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# Explaining *Korematsu*: A Response to Dean Chemerinsky

Robert J. Pushaw, Jr.\*

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In *Korematsu v. United States*,<sup>1</sup> the Supreme Court upheld Franklin D. Roosevelt's 1942 order, approved by Congress, removing Japanese Americans from the West Coast to prison camps to prevent possible sabotage and espionage.<sup>2</sup> Even though it had become apparent by the time the case reached the Court that there was no credible evidence of such treachery, a majority of Justices refused to second-guess the political branches' prudential judgment that this evacuation was necessary during the emergency that followed Pearl Harbor.<sup>3</sup> Accordingly, the Court ruled that

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

2. *Id.* at 215–24. The President authorized the Secretary of War to exclude “any persons” from designated Pacific Coast “military areas” (i.e., those deemed especially susceptible to attack, such as defense installations and port cities) and to provide for their transportation, food, and shelter. *See* PETER IRONS, *JUSTICE AT WAR* 63 (1983) (citing Executive Order No. 9066). Although the order did not explicitly say so, it was well understood that the targeted “persons” were Americans of Japanese descent and that they would be interned. *See id.* at 38–103.

3. *Korematsu*, 323 U.S. at 218–19, 223–24.

the government's paramount interest in national security justified the serious infringement of the detainees' constitutional rights to liberty and equality.<sup>4</sup>

Erwin Chemerinsky argues that *Korematsu* was a "terrible" decision, based on three criteria.<sup>5</sup> First, it had a devastating human and social impact on Japanese Americans.<sup>6</sup> Second, the majority opinion exhibited shoddy judicial craftsmanship by failing to recognize that the relocation and internment program did not meet the demanding legal test of strict scrutiny that applies to racial discrimination.<sup>7</sup> Third, *Korematsu* had a negative doctrinal effect, especially by reinforcing the idea that constitutional rights can be disregarded in times of crisis.<sup>8</sup>

Dean Chemerinsky's selection of *Korematsu* as one of the worst decisions ever reflects the consensus of constitutional law scholars.<sup>9</sup> Indeed, I have previously commented that the Court sustained "seemingly blatant constitutional violations" that appeared to be "monstrously unlawful"<sup>10</sup> and that "FDR's internment of Japanese Americans is a stain on his legacy, an overreaction to Pearl Harbor that reflected racism more than military exigencies."<sup>11</sup> Alas, I have now been asked to play devil's advocate by defending *Korematsu*.<sup>12</sup> I can hardly do so by praising the Court's abstract legal analysis or moral wisdom. Instead, I will try to explain why *Korematsu* and similar decisions have been rendered throughout American history.

My account grapples with a critical question that Dean Chemerinsky largely avoids: If *Korematsu* strikes us as clearly wrong, why did the Court fail to grasp this obvious point? The answer cannot be that Hugo Black and the five Justices who joined his opinion (including William Douglas) did not care about individual rights and liberties, for these liberal Democrats almost

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4. *Id.* at 223–24.

5. Erwin Chemerinsky, *Korematsu v. United States: A Tragedy Hopefully Never to Be Repeated*, 39 PEPP. L. REV. 163, 164 (2011).

6. *Id.* at 166–67.

7. *Id.* at 168–69.

8. *Id.* at 169–70.

9. See Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 273, 296 (noting this widespread agreement).

10. Robert J. Pushaw, Jr., *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1009, 1014 (2007) [hereinafter Pushaw, *Enemy Combatant*].

11. Robert J. Pushaw, Jr., *Justifying Wartime Limits on Civil Rights and Liberties*, 12 CHAP. L. REV. 675, 686 (2009) [hereinafter Pushaw, *Justifying*].

12. A few other scholars have tackled this difficult task. See, e.g., RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 294, 299 (2003) (approving *Korematsu* on the pragmatic ground that the Court properly declined to use hindsight in evaluating the government's action, but rather recognized that federal officials had erred on the side of caution in uncertain circumstances); see also Tushnet, *supra* note 9, at 289–307 (contending that the Court, in cases like *Korematsu*, should candidly acknowledge that executive officials will exercise extra-constitutional powers during emergencies and therefore should leave such judgments to the political process, instead of rationalizing such measures as constitutionally valid).

always sought to expand constitutional rights and vigorously protect them. Rather, the Court reacted the way it always has in a major war: by deferring to a strong and popular President who, with Congress's support, had taken an action that he deemed militarily necessary, despite infringements of constitutional rights.<sup>13</sup> Such results are commonplace because the Constitution assigns war powers exclusively to the elected branches and creates a Judiciary with limited competence to review their military decisions.<sup>14</sup> Only by ignoring the Constitution's institutional framework and its historical implementation can Dean Chemerinsky assert that the Court must uphold individual rights equally in times of war and peace.

