may well be true and correct, and the Second World War was big enough to produce a lot of major, potentially long-lasting messes to clean up). *See* Dolores K. Sloviter, *Memorial Tribute to the Honorable Albert Branson Maris* 1983-1989, 62 Temp. L. Rev. 471 (1989). In September 1945, shortly after the Second World War (though not its aftermath and clean-up) were officially over, it was noted:

> The United States Emergency Court of Appeals, which reviews determinations of prices by the Office of Price Administration, received appeals in 93 cases during the year and had 52 cases pending at the close of the year. The average time required by the court for disposing of cases (exclusive of any time required for submitting additional evidence) was 6.8 months. In order to meet the convenience of the parties the court traveled constantly so as to hold hearings where the cases were, and sat in twenty-two places scattered all over the country.

Henry P. Chandler, *Administrative Office of the United States Courts*, 4. F.R.D. 488.

[75] *See, e.g.*, Taylor v. Brown, 137 F.2d 654 (U.S. Emergency Ct. Ap. 1943); Wilson v. Brown, 137 F.2d 348 (U.S. Emergency Ct. Ap. 1943).

2.3. *HIRABAYASHI*: ISSUES

2.3.1. CRIMINAL CASES

As noted already, the vast majority of the citations of *Hirabayashi* were routine passing references concerning concurrent sentences in criminal procedure. Some jurisdictions—especially the First, Second, Third, and Ninth Circuits (which, probably not coincidentally, included most of the nation's major port cities as well as major immigrant populations), though not others, also had significant numbers of early cases from the 1940s and early 1950s trying to clean up the wartime messes, along with cases from the early Cold War that soon followed. Other categories of the cases associated with *Hirabayashi* are relatively limited, at least until the post-1980s hand-wringing.

More than 200 cases citing *Hirabayashi* involved ordinary criminal acts of one sort or the other. These included fifty-five narcotics cases, spanning 1951-1990, with nine in the 1950s, eighteen in the 1960s, and twenty-six in the 1970s, with a spike of seven in 1970 alone, followed by two late strays in 1989 and 1990. Most of the later narcotics cases from 1971 onward—seventeen—also included civil rights arguments, such as denial of equal protection to African American defendants. This injection of equal protection claims was a trend for other criminal cases in the 1970s, also. The next largest batch was thirteen cases of tax evasion—a rather distant second, but far ahead of all other crime categories, including various varieties of bank fraud, mail fraud, wire fraud, armed robbery, bank robbery, and transporting stolen cars or other stolen goods in interstate commerce, among others.

Just as overall use of *Hirabayashi* featured more prominently in certain jurisdictions, use of *Hirabayashi* in drug prosecutions also featured more prominently, mostly in the same jurisdictions. It is hard to imagine that other jurisdictions were not experiencing the same overall surge in drug use, drug trafficking, and drug prosecutions during the 1960s and 1970s as the heaviest users of *Hirabayashi*, which implies that the other jurisdictions may have been turning to other authorities to justify whatever crackdowns on drug activity were happening within their respective jurisdictions.[76] At any rate, of the 55 drug cases, the Ninth Circuit accounted for seventeen, and the Fifth and D.C. Circuits each accounted for thirteen (between the three jurisdictions, 78.2% of the total). The Second, Eighth, and Tenth Circuits cited *Hirabayashi* in narcotics cases

[76] Particularly during the heroin epidemic of the 1960s-early 1970s, when the "French Connection" was importing heroin to East Coast cities for distribution by the Mafia, cities and circuits along the East Coast were not without drug problems—particularly New York City. *See, e.g.*, John Bacon, *Is the French Connection Really Dead?*, 8 Drug Enf't 19 (1981). Michael Agar & Heather Schacht Reisinger, *A Tale of Two Policies: The French Connection, Methadone, and Heroin Epidemics*, 26 Culture, Med. & Psychiatry 371 (2002).

each two times, the Seventh Circuit three times, and the First, Third, Fourth, and Sixth Circuits never cited *Hirabayashi* even once in the narcotics cases. Presumably these jurisdictions were mostly using authorities other than *Hirabayashi* for similar purposes—or perhaps made significantly less use of the concurrent sentences doctrine.

Among other categories of issues that show up among federal circuit cases that cite Hirabayashi, the potentially quite interesting Fifth/Fourteenth Amendment Due Process/Equal Protection issue only showed up five times in four jurisdictions: the Second (1947 and rather precocious); the Fifth (1962); the Sixth (1958); and the D.C. Circuit (1956, 1968).[77] General federal power/delegation of power surfaced only a few times, almost entirely in the 1940s plus a few more from the 1950s, with only the Seventh Circuit showing two of these, while single uses in the First, Fifth, D.C., and U.S. Emergency Circuits represented the rest. Federal power to wage war appeared in various circuits, primarily in the 1940s and 1950s, with a few late manifestations concerning the Vietnam era and the much later "War on Terror". The First Circuit saw four of these cases; the Second six cases; the Third five; the Ninth nine; the Sixth two; and all other circuits, only one or zero. Before the "War on Terror", such cases often concerned conscientious objectors or other draft resistance. There were ten conscientious objector cases that cited *Hirabayashi*, 1943-1949, with two such cases in both the Second and Third Circuits, only one in the First, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits, plus two later failures to report for service in Vietnam from the Fifth and Sixth Circuits.[78]

[77] *See* United States v. Josephson, 165 F.2d 82 (2d Cir. 1947); Kendrick v. United States, 238 F.2d 34 (D.C. Cir. 1956); Oliphant v. Brotherhood of Locomotive Firemen and Enginemen, 262 F.2d 359 (6th Cir. 1958); Employing Lithographers of Greater Miami, Fla. v. N. L. R. B., 301 F.2d 20 (5th Cir. 1962); Washington v. United States, 401 F.2d 915 (D.C. Cir. 1968).

[78] *See* United States v. Irons, 369 F.2d 557 (6th Cir. 1966); Simmons v. United States, 406 F.2d 456 (5th Cir. 1969).

2.3.2. DISLOYALTY

Disloyalty represented another recurring theme during the 1940s-1950s.

- Refusal to Answer Questions/False Statements Regarding Communist Affiliations: a classic expression of Cold War culture and the McCarthy Era in America. Authors and intellectuals were more likely to get nailed for refusing to answer the questions about party membership; union officials were more likely to face prosecution for falsifying mandatory affidavits of non-Communist activity, then required by the federal law.[79] There were two such cases citing *Hirabayashi* from the Second Circuit (1947, 1951),[80] including the prosecution of novelist Dashiell Hammett, of Sam Spade/*The Maltese Falcon* fame, among others for refusing to answer questions; one case in the Sixth Circuit (1959, union official);[81] two in the Ninth Circuit (1949, refusal to answer; 1959, union official);[82] and two cases in the Tenth Circuit (1958, 1959, both involving union officials).[83]

- Treason: although these cases typically involved American citizens who were captured either in Germany, Austria, or Japan after the war, and mostly involved radio broadcasters who had assisted Axis nations, the two European cases were both tried in the First Circuit (1948, 1950),[84] the two Japanese cases both in the Ninth Circuit (both 1951).[85] Among the other, lesser-known cases, the Ninth Circuit cases included the in/famous prosecution of "Tokyo Rose".

[79] The Taft-Hartley Act of 1947 added this new requirement. *See* Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law*, 47 Cath. Univ. L. Rev. 763, 782-85 (1998). For more flavor of the times, see, e.g., 4 U.S. Attys' Bull. No. 25 (December 7, 1956) at p. 777 (describing prosecutions of various union officials).

[80] *See, e.g.*, United States v. Josephson, 165 F.2d 82 (2d Cir. 1947); United States v. Field, 193 F.2d 92 (2d Cir. 1951) (the Hammett case).

[81] *See, e.g.*, Davis v. United States, 269 F.2d 357 (6th Cir. 1959).

[82] *See* Alexander v. United States, 173 F.2d 867 (9th Cir. 1949) (Denman, J., diss.); Fisher v. United States, 254 F.2d 302 (9th Cir. 1958).

[83] *See* Sells v. United States, 262 F.2d 815 (10th Cir. 1958); Travis v. United States, 269 F.2d 928 (10th Cir. 1958).

[84] *See* Chandler v. United States, 171 F.2d 921 (1st Cir. 1948); *see also* Best v. United States, 184 F.2d 131 (1st Cir. 1950). Both opinions also came from Judge Magruder.

[85] *See* Tomoya Kawakita v. United States, 190 F.2d 506 (9th Cir. 1951); Iva Ikuko Toguri D'Aquino v. U. S., 192 F.2d 338 (9th Cir. 1951) (the "Tokyo Rose" case).

2.3.3. CIVIL RIGHTS CASES

Only fourteen cases involving civil rights in general cited *Hirabayashi* in the period before the wartime Japanese internment cases regained major public, judicial, and Congressional attention in the 1980s.[86] The first of these, an early (and unsuccessful) challenge to segregated public schools in 1950 in the D.C. Circuit,[87] was followed by a Second Circuit immigration case concerning civil rights in 1956,[88] a Sixth Circuit equal employment case challenging a segregated labor union in 1958,[89] a Fifth Circuit redistricting/voting rights case in 1959,[90] and a second school segregation case in the Fifth Circuit in 1960.[91] There then was a gap in use of *Hirabayashi* in the civil rights context until the major civil rights surge of the late 1960s-1970s, which saw a Fifth Circuit case in 1968 concerning prisoners' reading materials[92] along with a Fifth Circuit case in 1968 involving equal employment of minority police officers,[93] a Fifth Circuit case in 1969 regarding the closing of public swimming pools in a southern county,[94] three more school desegregation cases in 1971-1972 (4th Circuit, 1971,[95] D.C. Circuit, 1972,[96] 5th Circuit, 1972[97]), another redistricting case in 1975 (2nd Circuit),[98] and two cases involving American Indian tribal membership in 1975-1976 (7th Circuit, 1975,[99] 10th Circuit, 1976[100]). These fourteen cases thus represented only 5.2% of the 270 uses of *Hirabayashi* in circuit court opinions through the end of 1981 (4.6% of the total of 306 opinions); more ordinary crime- and criminal procedure-related cases accounted for more than 80%. Six of these fourteen civil rights came from the Fifth Circuit; another two apiece from the Second and D.C. Circuits; the Fourth, Sixth, Seventh, and Tenth Circuits supplied the rest.

[86] Such cases emerged in these years, from these circuits and raising these issues: *See generally* 1950 (D.C., school desegregation), 1956 (Second, immigration), 1958 (Sixth, segregated labor union), 1959 (Fifth, redistricting/racial gerrymandering), 1960 (Fifth, school desegregation); 1968 (Fifth, prison reading materials), 1968 (Fifth, equal employment/unequal treatment of minority police officers), 1969 (Fifth, equal accommodations/closing of public swimming pools), 1971 (Fourth, school desegregation), 1972 (D.C., school desegregation), 1972 (Fifth, school desegregation), 1975 (Second, redistricting), 1975 (Seventh, Indian tribal membership), 1976 (Tenth, Indian tribal membership).
[87] *See* Carr v. Corning, 182 F.2d 14 (D.C. Cir. 1950) (Edgerton, J., diss.).
[88] *See* United States ex rel. Lee Kum Hoy v. Shaughnessy, 237 F.2d 307 (2d Cir. 1956).
[89] *See* Oliphant v. Brotherhood of Locomotive Firemen and Enginemen, 262 F.2d 359 (6th Cir. 1958).
[90] *See* Gomillion v. Lightfoot, 270 F.2d 594 (5th Cir. 1959) (Brown, J., diss.).
[91] *See* Boson v. Rippy, 285 F.2d 43 (5th Cir. 1960).
[92] *See* Jackson v. Godwin, 400 F.2d 529, 537.
[93] *See* Baker v. City of St. Petersburg, 400 F.2d 294, 295, 297-298.
[94] *See* Palmer v. Thompson, 419 F.2d 1222 (5th Cir. 1969).
[95] *See* Wright v. Council of City of Emporia, 442 F.2d 588, 595 (4th Cir. 1971) (Winter, J., diss.).
[96] *See* Bulluck v. Washington, 468 F.2d 1096, 1116 (D.C. Cir. 1972).
[97] *See* Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142 (5th Cir. 1972).
[98] United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 528 (2d Cir. 1975).
[99] *See* Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975).
[100] *See* Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976).

2.3.4. IMMIGRATION AND NATURALIZATION

There were also a handful of immigration and naturalization-related cases citing *Hirabayashi* during the period from the 1940s-1990s, including two deportation cases from very different chapters of U.S. immigration history, the former a deportation under the Alien Enemy Act (1946, D.C. Circuit),[101] the latter a deportation of an undocumented Asian immigrant (1991, 9th Circuit).[102] Plus there was a 1956 case involving immigrant blood tests, criminal procedure, and civil rights (2nd Circuit),[103] and three criminal cases all from the Ninth Circuit in the early 1970s concerning fake immigration papers (1970),[104] immigrant smuggling (1971),[105] and immigration bribery (1973),[106] as well as a naturalization and expatriation case (1949, D.C. Circuit), the requirement that Iranian students prove immigration status to the American authorities during the Iranian Hostage Crisis that helped bring down the ill-fated Carter Administration (1979, D.C. Circuit),[107] a war bride denied entry (1949, 2nd Circuit),[108] passport restrictions during a national emergency (1957, D.C. Circuit),[109] and a case considering a Japanese American citizen's renunciation of citizenship under duress (1949, 9th Circuit).[110] These eleven cases represent 3.6% of the total of 306 circuit opinions citing *Hirabayashi.*

Many of the civil rights and immigration cases cited *Hirabayashi* for the larger legal concept of non-discrimination. Non-discrimination (without the rhetorical flourish of "odious") mostly dates to the earlier years and appeared four times in the Old Fifth Circuit (twice in 1968, 1969, 1972), with additional cases from the Fourth (1971), Ninth (2002), Tenth, and D.C. (2016) Circuits. Non-discrimination, with the added flourish of "odious," was mostly a feature of later, post-1980s judicial rhetoric, although the D.C. Circuit pioneered this terrain relatively early (1949, 1950, 1972, 1979), followed by the Seventh Circuit in 1975. Thereafter, the "odious"-embellished version was used in both the specifically national origin context and the more general context by the Third (2015); Fourth (1993, 1995, and twice in 2001); Fifth (1996 & 1998); Sixth (1983, 2006); Eighth (2006); Ninth (eight times, including 1985, 1989, 1997, 1998, 1999, 2002, 2003, 2004); Eleventh (2001); D.C. (1985, 1989, 1990); and Federal Circuit (2002).

[101] *See* Citizens Protective League v. Clark, 155 F.2d 290 (D.C. Cir. 1946).
[102] *See* Hing Tin Ngai v. U.S.I.N.S., 937 F.2d 612 (9th Cir. 1991).
[103] *See* United States ex rel. Lee Kum Hoy v. Shaughnessy, 237 F.2d 307 (2d Cir. 1956).
[104] *See* United States v. Tamayo, 427 F.2d 1072 (9th Cir. 1970).
[105] *See* United States v. Lucero, 443 F.2d 64 (9th Cir. 1971).
[106] *See* United States v. Castro, 476 F.2d 750 (9th Cir. 1973).
[107] *See* Narenji v. Civiletti, 617 F.2d 745, 754 (D.C. Cir. 1979) (joint statement dissenting against decision not to rehear case en banc).
[108] *See* United States ex rel. Knauff v. Watkins, 173 F.2d 599 (2d Cir. 1949).
[109] *See* Briehl v. Dulles, 248 F.2d 561 (D.C. Cir. 1957) (Edgerton, J., maj'y; Fahy, J., diss.).
[110] *See* Acheson v. Murakami, 176 F.2d 953, 953 n.1 (9th Cir. 1949).

Notably, the First, Second, and Tenth Circuits never used the "odious" flourish, the Third, Seventh, Eighth, Eleventh, and Federal Circuits only a single time, and the Fifth and Sixth Circuits only twice; so that the particular rhetorical flourish was mostly a product of the Fourth, Ninth, and D.C. Circuits. The full-bore Constitutional Train-Wreck rhetorical flourish only appeared in the Third (2015) and the Eighth (1987) Circuits, though it was conceptually a close relative to the "odious" cluster.[111]

Affirmative Action was a relatively new concept that emerged in the 1970s and appeared in court cases and opinions mostly later.[112] There were seventeen affirmative action cases citing *Hirabayashi*, 1983-2016, with eight from the 1980s-90s—four of those appearing one per year from 1996-1999—and another eight just from 2001-2006. *Hirabayashi* was associated with affirmative action twice in the Fourth and the Sixth Circuits, once in the Fifth and the Eighth Circuits, six times in the Ninth Circuit, three times in the D.C. Circuit, and once in the Federal Circuit.

2.4. HIRABAYASHI: JUDGES/OPINION WRITERS

Forty nine judges cited *Hirabayashi* at least two or more times. Of those, twenty four cited *Hirabayashi* only twice, another twelve did so three times, and the remaining eight judges cited *Hirabayashi* four times; only five cited the opinion more than four times. Generally, judges citing *Hirabayashi* twice don't show much of a discernible pattern, and many of the judges who cited *Hirabayashi* three or four times either did so all within the postwar clean-up period, or so widely spaced in time as to reveal little by way of a broader pattern. Judges who possibly selected *Hirabayashi* more deliberately and repeatedly over a more concentrated time period include Judge Craven on the Third Circuit (three uses, 1968-71), Judge Goldberg on the Fifth Circuit (three times, 1974-76), Judge Rives on the Fifth Circuit (four times, including two civil rights cases, 1960-70), Judge Simpson on the Fifth Circuit (three times, 1969-73), Judge Tuttle on the Fifth Circuit (four times, including one civil rights case, 1968-74), Judge Wisdom on the Fifth Circuit, (three times, 1961-74; four times, counting a quote of *Hirabayashi* misattributed to *Korematsu*), Judge Weick on the Sixth Circuit (three times, 1965-68), Judge O'Scannlain on the Ninth Circuit

[111] *See* McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (Lay, J., conc./diss.); Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015).

[112] Although the wider concept of "affirmative action" on civil rights issues has longer roots, dating back at least to *Brown v. Board of Education* (1954) and a 1961 executive order by President John F. Kennedy, affirmative action as a deliberate governmental effort and policy to increase educational and employment opportunities for specific under-represented minority communities mostly first emerged during the early 1970s under the Nixon administration. *See, e.g.*, Anthony M. Platt, *The Rise and Fall of Affirmative Action*, 11 Notre Dame J. L. Ethics & Pub. Pol'y 67, 72 (1997); Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 Cal. L. Rev. 893, 896-97 (1994).

(four times, 1997-2004), Judge Doyle on the Tenth Circuit (three times, 1973-76), and Judge MacKinnon on the D.C. Circuit (four times, including a civil rights case and the Iranian students case, 1970-79).[113] Although his four uses were spread over seventeen years (1949-65), Judge Edgerton of the D.C. Circuit might also represent a somewhat more interesting pattern than most, given that one of his uses was both the first school segregation case and the first use of the "odious distinctions" quote (1950), plus the same quote even earlier in 1949, while a later case involved passport restrictions (1957). Only a small handful of judges ever cited *Hirabayashi* more than four times: Judge Magruder of the First and Emergency Circuits, five times (1943-50, basically all wartime/postwar clean-up, one of those while on the Emergency Circuit); Judge Gewin of the Fifth Circuit, nine times (1969-78, eight standard criminal cases, one case concerning surveillance); Judge Carter of the Ninth Circuit, seven times (1970-73, six of these drug cases, one an immigration case, though three had some civil rights overtones); Judge Bazelon of the D.C. Circuit, seven times (1956-64, all criminal cases/concurrent sentences); and Judge Fahy of the D.C. Circuit, five times (1952-67, four criminal cases plus a passport restriction case). Notable repeat performers from circuits that produced relatively large numbers of *per curiam* opinions also showed up repeatedly among these opinions: for instance, Judges Gewinn (two times), Simpson (three times), and Tuttle (three times) among the Fifth Circuit's nine *per curiam* opinions citing *Hirabayashi.* The D.C. Circuit, which had an uncommonly large number (twenty) of *per curiam* opinions and apparently something of a preference for them, found Judge Bazelon in an additional eleven of them, Judge Fahy in six, Judge Edgerton in three, and Judge MacKinnon in two—along with recurring appearances of other D.C. Circuit judges such as Judge Wilbur K. Miller, Judge Washington, and (then) Judge Warren Burger (who used Hirabayashi three times in his own name, but was a member of six *per curiam* panels, usually as a relatively junior member). Judge Browning of the Ninth Circuit provided no opinions in his own name citing *Hirabayashi*, but was on the panel in four of the Ninth Circuit's twelve *per curiam* opinions, as the senior judge or chief judge in three of those. The *per curiam* format inherently tends to hide whichever panel member, if any, had a special fondness for *Hirabayashi* (or any other case).

