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Essay: Remember *Endo*?

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ESSAY

REMEMBER *ENDO*?

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Korematsu v. United States,[1] we all know, is an important case. It is not just that the Supreme Court upheld the constitutionality of forced evacuation of Japanese Americans by the United States Army a few months after the Pearl Harbor attack. It is not just that Hugo Black, the author of the Court's majority opinion, joined such other seeming heroes of civil rights and civil liberties as Earl Warren and Franklin Delano Roosevelt in support of the Army's efforts. The decision now seems so obviously wrong, as wrong as the relocation camps themselves. (Congress in the end ordered that reparations be paid to the individuals subjected to the Army scheme.) There must, we think, be some deep lesson that *Korematsu* teaches us about constitutional law. Perhaps Robert Jackson, dissenting in the case, was right in concluding that constitutional law would have been better served if the Supreme Court had not addressed the matter.[2] War's urgencies are too much for law to assimilate. Or perhaps we should acknowledge that constitutional law is not without its own cold realism: constitutional law recognizes war, recognizes the needs of war, and assigns those needs a legitimate priority.[3] At minimum, *Korematsu* counsels humil-

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[1] 323 U.S. 214 (1944).

[2] *Id.* at 246 (Jackson, J., dissenting) ("A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.").

[3] "[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963). This slogan, in somewhat different form, first surfaced in Justice Jackson's dissent in *Terminiello v. City of Chicago*, 337 U.S. 1, 36 (1949) (Jackson, J., dissenting), a case dealing with free speech protection of racist and religiously bigoted speech. Some years earlier, Justice Holmes, writing in *Moyer v. Peabody*, 212 U.S. 78 (1909), a case involving governor-ordered imprisonment of a union leader (for over two months), was more explicit: "When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process." *Id.* at 85.

ity. Critics of war measures should recognize the possibility that, were they in power, they too might acquiesce.

Since September 11, *Korematsu* and its associations have figured prominently in public debate about the proper scope of antiterrorism efforts. The case, it appears, is not only important in the abstract, it is important *now*. *Korematsu* is an infernal baseline.[4] Like *Lochner*,[5] *Dred Scott*,[6] and *Plessy*,[7] it marks what we hope not to repeat, or perversely supplies reassurance or legitimacy — what we think that we must do now is surely no worse. . . . All of this may vex Hugo Black. His opinion, read closely, tries hard to persuade its readers that *Korematsu* is not an important case. The important case, we are supposed to conclude, is *Korematsu*'s companion *Ex parte Endo*.[8] *Endo*, written by William O. Douglas,[9] held that the relocation camps as they stood were illegal. *Endo* closed the camps. Justice Black seems to have thought, or wanted his readers to think, that *Korematsu* addressed only an already-past short term.

Endo closed the camps. Why don't we remember *Endo*?[10]

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[4] "*Korematsu* is a case that has come to live in infamy." KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 631 n.4 (14th ed. 2001).

[5] Lochner v. New York, 198 U.S. 45 (1905).

[6] Scott v. Sandford, 60 U.S. 393 (1847).

[7] Plessy v. Ferguson, 163 U.S. 537 (1896). For proof, if it is needed, that we often group *Korematsu* with decisions like *Lochner*, *Dred Scott*, and *Plessy*, see CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 124, 162, 205 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

[8] 323 U.S. 283 (1944). In his draft opinion circulated to the Supreme Court on November 8, 1944, Justice Black already supposed that *Korematsu* and *Endo* would be announced simultaneously. *See* Jackson Copy of Black Opinion in *Korematsu*, at 4 (circulated Nov. 8, 1944) (on file with the Library of Congress, Manuscript Division, Robert H. Jackson, Container No. 132).

[9] Justice Black had unsuccessfully pressed Chief Justice Stone to assign him *Endo* as well as *Korematsu*. *See* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 316 (2d ed. 1997).

[10] It is important to define "we" for present purposes. There are, of course, writers working outside the parameters of legal scholarship narrowly defined who recognize the importance of the *Endo* decision. *See, e.g.*, THOMAS JAMES, EXILE WITHIN: THE SCHOOLING OF JAPANESE AMERICANS, 1942–1945, at 141–42 (1987); WENDY NG, JAPANESE AMERICAN INTERNMENT DURING WORLD WAR II: A HISTORY AND REFERENCE GUIDE 88–89 (2002). Close students of the internment cases themselves also appreciate how much was at stake in *Endo*. *See, e.g.*, PETER H. IRONS, JUSTICE AT WAR 254–55, 323 (1983). But it is writing about constitutional law in general that is especially relevant here. There is not much point to building up a long list of works by influential scholars in which there are discussions of *Korematsu* but not *Endo*, or treatments plainly giving *Endo* short shrift. A few perhaps especially prominent examples, drawn from leading casebooks and treatises, illustrate the point: GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL LAW 501, 505, 512–13 (4th ed. 2001); SULLIVAN & GUNTHER, *supra* note 4, at 631–33; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 277, 1000, 1013 (1st ed. 1978). *But see* WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW 700–01 (10th ed. 1997) (discussing *Endo*, but even still leaving it out of the table of cases).

The prevailing emphasis appears especially clearly in a thoughtful post-September 11 essay by Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23 (2002):

I.

Perhaps it's Felix Frankfurter's fault. Justice Frankfurter, so the story goes, tipped off the Roosevelt Administration that the *Endo* opinion was about to come out, allowing executive branch officials to announce — the day before the Supreme Court ruled! — that *they* were closing the camps.[11] Or perhaps Eugene Rostow's law review article,

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> When the media calls this the "second Pearl Harbor," as an Asian American, I cannot forget that the first Pearl Harbor triggered the internment of tens of thousands of loyal Americans based solely on their Asian ethnicity. . . . Many forget that some of America's most heralded civil libertarians — President Franklin Delano Roosevelt, who signed the executive order; Earl Warren, then-Attorney General of California; Supreme Court Justices Hugo Black and William O. Douglas — not only failed to challenge the internment, but affirmatively ratified it.

Id. at 37 (footnotes omitted); *see* Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 460–62 (2003). *But see* Detlev F. Vagts, International Decisions, Ajuri v. IDF Commander in West Bank, 97 AM. J. INT'L L. 173, 175 (2003). Chief Justice Rehnquist, interestingly, does remember *Endo*: in his extended discussion of the internment cases in *All the Laws but One*, he twice notes that "the entire program was promptly terminated after the decision in the *Endo* case." WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 202 (1998); *see also id.* at 192. But most of his discussion addresses *Korematsu* and the Supreme Court's earlier curfew decision in *Hirabayashi v. United States*, 320 U.S. 81 (1943). *See* REHNQUIST, *supra*, at 203–11. The Chief Justice's text is notably unsure of what to make of *Endo*:

> There is a certain disingenuousness in this sequence of three opinions. . . . There was no reason to think that Gordon Hirabayashi and Fred Korematsu were any less loyal to the United States than was Mitsuye Endo. Presumably they would have been entitled to relief from detention upon the same showing as that made by Endo.

Id. at 202.

[11] *See* IRONS, *supra* note 10, at 345; GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 230 (2001). It is also said that Chief Justice Stone communicated with executive officials and delayed release of the *Korematsu* and *Endo* opinions. *See* IRONS, *supra* note 10, at 344; NEWMAN, *supra* note 9, at 317. Justice Douglas, plainly suspicious, wrote to Chief Justice Stone on November 28, 1944:

> The Court is unanimous in the view that she [Endo] is unlawfully detained. An opinion in the case was distributed on November 8, 1944. A majority of the Court has agreed to it. But the matter is at a standstill because officers of the government have indicated that some change in detention plans are under consideration. Their motives are beyond criticism and their request is doubtless based on important administrative considerations. Mitsuye Endo, however, has not asked that action of this Court be stayed. She is a citizen, insisting on her right to be released — a right which we all agree she has. I feel strongly that we should act promptly and not lend our aid in compounding the wrong through our inaction any longer than necessary to reach a decision.

Memorandum from William O. Douglas to Harlan Stone (Nov. 28, 1944) (on file with the Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 116, Folder No. 70 O.T. 1944/ Endo v. Eisenhower/ Certiorari, Conference & Misc Memos). Stone issued a memorandum to the Court the next day: "It is desirable that we prepare to consider at Saturday's conference the opinions in . . . *Korematsu* . . . and . . . *Endo* . . . , so that we may put down the opinions on Monday if that course is thought to be desirable." *Id.* The decisions in both cases, however, were not announced until December 18. Paul Freund may be read as suggesting, however obliquely, that the delay in issuing *Endo* allowed time for public sentiment to change, to minimize any controversy. *See* PAUL A. FREUND, THE SUPREME COURT OF THE UNITED STATES: ITS BUSINESS, PURPOSES AND PERFORMANCE 88 (1961).

published a year or so after the decision, shaped the expectations of its readers, and ultimately subsequent readers of the Supreme Court opinions.[12] Rostow attacked the *Korematsu* opinion persuasively and hotly — and pretty much ignored *Endo*.[13] Readers of Rostow, noting both the emphasis and the onslaught, might reasonably think that it was *Korematsu* that counted.[14]

We might also recall that, especially around the time of *Korematsu* and the years immediately after, Hugo Black was an electric figure, perhaps especially within academic constitutional law provocative of both passionate support and adamant criticism.[15] Because Justice Black was its author, whatever controversy *Korematsu* would have generated in any case may have acquired additional charge. In addition, even in 1944, there was — there undoubtedly remains — a sense that internment of Japanese Americans was too reminiscent of German efforts, was too obviously inconsistent with the belief "It can't happen here."[16] Condemnation of *Korematsu* was — and is — a form of exorcism. There is no place for *Endo* within this effort.[17]

In any event, it appears, executive officials "had long recognized that [the government] had little hope of prevailing" in a case like Endo's, and some officials, at least, began making plans to close down the internment camps soon after the Supreme Court agreed to hear *Endo*. ROBINSON, *supra*, at 213; *see also id.* at 213–29. Initial commentary did not always treat the Supreme Court decision and executive action as linked. *See, e.g.*, CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 48 (1951). Concerning limited newspaper coverage of announcement of the *Korematsu* and *Endo* decisions, see IRONS, *supra* note 10, at 346.

There is a large body of writing addressing the World War II internment episode and its aftermath (most aspects of which I do not discuss here). For a useful bibliography, see LAST WITNESSES: REFLECTIONS ON THE WARTIME INTERNMENT OF JAPANESE AMERICANS 291–93 (Erica Harth ed., 2001).

12 Eugene V. Rostow, *The Japanese American Cases — A Disaster*, 54 YALE L.J. 489 (1945).

13 On *Korematsu* in particular, see *id.* at 508–12. Regarding *Endo*, see *id.* at 512–13.

14 Important initial discussions besides Rostow's include Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's* Korematsu *and* Endo *Decisions*, 45 COLUM. L. REV. 175 (1945), and Jacobus tenBroek, *Wartime Power of the Military over Citizen Civilians Within the Country*, 41 CAL. L. REV. 167 (1953). *See also* Charles Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253, 1299–1302 (1942) (defending internment).

15 "The New Supreme Court is hard enough to understand and predict, without forcing all analysis to choose between being pro- or anti-Mr. Justice Black." Eugene V. Rostow, Book Review, 56 YALE L.J. 1469, 1469 (1947). Other Justices, of course, were also recipients of academic praise and criticism — most prominently, Justice Frankfurter. *See, e.g.*, Fred Rodell, Book Review, 56 YALE L.J. 1462 (1947) (more or less screaming denunciation). With regard to the overall controversy, however, it appears that Justice Black was the catalyst.

16 Justices writing in *Korematsu* appreciated the implications — and debated the aptness — of the "concentration camp" label. *See infra* p. 1939.