The foregoing themes will be developed in two parts. Part I will critically examine Chemerinsky's proposed factors for assessing Supreme Court decisions, which improperly suggest that the Justices should creatively construe the Constitution on a case-by-case basis to achieve liberal social results. Part II will explain *Korematsu* in light of the Constitution's political and institutional arrangements, which throughout history have typically led the Court to yield to the President and Congress during wartime.

#### I. WHAT MAKES A SUPREME COURT DECISION BAD OR GOOD?

Dean Chemerinsky sets forth three assessment criteria. First, the Justices should have the empathy to understand the human and social impact of their decisions.<sup>15</sup> These effects can be horrible, as cases like *Dred Scott v. Sandford*<sup>16</sup> and *Plessy v. Ferguson*<sup>17</sup> illustrate.<sup>18</sup> Second, Chemerinsky considers the quality of judicial craftsmanship: "Is the opinion well-reasoned? Is precedent accurately cited? Does the opinion adequately address opposing views?"<sup>19</sup> He offers as examples of poor craftsmanship *Bush v. Gore*<sup>20</sup> and *Griswold v. Connecticut*<sup>21</sup>—although he clarifies that the problem with *Griswold* was finding a right to privacy in the "penumbras" of the Bill of Rights, instead of holding that "liberty" in the Fourteenth Amendment Due Process Clause includes "a fundamental right of

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13. I have elaborated this thesis in Pushaw, *Enemy Combatant*, *supra* note 10, at 1009–47.

14. *See id.* at 1005–23.

15. Chemerinsky, *supra* note 5, at 168–69.

16. 60 U.S. (19 How.) 393 (1857).

17. 163 U.S. 537 (1896).

18. Chemerinsky, *supra* note 5, at 165–66.

19. *Id.* at 165.

20. 531 U.S. 98 (2000) (per curiam).

21. 381 U.S. 479 (1965).

individuals to choose whether to procreate or not.”<sup>22</sup> Third, Chemerinsky analyzes the impact of a case on the later development of legal doctrine.<sup>23</sup> For instance, *Lochner v. New York*<sup>24</sup> had a pernicious influence because it led federal courts for three decades to strike down state laws protecting employees and consumers.<sup>25</sup>

Dean Chemerinsky asserts that “there could be widespread agreement that these are appropriate criteria to use in evaluating Supreme Court decisions.”<sup>26</sup> Perhaps, but I think his proffered factors give short shrift to the Constitution as law and instead focus on the Court developing doctrines that implement liberal social ideas. Because the Justices swear to uphold the Constitution, our supreme and fundamental law, the key question should be whether they have done so.

Therefore, I would judge the Court’s opinions based on a two-step “Neo-Federalist” analysis.<sup>27</sup> First, the Justices should try to determine, in light of the Constitution’s structure and underlying political theory, a disputed clause’s original “meaning” (its ordinary definition in 1787), “intent” (its drafters’ purposes), and “understanding” (the sense of its ratifiers and earlier implementers).<sup>28</sup> Second, the Court should then preserve those originalist principles that remain relevant, albeit filtered through two centuries of practice and precedent, by developing workable legal rules that can be applied as impartially and consistently as possible.<sup>29</sup>

I recognize, of course, that each of these steps requires the exercise of judicial discretion. First, the historical materials do not always disclose clear answers.<sup>30</sup> However, sometimes they do, and more often they at least

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22. Chemerinsky, *supra* note 5, at 165.

23. *Id.* at 166.

24. 198 U.S. 45 (1905).

25. Chemerinsky, *supra* note 5, at 166.

26. *Id.* at 164.

27. For a detailed description and defense of this methodology, see Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 397–99, 454, 470–72 (1996) [hereinafter Pushaw, *Justiciability*].

28. I have long drawn subtle distinctions among original “meaning,” “intent,” and “understanding.” See, e.g., Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any “Dear John” Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473, 478 n.35 (1998) (citing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 7–11 (1996)).

29. See, e.g., Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 4 (1999) (employing this methodology to devise and apply rules to determine whether or not Congress has exceeded its power “to regulate Commerce . . . among the several States”).