Because of the predominance of criminal/concurrent sentences, the relatively few cases involving issues such as civil rights, and the comparative rarity of judges citing *Hirabayashi* more than once for a purpose other than concurrent sentences, it is difficult to track or claim much evidence of judges displaying persistent or repeated interest in *Hirabayashi* for less conventional purposes, although the examples of Judges Rives,

[113] Notably, two of the "Fifth Circuit Four"—Judges Tuttle and Rives—appear on this list. *See* Bass, *The "Fifth Circuit Four"*, *supra* note 63.

MacKinnon, and Edgerton might represent exceptions from the earlier years of *Hirabayashi*'s career. There are also two exceptions of note from the later, post-1980s years. Although there were relatively few repeat performers from the hand-wringing/odious distinctions era, conservative Judge Diarmuid O'Scannlain of the Ninth Circuit cited *Hirabayashi* four times in eight years (three of those in just three years) and used the "odious distinctions" quote each time to call for perfect color-blindness regarding racial and other classifications,[114] and conservative Judge Jerry E. Smith of the Fifth Circuit used *Hirabayashi* similarly twice, in 1996 and 1998.[115]

2.5. HIRABAYASHI: QUOTES

This raises one of the more clearly visible and interesting patterns in the use of *Hirabayashi*: the wholesale embrace of the "odious distinctions" quoted by conservative judges to resist affirmative action programs or initiatives to confront structural racism in the post-1980 period. Although O'Scannlain and Smith, both Reagan judicial appointees, are relatively prominent as repeat performers, they were only salient representatives of a larger trend. Among the many uses of the "odious distinctions" quote for color-blind purposes by the Ninth Circuit from the 1990s onward, O'Scannlain was joined by fellow Reagan appointees Judges Beezer and Noonan, as well as a *per curiam* decision from Judges Hall and Leavy (both Reagan appointees) plus a district judge sitting pro tem. Other Reagan appointees joined in from other circuits: Judge Wollman (Eighth Circuit) and Judge Williams (D.C. Circuit). Other color-blind users of the "odious distinctions" quote from other circuits showed other conservative lineages. On the Fourth Circuit were Judge Niemeyer, appointed a district judge by Reagan, later elevated by Bush (Sr.); Judge Williams, appointed by Bush (Sr.); and Judge Traxler, appointed a district judge by Bush (Sr.) but later elevated to the Fourth Circuit by Clinton. [The Fourth Circuit also produced a full en banc *per curiam* opinion that also recycled the "odious distinctions" quote]. On the Sixth Circuit, Judge Sutton was appointed by Bush (Jr.) and Judge Engel was appointed by Nixon, while Judge Marcus on the Eleventh Circuit was appointed a district judge by Reagan long before being elevated by Clinton.

[114] *See* Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997); *see also* Parents Involved in Community Schools v. Seattle School Dist., No. 1, 285 F.3d 1236 (9th Cir. 2002); *see also* Johnson v. State of California, 321 F.3d 791 (9th Cir. 2003); *see also* Parents Involved in Community Schools v. Seattle School Dist., No. 1, 377 F.3d 949 (9th Cir. 2004).

[115] *See* Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996); United States v. Webster, 162 F.3d 308 (5th Cir. 1998).

Thus, seventeen of the twenty-two clear uses of the "odious distinctions" quote in the post-1980 period, all of them for color-blind purposes, came from partly or entirely Republican-appointed and/or -elevated judges.

The "odious distinctions" quote was also used by some Democratic judicial appointees, sometimes also for color-blind purposes. Judge Tamm, elevated to the D.C. Circuit by Lyndon Johnson but first appointed a district judge by Harry Truman in 1948, invoked the color-blind quote in striking down an affirmative action program not long before he died of old age; it is easy to imagine that an elderly judge whose experiences with civil rights ideas dated back to the strictly color-blind ideology of the late 1940s-early 1960s might have had particular difficulty accepting the concept of affirmative action programs.[116] Judge Robinson, also of the D.C. Circuit, likely represented a different story. Robinson, himself originally a notable African American civil rights attorney like Thurgood Marshall, used the color-blind language of *Hirabayashi* in aid of the defendants in a case involving both racial and national origin profiling of alleged Jamaican drug dealers;[117] it would be interesting to know what he thought of the use of the same language to strike down affirmative action programs. Ninth Circuit Carter appointees (and early female circuit judges) Judges Nelson[118] and Fletcher[119] each respectively used either a partial odious quote in a non-color-blind civil rights case, or issued a color-blind opinion without the quote. Third Circuit Judge Ambro, a Clinton appointee, used a partial odious quote in bemoaning the overall constitutional train-wreck associated with *Hirabayashi* and *Korematsu* in 2015;[120] Eighth Circuit Judge Lay, another Johnson appointee, bemoaned the train-wreck without using the quote in 1987,[121] while the reparations litigation was ongoing and the reparations movement was gathering steam. Judge Prost, a Bush (Jr.) appointee to the Federal Circuit, and Judge Pillard, an Obama appointee to the D.C. Circuit, both used fragments of the quote without the trademark term "odious" in color-blind opinions (2002, 2016).[122]

[116] *See* Steele v. F.C.C., 770 F.2d 1192 (D.C. Cir. 1985).
[117] *See* United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990).
[118] *See* Olagues v. Russoniello, 770 F.2d 791 (9th Cir. 1985).
[119] *See* Scott v. Pasadena Unified School Dist., 306 F.3d 646 (9th Cir. 2002).
[120] *See* Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015).
[121] *See* McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (Lay, J., conc./diss.).
[122] *See* Berkley v. United States, 287 F.3d 1076 (Fed. Cir. 2002); Rothe Development Inc. v. United States Department of Defense, 836 F.3d 57 (D.C. Cir. 2016).

For comparison, the five pre-1980 uses of the quote came from three judges, two of them Nixon appointees but perhaps reflecting how Republican judicial appointees of the 1970s and earlier were typically less conservative than Republican judicial appointees from Reagan onward.[123] The very first uses of the entire "odious distinctions" quote came in a 1949 dissent in a naturalization and expatriation case and in a 1950 dissent in an early (and unsuccessful) school desegregation case,[124] both written by D.C. Circuit Judge Edgerton, appointed by Franklin Roosevelt in 1937. Two other pre-1980 uses both came from D.C. Circuit Judge MacKinnon, a Nixon appointee who was once described as being politically to the right of Barry Goldwater,[125] who used the full quote both in a majority opinion in an unsuccessful 1972 school desegregation case and in a dissent to the non-rehearing of the Iranian students case in 1979.[126] The fourth pre-1980 use came in 1975 from a Seventh Circuit Nixon appointee who went on to bigger things: John Paul Stevens.[127]

The twenty-eight complete or partial iterations of the "odious distinctions" quote represented the majority (nearly 61%) of the forty-six opinions (15% of the total 306) that included any quotes from *Hirabayashi.* Next most popular, used nine times, was the "federal power to wage war [successfully]" quote, which appeared almost entirely from 1943 to 1949, but did reappear once much later in 2004. "In most circumstances irrelevant", describing racial/ethnic/national origin classifications, was used four times; "The Constitution [. . .]does not demand the impossible or the impractical", twice; and Justice Douglas' concurrence in *Hirabayashi*, favoring government power in that particular context, also twice. Ten quotes came from the Ninth Circuit, eight from the

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[123] *Compare* Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections,* 64 OHIO ST. L.J. 221, 244 (2003).

> Nixon trial judges are significantly more conservative on economic matters and defendants' rights than their predecessors. Reagan appointees are even more conservative than Nixon as well as Carter judges on criminal issues. And, the relationship is more than simply a party relationship: The particular policy goals of a president are reflected in the decisions of his appointees.

with Robert A. Carp et al., *The Decision-Making Behavior of George W. Bush's Judicial Appointees*, JUDICATURE, July-Aug. 2004, at 20.

> These numbers do not suggest that the decisions of the W. Bush cohort are "off the charts" in terms of their conservative character, but it is fair to say that they are distinctly the most right of center group of judges on record and that they seem to be growing more conservative over time.

[124] *See e.g.*, Lapides v. Clark, 176 F.2d 619 (D.C. Cir. 1949) (Edgerton, J., diss.); *see also* Carr v. Corning, 182 F.2d 14 (D.C. Cir. 1950) (Edgerton, J., diss.).

[125] See generally George MacKinnon,WIKIPEDIA(Jan. 3, 2021, 10:33 PM (UTC)),https://en.wikipedia.org/wiki/George_MacKinnon. Judge MacKinnon was also the father of feminist scholar and theorist Catharine MacKinnon; *see generally Catherine A. MacKinnon,* WIKIPEDIA(Dec. 28, 2021 03:07 AM (UTC))https://en.wikipedia.org/wiki/Catharine_A._MacKinnon

[126] *See* Bulluck v. Washington, 468 F.2d 1096 (D.C. Cir. 1972); Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979) (MacKinnon, J., diss.).

[127] *See* Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975).

D.C. Circuit, six from the Fourth and five from the Fifth Circuits, four from the Third and three from the Sixth Circuits, while the First, Eighth, and Federal Circuits quoted *Hirabayashi* twice, the Seventh, Eleventh, and Emergency Circuits once, and the Tenth, never. Aside from Judges O'Scannlain, Smith, and MacKinnon, mentioned above, few judges ever quoted *Hirabayashi* more than once: Third Circuit Judge Goodrich used the federal power to wage war quote twice from 1943-45, and First/Emergency Circuit Judge Magruder made both uses of the constitution not impractical quote in 1943.

2.6. HIRABAYASHI: USE IN CONCURRENCES OR DISSENTS

Judges used *Hirabayashi* in concurrences or dissenting opinions a total of twenty-three times, with sixteen dissents, four concurrences, and three partial concurrences/partial dissents.[128] Twelve of these twenty-three alternate opinions (52.2%) came from the D.C. Circuit alone, including nine dissents, two concurrences, and one partial concurrence/dissent. The Ninth Circuit produced three dissents, two in 1946 and 1949, one much later in 1999. The Fourth and Fifth Circuits each produced two alternate opinions, the Sixth, Seventh, Eighth, and Federal Circuits only one apiece. Five such opinions emerged by 1950 (one Seventh Circuit, two Ninth Circuit, two D.C. Circuit), another fourteen between 1957 and 1980 (nine from the D.C. Circuit, two each from the Fourth and Fifth Circuits, one from the Third Circuit), and four more reflecting the changed understanding of *Hirabayashi* from 1983 onward (one each from the Sixth, Eighth, Ninth, and D.C. Circuits). Only three judges dissented or concurred more than once, all of them from the D.C. Circuit: Judge Edgerton, with two dissents and one concurrence (1949, 1950, 1965), Judge Bazelon (1957, 1969), and Judge Fahy (1957, 1967). Although ten of the alternate opinions were in standard criminal cases involving concurrent sentences, more "interesting" cases were somewhat likelier to draw dissents or concurrences, so the list also includes four civil rights cases, three affirmative action/color-blind cases, two Cold War cases involving passport restrictions or refusal to answer questions regarding Communist affiliations, and two immigration and naturalization cases, among others.

[128] Notably, there were also dissents in two of the reparations cases, both iterations of *Hohri v. United States*, which are not included in the general statistics for reasons explained above. *See supra* note 44.

2.7. HIRABAYASHI: CO-CITING OF OTHER CASES

The citing of other cases involving civil rights or the Japanese American experience were likely to indicate different use of *Hirabayashi* from the standard crime/concurrent sentences context. As usual, circuits that were more active in use of *Hirabayashi* were also more active in using such other cases. Thus, of the cases also citing major civil rights (or constitutional train-wreck) cases such as *Scott v. Sandford*,[129] *Plessy v. Ferguson*,[130] *Bolling v. Sharpe*,[131] *McLaughlin v. State of Florida*,[132] or *Loving v. Virginia*,[133] or other notable Japanese American precedents such as *Ex parte Endo*,[134] *Yasui v. United States*,[135] *Oyama v. California*,[136] or *Takahashi v. Fish & Game Comm'n*,[137] ten such cases were in the D.C. Circuit, twelve in the Fifth, nine in the Ninth, six in the Fourth, three in the Second and Sixth, two in the Third and Seventh, one in the Eighth and Federal Circuits, and none in the First, Tenth, or Eleventh Circuits. Of the forty-eight opinions using any of these other cases, twelve were dissents, and eighteen also invoked the "odious distinctions" quote. *Korematsu* was predictably most popular and closely related to *Hirabayashi*, appearing in twenty-five cases; *Bolling* appeared in thirteen; *Loving* in eleven; *McLaughlin* in six; *Plessy* in nine; *Dred Scott* in two; *Endo* in seven; *Yasui* in three; *Oyama* in two; and *Takahashi* in one case also citing *Hirabayashi.* Twenty-two (45.8%) of these co-citations come in the period after 1983, and many are associated with hand-wringing. Of the nine total invocations of *Plessy*, an especially powerful rhetorical tool, from 1950 to 2015 (1950, 1960, 1969, 1971, 1998, 1999, 2001, 2006, 2015), five came after the 1990s, four of those in a cluster from 1998 to 2006. There was relatively little clustering of such additional cited cases by an opinion-writing judge, though certain judges relatively more concerned with civil rights or writing opinions on more such cases used more co-citations, such as Fifth Circuit Judge Rives, who used *Plessy* in 1960 and *Loving*, *Plessy*, and *Dred Scott* in 1969; D.C. Circuit Judge Robinson, who used *Bolling*, *Loving*, and *McLaughlin* in 1968 and *Korematsu*, *Oyama*, and *Takahashi* in 1990 (the Jamaican drug dealers case); and D.C. Circuit Judge MacKinnon, who used *Korematsu*, *Bolling*, and *McLaughlin* in 1972 and *Korematsu*, *Bolling*, and *Endo* in 1979 (the Iranian students case).

[129] Scott v. Sandford, 60 U.S. 393 (1857).
[130] Plessy v. Furgson, 163 U.S. 537 (1896).
[131] Bolling v. Sharpe, 347 U.S. 497 (1954).
[132] McLaughlin v. State of Florida, 379 U.S. 184 (1964).
[133] Loving v. Virginia, 388 U.S. 1 (1967).
[134] Ex parte Endo, 323 U.S. 283 (1944).
[135] Yasui V. United States, 320 U.S. 115 (1943).
[136] Oyama v. California, 332 U.S. 633 (1948).
[137] Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

3. *KOREMATSU* (1944): MIND THE GAP!

3.1. KOREMATSU: USE IN GENERAL, 1945-1980

Leaving aside several reparations-related cases that necessarily included much fuller discussion of the legal and historical background of the Japanese American internment than most other cases, as well as one Ninth Circuit case from early 1944 that discussed only earlier developments in the *Korematsu* litigation before *Korematsu* (1944) was decided, there were 111 federal circuit court cases that included citations of *Korematsu*, four of those including dissents that invoked *Korematsu* along with the majority opinions, for a total of 115 opinions citing *Korematsu* outside the reparations/exoneration context from March 1945 through October 2016.[138] Of these, the First Circuit accounted for five opinions (4.3% of the total of 115), from 1970 to 2014; the Second Circuit produced ten citing cases and twelve citing opinions (10.4%), mostly from 1972-2002, but with a late straggler in 2014; the Third Circuit issued eleven citing opinions (9.6%), 1976-2002, plus a late straggler in 2015; the Fourth Circuit saw eight cases and nine citing opinions (7.8%) between 1970 and 2003; the Fifth Circuit produced seventeen opinions (14.8%), mostly between 1966 and 2001 but with early or late outliers in 1945 and 2011; the Sixth Circuit wrote seven citing opinions (6.1%), all between 1990 and 1998 but for a late straggler in 2014; the Seventh Circuit accounted for five opinions (4.3%), mostly from 1973-1994 with a late outlier in 2008; the Eighth Circuit saw eight citing opinions (7.0%), mostly from 1971 to 1991 but with a late straggler in 2010; the Ninth Circuit produced nineteen cases and twenty citing opinions (17.4%) in clusters from 1946-1950, 1967-75, 1990-2001, and 2014-15; the Tenth Circuit issued three opinions (2.6%) in 1985, 1989, and 2004; the young Eleventh Circuit saw only a single opinion (0.9%) in 1996; the D.C. Circuit wrote sixteen citing opinions (13.9%) in clusters from 1972-79, 1984-1998, and 2010-2016; and the Federal Circuit produced a single opinion in 1989.

[138] The annual usage rate of *Korematsu* (1944), in cases and opinions, is as follows (numbers in parentheses indicating years when cases with multiple citing opinions appeared): 1x 1945 & 1947 & 1949, 2x 1946 & 1950, 0x 1951-1965, 1x 1966 & 1967 & 1969, 2x 1968, 3x 1970, 4x 1971, 6x 1972, 4x 1973, 3x 1974 & 1975 & 1976 & 1977 & 1978 & 1980, 2x 1979 & 1981 & 1982, 0x 1983, 1x 1984 & 1985, 4(5)x 1986, 2x 1987, 1x 1988, 2x 1989, 5(6)x 1990, 1x 1991, 4(5)x 1992, 1x 1993, 3x 1994, 3(4)x 1995, 4x 1996, 1x 1997 & 1999, 2x 1998 & 2000 & 2001 & 2002, 2(3)x 2003, 1x 2004 & 2007 & 2008, 0x 2005 & 2006 & 2009, 2x 2010, 1x 2011 & 2012, 0x 2013, 4x 2014, 2(3)x 2015, 1x 2016.

Perhaps, unlike *Hirabayashi* (1943), which gave only a tentative Supreme Court legal/constitutional stamp of approval to an early phase of the whole internment process (although the case was decided well after the whole internment program was already well underway and was effectively unstoppable)[139]—and which also avoided any outright dissents, largely due to Chief Justice Stone's successful cajoling of an already uneasy Justice Murphy[140]—*Korematsu* (1944), which gave a more final stamp of approval to the proceedings,[141] and which included three ringing, stinging dissents, may have been tacitly recognized by the rest of the American judiciary from an earlier date as something fundamentally heavier, darker, more solemn, and better to avoid. At any rate, unlike *Hirabayashi*, with its active career as an authority justifying federal wartime and general powers even before its primary role as a criminal procedure authority, which saw *Hirabayashi* cited forty-eight times by 1950 and 145 times by the end of 1966, *Korematsu* was cited only seven times (6.1 % of the total 115 opinions) through the end of 1950, then was entirely forgotten by the federal circuits until December 1966—a rather lengthy gap of sixteen years at a time when American civil rights law and issues were developing rapidly, and notwithstanding the U.S. Supreme Court's prominent invocations of *Korematsu* in both *Bolling v. Sharpe* (1954, the companion to the better-known *Brown v. Board*) and *McLaughlin v. Florida* (1964).

All but one of the seven pre-1951 uses of *Korematsu* were in the Ninth Circuit—the original home circuit for the *Korematsu* litigation that also included all previous mid-level appellate activity, and where (possibly earlier-anxious, later perhaps relieved-feeling) local circuit judges likely perceived the Supreme Court's opinion to have justified their earlier actions in the already controversial case. The Ninth Circuit thus had more than

[139] Concerning the historical and political realities confronted by the Supreme Court justices regarding both *Hirabayashi* and *Korematsu*—in particular, the fact that the most the Court could have hoped to accomplish, practically, by reversing either case would have been a largely ineffectual, politically unpopular empty gesture that would have left the Japanese Americans stuck in internment camps through the end of the war, regardless—see, e.g., Dewey, *supra* note 10, at 83-90. Another of history's greatest demonstrations of the actual powerlessness of the U.S. Supreme Court in the face of a tide of public opinion involved another historic mass violation of human rights, the federal government's forcible removal of the Cherokee Nation and neighboring tribes from their ancestral homelands in the southeastern United States in the 1830s, notwithstanding the Court's upholding of the Cherokees' rights in Worcester v. Georgia, 31 U.S. 515 (1832).