17 "We remember and recognize our continuity with those in the past who, for one reason or another, routinely said and did things that we would today regard as unthinkable." George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1571 (2002).

But there may have been — may still be — much more. Professor Rostow began his article with these sentences:

> Our war-time treatment of Japanese aliens and citizens of Japanese descent on the West Coast has been hasty, unnecessary and mistaken. The course of action which we undertook was in no way required or justified by the circumstances of the war. It was calculated to produce both individual injustice and deep-seated social maladjustments of a cumulative and sinister kind.
>
> All in all, the internment of the West Coast Japanese is the worst blow our liberties have sustained in many years.[18]

Internment not only coincided with and responded to manifestations of racial prejudice and fear in the immediate aftermath of Pearl Harbor. During the extended period of detention, a sometimes self-indulgent, sometimes squalidly flatulent prejudice against the camps and their occupants also infiltrated reactions of members of surrounding communities — and members of the population at large. Litigation concerning the camps, Peter Irons powerfully demonstrated, exhibited its own pathologies: lawyers on all sides and in all capacities too often (to be sure, not always) fell short in ways that implicated even proceedings in the Supreme Court in *Korematsu* and other cases.[19] Eric Muller has recently supplemented this sorry chronicle through his study of prosecutions of interned Japanese-American draft resisters.[20] Lawyerly misconduct led to the *coram nobis* reversals of the convictions of Fred Korematsu and Gordon Hirabayashi, among others, some forty years after the fact.[21]

There is also the profound, troubling object lesson of camp experience itself — of what happened, of what it was like. Well-ordered evidence was available early on. In 1946 in *The Spoilage*,[22] Dorothy Swaine Thomas, Richard S. Nishimoto, and their collaborators at the University of California, students of (and in some cases also "participant observers" in) the West Coast internment, reported that the camps themselves and their administrators demoralized some occu-

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[18] Rostow, *supra* note 12, at 489–90.

[19] *See, e.g.*, IRONS, *supra* note 10, at 186–218, 278–92 (noting that government lawyers in particular failed to disclose in briefs that there was dispute among government officials about the "facts" presented to or asserted by General DeWitt that he emphasized in versions of his report).

[20] ERIC L. MULLER, FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II (2001).

[21] For relevant documents, see JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (Peter H. Irons ed., 1989).

[22] DOROTHY SWAINE THOMAS & RICHARD S. NISHIMOTO ET AL., THE SPOILAGE (1946). For an overall description of the remarkable effort of University of California social scientists to study Japanese-American internment as it was occurring, see JACOBUS TENBROEK ET AL., PREJUDICE, WAR, AND THE CONSTITUTION, at v–vi (1954).

pants and outraged many others. *The Spoilage* is narrative social science too rich in unsettling detail to be readily summarized. It suggests that the camps — not always, but often enough to be noteworthy — put at issue underlying questions of loyalty, and sometimes as a result the camps became theaters of deep-seated resistance — for example, at times violent breakdowns in order, mass renunciations of citizenship, and occasional demonstrations of support for Japan.[23]

It is not surprising if what we remember about the Supreme Court's internment cases is congruent with the obvious lessons of Japanese-American internment. We recall the fact of racism, the failures of legal process, the corrosive effects of gross institutional responses. *Korematsu* fits well within this tableau. The Supreme Court's holding, of course, is important in this regard. But Justice Black's explanations — rather, their evident deficiencies — are also relatively easy to depict as contributions to the overall travesty. *Endo* — its result — plainly does not fit so well. There is also an important difference in argument, or rather, sources of argument. Justice Black's opinion in *Korematsu* without doubt sounds in constitutional law. Justice Douglas, author of the *Endo* opinion, was more obscure. *Endo* appears to be an exercise in statutory construction; even so, constitutional references figure throughout the opinion, however elusively.[24] If

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[23] *See, e.g.*, THOMAS & NISHIMOTO ET AL., *supra* note 22, at 113–46, 333–61. Eric Muller's recent examination of draft resistance within the camps reinforces this account. *See* MULLER, *supra* note 20.

[24] Professor Rostow understood *Endo* to be an exercise in "statutory interpretation," even if at times "rather strenuously construed" or "extraordinarily technical." Rostow, *supra* note 12, at 512–13. Dembitz also depicted *Endo* as a statutory ruling and concluded that it was "clearly correct" since "a contrary holding" would have imputed to Congress and executive officials "a too-casual approach" to constitutional rights. Dembitz, *supra* note 14, at 215. Also reading *Endo* as statutory interpretation, tenBroek observed: "[S]ome of the reasons given for confining the executive orders and legislation to a narrow scope were equally, if not more, compulsive of a constitutional negative on the program." TenBroek, *supra* note 14, at 200. Chief Justice Rehnquist, writing more recently, adopts a similar reading:

> Although the Court based its reasoning in *Endo* on the provisions of the Act of Congress and the Executive Order, and therefore Congress and the President would have been free to change those to provide for detention, the Court's opinion strongly hinted at constitutional difficulties if that were to be done.

REHNQUIST, *supra* note 10, at 202.

There are not many Supreme Court opinions, and none later than 1976, that invoke or even cite *Endo* — at least apart from references to *Endo*'s resolution of habeas corpus questions that, however important, are not pertinent here. *See, e.g.*, Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 495 (1973); Jones v. Cunningham, 371 U.S. 236, 243–44 (1963). In some cases, Justices (excluding, for the moment, Justice Douglas) have treated *Endo* as constitutional law. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164–65 & nn.17–18 (1963); Ludecke v. Watkins, 335 U.S. 160, 175 n.2 (1948) (Black, J., dissenting); Oyama v. California, 332 U.S. 633, 666 (1948) (Murphy, J., concurring). In other cases, Justices appear to have read *Endo* as addressing statutory construction. *See* United States v. Robel, 389 U.S. 258, 280–81 (1967) (Brennan, J., concurring); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 28 (1955) (Reed, J., dissenting). Sometimes the citation to *Endo* is altogether ambiguous. *See* Hampton v. Mow Sun Wong, 426 U.S.

it is constitutional law that we care about most, and ordinarily it appears that it is, then *Korematsu* matters more (we might think) notwithstanding *Endo*'s result.

It is this last proposition that I mean to explore and challenge here. I think that *Endo* is just as much a part of constitutional law as *Korematsu*. If we have difficulty with this conclusion, it is because constitutional law is more complex than we ordinarily suppose. Recognizing this complexity may be helpful in thinking through problems prominent in contemporary constitutional law. Being put in a position to remember *Endo* within the constitutional law we have now may be even more important. There is no reason to suppose that we will, as a result, forget the wrong that internment perpetrated.

II.

Korematsu's reference to *Endo* comes near the close of Justice Black's opinion: "The *Endo* case, *post*, graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected."[25] *Endo* invalidated detention. Because *Korematsu* concerned only an exclusion order, Black insisted, enforcement of the order did not violate constitutional obligations:

> Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers — and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies — we are dealing specifically with nothing but an exclusion order. . . . Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily. . . . There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short.[26]

88, 113 n.46 (1976); Greene v. McElroy, 360 U.S. 474, 506–08 (1959); Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, 37 n.16 (1948); Ala. State Fed'n of Labor v. McAdory, 325 U.S. 450, 470 (1945).

[25] Korematsu v. United States, 323 U.S. 214, 222 (1944).

[26] *Id.* at 223–24. Justice Roberts, dissenting, characterized the camps as "concentration camps." *See id.* at 226, 230 (Roberts, J., dissenting). An earlier draft of this part of Justice Black's opinion, undated but plainly prepared after Black had circulated a first version of his opinion, and edited in Black's hand, included a more extensive discussion of the "concentration

Korematsu was subject to the exclusion order categorically, because of his "ancestry," without "evidence or inquiry concerning his loyalty and good disposition towards the United States."[27] Such gross classification, however, reflected methodological difficulty, not "racial antagonism."[28] Black modeled *Korematsu* on *Hirabayashi v. United States*,[29] the Supreme Court decision a year earlier upholding a curfew imposed on Japanese Americans:

> Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we 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 that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin.[30]

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camp" label, and also a provocative reference to *Endo* (the passages deleted by Black, the most pertinent here, are struck through):

> Our task would be simple, our duty clear, were this a ~~plain~~ case involving the imprisonment of a loyal citizen in a concentration camp ~~solely~~ because of racial prejudice. ~~But to state this case in these terms is to distort its true outlines, and to illustrate again that we are frequently be-deviled by an "uncritical use of words." Tiller case.~~
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> . . . .
>
> ~~It would be idle to deny that the course of American life and thought has been increasingly polluted by the warped psychology of race hatred. This has been but a reflection of the witch's brew that has lately been served up abroad. But the instant case poses no problem of "concentration camps."~~ Regardless of the true nature of the assembly and relocation centers — and we deem it ~~a misnomer~~ unjustifiable to call them "concentration camps" with all the ugly connotations that term implies — we are dealing specifically with nothing but an exclusion order. ~~We have purposely refrained from passing on any other aspect of the West Coast Relocation problem. This circumspection springs not from any moral inhibition, but from the sound, time-honored, doctrine of this Court that we ought not to decide grave questions of constitutional law prospectively, or when we are not directly called upon to enter a decision. (cite cases). And so here, since we restrict ourselves to the immediate issues raised by the indictment, we do not come to the constitutional validity of the detention program, in any of its phases. In a proper case, we dispose of one aspect of that program today. *See Endo v. Eisenhower.*~~

Hugo Lafayette Black, Edited Typescript (n.d.) (on file with the Library of Congress, Manuscript Division, Papers of Hugo Lafayette Black, Box No. 276, File "Korematsu v. United States").

[27] *Korematsu*, 323 U.S. at 223.

[28] *Id.* at 216.

[29] 320 U.S. 81 (1943).

[30] *Korematsu*, 323 U.S. at 218–19. "That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion." *Id.* For a detailed account of these "investigations," concluding that the setting and the procedures used contributed materially to determinations of "loyalties," see THOMAS & NISHIMOTO ET AL., *supra* note 22, at 53–112.

To be persuasive, this analysis plainly supposed that the decision to exclude was time-sensitive — of necessity made and implemented here and now. Only if this were so would the failure to judge individuals as individuals appear to be defensible. Justice Black repeatedly noted, in various ways, that "time was short."[31] He also insisted that the exclusion orders needed to be judged from within the perspective of the time, without "the calm perspective of hindsight"[32]: "We uphold the exclusion order as of the time it was made and when the petitioner violated it."[33] Black reconstructed the point of view of military officials themselves, caught up in the moment:

> Here, as in the *Hirabayashi* case, . . . ["]we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it."[34]

It is clear that this military perspective is idealized. Black was not interested in the actual opinions of General DeWitt or other military decisionmakers. Justice Murphy, dissenting, was able to demonstrate readily and elaborately that DeWitt was much more preoccupied with drawing conclusions from racial stereotypes than with pursuing a military analysis framed in some separate, technical vocabulary.[35] For Black, the content of the relevant military perspective consisted *entirely* of military recognition of the shortness of time: DeWitt's actual beliefs — Black seemed to be suggesting — were beside the point because in the "critical hour" the exclusion order would have been a militarily reasonable response regardless.

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[31] *Korematsu*, 323 U.S. at 224; *see id.* at 218, 219, 223 (stressing the "urgency" of the time in question).

[32] *Id.* at 224.

[33] *Id.* at 219.

[34] *Id.* at 218 (citation omitted) (quoting *Hirabayashi*, 320 U.S. at 99). In a statement prepared for his own use in connection with *Hirabayashi*, Black had noted:

> Inability to make quick and final decisions in order to meet actual or suspected dangers might bring about disastrous consequences. Purely military orders, limited to the comings and goings of occupants of an area which may at any minute become an active war zone, call for the exercise of a military, not a judicial judgment. . . . Therefore, I find it unnecessary to appraise possible reasons which might have prompted the order to be issued in the form it was.