30. See, e.g., Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 740–54, 782–85, 799–867 (2001) (acknowledging that neither Article III nor the records of the Convention and Ratification debates directly mention inherent judicial authority, but identifying legal principles to govern such powers based upon constitutional

narrow the range of plausible interpretations. Second, the Court would have to make delicate judgments as to which elements of the original meaning, intent, and understanding are worth maintaining and how they can best be promoted. Despite these difficulties, Justices should strive to articulate and apply rules that are rooted in the Constitution's text and history, not simply rely on their prudential wisdom to reach results that strike them as politically or socially correct.<sup>31</sup>

Dean Chemerinsky would reject my rules-based approach as misguided. Indeed, he has long maintained that the Court should construe the Constitution by exercising discretion, informed by the Justices' sense of morality, to give specific meaning to the Constitution's abstract language—an indeterminate and evolutionary process that strives to identify and preserve society's fundamental values.<sup>32</sup> But why should five Justices' personal opinions about morality and basic social values trump the People's collective wisdom about such matters embodied in the Constitution—or the policy preferences of elected representatives that do not run afoul of any constitutional provision as “the People” understood it?<sup>33</sup>

The acid test to determine if a judge or scholar has a legally principled constitutional approach is whether its application sometimes leads to results that conflict with that individual's politics or ideology. For instance, Akhil Amar, a liberal Democrat, has employed a Neo-Federalist methodology<sup>34</sup> to arrive at conclusions that appeal to conservative Republicans like me in areas such as abortion and constitutional criminal procedure.<sup>35</sup> Conversely, I have often interpreted the Constitution's text, structure, history, and precedent to reach results that I find politically distasteful.<sup>36</sup>

structure and theory, early congressional practice, and precedent from the late eighteenth and early nineteenth centuries).

31. I have developed this idea in a symposium essay. See Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1185–87, 1206–11 (2003).

32. See ERWIN CHERMERINSKY, *INTERPRETING THE CONSTITUTION* 45–141 (1987).

33. To be clear, I agree with Dean Chemerinsky that “the Supreme Court has tremendous discretion” and that it is embarrassing when nominees like John Roberts and Sonia Sotomayor deny this fact. Chemerinsky, *supra* note 5, at 163. Unlike Chemerinsky, however, I do not think that such vast prudential power is good, and hence I would try to cabin it by insisting that the Court make a good faith effort to determine the actual law of the Constitution, grounded in its text and history.

34. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985).

35. See, e.g., Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 68, 75–79, 81–82, 109–14 (2000).

36. For instance, I have criticized the restrictive interpretation of Article III, championed by self-professed judicial conservatives like Justices Frankfurter and Scalia, as inconsistent with Article III's language, its history, the structural principle of separation of powers, and pre-New Deal precedent. See, e.g., Pushaw, *Justiciability*, *supra* note 27, at 395–99, 454–512; Robert J. Pushaw, Jr., *Article*

To take one example, I attacked *Bush v. Gore*<sup>37</sup> on two grounds. First, the case should have been dismissed as nonjusticiable because the Constitution commits resolution of presidential election disputes to the political process (initially to state officials, then to Congress to ascertain the validity of the electoral votes).<sup>38</sup> Second, contrary to the majority's holding, nothing in the Equal Protection Clause's language, history, or precedent prohibits inconsistencies within states in counting votes.<sup>39</sup> Consequently, I agree with Dean Chemerinsky that "*Bush v. Gore* is . . . a poorly reasoned judicial opinion."<sup>40</sup> But so is *Baker v. Carr*,<sup>41</sup> in which the Court incorrectly reached the political questions presented and invented a new Equal Protection requirement: that state legislative apportionments must be based solely on population.<sup>42</sup> Legal consistency would dictate that Chemerinsky condemn both *Bush* and *Baker*, but he has applauded the latter decision.<sup>43</sup> The most logical explanation is that *Bush* produced a conservative result, whereas *Baker* reached a liberal one.

Interpretation of the Due Process Clause provides another illustration of the advantages of apolitical Neo-Federalism over Dean Chemerinsky's approach. The Constitution's text, political theory, and history all indicate that the government cannot deprive a person of "liberty" (i.e., physical freedom) without "due process of law"—a fair hearing before an impartial decisionmaker.<sup>44</sup> Accordingly, I have criticized the Court's manipulation of the concept of "liberty" to achieve political and ideological goals, regardless of whether they are conservative (such as the "freedom of contract" rationale of cases like *Lochner*) or liberal (such as the right to abortion fabricated in *Roe v. Wade*).<sup>45</sup>

By contrast, Dean Chemerinsky condemns *Lochner* yet praises the Court for creating a "fundamental right" to make choices about

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*III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 465–532 (1994); Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847.