[140] Murphy, a former Governor General of the Philippines who was unusually racially progressive and aware for his times regarding Asians and Asian Americans, initially considered dissenting in *Hirabayashi*. Regarding this episode, see Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 Wash. U. L. Rev. 99, 128 (2006). [Murphy, interestingly, also apparently spent much of his adult life in an unofficial, secret, but committed early-day gay marriage to his lifelong partner. This may have given him additional insight and sensitivity regarding marginalized minorities—though if so, the same process apparently didn't happen with his contemporary, the F.B.I.'s J. Edgar Hoover].

[141] Emphasizing the more tentative nature of *Hirabayashi* as against the permanence of *Korematsu*, Justice Jackson, in his *Korematsu* dissent, accused his fellow "brethren" in the majority of having pulled a legal-constitutional bait-and-switch: "The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding". Korematsu, 323 U.S. at 247 (Jackson, J., diss.).

usual reason to wave *Korematsu* around. Four cases from the 1940s (two in 1946, one in 1947 and 1949) all concerned federal war powers and the validity of the relocation orders leading to the internment, in cases involving Japanese Americans who failed to report for military service[142] or sought to renounce their U.S. citizenship,[143] an Anglo radical who violated an order excluding him from the West Coast,[144] and the wartime Alien Property Custodian (in a case involving German- rather than Japanese-owned property that raised questions regarding federal preemption of California state law).[145] Two early Cold War cases that followed in 1950 involved false swearing or refusal to answer questions regarding Communist affiliations.[146] The last of these latter two cases, perhaps somewhat ironically, involved (selective) use of Justice Jackson's dissent to support federal power and judicial restraint in attempting to oversee military authorities: "In the very nature of things, military decisions are not susceptible to intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved".[147] The only other very early use of *Korematsu* came from the Fifth Circuit in 1945 and involved the tamer issues of wartime gasoline rationing and the general federal power to delegate regulatory authority.[148] After its prolonged dormant period from 1950-1966, *Korematsu* finally reappeared and made its initial debut as a civil rights precedent in federal circuit jurisprudence in a December 1966 opinion in a Fifth Circuit case involving school desegregation, *United States v. Jefferson County Board of Education*.[149] The opinion, by Judge John Minor Wisdom, one of the civil rights heroes of the Old Fifth Circuit, ironically confused *Korematsu* with *Hirabayashi*, citing the former for the latter's signal quote: "Classifications based upon race are especially suspect, since they are «odius to a free people»".[150] Notwithstanding this early hiccup, after another early rediscovery of *Korematsu* in a 1967 Ninth Circuit dissenting opinion questioning racial segregation in prisons,[151] the Fifth Circuit provided the next three uses of *Korematsu* through early 1969,[152] in two (successful) civil rights cases involving prison reading materials and equal

[142] *See* Hideichi Takeguma v. United States, 156 F.2d 437, 439 (9th Cir. 1946).
[143] *See e.g.*, Acheson v. Murakami, 176 F.2d 953, 953 n.1 (9th Cir. 1949).
[144] *See e.g.*, DeWitt v. Wilcox, 161 F.2d 785, 787-788, 790-791 (9th Cir. 1947).
[145] *See e.g.*, Allen v. Markham, 156 F.2d 653, 650-660 (9th Cir. 1946).
[146] *See* Alexander v. United States, 181 F.2d 480, 487 n.1 (9th Cir. 1950); Bridges v. United States, 184 F.2d 881, 887 (9th Cir. 1950).
[147] Bridges 184 F.2d at 887, quoting *Korematsu* at 245 (Jackson, diss.).
[148] *See* Randall v. United States, 148 F.2d 234, 235 (5th Cir. 1945).
[149] United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966). The case is sometimes referred to as a 1967 case because it could not have any effective impact until 1967, but the opinion issued on December 29, 1966.
[150] *Id.* at 871 (citing only *Korematsu* at 216, meaning to also cite *Hirabayashi* at 100).
[151] Toles v. Katzenbach, 385 F.2d 107, 110 (Browning, J., diss.).
[152] Regarding the Fifth Circuit's early and visible leadership on civil rights issues even in relatively hostile territory, see *supra* note 63.

employment,[153] along with a Vietnam draft resister's (unsuccessful) case.[154] The latter two civil rights cases basically recited the "*McLaughlin* mantra", from the 1964 Supreme Court opinion in which Justice White pulled various snippets of language from earlier cases such as *Korematsu*, *Hirabayashi*, and *Bolling* out of context and cobbled them together into the high Court's first comprehensive statement of the strict scrutiny standard for racial and other constitutionally suspect classifications.[155] The Vietnam draft case made the sole use of Justice Frankfurter's pro-government concurrence in *Korematsu* to appear in any circuit opinion and summarized Frankfurter's argument: "[C]onsiderations of national defense may render lawful what would be unlawful in a different context".[156]

Thus, most circuits did not rediscover *Korematsu* until 1970 or later. When they did, though, they brought a comparative surge of thirty-seven uses from 1970-1980 (32.2% of the total 115 opinions; almost the same as the number of civil rights-related cases from 1966-1980)—three times a year in almost every year except 1972 (a peak of six uses) and 1971 and 1973 (each with four uses). These were spread across various jurisdictions. The Fourth Circuit came relatively early to the party with four uses (one in 1970, two in 1971, one in 1975); the Third Circuit came relatively late, though actively, with six uses (two in 1976, three in 1978, one in 1980). The Second Circuit arrived relatively early, with four uses (two in 1972, one in 1973 and 1975). The Fifth Circuit added six more uses (two in 1972, 1974, two in 1977, 1980). The Eighth Circuit saw four uses (1971, two in 1974, 1980). The Ninth Circuit added only three, relatively early (1970, 1971, 1975). The D.C. Circuit showed six uses, most relatively early (two in both 1972 and 1973, 1977, 1979). Some other circuits were apparently less impressed. The First (1970, 1976) and Seventh (1973, 1979) Circuits both saw only two uses. The Sixth, Tenth, and Federal Circuits never cited *Korematsu* even once during the pre-1980 Civil Rights era. The Eleventh Circuit did not yet exist.

[153] *See* Jackson v. Godwin, 400 F.2d 529, 537 (Tuttle, J.); *see also* Baker v. City of St. Petersburg, 400 F.2d 294, 295, 297-298 (Wisdom, J.).

[154] *See* Simmons v. United States, 406 F.2d 456, 459 (Ainsworth, J.).

[155] McLaughlin, 379 U.S. at 191-93; *see* Dewey, *supra* note 10, at 118-121 (discussing in detail the linguistic evolution of the strict scrutiny standard in *McLaughlin*). The full McLaughlin mantra reads as follows:

> Normally, the widest discretion is allowed the legislative judgment ***; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious. [Citations] But we deal here with a classification based upon the race of the participants which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect", [Bolling v. Sharpe at 499] and subject to the "most rigid scrutiny". [Korematsu at 216], and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, [Hirabayashi at 100].

[156] Simmons v. United States, 406 F.2d 456, 459 (5th Cir. 1969) (citing Korematsu at 224-225 (Frankfurter, J., conc.))].

3.1.1. CIVIL RIGHTS CASES, 1966-1980:

Nearly all circuit cases and opinions citing *Korematsu* in the 1970s concerned civil rights to one degree or another. Only five of the thirty-seven cases did not: four concerned federal powers and constitutionality in the context of the Federal Drivers Act (creating exceptions to the wider Federal Tort Claims Act), the Federal Firearms Act, and the Social Security act; the fifth concerned attorney disciplinary standards. However, of the remaining thirty-two pre-1980 cases and opinions (27.8% of 115 opinions) citing *Korematsu* in which civil rights arguments were raised, usually involving equal protection, in over half the cases (seventeen of thirty-seven opinions, 1966-80; 14.8% of 115 total), the courts rejected such bids to extend civil rights further. Granted, attorneys during the Civil Rights era presumably had an overall incentive to make relatively freewheeling equal protection or other arguments, throw them at the wall of the court, and see which would stick. Some such arguments probably were better than others, while some may have been easier for courts to reject. Yet already from the beginning of the decade, courts appear to have been offering significant push-back to claims for expanded civil rights. Eleven of the cases rejecting civil rights arguments were decided from 1970-74, seven of those just in 1971-72, followed by two in both 1976 and 1977, one in 1979 and 1980. Of the fifteen cases (13% of 115 opinions) that did advance civil rights between 1971 and 1980, nine appeared from 1971-1975, three of those in 1975 alone, followed by two cases in both 1978 and 1980, one in 1977 and 1979.[157]

Although civil rights advocates continued to win some battles among the cases citing *Korematsu*, the overall momentum of civil rights activity appeared to have been somewhat blunted, with fewer numbers of both wins and losses during the second half of the decade—at least judging by this sample of cases in which *Korematsu* usually played a minor role. Notably, five of the seventeen opinions in cases rejecting civil rights claims were dissents in which particular judges invoked *Korematsu* while urging their "brethren" to be more sensitive to the civil rights issues raised, in cases involving rights of draft resisters, privacy rights, gender and equal opportunity in education, free speech, and immigration/nationality (the D.C. Circuit's Iranian students case). Three of those dissents appeared in the later period (1976, 1977, 1979). Among the cases that accepted civil rights claims, there were two dissents: one from the first case on that list, from the

[157] One case was, more than most, arguably both a victory and a loss for civil rights. In Drummond v. Fulton County Dept. of Family and Children's Services, 547 F.2d 835, 852 (5th Cir. 1977), the circuit court reversed the district court's finding that white, would-be adoptive parents of a Black foster child had no fundamental, constitutional rights violated by a local government policy favoring Black adoptive parents for Black foster children. The circuit court thus arguably upheld the rights of the white parents and Black child at the expense of (Black nationalist-derived) "community rights" arguments then in vogue regarding placement of Black foster children.

Fourth Circuit in 1971, concurring and dissenting because the other judges had not adopted an even stronger position in favor of school desegregation; the second, the very last case on the list, from the Third Circuit in 1980, in which a conservative judge criticized his colleagues for accepting a program to aid low-income litigants on only rational basis rather than strict scrutiny grounds. Those two dissents perhaps provide appropriate bookends to the whole decade during which civil rights initially advanced, then gradually stalled.[158]

The 1970-80 civil rights-related cases citing *Korematsu* involved a range of different rights claims and issues, though with a few recurring themes. In nine cases, defendants/parties raised equal protection arguments regarding criminal prosecutions or post-conviction felon status. Six concerned equal employment, mostly regarding race or ethnicity, but with a successful gay (non-military) litigant on the issue also surfacing.[159] Three cases concerned traditional sex/gender discrimination, two of those also concerning equal employment,[160] the other a challenge to an all-male public school.[161] Three cases concerned racial desegregation of schools, the first two earlier and

[158] For an interesting brief discussion of the wider phenomenon of the progress of civil rights stalling, see, e.g., Shaylyn Romney Garrett & Robert D. Putnam, *Why Did Racial Progress Stall in America?*, N.Y. Times, Dec. 4, 2020, https://www.nytimes.com/2020/12/04/opinion/race-american-history.html(briefly summarizing research results from the authors' recent book, Robert D. Putnam and Shaylyn Romney Garrett, The Upswing: How America Came Together a Century Ago and How We Can Do It Again (2020). Garrett and Putnam juxtapose what they present as the established mythology of the Civil Rights movement—no progress on the issues for decades until a sudden upswing in the 1960s—with their findings of gradual but significant progress in earlier decades that began to stall around 1970: "These data reveal a too-slow but unmistakable climb toward racial parity throughout most of the century that begins to flatline around 1970—a picture quite unlike the hockey stick of historical shorthand". Specifically regarding the 1970s, it is possible to see rather clearly, with hindsight, that the process that began in 1968—a majority of Americans gradually turning their backs on President Lyndon Johnson and his relatively aggressive civil rights agenda, and rejecting Democratic presidential candidate Hubert Humphrey, a life-long champion of civil rights, in favor of Republican candidate Richard Nixon, whose "Southern Strategy" of appealing to conservative white southern Democrats and their often pre-civil rights racial attitudes to convert the South to Republicanism tacitly announced that the new administration would be much less aggressive on civil rights matters, regardless of any politically necessary countervailing empty rhetoric to the contrary—ultimately and perhaps almost inexorably led to the election of Ronald Reagan in 1980 on an arch-conservative platform that much more overtly opposed the further extension of civil rights. Ironically, though (and based upon personal experience), because various civil rights battles were still being fought, and some of them even won, during the 1970s, it likely was difficult for civil rights advocates at the time to fully recognize the degree to which the tide already had turned against them by the early 1970s. This meant that the election of Reagan in 1980 came as a greater shock to liberals than it otherwise might have. The overall trajectory of America lurching in an ever more conservative direction since then—under the leadership of the likes of Newt Gingrich, George W. Bush, and Donald Trump, all of whom make Reagan look moderate and Nixon look downright liberal by comparison—is well-known and widely recorded. For more on the already predominantly conservative trajectory of the United States in the 1970s, see, e.g., Edsall & Edsall, *supra* note 18, 74-115.

[159] *See* Van Ooteghem v. Gray, 628 F.2d 488, 500 (5th Cir. 1980).

[160] *See* Struck v. Secretary of Defense, 460 F.2d 1372, 1378 (9th Cir. 1971) (pregnancy in the military); Wood v. Mills, 528 F.2d 321, 323 (4th Cir. 1975) (unequal pay and gender disparity among prison employees).

[161] *See* Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880, 894 (3d Cir. 1976) (Gibbons, J., diss.).

more traditional (and both unsuccessful),[162] the last of those a challenge by Black students to programs designed to guarantee some fraction of other racial/ethnic backgrounds in particular schools.[163] Other issues, from zoning and redistricting to hair-length ordinances, also made sporadic appearances.

Regarding "wins" or "losses" for civil rights during the 1970s, most "participating" jurisdictions saw some of each. The Third Circuit was somewhat striking, with three "wins" from 1978 onward and only one "loss", the gender equality/education case in 1976 (which drew a dissent).[164] The Fifth Circuit was also striking, with four "wins" and two "losses", all of them spread over time from 1972-1980. The Second Circuit saw two "wins" and one "loss", with one majority opinion in a successful case plus a dissent in the unsuccessful one both contributed by Judge Feinberg (both in 1972). The First Circuit had two cases rejecting civil rights arguments, both authored by Judge Coffin. Those were the only near-patterns visible among opinion-writers citing *Korematsu* during the 1970s (other than Judge Winter of the Fourth Circuit using *Korematsu* both in the 1971 school desegregation concurrence/dissent and briefly in passing in a non-civil rights 1970 case involving the Federal Drivers Act). Returning to civil rights wins or losses at the circuit level, the Seventh and Ninth Circuits had one in each column. The Eighth and D.C. Circuits, along with the First, perhaps showed more clearly the direction the nation was headed as it moved toward the 1980s and the election of Ronald Reagan: the Eighth had only one win and three losses; the D.C. Circuit, one win against five losses in cases involving civil rights claims, with dissents in the last two losses (1977, 1979).

3.2. KOREMATSU: USE IN GENERAL, 1981-2016

There were sixty-three cases (57.8% of 111) and sixty-seven opinions (58.2% of 115) not specifically associated with Japanese American reparations and exoneration that cited *Korematsu* from 1981 to 2016. The First Circuit produced three of these opinions (4.5% of 67) in 1986, 2007, and 2014. The Second Circuit accounted for six cases and eight opinions (11.9%), with two cases (three opinions) in 1986, one case (two opinions) in 1995, and other cases/opinions in 2000, 2002, and 2014. The Third Circuit saw five opinions (7.5%) in 1981, 1990, 1993, 2002, and 2015. The Fourth Circuit saw four cases and five opinions (7.5%) in 1982, 1995, 1996, and 2003 (two opinions).

[162] *See* Wright v. Council of City of Emporia, 442 F.2d 588, 595 (4th Cir. 1971) (Winter, J., diss.); Bulluck v. Washington, 468 F.2d 1096, 1116 (D.C. Cir. 1972).
[163] *See* Johnson v. Board of Ed. of City of Chicago, 604 F.2d 504, 515 (7th Cir. 1979).
[164] *See* Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880, 894 (3d Cir. 1976) (Gibbons, J., diss.).

The Fifth Circuit, one of the more active users of *Korematsu* in the pre-1981 period, was less so in the post-1980 period, with six opinions (9.0%) appearing in 1982, 1992, 1996, 2000, 2001, and 2011. By contrast, all seven uses of *Korematsu* in the Sixth Circuit (10.4%) were post-1981: in 1990, two in 1992, 1994, 1996, 1998, and 2014. The Seventh Circuit, among the less active users of *Korematsu* pre-1980, saw three additional uses (4.5%) in 1986, 1994, and 2008. The Eighth Circuit saw four of its total of eight uses of *Korematsu* in 1981, 1987, 1991, and 2010 (6.0%). The Ninth Circuit, a relatively major user of *Korematsu* before 1981, remained so after 1980, with nine cases and ten opinions (14.9%), starting after a long gap since 1975 with two cases (three opinions) in 1990, one in 1995, 1997, 1999, 2001, 2003, 2014, and 2015. The Tenth Circuit produced only three opinions (4.5%), all post 1981, in 1985, 1989, and 2004. The Eleventh Circuit's single opinion (1.5%) came in 1996. The D.C. Circuit wrote ten post-1980 opinions (14.9%)—more than half their total of sixteen *Korematsu*-citing opinions, even leaving out the two iterations of the *Hohri* reparations litigation they heard in 1986—in 1984, 1987, 1990, 1992, 1994, 1998, 2010, 2012, and 2016. The Federal Circuit wrote its single *Korematsu*-citing opinion in 1989.

Grouping all the post-1980 cases and opinions together might be slightly misleading, in that of course there were very significant political developments over the course of the 1980s regarding *Korematsu*, *Hirabayashi*, and other Japanese American internment cases from the 1940s: by the early 1980s, especially by about 1983-85, it was already clear that there was "trouble" with the cases, including a growing movement to overturn them and the 1982 congressionally commissioned study that attributed the Japanese American internment to racism;[165] but it wasn't until 1988 that Congress gave federal courts clear instructions as to just what to think about the problematic cases.[166] So to provide more detail: again, leaving aside the important *Hohri* and *Hirabayashi* reparations/exoneration litigation that reached the Ninth and D.C. Circuits during 1986-87, only thirteen of the other sixty-seven post-1980 federal circuit opinions citing *Korematsu* (19.4%) appeared before 1989, and of those, eight (11.9%) came while the *Hohri* and *Hirabayashi* re-litigation was already very visibly underway. The other fifty-four post-1980 opinions—80.6%, and nearly 47% of the 115 opinions citing *Korematsu*—all appeared after Congress's formal apology and reparations in 1988.

[165] Comm'n on Wartime Relocation and Internment of Civilians, Personal Justice Denied 18 (1982), https://www.archives.gov/research/ japanese-americans/justice-denied [readers accessing the website from a country different than the U.S.A. might experience automatic redirection to the homepage of the National Archives website].

[166] *See generally* Civil Liberties Act, 50 U.S.C. app. §§ 1989b–1989b9 (1988) (current version as amended at 50 U.S.C. §§ 4211–4220 (2012 & Supp. III 2015).