See NEWMAN, *supra* note 9, at 314–15.

[35] *See Korematsu*, 323 U.S. at 235–40 (Murphy, J., dissenting). Academic critics, both initially and more recently, have echoed and amplified Justice Murphy's account. *See, e.g.*, ROBINSON, *supra* note 11, at 85; Dembitz, *supra* note 14, at 205–07; Rostow, *supra* note 12, at 496–502.

If the exclusion order were understood as a means to accomplishing long-term detention, as part of a larger program of confinement of Japanese Americans, Justice Black's defense would collapse. Justice Roberts argued fiercely in dissent:

> The two conflicting orders, one which commanded [Korematsu] to stay and the other which commanded him to go, were nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp. . . . We know that is the fact. Why should we set up a figmentary and artificial situation instead of addressing ourselves to the actualities of the case?[36]

Black agreed that "Korematsu was under compulsion to leave the area not as he would choose but via an Assembly Center."[37] But he emphasized that "[t]he Assembly Center was conceived as a part of the machinery for group evacuation."[38] Confinement was a means to exclusion (not the reverse, as Roberts argued). "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."[39] Thus, an exclusion order and a detention order confining an individual in a "relocation center" were not "one and inseparable,"[40] even though exclusion itself involved (incidental) detention:

> Had petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law that his presence in that center would have resulted in his detention in a relocation center. Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone. . . . This illustrates that they pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others.[41]

A matter of "fact" for Roberts is only a possibility ("we cannot say") for Black. "[A]ctualities" derive from what officials do. Shortly thereafter, Justice Black cites *Endo* as "graphically illustrat[ing]" the difference between exclusion orders and detention orders.

The importance of *Endo* for *Korematsu* should be apparent. The distinction between the two orders — the distinction that *Endo* enacts and thus proves — is crucial if the order at issue in *Korematsu* is to be associated with a limited, distinctive moment in time possessing characteristics that explain the order's content independently of any coexis-

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[36] *Korematsu*, 323 U.S. at 232 (Roberts, J., dissenting). This is just one of many similar passages. *See id.* at 231–33.

[37] *Korematsu*, 323 U.S. at 223.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 221.

[41] *Id.*

tent racial animus. It should also be evident that *Korematsu* does not just presuppose *Endo*, but prepares the way. If the key to upholding the exclusion order was "the time it was made," then in another time, free of distinctive urgencies, the gross classification put to use in the exclusion order would presumably be vulnerable to challenge. Justice Black, declaring that the Supreme Court would judge the *Korematsu* exclusion order "as of the time it was made," cited to opinions that Justice Holmes had written for the Court in *Block v. Hirsch*[42] and *Chastleton Corp. v. Sinclair*.[43] These cases addressed congressional legislation imposing rent control in the District of Columbia in response to conditions resulting from American involvement in World War I.[44] In *Block*, Holmes upheld the congressional action, accepting the legislative emergency finding.[45] But in *Chastleton Corp.*, it appeared possible that the passage of time had mooted legislative factual assumptions and therefore the force of the congressional action itself: "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."[46] Citations send cryptic signals, to be sure. But it certainly seems as though Justice Black was all but announcing "this case is distinguishable."

Something like Justice Roberts's question presses hard, however. If it is necessary to frame analysis so carefully, to proceed both narrowly and abstractly, to put matters in a way that provokes labels like "figmentary," "artificial," or "hypothetical,"[47] why rule in favor of the government at all? For purposes of review, not just the time period of the exclusion order itself, but the later period within which judicial review proceeded, might have been deemed pertinent — allowing consideration of General DeWitt's "Final Report."[48] General DeWitt's explanations there, subjected to review, likely would have supported the characterizations supplied in Justice Murphy's dissent: "Justification for the exclusion is sought . . . mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment . . . ."[49] Invalidation would follow, would it not, given the start-

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[42] 256 U.S. 135 (1921).

[43] 264 U.S. 543 (1924).

[44] *See Korematsu*, 323 U.S. at 219.

[45] Justice Holmes wrote:

> In this instance Congress stated a publicly notorious and almost world-wide fact. That the emergency declared by the statute did exist must be assumed, and the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries of the world.

Block, 256 U.S. at 154–55.

[46] *Chastleton Corp.*, 264 U.S. at 547–48.

[47] *Korematsu*, 323 U.S. at 231 (Roberts, J., dissenting).

[48] *See id.* at 236 n.1 (Murphy, J., dissenting).

[49] *Id.* at 236–37.

ing points Justice Black marked out in the *Korematsu* majority opinion? "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[50]

There is, actually, some complexity. It is important to remember that Black's formula, however familiar it seems at first, is not ours. He is judging an express racial (or ancestral) classification, but he is not directly testing for a compelling justification — rather, he seeks to exclude the possibility of "racial antagonism" by identifying a "[p]ressing public necessity." This is pretty much the same test that the Supreme Court had applied since *Plessy v. Ferguson*.[51] The concern was not, at bottom, whether racial classification was *necessary to government*, a precisely apt response to an urgently pressing need, but rather *sufficiently governmental*, obviously enough responsive to familiar public preoccupations, not simply enforcement of lynch mob prejudices. *Korematsu* is a decade away from *Brown v. Board of Education*.[52] This is not to say that the Supreme Court that decided *Korematsu* had not already moved some distance away from *Plessy*, at least with respect to results.[53] Indeed, the same day that the Court announced *Korematsu*, it also released *Steele v. Louisville & Nashville Railroad* and its companions,[54] landmark origins of the duty of fair representation in labor law, described in *Steele* in terms expressive of constitutional equal protection norms,[55] and triggered in that case precisely by the possibility of "hostile . . . discriminations based on race

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[50] *Korematsu*, 323 U.S. at 216.

[51] *Compare id.* at 216, 223–24 ("Korematsu was not excluded because of hostility to him or his race."), *with* Plessy v. Ferguson, 163 U.S. 531, 550 (1896) ("[E]very exercise of the police power must be . . . enacted in good faith for the protection of the public good, and not for the annoyance or oppression of a particular class.").

[52] 347 U.S. 483 (1954).

[53] One passage in *Korematsu*, though, is uncomfortably reminiscent of Justice Brown's ill-put impatience in *Plessy* with the claim that streetcar segregation was a matter of legal racism and not an obvious governmental response to a problem of public order. *See Plessy*, 163 U.S. at 551. Justice Black at this point seems to be addressing the Japanese-American evacuees directly:

> [H]ardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier.

Korematsu, 323 U.S. at 219. Fairman, in an article he wrote before *Korematsu*, was more matter-of-fact (obviously echoing Holmes in *Moyer v. Peabody*, 212 U.S. 78, 85 (1909)): "When one considers the irreparable consequences to which leniency might lead, the inconvenience, great though it may be, seems only one of the unavoidable hardships incident to the war." Fairman, *supra* note 14, at 1302.

[54] Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944); Tunstall v. Bd. of Locomotive Firemen & Eng'rs, 323 U.S. 210 (1944); Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

[55] *See Steele*, 323 U.S. at 198, 202–03.

alone."[56] In his famous opinion in *Chambers v. Florida*,[57] Justice Black had, a few years earlier, appeared to commit the Supreme Court (and Black himself) to protection of racial minorities from hostile government action. "Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[58]

Within the terms of opinions like *Steele* and *Chambers*, the question in *Korematsu* was whether the military justification of evacuation was strong enough to marginalize, as simply superfluous talk, whatever racial hostility or prejudicial stereotyping surfaced in official explanations of the evacuation. Too close judicial scrutiny of the military situation, of course, would raise separation of powers worries.[59] The absence of pertinent overtly racist official justifications of the evacuation would, equally obviously, increase the ease with which the Supreme Court could accept a facially plausible military justification. Justice Black, by sharply limiting the judicially relevant time period, avoided the need to come to grips with General DeWitt's ex post Final Report.

But even if the Court had considered DeWitt's characterizations, it would have had to face two complex questions.

First: Why give decisive weight to DeWitt's wordings? The evacuation order was the work not just of DeWitt but of other military officials, including his superiors all the way up to the Commander-in-Chief;[60] the order was also, shortly after it was issued, ratified by Congress in legislation authorizing, inter alia, prosecution of exclusionary order violators like Korematsu.[61] What was the thinking of these other contributors to government action?[62] If that thinking had been entirely or largely military-only, why give priority to DeWitt's rationale? If officials were influenced not only by military considerations strictly defined, but also by public opinion, high-pitched and often racist, especially on the West Coast, were officials themselves therefore

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56 *Id.* at 203.

57 309 U.S. 227 (1940).

58 *Id.* at 241. There is an obvious echo here (and perhaps an intensification) of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

59 *See* REHNQUIST, *supra* note 10, at 205–06 (discussing Rostow's criticism of *Korematsu*). Interestingly, Chief Justice Rehnquist, in criticizing *Korematsu* insofar as the evacuation order extended to United States citizens, *see id.* at 206–10, appears to engage in close scrutiny much like that he faults Dean Rostow for proposing, *see id.* at 205. For criticism of the Rehnquist reading of *Korematsu*, see Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395, 1402–05, 1408–13 (1999).

60 DeWitt was shunted aside in 1943, apparently because he was too much of a loose cannon. *See* ROBINSON, *supra* note 11, at 198–99.

61 *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

62 For detailed discussion, see ROBINSON, *supra* note 11, at 73–124.

engaged in racist decisionmaking?[63] By 1944, the Supreme Court had decided in a number of cases that government officials could not defer to racist public opinion in derogation of established legal processes or requirements.[64] But was wartime need to damp down public panic different?[65]

Second: Were DeWitt's characterizations really evidence of "racial antagonism" in the constitutional sense? The constitutional requirement circa 1944 did not mark racial usages generally as always (or almost always) off-limits to government actors, whether in drafting legal documents or in more informal pronouncements. We all remember — usually with some disbelief and discomfort — the casual racial commentary in Justice Harlan's dissent in *Plessy*.[66] Chief Justice Stone, writing for the majority in *Hirabayashi*, had outlined a sociology of Japanese-American racial isolation reasonable enough, he thought, to justify governmental action. This outline was more carefully stated and ultimately assigned much responsibility for that isolation chiefly to the majority population, but was not all that different, readers today might conclude, from DeWitt's offensive musings.[67] We know now — Justice Black or some of his colleagues may have known or suspected then — that President Roosevelt was at least occasionally given to stereotyping speculations.[68] DeWitt's formulations were part of a larger lexicon, a kind of common property. It would not have been easy, we might suspect, to make *Korematsu* a case concerned only or even largely with General DeWitt.

Was Justice Black's opinion in *Korematsu*, in the main, meant to be an exercise in tact? There was no close analysis of military need and there was no close parsing of the varieties of official racism. The sharp distinction between evacuation and detention that kept difficult inquiries at bay also limited any resulting injustice to only the relatively few individuals prosecuted for curfew or evacuation order violations (individuals like Korematsu who had, Black thought it relevant to note, failed to obey seemingly lawful orders).[69] Continuing detention was the real issue, and that was left free for *Endo* to address.

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63 On public opinion, see *id.* at 89–92, 96, 101–02.

64 *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 281–86 (1936); Powell v. Alabama, 287 U.S. 45 (1932); Moore v. Dempsey, 261 U.S. 86, 91 (1923); Buchanan v. Warley, 245 U.S. 60, 80–81 (1917); *see also* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 54–57 (2000).

65 *Cf.* Lee v. Washington, 390 U.S. 333, 334 (1968) (Black, Harlan & Stewart, JJ., concurring) (stating that prison security and discipline may justify racial segregation of prisons in particular circumstances).

66 *See* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

67 *See* Hirabayashi v. United States, 320 U.S. 81, 96–98 (1943).