37. 531 U.S. 98 (2000) (per curiam).

38. See Robert J. Pushaw, Jr., *Bush v. Gore: Looking at Baker v. Carr in a Conservative Mirror*, 18 CONST. COMMENT. 359, 359–60, 390–94 (2001) [hereinafter Pushaw, *Conservative Mirror*].

39. See *id.* at 394; see also Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603, 619–23 (2001).

40. Chemerinsky, *supra* note 5, at 165.

41. 369 U.S. 186 (1962).

42. *Id.* at 209–37.

43. See Pushaw, *Conservative Mirror*, *supra* note 38, at 379–81 (describing this politicized approach taken by Chemerinsky and other scholars).

44. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 663–64, 718 (1988) (discussing these traditional procedural mechanisms to safeguard "liberty").

45. See Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J. L. & PUB. POL'Y 519 (2008).

procreation.<sup>46</sup> But if he believes that the Justices can craft constitutional rights to implement their personal notions of morality and their social values, both *Lochner* and *Roe* must be equally valid. Indeed, Chemerinsky would have to accept as legitimate the overruling of *Roe* and *Casey*<sup>47</sup> by a majority of Justices, based on their traditional moral and social convictions. Adopting Chemerinsky's criteria, the Court could conclude that *Roe* was a bad decision because it displayed sloppy judicial craftsmanship, had a devastating human and social impact by allowing over forty million abortions, and had negative doctrinal effects by extending its dubious privacy rationale to areas like sodomy in *Lawrence v. Texas*.<sup>48</sup> Indeed, Justice Scalia has made such arguments.<sup>49</sup>

Chemerinsky would likely respond that *Roe* correctly recognized a fundamental right to make reproductive choices, that its doctrinal impact in cases like *Lawrence* has been positive, and that its social effect has been beneficial by enhancing women's personal autonomy and economic opportunities. But there is no objective way to determine whether this moral and social vision, or Justice Scalia's, is correct. That is why Scalia would leave abortion to the political process, despite his deeply held pro-life views.<sup>50</sup>

Put simply, conceptions of morality and the social good are subjective and contested, which makes it troubling when the Court adopts one set of beliefs and imposes it on the nation under the guise of constitutional interpretation. That is exactly what the Court did in cases like *Roe*, *Dred Scott v. Sandford*,<sup>51</sup> and *Plessy v. Ferguson*.<sup>52</sup>

46. Chemerinsky, *supra* note 5, at 166.

47. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), two Justices voted to reaffirm *Roe* in its entirety. See *id.* at 911–22 (Stevens, J., concurring in part and dissenting in part); *id.* at 922–43 (Blackmun, J., concurring in part and dissenting in part). Justices O'Connor, Kennedy, and Souter issued a "joint opinion" preserving *Roe*'s central holding that women had a right to abortion before fetal viability, but giving states more latitude to regulate abortion. See *id.* at 834–901.

48. 539 U.S. 558 (2003) (overruling recent precedent and holding that the right to privacy includes the freedom of consenting adults to engage in sodomy).

49. See *Casey*, 505 U.S. at 979–1002 (Scalia, J., concurring in part and dissenting in part); *Lawrence*, 539 U.S. at 586–605 (Scalia, J., dissenting); see also Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003) (condemning *Casey*).

50. See *Casey*, 505 U.S. at 979–81, 994–96 (Scalia, J., concurring in part and dissenting in part).

51. 60 U.S. (19 How.) 393 (1857). Writing for the Court, Chief Justice Taney rejected the dissenters' moderate and humane constitutional approach, and instead adopted the most extreme proslavery position: that the Constitution did not include blacks (even free ones) as "persons" or "citizens," that Congress could not prohibit slavery in the territories, and that any attempt to do so would deprive emigrating slave owners of their property without due process. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 98, 253–54, 264–65, 380–82, 405 (2005) (summarizing and criticizing *Dred Scott* on these grounds).