The overwhelming majority of the post-1980 cases and opinions—forty-one (65.4% of the sixty-three post-1980 cases, 36.9% of the total of 111 cases citing *Korematsu*)—involved a wide variety of civil rights claims. Another ten post-1980 cases involved federal drug prosecutions that often included potential civil rights implications. Eleven other cases involved other legal issues, including, among others, the Federal Tort Claims Act and qualified immunity, Social Security benefits, destruction of foreign property in the "War on Terror", military veterans whose commanders deliberately exposed them to radiation during early atomic weapons tests, and a challenge to Minnesota's code of judicial conduct, along with three other federal criminal prosecutions.[167]

Most of the ten "ordinary" drug cases apparently were seen by panel majorities as relatively straightforward criminal prosecutions not especially concerning civil rights beyond the usual Fourth Amendment search and seizure issues, but nine of the ten cases drew concurrences or dissents in which a panel member nevertheless raised the specter of improper racial classifications and invoked *Korematsu* for purposes of warning and/or hand-wringing. Five drug cases came from the Sixth Circuit (two in 1992, one in 1990, 1994, and 1996), and four of those included concurrences or dissents (two of each) from Judge Nathaniel R. Jones, an African American jurist who repeatedly and urgently warned against the "War on Drugs" being allowed to repeat the unconstitutional excesses and

[167] Two of the most interesting "other cases" not concerning ordinary civil rights claims were a rare internment/reparations case not involving Japanese Americans (Jacobs v. Barr, 959 F.2d 313 (3d Cir. 1992) and parents' successful civil suit against Hamas for the death of their son at the hands of terrorists (Boim v. Holy Land Foundation for Relief and Development, 549 F.3d 685 (7th Cir. 2008). In the former case, the appellant, a German American citizen born in the United States who had been interned along with his non-citizen father at a (mostly) Japanese American internment camp, asked why he hadn't received reparations. Judge Mikva of the Third Circuit more or less tut-tutted him, noting that Congress had found that only Japanese Americans had suffered violations of their rights, so only they could receive reparations. In the latter case, dissenting Judge Rovner warned:

> The murder of David Boim was an unspeakably brutal and senseless act, and I can only imagine the pain it has caused his parents. Terrorism is a scourge, but it is our responsibility to ask whether it presents so unique a threat as to justify the abandonment of such time-honored tort requirements as causation. Our own response to a threat can sometimes pose as much of a threat to our civil liberties and the rule of law as the threat itself. See, e.g., [*Korematsu*].

549 F.3d at 718-19. In the military veterans radiation exposure case, dissenting Judge Gibbons invoked *Korematsu* in warning against the over-extension of absolute immunity to federal officials. Jaffee v. United States, 663 F.2d 1226, 1252 (3d Cir. 1981). Gibbons' dissent was a relatively early example of a federal judge calling *Korematsu* into question, and remained somewhat indirect and circumspect in doing so:

> In 1949, when Judge L. Hand wrote the *Gregoire* opinion, the notion of absolute official immunity for federal officers probably seemed a politically attractive idea. We had recently fought a war in which many things had been done which were thought necessary for victory, but which with the benefit of hindsight, probably would seem quite inconsistent with our concept of democracy and its traditions of personal integrity and individual freedoms. [See, e.g., [*Korematsu*] (legitimizing wholesale internments of Japanese)]. It was perhaps a fortunate fortuity that the *Gregoire* issue did not reach the Supreme Court for some time.

abuses of an earlier war.[168] In the only Sixth Circuit case in which Judge Jones was not on the panel, the defendants raised, but the panel rejected, what would become the often-repeated argument that federal laws and aggressive prosecution directed at crack cocaine involved improper de facto racial classifications and disparities constituting equal protection violations.[169] The other drug cases appeared in the First Circuit (1986), Fourth Circuit (1982), Fifth Circuit (2000 and 2001), and Eighth Circuit (1991).

3.2.1. CIVIL RIGHTS CASES, 1981-2016:

Returning to the main category of post-1980 cases citing *Korematsu* (cases generally involving civil rights), although judicial pushback against the further spread of civil rights and rejection of rights claims may already have been visible in *Korematsu*-citing cases from the early 1970s onward, that overall trend only intensified after 1980. In twenty-eight of the forty-one civil rights-related post-1980 cases (69.3%), courts rejected equal protection claims, affirmative action initiatives, or other civil rights arguments. Of these rejections, only five appeared from 1982-87, followed by a pronounced cluster of eleven from 1989-96, a still strong but dwindling collection of seven from 1997-2004, and five late strays from 2007-2016 (three of those just in 2014).

Such rejections of civil rights claims were spread throughout the various circuits, though some more than others. [And some circuits that may have been equally active in rejecting civil rights claims may of course have done so without ever invoking *Korematsu* in the process]. The First Circuit saw two post-1980 unsuccessful civil rights cases citing *Korematsu* (2007, 2014); the Second, three (1995, 2000, 2014); the Third, three (1990, 1993, 2002); the Fourth, three (1995, 1996, 2003); the Fifth, two (1982, 1996); the Sixth, none; the Seventh, one (1994); the Eighth, one (1987); the Ninth, four (1990, 1997, 2003, 2014); the Tenth, two (1985, 2004); the Eleventh, one (1996); the D.C. Circuit, five (1984, 1987, 1994, 1998, 2016); and the Federal Circuit, one (1989). Fifteen of the twenty-one cases included dissenting opinions from more rights-conscious judges questioning their bench colleagues: one of the two from the First Circuit, all three from the Second, two of three from the Third, one of three from the Fourth, the only case from the Eighth, three of four from the Ninth, both cases from the Tenth, and two of five from the D.C. Circuit. No patterns in authorship were visible beyond that Judge Betty Fletcher of the Ninth Circuit

[168] *See* United States v. Inman, 902 F.2d 35 (6th Cir. 1990) (Nathaniel R. Jones, J., conc.); United States v. Taylor, 956 F.2d 572, 592 (6th Cir. 1992) (Nathaniel R. Jones, J., diss.); United States v. Harvey, 24 F.3d 795, 799 (6th Cir. 1994) (Nathaniel R. Jones, J., diss.); United States v. Smith, 73 F.3d 1414, 1422 (6th Cir. 1996) (Nathaniel R. Jones, J., conc.).

[169] *See* United States v. Reed, 977 F.2d 584 (6th Cir. 1992).

wrote two of the three rights-conscious dissents, while conservative Judge Lawrence Silberman of the D.C. Circuit wrote two of that circuit's five majority opinions rejecting rights claims.

The rights raised and rejected included a diverse range of issues, though with a few recurring themes. Three cases involved unsuccessful challenges to pre-2000 rules on gays in the military and the Clinton administration's legendarily problematic "Don't Ask, Don't Tell" policy (1989, 1996, 1997),[170] while another case rejected a lesbian applicant's allegation of employment discrimination by the Federal Bureau of Investigation (1987).[171] Four cases involved undocumented immigrants; two of those also specifically concerned denial of health benefits (1990, 2004, two in 2014).[172] Several cases involved prison and prisoner issues, including the availability of prison reading materials in Japanese (1994),[173] prisoners' access to nude photos of loved ones (1995),[174] prisoners classified as special security threats (2002),[175] racial segregation in prison (2003),[176] and prisoners' access to sex-change surgery (2014).[177] Two additional unsuccessful rights claims concerned drug testing of prison staff (1987)[178] and of national security employees (1990).[179] Two cases that produced sharp dissents concerned the rights of enemy combatants in the unending "War on Terror" (2003, 2016).[180]

Of the thirteen cases citing *Korematsu* that saw civil rights claims upheld, seven (over half) appeared in 1990 or earlier, three of those in 1986 alone; while six other cases appeared between 1999 and 2015, three of those just from 2014-2015. Successful cases were limited to fewer circuits: the First, Fourth, Eighth, Eleventh, and Federal Circuits saw none; the Second Circuit had three, two of those finding the court taking a stand on pretrial detention in 1986;[181] the Third Circuit, one, concerning surveillance of Muslim communities as religious discrimination (2015);[182] the Fifth Circuit, one, concerning

[170] *See* Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *see* Thomasson v. Perry, 80 F.3d 915, 927 (4th Cir. 1996); *see also* Philips v. Perry, 106 F.3d 1420, 1439 (9th Cir. 1997) (Fletcher, J., diss.).
[171] *See* Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1987).
[172] *See* Flores by Galvez-Maldonado v. Meese, 934 F.2d 991, 1014 (9th Cir. 1990) (Fletcher, J., diss.); Soskin v. Reinertson, 353 F.3d 1242, 1265 (10th Cir. 2004) (health benefits); Korab v. Fink, 797 F.3d 572, 588 (9th Cir. 2014) (health benefits); Maldonado v. Holder, 763 F.3d 155, 174 (2d Cir. 2014) (Lynch, J., dissenting).
[173] *See e.g.*, Kikumura v. Turner, 28 F.3d 592, 599 (7th Cir. 1994).
[174] *See* Giano v. Senkowski, 54 F.3d 1050, 1062 (2d Cir. 1995) (Calabresi, J., dissenting).
[175] *See* Fraise v. Terhune, 283 F.3d 506, 530 (3d Cir. 2002) (Rendell, J., dissenting).
[176] *See* Johnson v. California, 336 F.3d 1117, 1119 (9th Cir. 2003) (Ferguson, J., dissenting).
[177] *See* Kosilek v. Spencer, 774 F.3d 63, 113 (1st Cir. 2014) (Thompson, J., dissenting).
[178] *See* McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (Lay, J., conc./dissenting).
[179] *See* Hartness v. Bush, 919 F.2d 170, 175 (3d Cir. 1990) (Edwards, J., dissenting).
[180] *See* Hamdi v. Rumsfeld, 337 F.3d 335, 373, 375-76 (4th Cir. 2003) (Motz, J., dissenting); Bahlul v. United States, 840 F.3d 757, 837 (D.C. Cir. 2016) (Rogers, J., dissenting).
[181] *See* United States v. Melendez-Carrion, 790 F.2d 984, 1004 (2d Cir. 1986); United States v. Salerno, 794 F.2d 64, 74 (2d Cir. 1986); Patrolmen's Benevolent Ass'n. of City of New York v. City of New York, 310 F.3d 43, 53 (2d Cir. 2002).
[182] *See* Hassan v. City of New York, 804 F.3d 277, 307 (3d Cir. 2015).

racial preferences in university admissions (and later even upheld by the U.S. Supreme Court!) (2011);[183] the Sixth Circuit, one, finding gun rights for the mentally ill subject to strict scrutiny (2014);[184] the Seventh Circuit, one, finding dismissal of a Korean doctor to require strict scrutiny on racial/ethnic grounds (1986);[185] the Ninth Circuit, three, concerning free speech and public protest, racial balancing at a university laboratory school, and immigration detention/flight risk (1990, 1999, 2015);[186] the Tenth Circuit, one, concerning the Fourth Amendment and search of a home;[187] and two slightly unusual cases from the D.C. Circuit, both written by Judge Robinson, an African American jurist and formerly a distinguished civil rights attorney.

Robinson's two opinions, both of them ultimately based on national origins grounds, are perhaps both somewhat notable as exceptions to overall patterns. The first case, in 1988, involved a clash between freedom of speech and privacy: a newspaper sought to use the Freedom of Information Act to learn the U.S. citizenship status of a medical doctor who later was a prominent figure in the Iranian government. The district court favored the newspaper; the D.C. Circuit reversed, applying strict scrutiny to defeat the First Amendment claim where national origins were concerned.[188] The other case involved federal prosecution of unusually successful and aggressive Jamaican drug dealers. In the district court, expert police testimony as to the drug dealers' alleged Jamaican origins, associations, and characteristic methods and mannerisms was admitted, but the D.C. Circuit, hewing to a strict "color-blind" standard on national origins, applied strict scrutiny and ruled the expert evidence inadmissible.[189] Thus, as with the much later Muslim surveillance case, in which the Third Circuit also applied a strict "color-blind" standard in a situation largely involving ethnic and/or national origins,[190] "color-blind" strict scrutiny could still sometimes be used to affirm civil rights in particular contexts, even as it was being used much more frequently and successfully to torpedo affirmative action programs and other efforts to address structural racism.[191]

[183] *See* Fisher v. University of Texas at Austin, 631 F.3d 213, 248 (5th Cir. 2011) (Garza, J., concurring).
[184] Although the Sixth Circuit had no cases citing *Korematsu* that rejected civil rights claims, their one case citing *Korematsu* that upheld civil rights claims was a peculiar one, applying strict scrutiny to gun rights for mental health patients. Tyler v. Hillsdale County Sheriff's Dept., 775 F.3d 308, 329 (6th Cir. 2014).
[185] *See e.g.*, Doe on Behalf of Doe v. St. Joseph's Hosp. of Fort Wayne, 788 F.2d 411, 418 (7th Cir. 1986).
[186] *See* Bay Area Peace Navy v. United States, 914 F.2d 1224, 1232-1233 (9th Cir. 1990); Hunter ex rel. Brandt v. Regents of University of California, 190 F.3d 1061, 1075 (9th Cir. 1999); Rodriguez v. Robbins, 804 F.3d 1060, 1074 (9th Cir. 2015).
[187] *See e.g.*, O'Rourke v. City of Norman, 875 F.2d 1465, 1467 n.1 (10th Cir. 1989).
[188] *See generally* Washington Post Co. v. U.S. Dept. of State, 840 F.2d 26, 35 n.66 (D.C. Cir. 1988).
[189] *See* United States v. Doe, 903 F.2d 16, 21-22 (D.C. Cir. 1990).
[190] *See* Hassan v. City of New York, 804 F.3d 277, 307 (3d Cir. 2015).
[191] *See* Gotanda, *supra* note 8; Bedi, *supra* note 8; Washington, *supra* note 8.

Unlike the rights-rejecting post-1980 cases, with their numerous dissents, the post-1980 rights-affirming opinions generated only three dissents invoking *Korematsu*: one, a conservative judge grumbling that a university laboratory school's admissions policies should have been subjected to "color-blind" strict scrutiny;[192] the other two found more conservative judges complaining that their colleagues had no business either invoking *Korematsu* or further extending rights in their majority opinions.[193]

3.3. KOREMATSU: USE AS A PROXY FOR RACIAL CLASSIFICATIONS, AND OTHER USES

Perhaps the single most interesting pair of repeated uses of *Korematsu* in federal circuit court opinions is, more or less, *Korematsu* = race, matched with *Korematsu* = national origin (or ancestry, parentage, lineage, descent, etc.). Because, basically, one is wrong, and the other is right. Legally speaking, *Korematsu* fundamentally was never about just race, or indeed race at all. As we understand matters today, the Japanese are not a separate "race". Nor was the Japanese American internment also targeted at fellow members of the same "race", such as Chinese Americans or Filipino Americans. Legally speaking, Japanese Americans were singled out because of their national origin and/or ancestry, for the same reason that German and Italian nationals of a different "race" from along the Pacific Coast were also interned (although their native-born children mostly were not, which was a key difference with respect to Japanese Americans).[194] The internment, rather obviously, targeted nationalities with which the United States was at war—meaning, in turn, that by definition, the internment was not undertaken *solely* on the basis of national origin or ancestry; it was undertaken based upon that combined with the enemy status of the nations/nationalities in question. The official dual citizenship of a significant number of Japanese Americans, as well as the eagerness with which the Japanese government sought to promote such dual citizenship among Japanese-derived immigrant communities in other nations, including American-born Japanese American United States citizens, caused additional confusion and suspicion and provided some added reasons for including native-born Japanese American citizens

[192] *See e.g.*, Hunter ex rel. Brandt v. Regents of University of California, 190 F.3d 1061, 1075 (9th Cir. 1999) (Beezer, J., dissenting).

[193] *See* United States v. Melendez-Carrion, 790 F.2d 984, 1013 n.5 (2d Cir. 1986) (Timbers, J., dissenting); *see also* Bay Area Peace Navy v. United States, 914 F.2d 1224, 1237 (9th Cir. 1990) (O'Scannlain, J., dissenting).

[194] However, significant numbers of German American and Italian American citizens were also interned along with non-citizen enemy nationals. *See* Alan Rosenfeld, German and Italian Detainees, Densho Encyclopedia, http://encyclopedia.densho.org/German_and_Italian_detainees (last visited Dec. 21, 2020). Rosenfeld notes that of the roughly 11,500 German Americans and 3,000 Italian Americans interned during the war, many were U.S. citizens.

along with Japanese citizens in the internment—even if those reasons proved to be mostly wrong.

The confusion concerning *Korematsu* as being a case about "race" arises from what was effectively an already antiquated use of the term "race" in the *Korematsu* opinions, dating back to the late 1800s (or earlier), when every different nation was described as a separate "race". This is all discussed at greater length elsewhere.[195] Suffice it to say that to describe *Korematsu* simplistically as giving a rule about "race" is simply and fundamentally wrong; to say it concerned national origin and ancestry—as was usually recognized correctly about its companion case, *Hirabayashi*—is quite correct. Federal judges should perhaps have received a clear if tacit signal of that lesson from U.S. Supreme Court Justice Harry Blackmun's opinion in *Graham v. Richardson*,[196] where, following some years of confused lumping of *Korematsu* together with race in Supreme Court jurisprudence based upon the earlier linguistic misunderstanding, Blackmun first subtly indicated that both *Korematsu* and *Hirabayashi* were actually about national origins and ancestry, not race.[197] As the following discussion reveals, many judges apparently never got that message.

From 1966, when the Fifth Circuit reintroduced *Korematsu* into federal circuit court jurisprudence after a long hiatus, through 2014, circuit courts repeated the basic statement that *Korematsu* = race as a suspect classification or target of strict scrutiny (or closely related statements such as, *Korematsu* and *Hirabayashi* = race, *Korematsu* and *Loving v. Virginia* = race, *Korematsu* and *McLaughlin v. Florida* = race, etc.) thirty times, making that legal equation the single most common use of *Korematsu* in its precedential life cycle. It appeared twice in 1968, once in 1970, four times in 1971 (at least two of those long after the opinion in *Graham v. Richardson* came out in June 1971), five times in 1972, twice in 1975 and once in every other year from 1973-1980, followed by later appearances in 1986, 1990, 1998, 2001, 2007, 2011, and twice in 2014.

Between 1972 (probably non-coincidentally just a year after *Graham v. Richardson*) and 1996, fifteen circuit opinions recognized that *Korematsu* = national origins (or ancestry, parentage, "corruption by blood", etc.). Seven of these appeared from 1972-1980 (one in each year except 1975 and 1978), with two additional uses emerging in both 1987 and 1989, single uses in 1985, 1990, 1995, and 1996).

[195] *See generally* Dewey, *supra* note 10.
[196] 403 U.S. 365, 371 nn. 21 & 22 (1971). For more on this particular matter, see Dewey, *supra* note 10, at 123-27.
[197] *See* Dewey, *supra* note 10, at 126-27.

Comparing these two uses, it is perhaps notable that the wrong use appeared twice as frequently as the right one; the wrong one remained stronger and more popular than the right one even after *Graham v. Richardson*; and the right one vanishes from the record after 1996, while the wrong one continued making appearances from 1998-2014.

Circuits seemingly varied in terms of their ability to get the message of *Graham v. Richardson* or, indeed, to actually read and understand *Korematsu* rather than merely absorbing brief, passing (mis)statements taken out of context and inserted into many other legal opinions. The First Circuit, never a major user of *Korematsu*, cited it once for *Korematsu* = race in 2007 (and got it wrong). The Second Circuit got it wrong four times, all after *Graham* (1972, 1973, 1976, 2014), and never got it right once. The Third Circuit, out of two uses, got it right once (1976) and wrong once (1978—after the correct use). The Fourth Circuit got it wrong four times in the 1970s (twice in 1971, once in 1972 and 1975) and right once in 1996. The Fifth Circuit, as usual an active user, got it wrong seven times, mostly in the 1960s-70s (1966, twice in 1968, 1972, 1974, 1977, 2011), right once in 1980. The Sixth Circuit got the matter right once in 1990. The Seventh Circuit got it wrong three times (1972, 1979, 1986). The Eighth Circuit got it wrong twice (1971, 1980) and right twice (1974, 1987—both correct uses came from Judge Lay; both incorrect ones came from different judges). The Ninth Circuit got it wrong five times (1970, 1971, 1975, 2001, 2014), right once in 1995 (by a district judge sitting *pro tem*). The Tenth Circuit got it right twice (1985, 1989). The D.C. Circuit got it wrong three times (1972, 1990, 1998) but right five times (1972, 1973, 1977, 1979, 1987)—though many of the right uses came earlier while wrong ones came later. The Federal Circuit got the definition right once (1989). The Eleventh Circuit didn't participate in this particular game. Interestingly, and perhaps ironically, aside from the First Circuit, those circuits that made relatively little use of *Korematsu* appear to have gotten this particular issue "right" more often than most heavier users.[198]

Relatively few judges had the distinction of having to make this particular distinction more than once. Of those, only Judge Lay of the Eighth Circuit got it right twice (1974, 1987). Judge Cudahy of the Seventh Circuit got it wrong twice (1972, 1986). Judges Wisdom (1966, 1968) and Tuttle (1968, 1977) both got it wrong twice, in the Fifth Circuit where the use of *Korematsu* for considering civil rights claims took root earliest

[198] Given courts' propensity to (sometimes unreflectively) recycle their own language as well as to rotely borrow language from higher courts, more "garbage in the system" typically means more such garbage resurfacing later, sometimes notwithstanding earlier efforts to clean it out; while jurisdictions that mostly never took in a particular sort of "garbage" in the first place do noticeably better at keeping free from it. *See* Dewey, *The Case of the Missing Holding*, *supra* note 16, at 216-218 (discussing the 6th Circuit's singular success at avoiding importation of an unfounded, ill-conceived legal doctrine).

and most deeply, following earlier misleading statements about *Korematsu* and race from Supreme Court opinions predating *Graham*.