68 *See* ROBINSON, *supra* note 11, at 8–44, 119–24 (discussing President Roosevelt's usages).

69 *Cf.* Walker v. City of Birmingham, 388 U.S. 307, 320–21 (1967) (rejecting a constitutional challenge to an injunction by an individual violating the injunction).

This is not the way that we read *Korematsu*, of course.[70] To treat *Korematsu* as shrinking so much that its result becomes a minor matter, we have to appreciate *Endo* as a large decision indeed — an appreciation Black may have felt but we have not yet grasped.

III.

Ex parte Endo[71] took up the case of Mitsuye Endo, a Japanese-American citizen and former California civil servant, detained in Utah even after camp administrators confirmed her loyalty and cleared her to leave camp because War Relocation Authority regulations closely controlled and drastically limited departures from relocation camps.[72] The Authority proceeded so slowly, it said, out of concern that release of Japanese Americans into the larger population would inflame prejudices and provoke hostile reactions. As a result, in July 1944, some 61,000 persons were in more or less the same circumstances as Endo.[73] The Supreme Court, in an opinion written by Justice Douglas joined by all the other Justices except Justice Roberts, who concurred in the result, held that "Mitsuye Endo is entitled to an unconditional release by the War Relocation Authority."[74]

The Douglas opinion is both terse and complexly inflected. It begins ambiguously:

> We are of the view that Mitsuye Endo should be given her liberty. In reaching that conclusion we do not come to the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure.[75]

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[70] Alexander Bickel, in his famous discussion of "the passive virtues," drew heavily on Justice Jackson's dissent in *Korematsu* and its emphasis on the "generative power" of declarations of constitutionality. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 131, 156 (1962) (quoting *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting)) (internal quotation marks omitted). Like Justice Jackson, Bickel treated *Korematsu* as a decision that "collides with principle," an affirmative but otherwise empty response by the Supreme Court believing "that the Congress or the President needs the support of its authority." BICKEL, *supra*, at 139. Interestingly, Cass Sunstein, expounding his conception of minimalism, labels *Korematsu* as a case of "minimalist validation" because "the Court . . . left open the possibility that other forms of discrimination would be invalidated." CASS R. SUNSTEIN, ONE CASE AT A TIME 29 & tbl.2.1 (1999) [hereinafter SUNSTEIN, ONE CASE AT A TIME]. But Sunstein does not expand upon this conclusion.

[71] 323 U.S. 283 (1944).

[72] For the details of the regulation, see *id.* at 291–93. *See also* THOMAS & NISHIMOTO ET AL., *supra* note 22, at 53–83.

[73] *See Endo*, 323 U.S. at 296 n.19. Persons not classified as loyal numbered 18,684. *Id.*

[74] *Id.* at 304; *see also id.* at 308 (Roberts, J., concurring in the result). Justice Murphy, although joining in the opinion of the Court, added a brief concurring opinion. *See id.* at 307 (Murphy, J., concurring).

[75] *Endo*, 323 U.S. at 297.

"[C]onstitutional issues" are not to be addressed: limits on the "power" of the War Relocation Authority presumably originate elsewhere. Or perhaps the only "constitutional issues" set aside are those "which have been argued" — other constitutional considerations, perceived by the Supreme Court, may be pertinent instead.[76]

It is clear, at least, that the instruments to be considered in the first instance are executive and legislative:

> Such power of detention as the Authority has stems from Executive Order No. 9066. . . . We approach the construction of Executive Order No. 9066 as we would approach the construction of legislation in this field. That Executive Order must . . . be considered along with the Act of March 21, 1942, which ratified and confirmed it as the Order and the statute together laid such basis as there is for participation by civil agencies . . . in the evacuation program.[77]

But Justice Douglas changes subject (in mid-paragraph) and addresses the Constitution:

> Broad powers frequently granted to the President or other executive officers by Congress so that they may deal with the exigencies of wartime problems have been sustained. And the Constitution when it committed to the Executive and to Congress the exercise of the war power necessarily gave them wide scope for the exercise of judgment and discretion so that war might be waged effectively and successfully. At the same time, however, the Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his government. Thus it has prescribed procedural safeguards surrounding the arrest, detention and conviction of individuals. Some of these are contained in the Sixth Amendment, compliance with which is essential if convictions are to be sustained. And the Fifth Amendment provides that no person shall be deprived of liberty . . . without due process of law. Moreover, as a further safeguard against invasion of the basic civil rights of the individual it is provided in Art. I, § 9 of the Constitution that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[78]

The constitutional structure generates the proper approach to construction of the executive order and statute:

> We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar but to indicate the approach which we think should be made to an Act . . . or an order . . . that touches the sensitive area of rights specifically guaranteed by the Constitution. This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its

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[76] For a frequently critical discussion of the briefs and oral arguments in *Endo*, see IRONS, *supra* note 10, at 307–09, 317–19.

[77] *Endo*, 323 U.S. at 298 (citation omitted).

[78] *Id.* at 298–99 (citations omitted).

face to violate a specific prohibition of the Constitution. We have likewise favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality. Those analogies are suggestive here.[79]

"This Court . . . ." "We . . . ."[80] Justice Douglas looks over his own shoulder. The *Endo* opinion, it appears, treats the process of reading the order, the statute, and the various constitutional provisions as the real subject of the opinion: the question is how the Supreme Court (or any court) should respond in dealing with a statute or order that appears to address matters also coming within the compass of constitutional terms. It is plain that overlaps of this sort do influence judicial reading of statutes and executive orders. That is the point, presumably, of the "analogies." Douglas restates his description of constitutional structure in the form of a rule of construction. The obviously parallel wording of the sentences is notable — a sense of judicial obligation, of judicial obedience to constitutional obligation, is broadly highlighted:

> *We must assume* that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a wartime measure *we must assume* that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. *We must assume,* when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.[81]

"[C]learly and unmistakably indicated": the Supreme Court, Justice Douglas declares, is obliged to exclude in advance the possibility of ambiguous extension, to treat legislative or administrative wordings as limiting and limited, without consideration of other interpretative options.

Application quickly follows:

> The purpose and objective of the Act and of [the] order[] are plain. Their single aim was the protection of the war effort against espionage and sabotage. It is in light of that one objective that the powers conferred by the orders must be construed.
>
> Neither the Act nor the order . . . use[s] the language of detention. . . . Moreover, unlike the case of curfew regulations, the legislative history of the Act . . . is silent on detention.[82]

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[79] *Id.* at 299–300 (citations omitted).

[80] Noun and pronoun here may not be precisely identical. "We" might be a reference to current Justices of the Supreme Court and their own previously made commitments. "This Court" might refer to the Supreme Court across the larger interval. The equation that I emphasize is also part — certainly the more generally perceived part — of the meaning.

[81] *Endo*, 323 U.S. at 300 (emphasis added).

[82] *Id.* at 300–01 (citation omitted).

Douglas acknowledges *Korematsu* (albeit without any express cross-reference). But he quickly returns to the conjunction of constitutional structure and judicial interpretation:

> The fact that the Act and the order[] are silent on detention does not of course mean that any power to detain is lacking. Some such power might indeed be necessary to the successful operation of the evacuation program. At least we may so assume. Moreover, we may assume for the purposes of this case that initial detention in Relocation Centers was authorized. But we stress the silence of the legislative history and of the Act and the Executive Order[] on the power to detain to emphasize that any such authority which exists must be implied. If there is to be the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program.[83]

The term "implied" is highly charged. It evokes *McCulloch v. Maryland*,[84] of course, John Marshall's famously expansive acknowledgement of powers implicitly granted by the Constitution to Congress, implied powers equally famously supposed to be "not prohibited, but consist with the letter and spirit of the constitution."[85] But "implied" also carries a contemporary 1944 resonance. *Endo*, like *Korematsu*, coexists with *Steele*[86] — one of the most dramatic of the Supreme Court's extractions of implied statutory obligations (and therefore rights). Chief Justice Stone's majority opinion in *Steele*, like Justice Douglas's opinion in *Endo*, begins with a constitutional proposition within whose terms a statute (in this case, the Railway Labor Act) is read.[87] In *Steele*, however, it is the statute, and not the Constitution, that is the subject of an extended reading — a notably virtuoso exercise in implied jurisprudence juxtaposing statutory provisions to disclose a common assumption informing but not explicit in the provi-

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[83] *Id.* at 301–02.

[84] 17 U.S. (4 Wheat.) 316 (1819).

[85] *Id.* at 421.

[86] Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944).

[87] Chief Justice Stone wrote:

> [T]he [collective bargaining] representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. . . .
>
> [W]e think that Congress . . . did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority. . . .
>
> . . . .
>
> We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.

Id. at 198–202.

sions individually.[88] *Steele* reminds us: to read statutes or orders restrictively, carefully leaving out all that is not expressly addressed, was in 1944 (perhaps more obviously than now) a choice.[89] *Endo*'s presentation of this choice as constitutionally mandated, therefore, would have been understood to carry weight — not merely ornament or flourish, mere accompaniment to commonplace explanation.

All that was left was the conclusion. Justice Douglas began with what looked like a syllogism:

> A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.[90]

These sentences, brought to bear, described a ruthlessly exclusive logic:

> Nor may the power to detain an admittedly loyal citizen or to grant him a conditional release be implied as a useful or convenient step in the evacuation program, whatever authority might be implied in case of those whose loyalty was not conceded or established. . . . The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded. *If we held* that the authority to detain continued thereafter, *we would transform* an espionage or sabotage measure into something else. That was not done by Executive Order No. 9066 or by the Act of March 21, 1942, which ratified it. *What they did not do we cannot do.* Detention which furthered the campaign against espionage and sabotage would be one thing. But detention which has no relationship to that campaign is of a distinct character. Community hostility even to loyal evacuees may have been (and perhaps still is) a serious problem. But if authority for their custody and supervision is to be sought on that ground, the Act . . . and . . . Order . . . offer no support. . . . To read them that broadly would be *to assume* that the Congress and the President intended that this discriminatory action should be taken against these people wholly on account of their ancestry even

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[88] *See id.* at 199–202.

[89] *Steele* and *Endo* appear only one volume later in the U.S. Reports than *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), a perhaps even more dramatic exercise in statutory implication setting aside, for Wagner Act purposes, the common law understanding of the employee-independent contractor distinction. *See id.* at 123–24. Notably, Justice Douglas was the author, only the year before *Endo*, of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), not surprisingly cited in *Steele*, *see* 323 U.S. at 204; set against *Erie* (it would later become apparent), *Clearfield Trust* was the starting point for judicial reconceptualization and reinvigoration of federal common law. *See* Henry Friendly, *In Praise of* Erie — *And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408–12 (1964). Douglas, we know, would go on to write *Lincoln Mills*, another federal common law classic. Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448 (1957).

[90] *Endo*, 323 U.S. at 302.

> though the government conceded their loyalty to this country. *We cannot make such an assumption.*[91]

The Supreme Court ("we") would act wrongly if it were to approve detention even as only part of a scheme of careful ("conditional") release. Why? Perhaps Douglas is just extracting full force from the government's concession of loyalty. But he goes on to quote President Roosevelt, as though the President (the Great Helmsman?) were assigning the Court its responsibilities:

> "Americans of Japanese ancestry . . . have shown that they can, and want to, accept our institutions and work loyally with the rest of us . . . . In vindication of the very ideals for which we are fighting this war, it is important to us to maintain a high standard of fair, considerate, and equal treatment for the people of this minority as of all other minorities."[92]

Is Douglas just signaling how far the Court would be departing from executive and legislative intention? In his first draft of the *Endo* opinion, Justice Douglas was notably blunter: "To read them that broadly would be to assume that the Congress and the President sought to create a second class of citizenship for this loyal group of Americans."[93] We recall Justice Black's declaration in *Korematsu*: "*Our* task would be simple, *our* duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice."[94] President Roosevelt, we realize, was evoking (indeed, in the admonitory tone and plural address of his language, personifying) the governmental obligation of equal protection — an obligation obviously extending to the Supreme Court. We recognize a fundamental constitutional logic underneath *Endo*'s conjunction of citizen loyalty and judicial duty (and also FDR's) — as Attorney General Edward Bates put it in 1862, "the reciprocal obligation of allegiance on the one side and protection on the other."[95] Top to bottom: that is, we note, also the substantive theme implicitly organizing Jus-

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[91] *Id.* at 302–04 (emphasis added).

[92] *Id.* at 304 (quoting SEGREGATION OF LOYAL AND DISLOYAL JAPANESE IN RELOCATION CENTERS, S. DOC. NO. 96, 78th Cong., 1st Sess., at 2 (1943)). Concerning the context of President Roosevelt's statement, including its inclusion in a document published by the U.S. Senate, see ROBINSON, *supra* note 11, at 195–98.

[93] William O. Douglas, Draft Opinion 33 (on file with the Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 116, Folder No. 70 O.T. 1944/ Endo v. Eisenhower/ Pencil draft).

[94] *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (emphases added).

[95] Edward Bates, Citizenship, 10 Op. Atty. Gen. 382, 388 (1862). The Bates opinion was, at the time, "much-noted." ROGERS SMITH, CIVIC IDEALS 280 (1997). Thomas Cooley's discussion of the Privileges or Immunities Clause of the Fourteenth Amendment, which preceded and anticipated the Supreme Court decision in the *Slaughterhouse Cases*, relied heavily on the Bates opinion. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 654–59 (4th ed. 1873) (notes and additions by Thomas M. Cooley).

tice Douglas's initial "syllogism" — "protection" including governmental protection against government itself.

IV.

I have, I am sure, quoted too much of the *Endo* opinion. But I mean to leave no doubt whatsoever that, in Justice Douglas's analysis, the Constitution prompted the construction of the order and the statute, and thus the conclusion that Endo's detention was illegal. It is clear, certainly, that the constitutional references in *Endo* are not routine. Douglas juxtaposes constitutional provisions and draws conclusions from the aggregation — the same method that he would employ, some two decades later, in his famous (some would say notorious) majority opinion in *Griswold v. Connecticut*.[96] *Endo*, we can see, is *Griswold* minus "emanations" and "penumbras." But however original the constitutional construction, it might be argued, *Endo* begins and ends, as Herbert Wechsler characterized it, as a case concerned with "statutory authority."[97] Why not read *Endo* as just another *Ashwander* exercise,[98] as one of the many instances in which the Supreme Court adopts a reading of a statute chosen to sidestep a possible constitutional difficulty?[99] This characterization would account for the constitutional exposition in the Douglas opinion. Exercises in avoidance are both familiar and ephemeral — they present themselves as constitutional law one step removed, as attempts to skirt constitutional questions, not face them. If this is all that *Endo* is, we could readily explain its obscurity.

Endo does not fit well within this characterization.

To be sure, in a 1962 interview Justice Douglas described the background politics of the case in a way that seems entirely consistent with the avoidance reading:

> I couldn't get a Court for the constitutional decision. . . . We had a considerable discussion. I had the desire to put it on the constitutional grounds but I couldn't get a Court to do that. Black, Frankfurter, Stone, were very clear that that was not unconstitutional but that this would have to turn, *Endo* would have to turn upon the construction of the regulations.[100]

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[96] 381 U.S. 479 (1965).

[97] HERBERT WECHSLER, *Mr. Justice Stone and the Constitution*, *in* PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 111 n.111 (1961).

[98] *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

[99] *See* IRONS, *supra* note 10, at 341–44.

[100] Transcriptions of Conversations Between Justice William O. Douglas and Professor Walter F. Murphy, Cassette No. 8, May 23, 1962, *available at* http://libweb.princeton.edu/libraries/firestone/rbsc/finding_aids/douglas/douglas8.html (last visited Apr. 6, 2003). I owe this reference to Eric Muller.

But in 1974, in his long dissenting opinion in *DeFunis v. Odegaard*,[101] written very near the end of his career, Douglas referred to *Endo* in a way that makes it easy for the reader to conclude that the case sounds in constitutional law. Indeed, he quoted language from his *Endo* opinion that, we have just seen, matched resolution of the question of authorization with deep constitutional premises.[102] We might wonder whether, in 1944, Justice Douglas reconciled his tactical aim to "get a Court" and his own "desire" by writing an opinion that — transposing phrases from his interview — "put . . . construction of the regulations . . . on . . . constitutional grounds."

The principal question, of course, is what we ought to make of the *Endo* opinion itself. However we ultimately judge it, there are two reasons, I think, why *Endo*'s lamination of "construction" and "constitutional grounds" should not be grouped with Supreme Court opinions interpreting statutes to avoid constitutional issues.

First, what record we have of the drafting history of the *Endo* opinion suggests that Justice Douglas was aware of the avoidance cases, and their characteristic phrasings, but wanted to frame his own analysis differently. His law clerk ("LL") supplied Douglas with a list of relatively recent Supreme Court decisions (including *Ashwander*) asserting the "[d]uty of the court to construe a statute, if possible, so as to avoid the conclusion that it is unconstitutional," but also concluded: "Each of these cases is good authority for the narrow point but I could find nothing which is particularly appropriate for your present pur-

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101 416 U.S. 312, 320–50 (1974) (Douglas, J., dissenting).

102 Justice Douglas wrote:

> [T]he day we decided *Korematsu* we also decided *Ex parte Endo*, . . . holding that while evacuation of the Americans of Japanese ancestry was allowable under extreme war conditions, their detention after evacuation was not. We said: "A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized."

Id. at 339–40 n.20 (1974) (Douglas, J., dissenting) (quoting *Endo*, 323 U.S. at 302). In 1958, four years before the Murphy interview, Justice Douglas had written:

> While the Court sustained the [Hirabayashi and Korematsu] convictions, the precedents established did not make the judiciary a rubber stamp for the military. They gave the judiciary final say as to whether deprivation of liberty of a citizen in time of war is constitutional. And when it came to the problem of detaining the Japanese after they had been evacuated from the West Coast, the Court held there was no such authority as respects persons who were loyal to the United States and against whom no charges had been preferred. *Ex parte Endo*.

WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE 210 (1958) (citation omitted). Justice Douglas continued by quoting exactly the same language from *Endo* that he would later quote in *DeFunis*, 416 U.S. at 339–340 n.20. *See* DOUGLAS, *supra*, at 210–11.

poses."[103] The first version of the *Endo* draft that survives, written in pencil by Justice Douglas himself, shows that the pertinent passage of the opinion was difficult work (there are considerably more cross-outs here than in most other parts of the draft):[104]

> We mention these constitutional provisions not to stir the constitutional issues *22 which have been argued at the bar but to indicate the approach which we think should be made ~~in interpreting~~ to an Act of Congress or an order of the Chief Executive ~~so as not to conclude unduly to imply that a greater impingement on the civil liberties of the individual was intended than~~ that touches the sensitive area of civil liberties specifically guaranteed by the Constitution. This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution. 22/ ~~In the that instances cited we struck~~ *23 We have likewise favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality. 23/ ~~down state legislation. Courts should~~ [unreadable] ~~when it comes to interpreting legislation rather than passing on its constitutionality courts should~~ These analogies are suggestive here. ~~as It indicates that we should be slow to They indicate that we should be slow to find an~~ [unreadable] ~~we should construe in an Act of Congress or an order of the Chief Executive an implied power so as to which affects civil rights liberties so as to imply more power affecting in a~~ [unreadable] ~~affecting civil liberties so as to imply only add to the express powers granted only those implied powers plainly~~ *24 They suggest that an Act of Congress or an order of the Chief Executive ~~should in be a field affecting civil liberties~~ should be narrowly construed so as to avoid ~~if possible or reduce to a minimum~~ any possible conflict with specific guarantees of the Constitution. We must assume that the Chief Executive and members of Congress are as sensitive to ~~the~~ requirements of the constitutional oath as are judges. ~~We must And assume that when we are asked to find in a grant of legislative or executive authority an implied power~~ In interpreting a wartime measure we must assume that their purpose was [unreadable] ~~to respect~~ to allow for the greatest possible accommodation between the war power and specific constitutional guarantees. When asked to find in a grant of legislative or executive authority [unreadable] implied powers, we must *25 assume that the law makers were ~~as~~ jealous of the liberties of the citizen ~~as the judge,~~ and intended to ~~go~~ place ~~further than the plain meaning of their words necessitates.~~ no greater restraint on him than was clearly and plainly indicated by the language they used.

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[103] Memorandum signed "LL" (n.d.) (on file with the Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 116, Folder No. 70 O.T. 1944/ Endo v. Eisenhower/ Certiorari, Conference & Misc Memos).

[104] Draft Opinion, *supra* note 93. Struck-through words are crossed out but readable in the Douglas draft. Unreadable cross-outs are indicated by bracketed inserts. Starred page numbers refer to pagination of the Douglas draft itself. Numbers preceded by slashes refer to Justice Douglas's original footnote calls.

Notably, much of the debris — the rejected wording — is an accumulation of phrases evocative of the avoidance doctrine. Subsequent revisions of this passage appear to be efforts to reduce further the appearance of any appeal to "passive virtues," any primary reliance upon the exercise of judicial discretion. "[C]ivil liberties" become "rights."[105] Justice Douglas deletes the sentence "They suggest that an Act of Congress or an order of the Chief Executive should be narrowly construed so as to avoid any possible conflict with specific guarantees of the Constitution."[106]

Second, regardless of whatever Justice Douglas intended, the approach put to work in *Endo* differs from the approach ordinarily taken in avoidance cases. The canonical formulation of the doctrine, quoted by Justice Brandeis in *Ashwander*, was framed by Chief Justice Hughes in *Crowell v. Benson*:

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[107]

Within these terms, it is clear, the constitutional question is not resolved — merely judged to be or not to be "serious."[108] The real work addresses statutory construction, the identification of "fairly possible" readings. It is usually supposed that these glosses are "preconstitutional," conceived by the reader "before facing the constitutional question."[109] Typically, whatever the method of statutory interpretation, the reader will have a preconstitutional preference for one interpretation over another. There is often a trade-off implicit in the determination of "fairly possible." The question becomes whether or not to

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[105] William O. Douglas, Typescript 9 (Nov. 1, 1944) (on file with the Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 16, Folder No. 70 O.T. 1944/ Endo v. Eisenhower/ Typed Draft).

[106] Galley marked "not circulated/WOD's desk copy" 12 (Nov. 2, 1944) (on file with the Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 16). In an early draft of the *Korematsu* opinion, Justice Black added a sentence after the "*Endo* . . . graphically illustrates" sentence included in the ultimate text. A first version, reading, "Each [order] involves in and of itself serious questions of statutory construction and even of possible constitutional implications," was edited by Black to read, "Each of the other orders . . . involves in and of itself difficult and serious questions of statutory construction and constitutional law." Edited Typescript (n.d.) (on file with the Library of Congress, Manuscript Division, Papers of Hugo Lafayette Black, Box No. 276, File "Korematsu v. United States").

[107] 285 U.S. 22, 62 (1932); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 599 (1992).

[108] *See* United States v. Del. & Hudson Co., 213 U.S. 366, 408 (1909).