In discussing courts and judges getting it "right" or "wrong", in a manner that might seem improperly dismissive, it is worth emphasizing that of course the judges and clerks who produced all these opinions generally were both, very bright and conscientious, as well as very busy, and likely were preoccupied with various other, more salient aspects of the often complex cases they were considering. So the purpose of this particular exercise is not so much to smugly play "Gotcha!" as to point out how, for all the best efforts of court professionals, the "garbage in the system"—the linguistic misunderstanding and misreading of the holding of *Korematsu*, compounded by repetition, simplification, and abstraction out of context—was significantly more stubborn and persistent than a more correct reading (rather like misinformation on the Internet?).[199]

The forty-five "right" or "wrong" uses of *Korematsu* described above already represent 38.3% of the 115 opinions using *Korematsu* in one way or another (with two-thirds of the forty-five, and more than a quarter of the 115, "wrong"). Other uses included twelve invocations of *Korematsu* regarding suspect classifications in general (1970-2000); seven others regarding strict scrutiny (1982 and 1990-2014, suggesting that the judicial recognition and use of "strict scrutiny" as a generic legal term of art may have come a little later than "suspect classifications"); seven invocations of *Korematsu* regarding national/wartime emergencies or pressing public necessity (1967, 1971, 1973, two in 1996, 2010, 2015; interestingly, none in this category from the 1940s); six citations supporting federal war powers, general powers, and the validity of the internment program, all but one from the 1940s; two opinions much later, both from the D.C. Circuit, drawing upon Justice Jackson's "loaded gun" dissent to use *Korematsu* as a basis of support for appropriate suspicion of federal power (2012, 2016); among various others.

[199] The list in the wrong column includes some additional examples, such as Judge Robinson's 1990 opinion (in the Jamaican drug dealers case) that lumps race together with national origin/ancestry indiscriminately (United States v. Doe, 903 F.2d 16, 21-22 (D.C. Cir. 1990)), and a similarly unhelpful 1975 opinion by Judge Oakes similarly lumping *Korematsu* and *Hirabayashi* together to collapse any meaningful distinction between race and ethnic origin (United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 528 (2d Cir. 1975)). Although a statement may be correct that in a particular case or situation, a distinction between race and national or ethnic origin may be meaningless, a general, sweeping statement to the effect that any distinction between race and national or ethnic origin always is and must be meaningless, may be patently incorrect, both legally and logically. Regarding persistent misinformation, both on the Internet and generally, see, e.g., John Cook, Ullrich Ecker & Stephan Lewandowsky, *Misinformation and How to Correct It*, *in* Emerging Trends in the Social and Behavioral Sciences (Robert Scott & Stephan Kosslyn eds., 2015), *available at* https://www.researchgate.net/profile/Ullrich_Ecker/publication/277816966_Misinformation_and_its_Correction/links/5575066108ae7536374ff554/Misinformation-and-its-Correction.pdf.

A perhaps sort of interesting before-and-after comparison may be found by comparing a Ninth Circuit opinion from 1950, holding that courts inherently cannot judge military necessity,[200] with later opinions holding that, for instance, courts necessarily make major political decisions,[201] or that the Supreme Court frequently decides foreign policy and national security questions.[202]

After the (mis)statement using *Korematsu* as a stand-in for race regarding strict scrutiny, though, by far the most substantial category of use of *Korematsu* came in the post-1980 flurry of hand-wringing over the (finally and belatedly) discredited Japanese American internment. There were twenty-four such uses from 1986-2015, with one in the First Circuit (2014), three in the Second (1986, 1995, 2002), three in the Third (1990, 2002, 2015, the first two both by Judge Wiener), one in the Fourth (2003), three in the Fifth (1992, 2000, 2001), four in the Sixth (1990, 1992, 1994, 1996, all from Judge Jones), one in the Seventh (2008), two in the Eighth (both by Judge Lay) (1987, 2008), three in the Ninth (1990, 1997, 1999), one in the Tenth (2004), and two in the D.C. Circuit (1992, 1994). In four cases, such hand-wringing generated calls from other (usually more conservative) panel members to knock off the hand-wringing, at least in the case at hand: two in the Second Circuit (1986 and 1995), one in the Fourth (2003), and one in the Ninth (1990). Nineteen of the hand-wringings appeared in alternate opinions, mostly dissents (fifteen dissents, one concurrence/dissent); the calling-out of the hand-wringing also involved two dissents and one concurrence.

3.4. KOREMATSU: JUDGES/OPINION WRITERS

Out of a total of ninety-one judges who wrote individual opinions citing *Korematsu*—as usual, leaving out the reparations/exoneration cases of the 1980s, plus another two *per curiam* opinions and a Joint Statement questioning denial of a rehearing—only sixteen judges cited *Korematsu* in more than one opinion, often spaced far enough in time to raise doubts about any pattern, and only three of those sixteen judges used *Korematsu* more than twice: Judge Denman, Ninth Circuit, three times (1947, 1949, 1950); Judge Jones, Sixth Circuit, four times (1990, 1992, 1994, 1996); and Judge Lay, Eighth Circuit, four times (1974, 1981, 1987, 1991). The latter three judges do all tend to show some pattern, and in the cases of Judges Jones and Lay, that appears to go with a heightened overall sensitivity regarding civil rights. Based upon the nature and/or timing of their respective opinions,

[200] *See* Bridges v. United States, 184 F.2d 881, 887, quoting *Korematsu* at 245 (Jackson, diss.).
[201] *See* Northern Kentucky Right to Life Committee, Inc.v. Kentucky Registry of Election Finance, 134 F.3d 371 (6th Cir. 1998) (Ryan, J., conc./diss.).
[202] *See* El-Shifa Pharmaceutical Industries Co. v. United States, 607 F.3d 836, 856 (D.C. Cir. 2010).

the same might be true for some of the "two-timers": Judge Feinberg, Second Circuit (1970, 1972); Judge Fletcher, Ninth Circuit (1990, 1997); Judge Gibbons, Third Circuit (1976, 1981); Judge Robinson, D.C. Circuit (1988, 1990); Judge Wiener, Fifth Circuit (1992, 2000); Judge Winter, Fourth Circuit (1970, 1971), and Judge Wisdom, Fifth Circuit (1966, 1968). It is possible that Judge Tuttle, Fifth Circuit (1968, 1977) and Judge Cudahy, Seventh Circuit (1986, 1994) also should appear on this latter list.[203] Other judges who used *Korematsu* mostly for not especially pro-civil rights purposes include: Judge Coffin, First Circuit (1970, 1976); Judge Roney, Fifth/Eleventh Circuit (1977, 1996); Judge Silberman, D.C. Circuit (1987, 1998); Judge Wilkinson, Fourth Circuit (1996, 2003). Perhaps notably, given the relative popularity of *Hirabayashi* with certain conservative judges in the post-1980 period, *Korematsu* appears never to have gained quite the same currency for enforcing color-blindness and defeating affirmative action. For instance, Judge Jerry Smith of the Fifth Circuit and Judge O'Scannlain of the Ninth Circuit, who respectively used *Hirabayashi* twice and four times for such purposes, each used *Korematsu* only once.

[203] Notably, Judge Tuttle, who might not have especially stood out in this particular list based upon only two widely spaced citations of *Korematsu*, was of course a known and relatively early friend of civil rights. *See* Bass, *The "Fifth Circuit Four"*, *supra* note 63. Judge Wisdom also used *Korematsu* twice (but only twice), situated more closely in time; the other two members of "The Four", Judges Brown and Rives, apparently did not feel the need to cite it more than once.

3.5. KOREMATSU: QUOTES

Thirty-two of the 115 opinions in 111 cases citing *Korematsu* (not counting the three reparations/exoneration cases of the 1980s and an early 1944 case citing only the earlier Ninth Circuit opinion) included or claimed to include quotes from *Korematsu*. Ten of these barely count as quotes, having only one to three words (seven of "most rigid scrutiny";[204] one "constitutionally suspect";[205] one "suspect";[206] one "pressing public necessity"[207]), although at least a few of these include additional paraphrasing ultimately derived from *Korematsu*. Another supposed quote is a quotation of *Hirabayashi* ("odious to a free people") misattributed to *Korematsu*.[208] Still another quotation, from Justice Murphy's dissent, is memorable if brief: "the ugly abyss of racism".[209]

Of the remaining twenty-three separate quotes in twenty-one other opinions, three are repetitions of the Supreme Court's strict scrutiny "mantra" in *McLaughlin*.[210] One of the more popular quotations was the "loaded gun" quotation warning against executive or legislative over-reaching from Justice Jackson's dissent, abbreviated to varying degrees (used four times): "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".[211] Other quotations from Jackson included: "The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding";[212] "[We] can apply only law, and must abide by the Constitution, or [we] cease to be civil courts and become instruments of [police] policy";[213] "So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination".[214] The list also includes a frankly problematic quote from Jackson's dissent in which Jackson admits that "military

[204] *See, e.g.*, Kills Crow v. United States, 451 F.2d 323, 325 (8th Cir. 1971); Chance v. Board of Examiners, 458 F.2d 1167, 1177 (2d Cir. 1972); United States v. Antelope, 523 F.2d 400, 403 (9th Cir. 1975); Hall v. Pennsylvania State Police, 570 F.2d 86 (3d Cir. 1978); Sylvia Development Corp. v. Calvert County, Md., 48 F.3d 810, 820 (4th Cir. 1995).

[205] United States v. Thoresen, 428 F.2d 654, 658 (9th Cir. 1970).

[206] United States v. Doe, 903 F.2d 16, 22 (D.C. Cir. 1990) (again, the Jamaican drug smugglers case).

[207] Toles v. Katzenbach, 385 F.2d 107, 110 (9th Cir. 1967) (Browning, J., dissenting).

[208] *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 871 (citing only *Korematsu* at 216, meaning to also cite *Hirabayashi* at 100).

[209] Maldonado v. Holder, 763 F.3d 155, 174 (2d Cir. 2014) (Lynch, J., dissenting).

[210] *See supra* note 155.

[211] *See, e.g.*, United States v. Brainer, 691 F.2d 691, 700 (4th Cir. 1982) (quoting *Korematsu* at 246 (Jackson, J., diss.)); Washington Post Co. v. U.S. Dept. of State, 840 F.2d 26, 35 n.66 (D.C. Cir. 1988); United States v. Burwell, 690 F.3d 500, 533 n.6 (D.C. Cir. 2012) (providing the entire Jackson "loaded weapon" quote).

[212] Hamdi v. Rumsfeld, 337 F.3d 335, 373 (4th Cir. 2003) (Motz, J., dissenting) (quoting *Korematsu* at 247 (Jackson, J., dissenting)).

[213] Hassan v. City of New York, 804 F.3d 277, 307 (3d Cir. 2015) (quoting *Korematsu* at 247 (Jackson, J., diss.)).

[214] Hamdi v. Rumsfeld, 337 F.3d 335, 376 (4th Cir. 2003) (Motz, J., diss.) (quoting *Korematsu* at 245 (Jackson, J., diss.)).

decisions are not susceptible of intelligent judicial appraisal" but that "a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority".[215]

Justice Murphy's stinging, resounding dissent also appeared more than once, and more than briefly. "[T]o infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights" (used twice);[216] "[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support [and to do otherwise

[215] The entire quote, used in Bridges v. United States, 184 F.2d 881, 887 (9th Cir. 1950), concerning the McCarthy-era prosecution of well-known Australian-born American radical labor leader Harry Bridges for subversive activities and for lying under oath about his Communist sympathies and affiliations, reads as follows:

> In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. * * * I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

In these statements, Jackson appears to acknowledge, at least tacitly, that military decisions sometimes must be made, as well as more overtly recognizing that judges cannot intelligently evaluate them. Jackson then contends that courts cannot be forced to provide constitutional stamps of approval to unconstitutional military actions—even if those military exercises of authority are, in fact, reasonable under the circumstances (and, implicitly, will be undertaken as such in the face of a national crisis). Jackson, here, thus appears to come uncomfortably close, at least for legal and constitutional theorists, to acknowledging the essential powerlessness of the law and the Constitution in the face of military crises or other national emergencies. Although this interesting and ironic feature of Jackson's *Korematsu* dissent has not perhaps drawn as much attention as it probably deserves—possibly because, as with so much other legal language, readers cherry-pick the language they like and pull it out of context without a second thought—it did not escape the notice of legal scholar Eugene V. Rostow, who was more of a radical in the 1940s than in his later years and who clearly read the entire *Korematsu* opinion, including all the dissents, in great detail. Rostow, in a memorably scathing article blasting the Supreme Court for upholding military, legislative, and executive actions associated with the Japanese American internment in *Korematsu*, lavishly praised Justice Murphy's dissent but somewhat lengthily skewered Jackson's dissent as fundamentally absurd and a "fascinating and fantastic essay in nihilism". Eugene V. Rostow, *The Japanese American Cases - A Disaster*, 54 YALE L.J. 489, 510-12 (1945). For a brief discussion of the very interesting life of Harry Bridges, see, e.g., *Harry Bridges: Life and Legacy*, Waterfront Workers History Project, University of Washington Civil Rights and Labor History Consortium, http://depts.washington.edu/dock/Harry_Bridges_intro.shtml (accessed Dec. 22, 2020). Regarding Eugene Victor Rostow, named by his parents after American socialist leader Eugene Victor Debs, and who served in the Roosevelt, Kennedy, and Johnson administrations before, in effect, converting to neoconservatism in his later years and working for the Reagan administration as a director of the Arms Control and Disarmament Agency who was vocally opposed to either nuclear arms control or disarmament, see, e.g., *Eugene V. Rostow*, Wikipedia, https://en.wikipedia.org/wiki/Eugene_V._Rostow (accessed Dec. 22, 2020). The former liberal/radical is remembered as a "Contributor" by the Federalist Society. *Prof. Eugene V. Rostow, Former Dean, Yale Law School*, The Federalist Society, https://fedsoc.org/contributors/eugene-rostow (accessed Dec. 22, 2020).

[216] *See e.g.*, Hunt v. Roth, 648 F.2d 1148, 1165 (8th Cir. 1981) (quoting *Korematsu* at 240 (Murphy, J., diss.)); Hassan v. City of New York, 804 F.3d 277, 307 (3d Cir. 2015) (quoting *Korematsu* at 240 (Murphy, J., diss.)).

would] encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow".[217]

Quotations from the *Korematsu* majority opinion include: "[n]othing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify [this sort of discriminatory deprivation]"(used twice);[218] "[the Court upheld the order only because it] could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal";[219] "[the Japanese plaintiff was] not excluded from the military area because of hostility to him or his race";[220] "[P]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can";[221] "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect, [and] courts must subject them to the most rigid scrutiny";[222] "there were disloyal members of [the Japanese-American] population, whose number and strength could not be readily ascertained ... such persons ... constituted a menace to the national defense and security, which demanded that prompt and adequate measures be taken against it";[223] and a very lengthy quotation likely used for local self-justification

[217] United States v. Taylor, 956 F.2d 572, 592 (6th Cir. 1992) (Jones, J., dissenting) (quoting *Korematsu* at 234, 240 (Murphy, J., diss.)). Judge Jones, however, notably also included a rather major concession in Justice Murphy's dissent, somewhat similar to the conundrum raised in the problematic quote from Justice Jackson: [That the] "scope of [. . .]discretion [of those waging the war] must, as a matter of necessity and common sense, be wide" (quoting *Korematsu* at 234 (Murphy, J., diss.)). The complete quotation from the Murphy dissent—the second paragraph of that dissent—actually tracks the problematic Jackson quote even more closely:

> In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

Korematsu at 234 (Murphy, J., diss.).

[218] Culver v. Secretary of Air Force, 559 F.2d 622, 636 (D.C. Cir. 1977) (Bazelon, J., diss.) (quoting *Korematsu* at 218); Narenji v. Civiletti, 617 F.2d 745, 754 (D.C. Cir. 1979) (joint statement dissenting against decision not to rehear case en banc) (the Iranian students case).

[219] Culver v. Secretary of Air Force, 559 F.2d 622, 636 (D.C. Cir. 1977) (Bazelon, J., diss.) (quoting *Korematsu* at 219).

[220] Doe on Behalf of Doe v. St. Joseph's Hosp. of Fort Wayne, 788 F.2d 411, 418 (7th Cir. 1986).

[221] Fisher v. University of Texas at Austin, 631 F.3d 213, 248 (5th Cir. 2011) (Garza, J., conc.).

[222] Bulluck v. Washington, 468 F.2d 1096, 1116 (D.C. Cir. 1972) (quoting *Korematsu* at 216).

[223] United States v. Smith, 73 F.3d 1414, 1422 (6th Cir. 1996) (Jones, J., conc.) (quoting *Korematsu* at 218). This quote, used by the liberal, pro-civil rights Judge Nathaniel R. Jones, at first glance may disturb civil libertarians, but here it is taken out of context; Jones used the quote only as part of a wider explanation and warning about how the Supreme Court got things terribly wrong in *Korematsu*. Ironically, of course, given the nature of selective cherry-picking of language out of context in the legal profession, this quote could be used in support of the specific point it makes—and it could be made to appear that Judge Jones used it approvingly.

in a 1947 Ninth Circuit opinion concerning an exclusion order applied to a non-Japanese American.[224]

Finally, another quotation from Justice Roberts' dissent that nevertheless, taken out of context, tended to support government authority, was used: "The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended".[225]

After two early quotations in 1947 and 1950, both from the Ninth Circuit, *Korematsu* was not allegedly quoted again until the misattributed quotation from *Hirabayashi* in 1966, then the brief "pressing public necessity" quote in 1967. The *McLaughlin* mantra appeared twice from the Fifth Circuit in 1968, followed by a third appearance from the Fourth Circuit in 1971. Of the fourteen quotations appearing between 1968 and the end of the 1970s, along with the three recitations of the mantra, there were seven of the very brief quotes (six of "most rigid scrutiny", one "constitutionally suspect"), along with both uses of "[n]othing short of apprehension [. . .]"; "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect, [and] courts must subject them to the most rigid scrutiny"; and the out-of-context quote from the Roberts dissent.

Quotation patterns changed abruptly starting in the early 1980s as *Korematsu*, *Hirabayashi*, and the whole Japanese American internment increasingly were called into doubt. Notably, the fourteen opinions after 1980 that quoted *Korematsu* one or more times included all but one of the quotations of Jackson's dissent and all those of Murphy's dissent.

Who did the quoting? The First, Tenth, Eleventh, and Federal Circuits appear never to have quoted *Korematsu* even once. The Second offered only three very brief quotes, two in 1972, the other in 2014. The Third quoted from *Korematsu* twice, once briefly in 1978, later at length from both Jackson's and Murphy's dissents in 2015. The Sixth quoted *Korematsu* twice, in 1992 and 1996, both in dissents or concurrences by Judge Nathaniel R. Jones.

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[224] *See e.g.*, DeWitt v. Wilcox, 161 F.2d 785, 787-788, 790-791 (9th Cir. 1947):

> Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion Order No. 34, *Korematsu* was under compulsion to leave the area not as he would choose but via an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

[225] United States v. Chalk, 441 F.2d 1277, 1283 (4th Cir. 1971) (quoting Korematsu at 231 (Roberts, J., diss.)).

The Seventh quoted *Korematsu* only once, in 1986; the Eighth quoted *Korematsu* twice, once in 1971 with the very brief "most rigid scrutiny", the other time in 1981, the first circuit to quote *Korematsu* in the 1980s and using a critical quotation from Murphy's dissent.[226]

Thus, the other twenty-two of thirty-two quotations all came from just the Fourth, Fifth, Ninth, and D.C. Circuits, four from the Fifth, five apiece from the Fourth and Ninth, and seven from the D.C. Circuit. The Fourth Circuit's two quotations from 1971 included the *McLaughlin* mantra and the uncritical-looking Roberts quote; two of the three between 1982 and 2003 were critical Jackson quotes. Leaving aside the 1966 misquote of *Hirabayashi*, the Fifth recited the *McLaughlin* mantra twice in 1968, then much later, in 2011, used the more resounding, "[P]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can".

The Ninth Circuit quoted *Korematsu* in 1947, 1950, 1967, 1972, and 1975. 1947 saw use of the lengthiest quote in support of government authority; 1950, the slightly perplexing Jackson quotation to the effect that a court should not rubber-stamp military decisions as constitutional, but also cannot stop them. The remaining three quotations were extremely brief, and the Ninth Circuit never quoted *Korematsu* again.

The D.C. Circuit's three quotations of *Korematsu* from before 1980 include "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect, [and] courts must subject them to the most rigid scrutiny" in 1972, and the two uses of "[n]othing short of apprehension ..." in 1977 and 1979. By contrast, of the four quotations of *Korematsu* to appear after 1980 in the D.C. Circuit three were different versions of the Jackson "loaded gun" quote (1988, 2012, and 2016), plus the diminutive, one-word "suspect" (1990).

Other than Second Circuit Judge Feinberg, with two uses of "most rigid scrutiny" in 1972, and Sixth Circuit Judge Jones, with two lengthy quotations in 1992 and 1996, and excluding the 1966 misquote of *Hirabayashi* from the Fifth Circuit and the single-word quote from the D.C. Circuit in 1990, no other judges quoted *Korematsu* even twice.

[226] *See* Hunt v. Roth, 648 F.2d 1148, 1165 (8th Cir. 1981) (quoting *Korematsu* at 240 (Murphy, J., diss.))

3.6. KOREMATSU: USE IN CONCURRENCES OR DISSENTS

Out of the 115 total opinions in 111 *Korematsu*-citing cases, forty-one opinions (35.7%) were either concurrences or dissents, the overwhelming majority—thirty-six—of those being dissents, plus five concurrences and two partial concurrences/dissents. Only ten of these alternate opinions appeared between 1950 and the end of 1980 (nine dissents, one concurrence); the other thirty-one, more than 75% of the total, came from 1981 onward, all but one from 1985 onward. After somewhat uneven appearances during the 1980s—one in 1985, three in 1986, one in 1987, none in 1988 or 1989, then a cluster of four in 1990—these alternate opinions appeared at an average rate of about one per year from 1991 through 2002, with slight variations (none in 1993, two in 1994, and two in 2000). After another small surge of three opinions in 2003—two of them being a concurrence and a dissent challenging each other in the same case[227]—the engine sputtered somewhat, with only six more such alternate opinions appearing between 2004 and 2016 (and clustered somewhat toward the end of that period).[228]

Generally, in most circuits, such concurrences or dissents were relatively few in number and/or widely scattered in time, showing few repeat performers and seemingly no particular patterns.[229] The partial exceptions are the Third Circuit, with five alternate opinions from 1976-2002 and two of those both dissents by Judge Gibbons (1976, 1981); the Sixth Circuit, in which all four concurrences and dissents, 1990-1996, came from Judge Jones; the Eighth Circuit, in which both alternate opinions, a dissent and a concurrence/dissent, were by Judge Lay (1987, 1991); and the Ninth Circuit, with seven alternate opinions, 1950, 1967, and 1990-2003, with the five dissents from 1990 onward showing a pronounced pattern of more liberal judges challenging more conservative majorities or more conservative judges challenging more liberal majorities, and with two of the more liberal dissents coming from Judge Fletcher.

[227] *See* Hamdi v. Rumsfeld, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., conc.; Motz, J., diss.).
[228] These last six alternate opinions appeared in 2004, 2008, 2011, 2016, and two in 2014.
[229] [First: 2x 1986, 2014; Second : 5x, 1972, 1986, 1995, 2000 2014; Fourth: two cases with three opinions, two of them answering each other in 2003: 1971, 2003, 2003; Fifth: 3x 2000, 2001, 2011; Seventh 2x 1973 2008; Tenth: 2x 1985, 2004; D.C.: 5x, 1977, 1979, 1986, 1994, 2016; Eleventh & Fed: 0].

3.7. KOREMATSU: USE OF CONCURRENCES OR DISSENTS FROM KOREMATSU ITSELF

Fifteen of the 115 opinions not including the reparations cases drew upon the concurrences or dissents in *Korematsu*. Only three of these appeared before 1981 and included the only citation of Justice Frankfurter's concurrence, supporting federal war powers authority, in any federal circuit opinion (1969),[230] along with the two quotations from the Jackson and Roberts dissents that, taken out of context, appeared to support government authority.[231] From 1981 onward, the other twelve opinions drew only from the more critical language of the sharper dissenting opinions, with four uses of Murphy and nine of Jackson (and one opinion using both of them at some length[232]). Opinions using the *Korematsu* dissents also represented twelve of the thirty-two quotations of *Korematsu*.

3.8. KOREMATSU: DEPTH OF USE

The depth of use of *Korematsu* in circuit court opinions was ranked by eleven (or twelve) different categories: Passing Reference [hereinafter P.R.], in which an opinion mentioned *Korematsu* only briefly in passing for some relatively normal citation purpose; P.R.*, in which an opinion mentioned *Korematsu* briefly in passing to criticize it or raise a warning based upon it; Passing References including very brief Quotes (i.e., "most rigid scrutiny") [hereinafter P.R.(Q.)]; P.R.**, in which an opinion, in passing, chided a P.R.* opinion in the same case or otherwise questioned the propriety of raising *Korematsu* at all in the context of the case; Passing References including slightly more substantial Quotes than with P.R.(Q.)s [hereinafter P.R.Q.]; Quote [hereinafter Q.], indicating a more normal-length quote from *Korematsu*; Substantial, referring to uses of *Korematsu* at some length and depth, though without quotes; Substantial*, like P.R.* indicating the invocation of *Korematsu* to criticize it or warn against it, only more substantial; Substantial Q., including a lengthier quote from *Korematsu*; Substantial+ Q., including both substantial discussion and substantial quote/s; Full Mantra, reciting (nearly verbatim) the language from the Supreme Court's *McLaughlin v. Florida* statement of the strict scrutiny standard, which represents in effect a somewhat more stylized but

[230] *See* Simmons v. United States, 406 F.2d 456 (5th Cir. 1969) (a Vietnam War draft resistance case).
[231] *See* Bridges v. United States, 184 F.2d 881, 887 (9th Cir. 1950) (quoting *Korematsu* at 245 (Jackson, J., diss.)); United States v. Chalk, 441 F.2d 1277, 1283 (4th Cir. 1971) (quoting *Korematsu* at 231 (Roberts, J., diss.)).
[232] *See* Hassan v. City of New York, 804 F.3d 277, 307 (3d Cir. 2015).

distinctive version of the P.R.(Q.); and, finally, P.R.(Q.)-Mistake, for the misattribution of the quote from *Hirabayashi.*[233]

The tally of these uses is as follows (and includes how frequently such uses involved co-citations of certain other key cases involving civil rights and/or the Japanese American experience):

- P.R. = fifty-three [includes twenty-six uses of other cases]
- P.R.* = twenty-four [includes six uses of other cases, including 4x *Plessy* and 2x *Dred Scott*]
- P.R.(Q.) = ten [includes eight uses of other cases]
- P.R.** = five [one use of another case, *Plessy*]
- P.R.Q. = two [no other cases co-cited]
- Q. = nine [includes four uses of other cases]
- Substl = two [includes two uses of other cases]
- Substl* = two [includes one use of other cases]
- Substl Q = three [includes two uses of other cases]
- Substl+ Q = four [includes two uses of other cases]
- Full Mantra = three [includes three uses of other cases]
- P.R.(Q.)-Mistake = one [includes one use of other cases]

[233] This "depth of use" analysis is borrowed from a pair of studies of all the citations of works by Michel Foucault over a twenty-five year period in the journal literature produced by library/information science scholars. It represents an effort to overcome what has been a basic flaw of citation analysis ever since the beginning of computer-assisted citation-counting efforts in the 1960s for academic articles—the inability to go beyond raw numbers to check the character, quality, and depth of use of the citation through what bibliometricians refer to as "tiered analysis". See, e.g., Blaise Cronin, *Tiered Citation and Measures of Document Similarity*, 45 J. Am. Soc'y Info. Sci. 537 (1994). [Of course, Westlaw's Depth scale for court opinions already helps with comparative depth analysis, along with other similar systems from other legal information providers. Westlaw's, and Lexis-Nexis/Shepard's systems for tracking positive or negative treatment of court opinions in later citing opinions also generally do a good job of revealing citation "valence"—positive or negative—that traditionally has been lacking from academic citation analysis systems such as the first and best-known, Web of Science]. Such an approach admittedly may produce more useful and interesting results with larger data sets, such as the hundreds of articles citing Foucault, than the more limited data set here. *See* (if so inclined) Scott Hamilton Dewey, *Foucault's Toolbox: Use of Foucault's Writings in LIS Journal Literature, 1990-2016*, 76 J. Documentation 689 (2020); Scott Hamilton Dewey, *(Non-)Use of Foucault's Archaeology of Knowledge and Order of Things in LIS Journal Literature,* 1990-2015, 72 J. Documentation 454 (2016).

P.R.s, by far the dominant category (46.1% of 115 opinions), were spaced fairly evenly in time, with five, 1945-1950, twenty-seven, 1969-1980, and twenty-one, 1982-2014. Use activity of all P.R.(etc.) variants varied somewhat among the circuits, with some visible clustering in certain circuits and across time.

P.R.*s, perhaps a somewhat more historically, politically, and rhetorically interesting category for criticizing *Korematsu*, basically all appeared from 1985 onward, with only two earlier pioneers that gently criticized the opinion appearing in 1973 (a dissent urging fellow panelists to reflect on the "unfortunate ruling in *Korematsu*")[234] and 1981 (in a case involving U.S. service members deliberately exposed to radiation in early atomic weapons tests, the dissent questioned the over-extension of absolute official immunity for federal officers).[235] Only two more P.R.*s appeared in the 1980s (1985 and 1986), followed by a comparative flood of eighteen from 1990-2004 (including at least one such use in every year except 1993 and 1998), then only three later stragglers in 2008, 2014, and 2015. Most circuits produced either zero (Fourth, Eleventh and Federal Circuits), one (Eighth Circuit) or two (First, Second, Sixth, Seventh, Tenth, D.C. Circuits) PR*s, often spaced fairly widely in time, but the Third Circuit had three while the Fifth and Ninth Circuits each had four P.R.*s.

Twenty-one of the twenty-four cases producing P.R.*s involved civil rights claims. Notably, nineteen of the P.R.*s appeared in alternate opinions, including one concurrence and eighteen dissents. Sixteen of these dissents found dissenting judges using *Korematsu* to warn against executive or legislative overreaching and/or improper denial of equal protection or fundamental rights in cases where the majority rejected rights claims. The one concurrence accepted the majority's decision in a drug prosecution, but still worried about *Korematsu*-like excesses in the war on drugs.[236]

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[234] United States v. Fern, 484 F.2d 666, 670 (7th Cir. 1973) (Gordon, District J., diss.)[discussing a federal drug prosecution]

> It is clear from the facts of this case that the search of the appellant's handbag conducted here cannot be brought within the ambit of *Terry*. The mere fact that the appellant fitted a 'behavioral profile' does not constitute probable cause for the search in this case. Moreover, when faced with a heated issue such as this, I think we might reflect on the unfortunate ruling in *Korematsu*, before approving the search in this case.

[235] *See* Jaffee v. United States, 663 F.2d 1226, 1252 (3d Cir. 1981) (Gibbons, J., diss.)

> In 1949, when Judge L. Hand wrote the *Gregoire* opinion, the notion of absolute official immunity for federal officers probably seemed a politically attractive idea. We had recently fought a war in which many things had been done which were thought necessary for victory, but which with the benefit of hindsight, probably would seem quite inconsistent with our concept of democracy and its traditions of personal integrity and individual freedoms. [See, e.g.,[*Korematsu*] (legitimizing wholesale internments of Japanese)]. It was perhaps fortunate that the *Gregoire* issue did not reach the Supreme Court for some time.

[236] *See* United States v. Inman, 902 F.2d 35 (6th Cir. 1990) (Nathaniel R. Jones, J., conc).

Two P.R.*s were in majority opinions finding in favor of rights claimants;[237] one came in a majority opinion rejecting an affirmative action program;[238] and one P.R.* found a conservative judge dissenting from a more liberal majority's upholding of an affirmative action program (and rolling out *Plessy* to help make his point).[239] Only one of the P.R.*s invoked one of the *Korematsu* dissents.[240]

The five P.R.**s, mostly criticizing *Korematsu*'s critics in P.R.*s and also a relatively interesting category (that tended to produce lengthy and sometimes vitriolic discussion), all appeared, relatively evenly spaced, between 1986 and 2003, with two from the Second Circuit (1986, 1995), one each from the Ninth (1990), Eighth (1998), and Fourth (2003) Circuits. Two of the P.R.**s appeared in conservative dissents against more liberal majorities in civil rights cases, one from the Second Circuit concerning pretrial detention based on a determination of dangerousness,[241] and one from the Ninth Circuit concerning free speech, public protest, and appropriate time/manner/place restrictions (and representing conservative Judge O'Scannlain's one invocation of *Korematsu*).[242]

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[237] *See* Patrolmen's Benevolent Ass'n. of City of New York v. City of New York, 310 F.3d 43, 53 (2d Cir. 2002); *see also* Rodriguez v. Robbins, 804 F.3d 1060, 1074 (9th Cir. 2015).

[238] *See* Hopwood v. State of Texas, 78 F.3d 932, 945 n.26 (5th Cir. 1996).

[239] *See* Hunter ex rel. Brandt v. Regents of University of California, 190 F.3d 1061, 1075 (9th Cir. 1999) (Beezer, J., diss.) (also invoking *Plessy*).

[240] *See e.g.*, Giano v. Senkowski, 54 F.3d 1050, 1057 (2d Cir. 1986) (Calabresi, J. diss.).

[241] *See* United States v. Melendez-Carrion, 790 F.2d 984, 1013 n.5 (2d Cir. 1986) (Timbers, J., diss.)

> These procedural safeguards, including an individual determination of probable cause to believe the defendant has committed a serious crime, an individual detention hearing, the right to counsel, the right to present evidence, the right to cross-examine witnesses, and the burden of "clear and convincing evidence" imposed on the government, were not present in the case of the internment of the Japanese-Americans during World War II. [. . .] Judge Newman's allusion to [*Korematsu*], fails to recognize these significant distinctions. While *Korematsu* indeed may be a regrettable blemish in the history of American jurisprudence, obviously the form of detention authorized under the Bail Reform Act, with its attendant procedural protections, is not such a departure from American ideals of individual liberty.

[242] *See* Bay Area Peace Navy v. United States, 914 F.2d 1224, 1237 (9th Cir. 1990) (O'Scannlain, J., diss.)

> In short, the Coast Guard properly acted in an anticipatory fashion to ensure security and to promote maritime safety. In so doing, it was advancing significant governmental interests through a narrowly-tailored regulation. The majority's implication that a catastrophe must first occur before a sufficient safety-and-security zone may be established is not compelled by the first amendment.11 [FN 11] Ironically, the concurrence considers this view of the government's security interests to be "overblown," yet itself goes on to represent this dissent as concluding that "even speculative security interests are so significant as to justify almost any type of regulation". Ante at 1232. Such an assessment grotesquely mischaracterizes and distorts this dissent. Only a focal length of 150 feet (the spread between seventy-five yards and twenty-five yards) constitutes the entire jurisprudential difference between the majority and the dissent. The three-hour-long safety-and-security zone of seventy-five yards, therefore, is scarcely on an analytical par with the forcible internment of Japanese–Americans during World War II. [. . .] The attempted conflation of this case with *Korematsu* cannot stand; excited references to emotionally charged symbols are of no assistance to good-faith analysis of the relevant constitutional issues.

Other P.R.**s found majority or concurring opinions criticizing a dissenter's allegedly improper use of *Korematsu*, as in a key Fourth Circuit enemy combatants case from the "War on Terror"[243] and a Second Circuit case in which the majority rejected prisoners' claim of a fundamental right to access to nude photos of loved ones.[244] [The fifth case categorized as a P.R.**, though somewhat different from the others, did not fit neatly in any other bin and is interesting enough to deserve some special attention.[245]] Since 2003, there have been no further slap-downs alleging inappropriate waving of the bloody shirt of *Korematsu*.

Of the nine Q.s (1971-2012), two came from the Fourth Circuit (1971, 1982),[246] four from the D.C. Circuit (1972, 1979, 1988, 2012),[247] and one each from the Fifth,[248]

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[243] Hamdi v. Rumsfeld, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., conc.)

> Moreover, the recharacterizations of the holding in the dissent are manifestly far afield. The panel did not suggest that its holding would apply to any part of the world where American troops might happen to be present.[. . .] There is not the slightest resemblance of a foreign battlefield detention to the roundly and properly discredited mass arrest and detention of Japanese-Americans in California in *Korematsu*. These attempts to recharacterize the holding of the panel find no support in the opinion's text itself.

[244] *See* Giano v. Senkowski, 54 F.3d 1050, 1057 (2d Cir. 1986)

> The dissent's suggestion that our affirmance of a prison regulation barring certain naked pictures from the prison puts us on the damnable path to [*Korematsu*] (upholding an executive order that excluded citizens of Japanese ancestry from restricted areas of the West coast and placed them in relocation centers), is a lyric leap. Courts do not exist to rubber stamp bureaucratic excesses. There is a point where judicial deference to executive or administrative expertise must be denied. Nude pictures of loved ones in a prison setting do not begin to approach that point.

[245] *See e.g.*, Northern Kentucky Right to Life Committee, Inc.v. Kentucky Registry of Election Finance, 134 F.3d 371 (6th Cir. 1998) (Ryan, J., conc./diss.)

> Courts are used to adjudicate "political" issues, as I understand the term, all the time, and in an honorable and wholly appropriate fashion. There is nothing more deeply and honorably rooted in our tradition of constitutional self-government than the people's First Amendment right of access to the court to protect the hard-won political principle of free speech. Surely it is readily apparent that "political" considerations inspired the litigants and their various supporters and detractors in a variety of noteworthy Supreme Court cases-cases, indeed, that have shaped the constitutional landscape. See, e.g., [. . .]; [Brown v. Board]; [Korematsu]; [. . .]. I will not belabor the point, but it seems self-evident to me that while it is obviously improper for judicial decision-making to be colored by political considerations, it is salutary indeed that the litigants can utilize the courts in this country in order to fight "political" battles. Indeed, the lower court itself seemed to recognize this much when it observed, in denying fees to the Registry under section 1988, that the type of challenge brought by the plaintiffs here "draw[s] out the nuances of the guarantees of the First Amendment[. . .]"

[246] *See* United States v. Chalk, 441 F.2d 1277, 1283 (4th Cir. 1971) (quoting Korematsu at 231 (Roberts, J., diss.)); United States v. Brainer, 691 F.2d 691, 700 (4th Cir. 1982) (quoting *Korematsu* at 246 (Jackson, J., diss.).

[247] *See* Bulluck v. Washington, 468 F.2d 1096, 1116 (D.C. Cir. 1972) (quoting *Korematsu* at 216); Narenji v. Civiletti, 617 F.2d 745, 754 (D.C. Cir. 1979) (joint statement dissenting against decision not to rehear case en banc) (the Iranian students case); Washington Post Co. v. U.S. Dept. of State, 840 F.2d 26, 35 n.66 (D.C. Cir. 1988); United States v. Burwell, 690 F.3d 500, 533 n.6 (D.C. Cir. 2012).

[248] *See* Fisher v. University of Texas at Austin, 631 F.3d 213, 248 (5th Cir. 2011) (Garza, J., concurring).