[109] Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 84.

adopt a statutory gloss that is second-best preconstitutionally in order to minimize a real but uncertain constitutional risk.[110]

There are cases that plainly illustrate this mode of proceeding.[111] *Kent v. Dulles*,[112] among the best known, is especially interesting here. Its majority opinion is again the work of Justice Douglas, who in fact cites *Endo* in the course of his discussion.[113] Like *Endo*, *Kent* ultimately emphasizes absence or silence — in *Kent*, no specific congressional authorization for a State Department policy of denying passports to Communist Party members. "Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them."[114] This proposition, Justice Douglas indicates, is a close cousin to a sentence in his *Endo* opinion: "If there is to be the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program."[115] But before *Kent* states this conclusion, Douglas reviews the history of congressional and executive attention to passports.[116] He notes that, prior to passage of the statute immediately pertinent in the case, there was both a generally accepted acknowledgement that the Secretary of State possessed discretion and a practice of narrow exercise of that discretion by the Secretary.[117] Two possible interpretations of the congressional delegation at issue were therefore available,

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[110] *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1971 (1997). Within this model, there is plainly room for disagreement. Sometimes the tradeoff is depicted as minimal, merely a "mild sort of 'bending'"; "Congress itself would prefer validation to invalidation." CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 165, 164 (1990) [hereinafter SUNSTEIN, RIGHTS REVOLUTION]. Adopting a second-best preconstitutional statutory interpretation may, in any event, give effect to "constitutional norms" that "are quite generally underenforced." *Id.* at 165. From other perspectives, or in other cases, choice of statutory second-best readings seems problematic. It is not clear whether Congress should be averse to the risk of constitutional invalidation. *See* Schauer, *supra* note 109, at 92. Moreover, invocation of constitutional risks is a kind of "phantom" constitutional law, *see* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 564 (1990) — judges may be tempted to act on background assumptions free from "the necessity of the full statement of reasons supporting the constitutional decision." Schauer, *supra* note 109, at 89. On either view, though, the underlying organization of the analysis remains the same. *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules and Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2029–32, 2053–55, 2209–11 (2002).

[111] *See, e.g.*, BE & K Constr. Co. v. NLRB, 122 S. Ct. 2390, 2401–02 (2002); NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 504–07 (1979).

[112] 357 U.S. 116 (1958).

[113] *See id.* at 129.

[114] *Id.*

[115] *Endo*, 323 U.S. at 301–02.

[116] *See Kent*, 357 U.S. at 121–24, 127–28.

[117] *See id.* at 124–25, 128.

grounded in one or the other of these historical facts. (The four dissenters in the case vigorously contested this statutory conclusion.[118])

The *Endo* opinion, we have seen, proceeds differently. Justice Douglas does not consider "preconstitutional" possibilities. His constitutional discussion, of itself, brings the statute and executive order into focus. Analytically, the Constitution precedes the statute and the order. The *Kent* opinion frames its constitutional passages much more loosely. Douglas in this instance is less interested in constitutional provisions or Supreme Court cases (although there are references[119]); he proffers a larger cultural gloss — an account of "how deeply engrained in our history this freedom of movement is."[120] The constitutional discussion is not presented as itself decisive.[121] Rather, we might think today, it describes a kind of "equity of the statute."[122] Constitutional considerations plainly do different work in *Endo*. To be sure, they function as a kind of context, figure much like definitions of terms; nonetheless, Douglas does not treat the constitutional part of the opinion as either ready-made or merely evocative — rather, it is the result of energetic constitutional construction. And even though Douglas puts the obligations of the Supreme Court itself at the center of the opinion, he eschews any acknowledgement of the exercise of judicial discretion of the sort that *Ashwander*, as understood by both its defenders and critics, would lead us to expect.[123] Douglas, it seems, is not concerned as an independent matter about what we now refer to as "the constitutional legitimacy of the methodology"[124] he commits the Supreme Court to using. His reading of the Constitution, of itself, justifies the work.[125]

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118 *See id.* at 130–43 (Clark, J., dissenting).

119 *See Kent*, 357 U.S. at 125–26.

120 *Id.* at 126; *see also id.* at 126–27.

121 *See id.* at 127.

122 *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 119–26 (2001).

123 *Kent v. Dulles* is again different. *See, e.g.*, *Kent*, 357 U.S. at 129 ("We hesitate to find . . . .").

124 For the quoted phrase, see Jerry Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 839 (1991).

125 In Professor Elhauge's terms, the Constitution figures in *Endo* like a canon, substituting for judicial improvisation with respect to statutory construction. But the Constitution also substitutes for Elhauge's first, "hermeneutic" stage of statutory construction: the Constitution resolves the meaning of what judges might otherwise regard as ambiguous words. *See* Elhauge, *supra* note 110, at 2029–31. Interestingly, in *United States v. Kuwabara*, 56 F. Supp. 716 (N.D. Cal. 1944), decided a few months before *Endo*, Judge Goodman, quashing indictments of twenty-six Japanese-American internees alleged to be draft resisters, adopted a reverse of Justice Douglas's approach. Goodman used language contained in the Selective Training and Service Act to gloss the Fifth Amendment requirement of due process of law concretely enough to justify dismissing the prosecutions. *See id.* at 719. The trial of the *Kuwabara* case is one of the principal subjects of Eric Muller's work. For Professor Muller's own appreciation and criticism of Judge Goodman's opinion, see MULLER, *supra* note 20, at 131–60.

This is not a version of constitutional minimalism — *Endo* certainly does not "bracket large-scale issues of the good and the right" in its constitutional discussion.[126] The use that Douglas makes of the Constitution in reading the statute and executive order at issue in *Endo* marks the Constitution itself — the question of its content — as potentially controversial. But adjudication — once the question of the import of the Constitution is resolved — is straightforward. This approach can claim famous precedent: In *Gibbons v. Ogden*,[127] Chief Justice Marshall undertook his expansive exposition of the Commerce Clause, at least ostensibly as a preliminary "train of reasoning,"[128] in order to supply a backdrop against which a seemingly narrow congressional licensing statute appeared as an expansive authorization of navigation preemptive of New York's grant of a steamboat monopoly.[129] Jerry Mashaw may be right: "Any theory of statutory interpretation is at base a theory about constitutional law."[130] But in *Endo*'s case, as in *Gibbons*, it is clear that the "theory of constitutional law" claims the foreground. *Endo* is not, in any central sense, a case about statutory interpretation.

V.

"Quiet theory" — Justice Jackson used this phrase to conclude a note he wrote in the margin of his copy of the draft of *Endo* that Justice Douglas circulated on November 8, 1944. He also wrote: "Finds no constitutional vice/Seems to sanction mass detention without individual charges of disloyalty."[131] Jackson's *Endo* file includes a typescript of a characteristically eloquent concurring opinion he drafted but never circulated, which was, he must have thought, more constitutionally emphatic.[132]

If it is constitutional law, what sort of constitutional law is *Endo*?

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126 SUNSTEIN, ONE CASE AT A TIME, *supra* note 70, at 249.

127 22 U.S. (9 Wheat.) 1 (1824).

128 *Id.* at 221.

129 *See id.* at 211–16. For an important discussion of some of Chief Justice Marshall's other work that appears to be of a piece, see William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1070–82 (2001). *See also* John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1677–79 (2001) (reassessing the significance of the Marshall opinions).

130 Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988).

131 Robert H. Jackson, Handwritten Note (marginal note on first page of Douglas opinion in *Ex parte Endo*, circulated Nov. 8, 1944) (on file with the Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Container No. 133).

132 For the text of Justice Jackson's draft, see Undated Typescript entitled "Endo" (n.d.), *reprinted in* Appendix, *infra* p. 1969.

In *Korematsu*, Justice Black worked through the familiar problem of "institutional realism": there is the office and there is also the officeholder. Whether we come to the question through the ancient associations of the phrase "color of law" or through Jensen and Meckling's "agency cost" diagnostics popular at the end of the twentieth century, it is all the same — office carries with it obligations which the particular individual meets or not; office creates opportunities for expression or achievement of individual beliefs or aims which the individual does or does not pursue. In *Korematsu*, Black proceeded as though it did not matter what the particular beliefs and aims of General DeWitt or others were. His or their acts — even if only *also*[133] — were readily defensible within terms suggested by the proper preoccupations of office.

In *Endo*, Justice Douglas repeatedly called attention to obligations attendant to adjudication ("we must"). But he specified these obligations through a mode of proceeding that we might call "formal realism." There are documents — an executive order, a statute, a constitution — that must be read together. Or rather, since they cannot be read simultaneously, the documents must be read in light of each other. Or rather, if it is not just a perfect hermeneutic circle, there must be some order to the reading — some document, read first, organizes the ordering and reading of the remaining documents. Douglas starts with the Constitution and its account of rights, and proceeds to read the other instruments consistently.

Institutional and formal realism, we can see, stand in contrast with "moral realism" — the starting assumption that we can work out notions of rights and duties immediately, that we can directly elaborate norms.[134] In *Korematsu*, Justice Jackson's dissent was seemingly insti-

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[133] *See supra* p. 1941 & n.35, p. 1946 & nn.66–68.

[134] The terms "institutional," "formal," and "moral" are put to use in different ways by different writers. For example, in *Justice Accused*, Robert Cover, elaborating "the moral-formal dilemma," defines "formal" in terms that emphasize a sense of judicial role and craft. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 197 (1975). These are terms that I would label "institutional." Ernest Weinrib associates "formal" with a particular notion of coherence present (or absent) in groups of legal ideas. *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 32–33 (1995). Coherence functions as a fundamental norm within Weinrib's analysis; accordingly, it would fall under the "moral" heading for my purposes. My use of these three familiar terms diverges from the approach of others in important part, I think, because I treat "formal" as deriving from the plural and prosaic "forms" and not from some unitary, more or less abstract conception of "form." Thus, I associate sensitivity to forms with attention to the documentary dimension of law — a mode of analysis and argument grouping, inter alia, standard form contracts, form books, statutes, constitutions, and judicial opinions (all of these examples of forms in my sense can in turn be redescribed as aggregates of forms). For the point of departure for this approach, see M.T. CLANCHY, FROM MEMORY TO WRITTEN RECORD: ENGLAND 1066–1307 (2d ed. 1993). It should also be evident that the formal realism that I notice subsumes "intratextualism," the approach to constitution-reading practiced and advocated by Akhil Amar. *See* Akhil Reed Amar, *Intratrextualism*, 112 HARV. L. REV. 748 (1999). Amar supposes, even as he identifies multiple uses of words or phrases in its text, that these multiples "are part of a single

tutionalist — wartime measures are not proper subjects for judges judging to bring to bear constitutional law. But Jackson, it is easy to see, reaches this conclusion because he believes that the job of judges is to announce constitutional law possessing moral force. His own wartime opinion in *Barnette* is surely the archetype.[135] (Eugene Rostow was wrong to call Jackson a nihilist in *Korematsu*.[136]) Moral realism is, of course, commonplace in constitutional law. It is not only the province of commentators as elaborate as Ronald Dworkin:[137] Holmes, ostensibly skeptical, frequently called attention to the manifest injustice of particular decisions or the failure of judges to acknowledge the propriety of legislative moral judgments.[138] Moral realism is not necessarily categorical: the close-case balancing tests of Learned Hand (circa *Dennis*[139]) and the second Justice Harlan are well-known illustrations.[140] Notably, the moral presentation of constitutional law is not restricted to familiar topics of moral discourse generally. Peculiarly constitutional concerns like separation of powers and federalism may be described in terms claiming normative force, as decisively marking right or wrong — for example, "state sovereignty" or "injury in fact."