Seventh,[249] and Eighth Circuits.[250] These included two dissents and one concurrence, and they invoked Justice Jackson's dissent five times, Justice Murphy's once, and Justice Roberts' once. The eleven Substantial uses of various sorts (1947-2015) included three from the Ninth Circuit (1947, 1950, 1990);[251] two from the Sixth Circuit (both penned by the ubiquitous Judge Jones in 1992 and 1996);[252] two from the D.C. Circuit (1977, 1992);[253] and one each from the Second (1986),[254] Third (2015),[255] Fourth (2003),[256] and Eighth (1987)[257] Circuits. Eight of the eleven Substantials (all but one after 1950) concerned civil rights issues; the other was an unusual (and unsuccessful) German American reparations case from 1992.[258] The Substantials showed two dissents, one concurrence, and one concurrence/dissent, and they invoked Jackson's dissent twice, Murphy's once, and both Jackson's and Murphy's in one case.[259]

3.9. KOREMATSU: CO-CITING OF OTHER CASES

Fifty-one (44.3%) of the 115 opinions citing *Korematsu* (excluding the reparations/exoneration cases, etc.) also cited other cases from the batch of key civil rights cases—*Bolling*, *McLaughlin*, *Loving*, *Plessy*, *Dred Scott*—and/or Japanese American cases—*Hirabayashi, Endo*, *Yasui*, *Oyama*, *Hirabayashi*—that were also checked regarding

[249] *See* Doe on Behalf of Doe v. St. Joseph's Hosp. of Fort Wayne, 788 F.2d 411, 418 (7th Cir. 1986).
[250] *See e.g.*, Hunt v. Roth, 648 F.2d 1148, 1165 (8th Cir. 1981) (quoting *Korematsu* at 240 (Murphy, J., dissenting)).
[251] *See e.g.*, DeWitt v. Wilcox, 161 F.2d 785, 787-788, 790-791 (9th Cir. 1947); *see* Bridges v. United States, 184 F.2d 881, 887 (9th Cir. 1950); *see also* Bay Area Peace Navy v. United States, 914 F.2d 1224, 1232-1233 (9th Cir. 1990).
[252] *See* United States v. Taylor, 956 F.2d 572, 592 (6th Cir. 1992) (Jones, J., diss.); *see* United States v. Smith, 73 F.3d 1414, 1422 (6th Cir. 1996) (Jones, J., concurring).
[253] *See* Culver v. Secretary of Air Force, 559 F.2d 622, 636 (D.C. Cir. 1977) (Bazelon, J., dissenting) (quoting *Korematsu* at 219); Jacobs v. Barr, 959 F.2d 313 (3d Cir. 1992).
[254] *See* United States v. Melendez-Carrion, 790 F.2d 984, 1004 (2d Cir. 1986).
[255] *See* Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015).
[256] *See* Hamdi v. Rumsfeld, 337 F.3d 335 (4th Cir. 2003) (Motz, J., dissenting).
[257] *See* McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (Lay, J., conc./diss.).
[258] *See* Jacobs v. Barr, 959 F.2d 313 (3d Cir. 1992). *See supra* note 167.
[259] A separate section on the depth of use of *Hirabayashi* was not included in the main text because it was likely less interesting, with an overwhelming number of passing references and fewer other interesting categories, while some potentially more interesting issues likely were addressed by discussing quotations. At any rate, 262 of the 306 opinions citing *Hirabayashi* (85.6%) were in the P.R. (passing reference) range, with eleven of those making two passing references, ten of them giving a brief quote (so, P.R.Q.s). *Hirabayashi* had 31 Q.s, overwhelmingly dominated by the "odious distinctions" quote. Again, leaving aside the richer original 9th Circuit appearance of what would become *Korematsu* (1944) as well as the 1980s exoneration/reparations cases, only ten opinions, by a liberal definition, could be considered to have offered more "Substantial" treatment of *Hirabayashi* (six of these from the 1940s and addressing the issues of those times): *see* O'Neal v. U.S., 140 F.2d 908 (6th Cir. 1944); Ex parte Duncan, 146 F.2d 576 (9th Cir. 1944); Kramer v. U.S., 147 F.2d 756 (6th Cir. 1945); *see* Smith v. U.S., 148 F.2d 288 (4th Cir. 1945); *see* Spaulding v. Douglas Aircraft Co., 154 F.2d 419 (9th Cir. 1946); *see* Atherton v. U.S., 176 F.2d 835 (9th Cir. 1949); *see* Smith v. U.S., 335 F.2d 270 (D.C. Cir. 1964) (Bazelon, J., maj'y; Miller, J., diss.); *see* Fuller v. U.S., 407 F.2d 1199 (D.C. Cir. 1967) (Leventhal, J., maj'y; Fahy, J., diss.); *see* U.S. v. Hooper, 432 F.2d 604 (D.C. Cir. 1970); *see also* Hamdi v. Rumsfeld, 337 F.3d 335 (4th Cir. 2003) (Motz, J., dissenting).

Hirabayashi. *Hirabayashi* itself was, predictably, unusually popular, appearing nineteen times, either alone with *Korematsu* or along with various other cases on the list. *Bolling*, however, was even more popular, appearing twenty-one times in cases also citing *Korematsu*, while *Loving* is the co-citation champion with twenty-two appearances. *McLaughlin* was co-cited twelve times; *Plessy*, eight times; and *Dred Scott*, only three times, all of those in the Fifth Circuit and all of them along with *Plessy* (1966, 2000, 2001).[260]

The other Japanese American cases, aside from *Korematsu* and *Hirabayashi*, mostly have had more specialized and less salient roles in jurisprudence and citation, and they appear less frequently in association with *Korematsu* as such. However, *Endo*—still an important authority regarding citizenship, naturalization, and loyalty—was co-cited with *Korematsu* five times through 2015.[261] *Takahashi* also appeared five times,[262] *Yasui*[263] and *Oyama*[264] only twice.

Thirty-two of the uses of other cases in conjunction with *Korematsu* appeared from 1945-1979, all but six of those, 1966-1979; the other twenty-two, 1982-2015. Certain co-cited cases gained or lost relative popularity between the two periods. For instance, *Hirabayashi* appeared thirteen times in the earlier period, only six times in the latter period. *Bolling* faded even more dramatically, with seventeen earlier, four later appearances. *Loving* had fifteen earlier, seven later appearances; *McLaughlin* almost vanished in the later period with eleven earlier appearances, one later appearance. *Plessy* and *Dred Scott* gained momentum in the later periods, with three/five and one/two earlier/later appearances, respectively. Overall, the Japanese American cases were mostly rediscovered in the post-1980 period, with earlier/later scores as follows: *Endo*: three/two; *Takahashi*: one/four; *Yasui*: one/one; *Oyama*: zero/two.

As usual, different circuits made differential use of co-cited cases. Some of the usual heavier users of *Korematsu* continued in that capacity: the Third Circuit had five co-citations with other cases (1976-78, 2015); the Fourth Circuit, seven co-citations with other cases (1970-2003); the Fifth, eleven (1945, 1966-2001); Ninth Circuit, ten (1946-1975, 1999, 2014); the D.C. Circuit, six (1972-1992). Other circuits provided co-citations little if at all: First Circuit, once (with *Plessy*, 2014); Second Circuit, three times (1972-75, including

[260] Database searches also bring up situations where particular cases are not being cited, but either earlier or later related cases may be—as with citations of the litigation to exonerate Gordon Hirabayashi that reached the Ninth Circuit by 1987—as well as, in recent years, relatively numerous appearances of names such as Hirabayashi, Korematsu, and Yasui, reflecting the formation and active participation by descendants of earlier Japanese American internment defendants in various public interest organizations committed to civil rights.

[261] Ninth Circuit, 1946, 1949; D.C.Circuit, 1979, 1992; Third Circuit, 2015.

[262] Fourth Circuit, 1975; Seventh Circuit, 1986; D.C. Circuit, 1990; Tenth Circuit, 2004; Ninth Circuit, 2014.

[263] Ninth Circuit, 1946; D.C. Circuit, 1992.

[264] D.C. Circuit, 1990; Fourth Circuit: 1995.

Hirabayashi, *Bolling*, *McLaughlin*, *Loving*); Sixth Circuit, never; Seventh Circuit, three times (1979, 1986, 1994, including only *Bolling*, *Loving*, and *Takahashi*); Eighth Circuit, twice (1971, 1974, including *Bolling*, *McLaughlin*, and *Loving*); Tenth Circuit, twice (1989, 2004, including *Loving* and *Takahashi*); Eleventh Circuit, never; Federal Circuit, once (1989, including *Bolling* and *Loving*).

Few individual judges were repeat players in the co-citation game. The few who cited *Korematsu* together with another targeted case more than once include: Judge Cudahy, Seventh Circuit (1986, 1994, co-citing *Bolling*, *Loving*, and *Takahashi*); Judge Denman, Ninth Circuit (1947, 1949, *Hirabayashi* and *Endo* only); Judge Tuttle, Fifth Circuit (1968, 1977, co-citing *Hirabayashi* (in both), *Bolling* (in both), *McLaughlin*, *Loving*); Judge Winter, Fourth Circuit (1970, 1971, co-citing *Hirabayashi*, *Bolling* (in both), *McLaughlin*, *Loving*, *Plessy*); and Judge Wisdom (1966, 1968, co-citing *Hirabayashi*, *Bolling* (in both), *McLaughlin*).[265]

4. A COMPARISON OF CIRCUIT COURT USES OF *KOREMATSU* AND *HIRABAYASHI* WITH HISTORICAL TRENDS AND SUPREME COURT USES, 1943-2016

This Section offers a wider comparative historical framework for this study by providing a brief summary of the political, social, and cultural history of the postwar United States that set the backdrop for all developments regarding *Korematsu* or *Hirabayashi* at both the Supreme Court and federal circuit court levels.[266] Although some or all of this may only be review for members of the legal community,[267] particularly those who were formerly undergraduate history majors or graduate students in history, this approach, by illuminating the wider context, seeks to prevent the law and legal evolution from hiding in either an ahistorical fantasy land or an "exceptional" purely legal realm where,

[265] Again, Judges Tuttle and Wisdom appear on this list of co-citers, but Judges Brown and Rives do not. *See* Bass, *The "Fifth Circuit Four"*, *supra* note 63.

[266] [Any of the brief, encyclopedic summary here can, of course, be documented and footnoted to death. I haven't done so, but I can].

[267] Anyone who has been a history professor or teacher likely knows not to put too much faith in readers' general historical awareness, though. Plenty of Americans long have, and still do, largely subscribe to Henry Ford's famous statement that "History is bunk". *See generally* H. L. Mencken, A New Dictionary of Quotations on Historical Principles from Ancient and Modern Sources (3th ed. 1946). Mencken gives the short version of the quote that has become best remembered in history. The full quote, from an interview Ford gave to the *Chicago Tribune* in 1916, allegedly reads, "History is more or less bunk. It's tradition. We don't want tradition. We want to live in the present, and the only history that is worth a tinker's damn is the history that we make today". *See* Martin, G. (2014). History is bunk. In *The Phrase Finder online*. Retrieved April 17, 2014 from https://www.phrases.org.uk/meanings/182100.html.

frankly, law too often is happy to reside. A close comparison of relevant time frames both inside and outside the law may, among other things, help to reveal the degree to which outside forces and developments were driving changes in the law—as opposed to assumptions to the contrary within the legal profession.

America's prewar history of discrimination against Japanese Americans, as well as the mounting friction between Japan and the United States over geopolitical issues in China and the Pacific region from the 1930s onward, which culminated in the Japanese attack on Pearl Harbor which in turn triggered the policies and governmental or legal decisions that allowed the Japanese American internment to move forward from early 1942 onward, are relatively lengthy and complex and are discussed in greater detail elsewhere.[268]

After a year of danger and uncertainty for the Allies in 1942 in which the Axis powers reached their respective high-water marks, from 1943-1945, the Allies finally began to roll back the Axis powers in World War II, with ultimate victory looking increasingly inevitable throughout the later years of the war. With final victory and unconditional surrender of Nazi Germany and Imperial Japan secured, ahead of the anticipated schedule, by September 1945 (with the help of the atomic bomb), the United States turned toward the matters of de-commissioning and bringing home millions of service members scattered around the globe, and reintegrating them into everyday life as the nation converted from war production back to a peacetime economy. Peace was shorter-lived than the architects of the new United Nations international organization had dreamed, though, as conflicts over the future of the postwar world arose between the world's last two remaining superpowers, the United States and the Soviet Union. Such friction was quite visible already in Europe by 1947, and grew and spread from there as the two former allies gradually settled into the Cold War, which also broke out into hotter "proxy wars" in the Korean War from 1950-1952 and the Vietnam War from (roughly) 1965-1972. In the United States, as with the earlier aftermath of World War I, Americans launched into a nationwide anti-radical "Red Scare" that included the hunting of alleged pro-Soviet spies and the quelling of domestic radicals and "subversives", culminating in the hysterical red-baiting remembered as McCarthyism. A nuclear standoff between the two superpowers that developed during the 1950s reached a crescendo with the Cuban Missile Crisis of 1962, when the United States and Soviet Union came closer to actual nuclear war than at any time before or later. Thereafter, Cold War tensions eased somewhat.

[268] *See* Dewey, *supra* note 10, at 55-90.

Through the Cold War years, the African American Civil Rights movement was struggling to build upon racial progress achieved gradually during the 1930s-1940s, while encountering stiff headwinds due to the postwar conservative reaction, during which many Americans viewed both labor organizing and racial equality as emblematic of the Spread of International Communism. The Southern Civil Rights movement against legal segregation especially in the American South, led by figures such as Dr. Martin Luther King, Jr., sought both to display Americanism and seize the moral high ground using nonviolent tactics. During the 1950s, key legal victories at the U.S. Supreme Court striking down segregation in particular contexts—such as *Brown v. Board of Education* (1954) and *Browder v. Gayle* (1956) (the Montgomery Bus Boycott case)—unfortunately were followed by limited actual progress on the ground and in some cases were met with resistance, threats and intimidation, and outright violence. The Civil Rights movement continued its non-violent political mobilization while attracting domestic and international media attention. By 1963, the movement was starting to force initially reluctant U.S. federal officials to act more aggressively to promote racial equality. In 1964, the major new Federal Civil Rights Act was passed by Congress, over pro-segregationist Southern legislators' resistance, partly in the name of the recently slain President John F. Kennedy. Other important federal enactments, such as the 1965 Voting Rights Act and the 1968 Fair Housing Act, followed.

By the later 1960s, youth radicalism was visibly on the rise, as well as a nationwide crime wave associated with the unusually large Baby Boom generation reaching late adolescence/young adulthood. Civil rights activism in the Northern inner cities gradually abandoned non-violence in favor of greater militance, as leadership was taken over by younger and more radical leaders. Around the same period, especially from 1967 onward, a youth anti-war movement protesting U.S. involvement in Indochina grew, especially on college campuses. Other protest movements also emerged more visibly: feminism, Brown Power (concerned with Latino civil rights), etc. Young radicals grew more radical and more militant in the anti-war movement up until the Kent State incident of 1970, when U.S. National Guardsmen at an Ohio University campus shot and killed four militant protesters. After a gradual earlier winding down of U.S. involvement in the Vietnam War, the United States withdrew its last forces from Indochina in 1972. Saigon quickly fell to Communist North Vietnamese forces.

1968 already had been a watershed year, in which new federal reforms together with youth radicalism and militance triggered a visibly growing conservative backlash. The assassination of Dr. King in April 1968 brought the worst rioting to the most cities that the nation had ever seen.

Student radicals clashed with Chicago police at the infamous 1968 Democratic Convention. Ultimately, American voters elected President Richard Nixon, a moderate conservative who tacitly promised to slow down the pace of civil rights progress and other reforms, and who, through his "Southern Strategy", began the process of turning conservative Southern Democrats into conservative Southern Republicans.

During the 1970s, civil rights, feminism, environmentalism, and other movements continued to win some victories, yet also gradually lost momentum and faced growing conservative pushback during times of mounting economic troubles. A sense of national frustration helped bring the election in 1980 of popular, arch-conservative President Ronald Reagan, who promised not just to slow but to roll back liberal reforms of the 1960s-1970s. Reagan started that process in earnest during his two terms, while later waves of further increased political conservatism—reflected in the "Contract With America" Congress led by Newt Gingrich after the 1994 midterm elections and the elections of conservative Republican Presidents George W. Bush (2001-2008) and Donald Trump (2017-2021)—confirmed the overall nationwide conservative backlash, while moderate, pro-corporate Democratic Presidents Bill Clinton (1993-2001) and Barack Obama (2009-2017) mostly could only help to slow or moderate the overall conservative trend.[269] The various Republican administrations from Reagan onward also were more successful at placing more, increasingly conservative Republican judges on all levels of the federal bench, helping to lock in Republican political advantages even when Democrats controlled the White House or Congress.

Although *Korematsu* and *Hirabayashi* admittedly might not be the ideal cases to measure the overall performance of the federal judiciary against the political and historical backdrop of the times, nevertheless, use of the two cases by federal circuit courts generally matches the shifts of political winds rather well. Both cases were featured in the post-war clean-up phases, plus the onset of the Cold War. *Korematsu*, as noted earlier, went entirely dormant between August 1950 and December 1966, while *Hirabayashi* saw sporadic uses in the later years of the Cold War as well as occasional early applications to civil rights situations (1950, 1956, 1958, 1959, 1960, most of those dissents and/or defeats for civil rights activists)—but *Hirabayashi* already had shifted into its primary role as a general federal criminal procedure precedent, including prosecutions arising from the 1960s-1970s Boomer crime wave (like *Korematsu* (1943)). *Korematsu* was belatedly rediscovered for civil rights purposes in late 1966; *Hirabayashi* not until 1968;

[269] The historical situation of the Japanese American reparations movement, occurring during the already conservative 1980s when overall civil rights progress was on the defensive at best, is an interesting topic left for an anticipated future study. For a very brief background on "the road to reparations", see Dewey, *supra* note 10, at 91-97.

both of those well after the really hot phase of the Civil Rights movement re-started in 1963-1964, and also a while after the U.S. Supreme Court saliently rediscovered both cases for civil rights purposes in *McLaughlin* in 1964 (and in *Loving* in 1967). Thereafter, both cases saw at least small flurries of use in civil rights contexts during the 1970s, with the federal circuit courts using *Korematsu* little more than, and *Hirabayashi* less than, the Supreme Court itself (although the circuit courts might have been making greater use of other opinions that recycled the *Korematsu* or *Hirabayashi* language without citing them).[270] During the 1980s, and especially after 1988 and congressional apology and reparations, *Korematsu* and *Hirabayashi* both shifted into their primary hand-wringing roles, with *Hirabayashi* eagerly brandished by conservative judges to help batter down affirmative action programs or other efforts to address structural racism, while more liberal judges used *Korematsu*-as-constitutional-train-wreck to warn their more conservative counterparts against excesses in the denial of civil rights. Both *Korematsu* and *Hirabayashi* also saw some rediscovery during the post-2001 "War on Terror". Such circuit uses generally tracked and followed earlier, similar uses by the Supreme Court.

CONCLUSION

In this study, various identifiable data categories have been reviewed systematically, in an effort to provide a more complete picture of the life-cycles of two major, interesting, and problematic Supreme Court cases than might be available through a more conventional narrative study that only cherry-picked anecdotal items of interest. Of course, readers (understandably!) might wish they'd received a cherry-picked (and perhaps more readable) anecdotal treatment instead. Some of the data, hopefully, might be sort of interesting—perhaps regarding the significant (and possibly unexpected?) participation of both *Korematsu* (1943) and *Hirabayashi* in the construction of the postwar edifice of criminal procedure, quite remote from their wider constitutional and civil

[270] Regarding the Supreme Court's use of *Korematsu* from 1964 onward, see *id.* at 118-131. The Supreme Court made notably less use of *Hirabayashi* than the circuits for the concurrent sentences doctrine (ten such uses, 1946-1969, ending with *Benton v. Maryland*, the case that first really called the doctrine into question), but greater use of the opinion for civil rights purposes than the circuits—including ten cases from 1948-1980 (and another seven from 1986-2016) using the "odious to a free people" quote, plus another six from 1971-1974 (and two from 1982-1987) correctly associating *Hirabayashi* with national origin, plus other three cases (other than *McLaughlin*) quoting a misleading quotation from *Hirabayashi*: "racial discriminations are in most circumstances irrelevant and therefore prohibited" (Hurd, 1948; San Antonio, 1973; Parents Involved, 2006). Interestingly, this particular misleading and anachronistic quote from *Hirabayashi* only appears in its entirety one time in the federal circuit court jurisprudence: Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996) (Jerry Smith, J.). [Citations for all Supreme Court cases can be provided if desired].

rights implications; perhaps conservative judges' eager grasping of the color-blind language of *Hirabayashi*, mostly post-1980, as civil rights progress was mostly being beaten to a standstill, is of interest, as is perhaps more liberal judges' hand-wringing over *Korematsu* in the post-1980s period (along with more conservative judges' challenges to that particular rhetorical bludgeon). Perhaps federal circuit courts' total ignoring of *Korematsu* between 1950 and the very end of 1966 (notwithstanding the Supreme Court's pointed flagging of *Korematsu* in key civil rights cases in 1954 and 1964) is of some interest. Perhaps the marked chronological pulsing/clustering patterns of citations of the internment cases in various circuits—which don't always match chronologically between circuits, and which would require additional analysis to try to determine whether such pulsing was endogenous or the result of imported influences from foreign circuits[271]—is of at least some interest. Perhaps the evidence regarding relative "wins" or "losses" on civil rights issues in the 1970s is of some interest. Perhaps the relative surge in the quoting of *Korematsu* dissents, and the co-citing of *Korematsu* or *Hirabayashi* with the likes of *Plessy*—mostly after it was "safe" to do so—may be of some interest. At least in theory, the circuit courts' overall misinterpretation of *Korematsu* (and following of the Supreme Court in doing so) as being a case about "race" when it was really about national origins (in the particular and peculiar context of enemy nationals during wartime), might be of some interest.