In *Endo*, Justice Douglas sometimes puts propositions in moral form, for example in his characterization of components of the Bill of Rights. But these propositions are presented first and foremost as documentary items — as elements of the Constitution. Douglas uses his constitutional description, as we have seen, to define the environment, to fix the set of expectations, within which the Supreme Court reads the executive order and the ratifying statute. Individuals, it is to be supposed, possess certain rights; given these rights, government

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coherent Constitution." *Id.* at 822. He notes but does not make much use of "intertextualism," juxtapositions of constitutional wordings with other phrasings in other documents, *see id.* at 799–800; he also sets to the side the question of how intratextualism works in statutory interpretation, *see id.* at 801 n.204. These various limitations appear to be ad hoc. Amar's image of "folding the parchment," *id.* at 788, precisely evokes a technique — a kind of constitutional origami — for representing a single document as several. In fact, of course, there is no "the" Constitution, rather an accumulation of documents — the 1787 text plus the amendments — most themselves divided into parts. Arguably, it is the fundamentality of this formal pluralism, the irreducible multiplicity of "the" Constitution, that provokes Amar's most powerful work, his study of the juxtaposition of the Bill of Rights and the Fourteenth Amendment. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

135 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

136 *See* Rostow, *supra* note 12, at 510–12.

137 *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

138 *See, e.g.*, Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting); Hammer v. Dagenhart, 247 U.S. 251, 280 (1918) (Holmes, J., dissenting).

139 *See* United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

140 *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); NAACP v. Alabama, 357 U.S. 449, 466 (1958) (Harlan, J.).

military concerns are understood to be limitable, to terminate at some particular point. Military concerns evident from the terms of the order and the statute are read in a way revealing their limits.[141] Ultimately, this becomes the discussion of loyalty, just a reversed formulation (what lies outside, as it were) of the military worry about sabotage and espionage.[142] In the light of these expectations, the reader of the order

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[141] Chief Justice Stone proposed, and Justice Douglas agreed, that the *Endo* opinion include this paragraph:

> It should be noted at the outset that we do not have here a question such as was presented in *Ex parte Milligan* or in *Ex parte Quirin* where the jurisdiction of military tribunals to try persons according to the law of war was challenged in habeas corpus proceedings. Mitsuye Endo is detained by a civilian agency . . . . Moreover, the evacuation program was not left exclusively to the military; the [War Relocation] Authority was given a large measure of responsibility for its execution and Congress made its enforcement subject to civil penalties . . . . Accordingly, no questions of military law are involved.

Endo, 323 U.S. at 298 (citations omitted); *see also* William O. Douglas, Galley dated Nov. 2, 1944 and marked "not circulated/ C.J. copy showing suggestions/ 11/8/44," at 11 (on file with the Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 116, Folder No. 70/ Endo v. Eisenhower/ Galley draft/ O.T. 1944"). It is not the "civilian" status (as such) of the Authority, however, that determines what background concerns are pertinent to reading the applicable executive orders and statute. Douglas acknowledges, in principle, the possibility of "[b]road powers . . . granted to the President or other executive officers by Congress so that they may deal with the exigencies of wartime problems" without differentiating between military and civilian agencies as such. *Id.* Rather, in the following pages of the *Endo* opinion, it is the overlay of constitutional propositions and statutory and administrative language that explains the decision. *See Endo*, 328 U.S. at 298–304.

[142] *Endo* was in the process of decision at the time of reargument of *Cramer v. United States*, 325 U.S. 1 (1945), the treason case in which the Supreme Court would announce its ruling a few months later. *See id.* (reargued Nov. 6, 1944; decided Apr. 23, 1945). *See generally* Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 461–62 (2003). In *Cramer*, the Court splitting 5–4, Justice Jackson wrote for the majority, declaring that "the commonplace overt acts as proved" were not sufficient to meet the constitutional test for treason. *Id.* at 40. "Meeting . . . in public drinking places to tipple and trifle was no part of the saboteurs' mission and did not advance it." *Id.* at 38. Justice Douglas wrote for the dissenters:

> [T]he requirement of an overt act is designed to preclude punishment for treasonable plans or schemes or hopes which have never moved out of the realm of thought or speech. . . . The treasonable project is complete as a crime only when the treasonable intent has ripened into a physical and observable act. The act standing alone may appear to be innocent or indifferent, such as joining a person at a table, stepping into a boat, or carrying a parcel of food. . . . Its character and significance are to be judged by its place in the effectuation of the project.

Id. at 61 (Douglas, J., dissenting). Intent, for Douglas, was the key: the measure of the project, and thus the measure of the significance of the overt acts. Proof of intent, and thus proof of significance, he argued, was not subject to the constitutional requirement of proof by testimony of two witnesses — only proof of the fact of the overt acts as such. (Proof of intent would still require proof beyond reasonable doubt.) Justice Jackson placed the opposite emphasis: "To take the intent for the deed would carry us back to constructive treasons." *Id.* at 40.

Notably, in *Endo*, Justice Douglas assigned the same priority to loyalty that he would give to treasonous purpose in *Cramer*: "Loyalty is a matter of the heart and mind . . . . He who is loyal is by definition not a spy or a saboteur." *Endo*, 323 U.S. at 302. Justice Jackson, in his draft concurrence, also anticipated his approach in *Cramer*:

> There is no way by which trial techniques can establish what is in a man's heart if the time to act has not yet come and he has kept his mouth shut. Anyone bent on keeping

and the statute notices that there is nothing in those instruments that is affirmatively inconsistent with the constitutional presuppositions. But if the initial expectations had been opposite — for example, if it were thought to be clear that rights listed in the Bill of Rights were irrelevant once a state of war existed — the instruments would have been just as consistent: they might just as easily have been read to allow for continued confinement.[143]

Because constitutional propositions figure as points of reference, they need not be put forward as tests, stated as propositions purporting to regulate the terms of their own application, in the shape of rules and exceptions or decisively preemptive principles. There is no need in Douglas's *Endo* opinion for anything so catechetical, so test-like — so promising of investigation or inquisition — as Black's initial statement in *Korematsu* that racial classifications are suspect. Constitutional propositions in *Endo* specify (and thus literally "constitute") the relevant world — the entities and interactions — within which legislators and executive officials act. For example, Justice Douglas presents his discussion of citizenship and loyalty (read separately, attributable

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> another in custody may say, and quite rightly, that it cannot be known that his prisoner would not commit crime if he were at large. So the grounds taken by the Court is one available to but few and favored ones.

Robert H. Jackson, Undated Typescript entitled "Endo" (n.d.), *reprinted in* Appendix, *infra* p. 1969. Jackson based his own analysis on the fact of United States citizenship. *See id.*

Jackson's draft, we know, was literally wrong: "the grounds taken by the Court" in *Endo* did not cover only a "few . . . favored ones." The focus on citizenship, moreover, raised complicated questions in cases of dual citizenship. *See* Kawakita v. United States, 343 U.S. 717 (1952) (treason prosecution of a jointly Japanese and American citizen). But it was true, at the time of *Endo*, that large numbers of internees were not "loyal" as a matter of government classification. *See supra* note 23. Justice Douglas's analysis was, in that important regard, restrictive.

The question whether loyalty should have been the first preoccupation in either *Endo* or *Cramer*, however, need not be conceived exclusively as a question of the proper moral vocabulary of constitutional law. Formally, the question in *Endo* was whether the Constitution recognized as pertinent both concerns for security and concerns for liberty — and, if so, what effect the double acknowledgement would have with regard to interpretation of the executive orders and congressional authorization. In *Cramer*, the question was whether the Treason Clause, rather than ordinary rules of proof in criminal cases, addressed only proof of overt acts as such or also, to some extent, proof of other elements of the offense. In *Endo*, it is not clear, notwithstanding Justice Jackson's eloquence, how the fact of citizenship suggests anything about the relative salience of the two constitutional concerns; loyalty, Justice Douglas saw, plainly did provide a basis for assigning precedence. In *Cramer*, Justices Jackson and Douglas disagreed about whether the relevant constitutional concerns had a broader or narrower scope, and thus the two also disagreed about how much the Constitution preempted the ordinary rules of proof.

[143] For consideration of other instances, including Justice Douglas's analysis in the *Steel Seizure Case*, in which constitutional propositions fix our sense of the operative limits of statutory terms, see Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 524–27 (1982).

as readily to Justice Black[144]) not as marching orders, but as simply an accumulation of definitions, as re-presentations of the constitutional starting points. Constitutional propositions "constitute" not by immediately cueing or otherwise authorizing enforcement of some already extant sense of right political order, but by first of all functioning as algorithms for reading. They organize the interrelationship of statutes and executive orders.

As we have seen, they also identify the sorts of terms with which statutes and executive orders may be written. In *Endo* itself, this structuring work called attention to a limit to the reach of statutory and administrative language that was not otherwise apparent. But in other cases, legislative or executive wordings may obviously and affirmatively reveal their constitutional genealogy. Sometimes it may turn out that statutory or administrative instruments are confrontationally framed, in ways that show no traces of constitutional influences. Finally, other instruments may, more ambiguously, acknowledge constitutional formulas or arrangements in the very process of departing from them. These latter possibilities confirm that attention to formal inter-relationships is not a mere avoidance tactic. Formal sensitivity is entirely capable of disclosing not only constitutional bases for understanding terms of other instruments but also, in the process, grounds of affirmation or rejection — and sometimes recognition of hard cases as well.[145]

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[144] I owe this observation to John Ely. In view of Justice Black's interest in writing *Endo*, *see supra* note 9, we might suspect that something like this paragraph of Douglas's opinion would have figured centrally in a Black version.

[145] There is more suggested by *Endo*'s method than the range of its analytical resources, important though that is. We have seen that Justice Douglas, because he puts the Constitution to work ordering and organizing, as a kind of semantic context, is able to present constitutional terms and presuppositions in a way that suggests and employs their central meanings, and not the ambiguous edges of their implications. The Constitution serves as a source of fundamentals in *Endo* — as analogous, for example, to the propositions that Douglas drew upon in invalidating a mandatory sterilization statute in *Skinner v. Oklahoma*, 316 U.S. 535 (1942):

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches.

Id. at 541. These propositions do not figure in the opinion as originating in any particular legal document or body of law. They are presented as self-evident, as matters of common understanding, ordinarily noncontroversial conclusions. These common understandings, notably, are not themselves decisive in *Skinner* — rather, they set expectations, provide reason for skepticism and justification for close scrutiny, and thus inform application of the Equal Protection Clause of the Fourteenth Amendment, the constitutional provision that Justice Douglas treats as resolving the case. *See id.* at 541–42. Constitutional propositions similarly fixed expectations in *Endo*, resolving the content of statutory and administrative formulas.

VI.

Endo's way of proceeding fits comfortably within a properly compound, capacious description of constitutional law. *Endo* belongs in the canon: we have no reason not to remember it. But what would we gain?

Wu Hung, in his wonderful account of early Chinese art and architecture, describes in detail Liang dynasty mausoleums dating from the sixth century.[146] Three pairs of monuments marked "the spirit road" running out from a tomb.[147] One pair consisted of a gate formed by two pillars.[148] Each pillar bore an inscription identical to the other's, except that "the inscription on the left panel is a piece of regular text, but the one on the right panel is reversed."[149] The pillars thus presented a kind of puzzle to readers standing between them. "It would not take more than a few seconds for a literate person to read the

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The question of "fundamentals," we recall, repeatedly surfaced in constitutional law in the 1940s, following the collapse of the previous analytical apparatus. We can readily list, along with *Endo* and *Skinner*, several still well-known efforts: Justice Frankfurter's syntheses of Anglo-American jurisprudential traditions, Justice Stone's recurring attempts to frame new doctrinal formulas, Justice Jackson's rhetorical contributions, and (most controversially at the time) Justice Black's rereading of provisions of the Bill of Rights as freestanding and decisive, and also as memorials of defining elements of the American Revolution. Significantly, Justice Douglas's method in *Endo* enabled him to depict constitutional propositions, because he treated them as fundamentals, as expressible in "plain speech," as akin to Justice Black's readings. This ordinary-language constitutional law differed from the more narrowly legal and thus necessarily more esoteric efforts of Justices Frankfurter and Stone. Justice Jackson's phrases, often too remarkable and too original to be called ordinary language, were nonetheless in no sense technical — modern "democratic eloquence," open to appreciation by the public at large. *Cf.* KENNETH CMIEL, DEMOCRATIC ELOQUENCE: THE FIGHT OVER POPULAR SPEECH IN NINETEENTH-CENTURY AMERICA (1990).