Perhaps even some of the rather quaint historical details—like somebody getting busted and imprisoned for Prohibition violations longer after Prohibition had ceased to be the law or the Constitution—might be of interest.[272]

But, perhaps not.

Some other, more inconclusive results—such as efforts to track recurring patterns of citation or quotation by particular federal circuit judges, or other mostly failed efforts to track and detect recurring patterns—likely are of no interest. [Oh, well—it's not for lack of trying].

Yet as indicated earlier, perhaps of most interest for the project overall is the extent to which it was, indeed, the dog that didn't bark.[273]

[271] Regarding the exportation/importation and incorporation of "bad" legal doctrines and holdings between foreign federal circuits, see e.g., Dewey, *The Case of the Missing Holding*, *supra* note 16.

[272] [As always, people with some sense of history may be more inclined to see some modest level of interest where other, normal people don't].

[273] *See* Doyle, *supra* note 43.

This project—really at the Supreme Court level as well as the federal circuit court level—essentially presents a conundrum:

- First, if the Japanese American internment cases were indeed among the most awful, *legal and constitutional* train-wrecks of American history—then why were they not solved, by *legal and constitutional* (i.e., judicial) means, much earlier? [And, at the very latest, in the 1980s, in the *Hohri* litigation—before political, non-judicial branches of government "instructed" the judiciary as to what to think?]
- Secondly, if the whole, tragic and ultimately unnecessary Japanese American internment process of the war years was, nevertheless, legally justifiable (given the unfortunate major gap between what people (and judges) knew at the time, and what we all now (somewhat smugly) recognize with hindsight)—then why did federal judges begin fulminating about it (only) after they received a (notably, inherently political and non-judicial) signal that it was OK to do so?

And—unfortunately—the U.S. federal judiciary has no very satisfactory answer to this conundrum. And no amount of ostentatious hand-waving or hand-wringing, long after the fact, and long after it became "safe" to do so, provides an adequate answer.

This particular study was a study of how the major Japanese American internment cases not only were used, but were not used. And, the many details of the study show that, contrary to whatever might have been anticipated or wished for going into the study, federal circuit courts generally did little or nothing to use the cases to resolve the constitutional problems that federal courts had helped to make—until after non-judicial, political branches of government sought to resolve the problem, very belatedly, and in so doing, told courts what to think about the cases. Basically, circuit courts' uses of the cases tracked both overall trends in politics and history, and earlier signaling uses by the Supreme Court—rather like a delayed-action political weathervane. Rather disappointing?

Yes. [At least for people who believe in the myth of The Law and The Courts as appropriate de facto super-legislatures to (justly and accurately) resolve all human problems. Here, judges and courts only showed any significant awareness of the problem after non-judicial authorities instructed them to do so—and more than forty years too late].

Or to summarize, perhaps more bluntly and brutally: if the (post-John Marshall, *Marbury v. Madison*) judicial super-legislature (as enhanced at various moments in the later nineteenth and twentieth centuries, and raised to an extreme level in the politically dysfunctional recent decades since the 1970s) can solve everything, as they implicitly claim to—why didn't they, in a timely fashion, in the Japanese American internment context? And, alternately—if they can't solve everything: why don't they stop making claims they cannot fulfill, and perhaps go back to being "the least dangerous branch of government" as envisioned by the Constitution's framers?

Notably, and realistically, in response to various later, comfortably post-1970 and post-1988 judges and scholars who wondered aloud how and why the likes of Hugo Black and William O. Douglas—life-long, clearly demonstrated friends of civil rights—could have gone along with *Korematsu* and *Hirabayashi*: perhaps some much wiser and more experienced judges, some of whom had some actual experience in real political life outside the law (in the case of Hugo Black, experience of not one but two World Wars), recognized what was actually politically possible under the bizarre, ugly political and actual realities of total war? In a way that comfortably post-1970 lawyers, judges, and scholars generally cannot?

Such people might be engaging in the classic cognitive-historicist fallacy of imagining that they, suddenly transported back to 1942 with all their smug post-1970 and post-1988 hindsight-fueled awareness magically intact, would have done "right" at the time in a way their more benighted actual denizens of the early 1940s could not.

That is a cute fantasy—but also rather laughable. [Similarly to high-school or college students who might envision themselves as having been antebellum Abolitionists at a time and in places where Abolitionists were not very welcome and perhaps got lynched. Or people who think they readily would have risked life, limb, and all their family members to resist the Nazis when it was so much easier just to go along with the Nazis. Or that Hollywood movie that had a 1990s-vintage American super-carrier transported back in time to deal with the much more rudimentary Japanese 1940s-vintage fleet before Pearl Harbor].

In particular—would people who (somewhat unquestioningly) agreed with whatever Congress said in 1988, after mostly failing to do justice or stick their necks out on the issue in any other way before then, likely somehow have been quite heroically different when the same Congress said something back in the much more charged and dangerous days of 1942?
To put it mildly: probably not.

This is not, of course, to gratuitously bash federal judges, who are and long have been of course mostly very bright, hard-working, conscientious people, as well as their clerks. [Few of the rest of us would do any better in dealing with difficult issues now, and even fewer of us would have done any better back in the crisis/panic period of 1942].

It is, however, to call out the traditional smug ahistoricism and pseudo-timelessness/universality of The Law. [That is, pretending, at any given moment in time, that The Law, in whatever form it arrives at after various political and historical processes, is and always was and will be The Law, and was always supposed to be that way, and is right and true, regardless of whatever particular political and historical processes that formed it]. By this quasi-religious understanding of The Law, both the *Dred Scott* decision, and for that matter the Fugitive Slave Act, were in their day of course The Law, and thus "right" and to be respected and revered, before a long, bloody American Civil War and its aftermath declared them to be, in fact, no longer The Law or "right". The somewhat tortured history of the Japanese American internment cases offers a less bloody, but equally blatant, example of the political re-visioning of what was, in fact The Law and what was, therefore, "right".

There is another, perhaps somewhat disturbing, temporal anomaly associated with the whole legal/constitutional train-wreck of the Japanese American internment and the undoing of it. Although this could of course be purely coincidental, it is nevertheless noteworthy that the congressionally sponsored study that started the process of assembling the evidentiary base, later used to challenge and officially reject the internment began in 1981—after the last two surviving members of the *Korematsu* and *Hirabayashi* Courts, retired former Justices William O. Douglas and Stanley Reed, both passed away at advanced ages in early 1980. [Justice Hugo Black, author of the *Korematsu* opinion, had died earlier in 1971, while Justices Frank Murphy and Robert H. Jackson, the main dissenters in the opinion, both died relatively soon after the Second World War in 1949 and 1954, respectively]. If this specific timing was indeed a factor of any significance—if, in other words, justice had to await the passing of two formerly important men, so that their egos no longer could be bruised—then that potentially represents yet another significant problem for timely "justice under the law" that surfaced in the internment context.[274]

[274] Because most members of the *Korematsu* Court were Roosevelt appointees, it's possible that Republicans in Congress and in the Reagan administration may have had some political incentive to see the internment cases be discredited, also. Although Douglas lived to be eighty-one, Reed lived to be ninety-five—so waiting for him to pass was like waiting for things to come out from under copyright protection. [See Wikipedia for confirmation of all these dates, but others are available as necessary].

To return to the overarching theme of "the banality of evil": this study, and its related predecessor, already have alluded to the problem of chronic historical decontextualization in the law—the law's and legal profession's relative overall obliviousness to the particular historical contexts of particular cases and decisions, as reflected in the lifting of selected facts and resulting legal language from one case and its potential application to what are, on balance, really quite different factual and historical contexts.[275] Perhaps that phenomenon is associated with the banality of evil, and the process of very historically specific—and toxic—cases and opinions getting used and recycled through other, less dangerous court opinions and areas of the law without regard for the specific features that in fact made such precedential cases the sort of great cases that could make bad law, to paraphrase Justice Holmes.

[275] Perhaps a classic example is Eugene V. Rostow's extended harping (in his biting 1945 critique of the *Korematsu* decision, *see supra* note 215) on how any decision in the Japanese American internment cases, in 1942, should have been entirely controlled by the historically and factually quite different situation encountered in *Ex parte Milligan* during the U.S. Civil War. *See Ex parte Milligan*, 71 U.S. 2 (1866); Rostow, *supra* note 215. Rostow's argument may even have been legally correct, at least in theory: the United States had not seen any major threats of invasion or of overthrow of the U.S. federal government between the Civil War and World War II, so legal precedents had not advanced much during the intervening three quarters of a century. But technology, military hardware, and military tactics had advanced a great deal, far ahead of the law. Aircraft, and aircraft carriers, and landing craft designed to deliver soldiers armed with machine guns as well as tanks, did not exist in the 1860s; but they were extensively used by the early 1940s. Rostow's argument, in his article, basically contends that the law should pretend that the 1940s were the same as the 1860s. For an amusing intellectual experiment, readers can consider the absurdity of pretending that the 1950s-1960s, with "Mutually Assured Destruction" by nuclear weapons delivered by aircraft or missiles within minutes, also operated on the same timetable as that which existed in the 1860s. More digitally inclined readers can consider whether not only ICBMs, but also a massive digital/Internet attack by one nation upon another's critical systems, should be judged according to the technological and timeframe standards of *Ex parte Milligan* in the 1860s? It may be absurd to contend such a position in the 2020s; it may even have been absurd for Rostow to contend such a position in the mid-1940s, notably after any invasion threats were already safely laid to rest by a whole lot of U.S. and other Allied service members who, unlike Rostow, didn't have the comfort of being ensconced in a law school or government agency, and many of whom paid with their lives, lacking the luxury of living in worlds of pure intellectual theory or government policy. Notably, Rostow's article appeared during the very brief window of time when the Second World War visibly was drawing to a close, but before the forthcoming Cold War was yet anticipated (i.e., it was easier to make such arguments during the period of (temporarily) relaxing from a former crisis rather than during the onset of a new crisis); this was precisely the same international frame of mind among the Allied nations that produced the initial hopeful dreams for the new United Nations, before those dreams were too soon undone by the newly developing harsh reality of the Cold War. Rostow, who went from being the child of radical socialists (in the early 20th century) to a dutiful New Dealer (1930s-1940s) to somebody who coped with both the Cold War and the 1960s before becoming a neoconservative when the new, altered political reality of post-1980 Reaganite America beckoned, demonstrated that he was nothing if not a political survivor (perhaps even a political opportunist?). [To put it more succinctly and evocatively: Rostow, who rose to be dean of Yale Law School as well as an official of the Reagan administration, rode the various waves of twentieth-century U.S. history like a skilled surfer]. Notably, after his 1945 article, Rostow appears to have abandoned the whole issue of the Japanese American internment and seems never to have revisited it – rather like most of the pre-1980s federal circuit court opinions reviewed in this article. Notably also, *Ex parte Milligan*, decided in 1866, came at a historical moment, and with a corresponding political and rhetorical mindset, when any actual crisis was long past, and when the (re-)United States sought healing and closure from the horrifically bloody events of the early 1860s – including a gradual process of welcoming former rebels and traitors back into the national community. It is perhaps inevitable that facts observed, and decisions made, at moments of outright crisis will look different from facts observed and decisions made after the crisis is past.

Yet, beyond this sort of historical/factual decontextualization, an associated and perhaps even more powerful factor in the conversion of great cases/bad law into more garden-variety, apparently domesticated, recurring legal rubber-stamps on more mundane issues—as seen notably with *Hirabayashi* regarding the concurrent sentences doctrine—is textual/linguistic decontextualization. That is, by the nature and customary working of the law, it is perhaps rather too easy for lawyers, judges, and clerks, in their various briefs, opinions, and bench memoranda, to take some abstracted, decontextualized cluster of words—perhaps found in a legal brief, or some other court opinion, or even a Westlaw headnote—and plug it into a particular slot in a later legal argument in such a fashion that, for example, *United States v. Hirabayashi*—a big, dark case later determined by history to have been part of a monumental mass violation of human rights and of constitutionality—can appear to be no different from a hypothetical, relatively innocuous *United States v. Smith* concerning much lesser issues. Most such lawyers, judges, and clerks, in routinely recycling and perhaps further abstracting *Hirabayashi*'s language and holding regarding concurrent sentences, likely never had to interact more fully or thoughtfully with the full meaning and entirety of *Hirabayashi* and the wider (and darker) reality it represented. [And, as always, busy, hard-working federal judges and clerks wrestling with crowded case dockets usually would have had other, bigger, perhaps more urgent cases, or issues in the same case, requiring more of their time and attention—making a relatively quick rubber-stamp that much more desirable where it seemed appropriate].[276]

Although one might also perhaps question to what extent this abstracting is really a problem, at least regarding certain routine and (supposedly) well-settled legal issues? That is, even if cases and opinions such as *Korematsu* and *Hirabayashi* are later recognized to be extremely regrettable legal/constitutional train-wrecks—does that mean, for example, that *Hirabayashi*'s widely used language/holding regarding concurrent sentences, or any other legal or general statement made in the case, was therefore also fundamentally "wrong"? And, to return briefly to the matter of temporal decontextualization as well: was *Hirabayashi's language*/holding on concurrent sentences, like similar holdings in other cases, legally "right" at least until the Supreme Court in *Benton v. Maryland*, twenty-six years later, suggested that it might in fact be "wrong"?

[276] For a brief reflection from a former judicial attorney on such matters regarding time efficiency, see Dewey, *How Judges Don't Think*, *supra* note 16, at 79-82.

Whatever the ultimate answers to the questions raised in the preceding paragraph, perhaps the main, overarching irony to the whole situation—and to this study—is that, whether "right" or "wrong", either on the truly major issues (like federal executive and/or legislative power in wartime and its ability to trump constitutional rights) or more ancillary issues (like concurrent sentences or probation as an appealable final judgment), toxic train-wrecks such as *Korematsu* and *Hirabayashi* are in fact by now so woven into the fabric of American common law as to be effectively impossible to pull out. That is, the Supreme Court can officially disown and overrule an earlier holding—as it has already done with *Korematsu*,[277] and presumably might do with *Hirabayashi* at some later point[278]—but doing that can in no way undo such opinions' wider, hydraulic (perhaps in some ways corrosive?) overall impacts on the law. An earlier study explained in detail how the Supreme Court's doctrine of strict scrutiny of racial and other suspect classifications, for purposes of Fourteenth (and Fifth) Amendment equal protection analysis, came into being through what were, effectively, judicial rhetorical sleights of hand, primarily in *Bolling* and *McLaughlin*—the selective textual/linguistic and historical/factual abstraction and decontextualization of *Korematsu* and *Hirabayashi*, which (somewhat mystically) transmuted the very fact- and situation-specific holdings of cases concerning wartime emergency infringements upon the civil rights of persons with the misfortune to share national origins with an enemy combatant nation, into a generalized prohibition of consideration of race in virtually any situation, which, in turn, started out as a convenient legal-rhetorical tool for dismantling de jure segregation, but later was wielded enthusiastically by conservatives, in effect, to protect de facto segregation by striking down most affirmative action programs or other initiatives to challenge structural racism for being insufficiently "color-blind".[279] [Which is not even to say that the doctrine of strict scrutiny is necessarily either morally or legally "wrong" in principle, but only to point out that it is in fact legally and constitutionally unfounded

[277] *See e.g.*, Trump v. Hawaii (2017), at 38, https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf. The Supreme Court in 2017 notably followed the misunderstandings of earlier opinions by characterizing *Korematsu* as having been entirely and exclusively about race when, as explained above, it clearly wasn't: "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" [In other words, the Supreme Court itself, like circuit courts discussed above, ultimately got it "wrong"]. Notably, scholars have argued that although *Korematsu* formally was overturned, it still, unfortunately, survives. *See, e.g.* Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L. J. FORUM 641 (2019). Jamal Greene, *Is Korematsu Good Law?,* 128 YALE L.J. FORUM 629 (2019).

[278] *See, e.g.,*Eric L. Muller, *Hirabayashi and the Invasion Evasion*, 88 N. C. L. REV. 1333 (2010). (May 2010) (calling for full reversal of *Hirabayashi* as with *Korematsu* (and implicitly confirming that *Hirabayashi* has never received the public salience of the better-known *Korematsu*)).

[279] Dewey, *supra* note 10, at 109-123, and 97-131 generally.

according to the interrelated doctrines of precedent and stare decisis that, in theory, control the American common law].[280] The present study tracks and confirms the spread of strict scrutiny doctrine—as well as the original fundamental misunderstanding regarding race and related, decontextualized snippets of language—throughout the various federal circuits, plus other aspects of the Japanese American internment cases taking firm root in the law. As such language gets further abstracted and recycled—including in later court opinions only quoting or citing a later source that recycled the same language without including its earlier origins—connections to original, perhaps tainted sources become ever more difficult to trace.[281] [For instance, any case that cites either *Bolling*, *McLaughlin*, or *Loving* on strict scrutiny, either directly or indirectly, is also already "tainted" by *Korematsu* and *Hirabayashi*, whether it cites them or not]. To track down all of *Korematsu*'s or *Hirabayashi actual* if sometimes indirect impacts on the law since the mid-1940s would require a vast, unwieldy forensic precedential dragnet—monumentally difficult if not absurd in theory, and impossible in actual practice. It is impossible to clean them entirely out of the system, even if we wanted to. That garbage got in, and there's effectively no way of getting it out.

Thus, even if *Korematsu* and *Hirabayashi* are officially cast out as pariahs, their numerous precedential progeny will remain alive and well, and various legal language or principles originating in or advanced by the two cases likely will remain in active circulation—whether "right" or "wrong".

Perhaps all these theoretical complications do not really matter in practice. But if in fact they don't matter, that raises further doubts about whether the doctrines of precedent and *stare decisis* really matter, either.

Which leads to the standard ultimate question for any normal law journal article: "OK—so what do we do now?"

[280] In Australia, another common law nation, the national constitution is different and primarily concerned only with the overall structure of Australia's federal government rather than particular enumerated rights, while Australian judges reportedly offer their decisions in cases with factual and legal reasons, but more briefly and without all the obsessive precedential baggage found in American court opinions. Australian courts thus handle precedent and stare decisis rather differently from American ones. Political power in Australia also remains more focused in the legislative branch, and less so in a judicial super-legislature—as was also the intent and expectation of the Framers of the United States Constitution for the new American nation centuries ago. With its reduced obsession over judicial precedent, as well as parliamentary supremacy, Australian judicial practice notably is more like judicial practice throughout the global majority of nations that are civil law jurisdictions.

[281] This inexorable process of precedential sedimentation in the common law might be thought of as "precedent-laundering", perhaps generally more innocent than but still analogous to money-laundering (passing of tainted assets through the hands of various different holding institutions to help hide their suspect origins in organized crime or similarly unlawful sources). Again, regarding precedential sedimentation in general, see, e.g., Dewey, *The Case of the Missing Holding*, *supra* note 16.

The present study already has revealed itself as not a normal law journal article, being both insufficiently practical or useful, as well as much too long.

Yet at least in theory, pointing out recurring problems and arguable misfirings in the transmission of legal rules, principles, and precedents within America's common law system, should help aid the possibility of discovering better ways to rein in these processes, and so perhaps make the law more truly stable and reliable, and less of a political football or badminton birdie.

Yet a review of the history cautions that, although we might keep our fingers crossed regarding such beneficial reforms, we would probably best not hold our breath.