Justices Black, Douglas, and Jackson, we might say now, were evoking (and also contributing to and reinforcing) the "popular" Constitution: basic constitutional propositions widely understood and endorsed within the public at large, understandings in an important sense independent of "judicial" constitutional law. For differing versions of the idea of the popular Constitution, see, for example, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 266–94 (1991); and BICKEL, *supra* note 70, at 244–72; MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 6–32 (1999). As a matter of history, popular understandings of basic constitutional provisions enforced through ordinary politics may have predated, and provided at least an initial model for, judicial resort to the Constitution as ordinary, albeit preemptive law. *See, e.g.*, SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 1–12 (1990); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 16–74 (2001). The question of the current pertinence of the idea of the popular Constitution is controversial. Cases like *Endo* — indeed, the full range of the Supreme Court's experiments in the 1940s — may be especially interesting from the perspective of constitutional theory today insofar as they illustrate and test ways of acknowledging and framing the popular Constitution within the texts of judicially written constitutional law.

146 WU HUNG, MONUMENTALITY IN EARLY CHINESE ART AND ARCHITECTURE 252–61 (1995).

147 *Id.* at 252–53.

148 *Id.*

149 *Id.* at 254.

normal inscription on the left, but to understand the inscription on the right he would first need to find clues."[150] On one level, the puzzle was not difficult:

> Such clues are found visually in the physical relationship between the two inscriptions: both their symmetrical placement and echoing patterns suggest that the illegible text "mirrors" the legible one. Unconsciously, the visitor would have taken the normal text as his point of reference for the other's meaning.[151]

A second puzzle remained, however. Its reader would quickly appreciate that the reversed inscription "would become not only legible in content but normal in form if the reader could invert his own vision to read from the 'back' — from the other side of the column."[152] What was the significance of this shift in perspective? Wu explains:

> A gate always separates space into an interior and an exterior; in a cemetery these are commonly identified as the world of the dead and the world of the living. The pair of inscriptions on the twin pillars signifies the junction of these two worlds and the meeting point of two gazes projecting from the opposite sides of the gate . . . : the "natural" gaze of the mourner proceeding from the outside toward the burial ground . . . , and his "inverted" gaze, which is now attributed to the dead at the other end of the spirit road . . . .[153]

"[T]he meeting point of two gazes" in these funeral gates, more particularly the "zhengfanshu (front and reversed writing)" that created the sense of "the meeting point" was — or so Wu argues — one of the first instantiations of pictorial space in Chinese art, "a profound change in visual perception and representation."[154]

Korematsu and *Endo* — like the inscriptions on the pillars, I want to say[155] — are supposed to be read one after the other (Justice Black, we saw, was quite clear about this in *Korematsu*). But the readers turning from one opinion to the other are put in a more difficult setting than their Liang counterparts. It is not so easy to decode the *zhengfanshu*, to determine which opinion is "regular" and which is "reversed."[156] *Korematsu* posits a brief moment in time during which, it

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150 *Id.*

151 *Id.* (emphasis omitted).

152 *Id.* (emphasis omitted).

153 *Id.* at 255.

154 *Id.* at 260–61; *see also id.* at 261–80. This summary, I need to emphasize, edits out almost all of the brilliance and the careful scholarship evident in the original.

155 A perhaps cautionary note: "Readers unfamiliar with Chinese writing may gain some sense of the irony created by this juxtaposition from an English 'translation' of the Chinese passages: although the content of the two inscriptions is identical, their effect is entirely different." *Id.* at 254.

156 References to "mirror images" are not uncommon in American legal writing, but the usage ordinarily assigns a positive value to the original and treats the reflection as derivative, or — in cases in which the transposition figured by a mirror image is noted — the reflection is judged

appears, constitutional law cannot bring to bear its usual tests — after recognizing the moment, stands aside. (Justice Black and his critics do not disagree very much about this. Black simply emphasizes the briefness of the moment, and thus what he insists is its limited significance.) *Endo* depicts a legal space within which the unconstitutional and the extraconstitutional are inexpressible. It is not easy, therefore, for readers of *Korematsu* and *Endo* to appreciate "the meeting point." Is it possible for constitutional law to be *both* intermittent and organizational?

Alexander Bickel famously argued in *The Least Dangerous Branch* that constitutional law could not be organizational *unless* it was intermittent — *Brown v. Board of Education*[157] was not conceivable in defensible terms otherwise.[158] But because Bickel wrote, at least ultimately, in praise and defense of *Brown*, his was and is a distinctively optimistic masterpiece. Momentary gaps in the domain of constitutional law, within Bickel's account, were chiefly the work of the judiciary, and thus seemingly always available for closure in some subsequent, apt case. Bickel's readers are well prepared to appreciate the virtue of patience. *Korematsu* posited a gap open to military improvisers — plainly not Bickel's "least dangerous branch." *Endo* did not close the gap, but rather ignored it, proceeded as though there was no possibility that constitutional law was a less than universal language. *Endo* shows *Korematsu* to be marginal — even as, of course, *Korematsu* also shows *Endo* to be marginal.

There is no "meeting point," no appreciation of doubled perspectives akin to life and death — instead, mutually repelling perspectives. But if *Korematsu* and *Endo* together do not set up a Liang gate as such, they do together induce a similarly doubled legal consciousness. Felt necessity and originating commitment press in the alternative. If both are to be acknowledged, acknowledgement may be only dissonant or staccato, neither harmonious nor reciprocal, rather oscillatory: back and forth. Especially in circumstances in which judicial review is unavailable, reluctant, or likely to be too late to be relevant, executive or legislative appreciation and expression of this alternation may be the only telling manifestation of constitutional law. Thus, in a Justice Department or Defense Department under stress, challenged, doubled perspectives evident in instruments or acts, signs that *both* emergency

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negatively. The best known recent example is the title of Professor Tribe's discussion of *Bush v. Gore*: Laurence H. Tribe, eroG v. hsuB *and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001). Within Tribe's comment, mirror-image transposition figures most tellingly in its repeatedly perspective-reversing characterization, tantamount to orbital chiropractics, of the argument of lawyers for soon-to-be President Bush. *See id.* at 184.

[157] 347 U.S. 483 (1954).

[158] *See* BICKEL, *supra* note 70, at 56–65, 244–72.

responses and ordinary senses of limitation are or were subject to question, may be the only readable signs of the continuing impact of constitutional sensibility, of at least the elementary patterns of constitutional law.[159]

It is the experience and the possibility of this conjunction that we forego if we read only *Korematsu* and forget to read *Endo*. *Caveat lector*.[160]

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[159] This conclusion perhaps calls attention to the importance of regular use of constitutional analytics, as a kind of fire drill, in even routine administrative decisionmaking. Vincent Blasi, in an especially thoughtful discussion of free speech protections in times of crisis, argued that marking off free speech as important in ordinary times was a form of practice, repetition increasing the chance that free speech would also be taken seriously in crises. *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 277 (1st ed. 1978) (arguing that judicial enforcement of individual rights in peacetime is disciplinary preparation for Congress in wartime).

[160] Owen Gross argues that emergencies — quintessentially wartime (or terrorist) crises — invite responses by government that cannot be made to fit within ordinary constitutional law except at great cost. *See* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003). Assertions of "business as usual" tend to construct an obviously "illusory façade of normalcy." *Id.* at 1045. Efforts at "accommodation," acknowledging the relevance of states of emergency within constitutional law, can "be charged with being unprincipled and apologetic." *Id.* at 1068. Professor Gross proposes an "extralegal measures" model. This approach "calls upon public officials to act outside the legal order while openly acknowledging their actions. They must assume the risks involved in acting extralegally. It is then up to the people to decide . . . how to respond ex post to such extralegal actions." *Id.* at 1099. Gross elaborates the extralegal measures idea at length, and draws upon a wide range of sources — inter alia, Justice Jackson's *Korematsu* dissent, *see id.* at 1125, 1131–32, and also formulations of John Locke, *see id.* at 1102–04, Thomas Jefferson, *see id.* at 1106–09, and Carl Schmitt, *see id.* at 1120–21.

This proposal invites extended discussion. I offer one observation here. Professor Gross, we can see, trades heavily on the assumption that constitutional law is normally (is supposed to be) very well-ordered — "rules," not "chaos." This is why emergencies must be either suppressed from view or acknowledged at cost of credibility. But if it is the case, as I have argued, that constitutional law is ordinarily complex, a collection of emphases and therefore a range of variations, it becomes possible to recognize such complexity, and the attendant differences in focus and result, without proclaiming crisis. "[T]he integrity of the ordinary legal system" does not require, therefore, recognition of "extralegal measures," *pace* Professor Gross, *id.* at 1132, with all the obvious risks (risks, it should be emphasized, that Oren Gross carefully maps and thoughtfully explores).

APPENDIX:
JUSTICE JACKSON'S DRAFT CONCURRENCE[161]

In this case we have a demand that the Court reach out a protecting arm to a citizen in unlawful restraint. If she were in military custody for security reasons, even if I thought them weak ones, I should doubt our right to interfere for reasons I have stated in Korematsu's case. No such question need trouble us. Miss Endo is now in civilian custody.

This decision and that in Korematsu's case are separated by a wide chasm, and the real question in this case seems to have fallen therein. In Korematsu's case the Court carefully stops short of the question whether an American citizen may be detained in camps without conviction of crime. In Endo's case the Court is careful to start beyond it and to hold no more than that such a citizen may not be held after the government confesses it has no security reason for holding her. I should release her whether it had made that confession or no. She is an American citizen, virtually imprisoned, without charge or conviction of crime, and there has been ample time to place and try such a charge.

The difference in grounds is substantial. No one may as matter of right obtain a certification of loyalty. There is no way by which trial techniques can establish what is in a man's heart if the time to act has not yet come and he has kept his mouth shut. Anyone bent on keeping another in custody may say, and quite rightly, that it cannot be known that his prisoner would not commit crime if he were at large. So the grounds taken by the Court is one available to but few and favored ones.

But under our form of government it has never been thought that a citizen must prove or be admitted to be harmless in order to be free. On the contrary, it has been supposed that it must be charged that he has committed or conspired or attempted or threatened to commit some crime before he could be temporarily detained, and the charge must be speedily proved if he is to be held. The absence of such accusation or conviction, I should think, is sufficient to require the release. She is held only on the basis of "protective custody" — a custody that I gather is almost as uncomfortable for the custodians as for their involuntary guests.

It is said, and may well be true, that if the citizen of Japanese ancestry goes out among our people he or she may be the victim of

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[161] Robert H. Jackson, Undated Typescript entitled "Endo" (n.d.) (on file with the Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Container No. 133).

discrimination or even violence. So it is sought to release them only when they have assured employment and can prove some "community acceptance" in a place from which they are not excluded by the military. On a voluntary basis this protection would be wholly commendable and as much is due them. Of course, when a people is exiled from home on the military judgment that they are potential saboteurs, that they are objects of fear and hatred to the inhabitants of regions to which they are strangers [unreadable cross-out] it does not help them any that this Court adds that the undiscriminating holding is found reasonable. Any humane government would offer them shelter from the storm of prejudice so whipped up against them.

But "protective custody" on an involuntary basis has no place in American law. The whole idea that our American citizens' right to be at large may be conditioned or denied by community prejudice or disapproval should be rejected by this Court the first time it is heard within these walls. To fail is to betray

"Ancient rights, unnoticed as the breath we draw,
Leave to live by no man's leave, underneath the law."[162]

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[162] Justice Jackson quoted part of this couplet, again without attribution, in his well-known concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952).