In short, I reject the notion that the Justices should interpret the Constitution by exercising virtually unrestrained discretion to identify and protect what they feel are fundamental social values, based on their moral sensibilities. Rather, the Court should apply a Neo-Federalist methodology to constitutional provisions, which would in most instances yield rules of law that can be applied fairly and consistently.<sup>53</sup>

In rare situations, however, a careful study of the Constitution's language, structure, history, and precedent leads to the conclusion that a particular issue cannot readily be resolved through principled legal decisionmaking. The best example is the federal government's exercise of its constitutional war powers in a manner that allegedly violates individual rights. The Court has always struggled in such cases because (1) it is not well-equipped institutionally to review the political branches' determination that a specific act was necessary to ensure military success; and (2) invalidating such an action could lead to a loss of American lives and limbs (or even the war itself).<sup>54</sup> Therefore, I disagree with Dean Chemerinsky that we can readily compare wartime decisions like *Korematsu* with those that exclusively involved domestic affairs such as *Dred Scott*, *Plessy*, *Lochner*, *Griswold*, *Roe*, and *Bush*. I aim to show that his suggested criteria, which are of limited utility even in the latter cases, provide almost no help in evaluating the Court's opinions concerning military actions.

## II. UNDERSTANDING *KOREMATSU*: POLITICAL AND PRACTICAL LIMITS ON JUDICIAL REVIEW OF MILITARY DECISIONS

Dean Chemerinsky applies his three criteria to *Korematsu* and gleans several lessons. I will begin by summarizing the inadequacies of his approach to *Korematsu*. I will then provide a more complex account of constitutional adjudication during wartime, which will help us comprehend why the Court decided *Korematsu* the way it did.

### A. A Critical Analysis of Chemerinsky's Three Factors

First, Dean Chemerinsky details the negative human and social impact of the majority's holding on the lives of 110,000 Japanese Americans, who were deprived of their liberty and property because of their race.<sup>55</sup> I do not wish to minimize their hardship by observing that World War II claimed

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52. 163 U.S. 537 (1896). Contrary to the majority's vision of segregation as the appropriate social and moral order, the Thirteenth and Fourteenth Amendments prohibited states from precisely the sort of racial discrimination that Louisiana had practiced by separating black and white passengers on trains. *Id.* at 552–64 (Harlan, J., dissenting).

53. See *supra* notes 27–29 and accompanying text.

54. See Pushaw, *Enemy Combatant*, *supra* note 10, at 1017–47.

55. Chemerinsky, *supra* note 5, at 166–67.

over sixty million lives<sup>56</sup> and that hundreds of millions of people experienced injury, starvation, and massive property destruction.<sup>57</sup> Most importantly to the United States, our armed forces incurred over 400,000 deaths and many more wounded.<sup>58</sup> As these statistics remind us, the Justices living through the war had a very different perspective on the human and social impact of their decisions than we do today. That is why this proposed criterion is not very illuminating in assessing *Korematsu* or any other wartime case.

Second, Dean Chemerinsky stresses the poor judicial craftsmanship of Justice Black's opinion: The Court properly created the strict scrutiny test and found national security to be a compelling government interest, but incorrectly held that the summary imprisonment of Japanese Americans was a necessary (or even reasonable) means to achieve that interest.<sup>59</sup> Rather, the Court should have required the federal government to perform "individual screening" to determine whether any people of Japanese descent posed an actual threat.<sup>60</sup> From this failure to do so, Chemerinsky draws the lessons that detention should only be based on individualized suspicion of a crime and that Americans should always keep in mind that their governments have engaged in race discrimination.<sup>61</sup>

These conclusions are generally sound as to garden-variety Due Process and Equal Protection cases, but they may not hold true in the extraordinary conditions of wartime. Most pertinently, in *Korematsu* the Court ruled that, on the record presented, it lacked a factual basis to dispute the federal government's judgment that the post-Pearl Harbor emergency did not allow time for investigation of each Japanese American and that mass evacuation was necessary to prevent any acts of espionage or sabotage (as even one might have crippled the war effort).<sup>62</sup> As we shall see, these same problems—the Judiciary's relative lack of competence and information vis-

56. See GERHARD L. WEINBERG, *A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II* 894 (1994). This total includes Nazi Germany's systematic murder of six million Jews. Dean Chemerinsky compares this Holocaust to the internment of Japanese Americans. Chemerinsky, *supra* note 5, at 166–67. I do not think that imprisoning 110,000 people can meaningfully be equated with killing six million. But perhaps this difference simply illustrates my point that judgments about human and social impact are inherently subjective.

57. See GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* 5 (2001) (deploring the mistreatment of Americans of Japanese descent, but acknowledging that these "human costs . . . were insignificant compared with the military casualties of World War II").

58. See *THE WORLD ALMANAC AND BOOK OF FACTS* 141 (2010).

59. See Chemerinsky, *supra* note 5, at 166.

60. *Id.* at 168.

61. *Id.* at 169–71.

62. *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944).

à-vis the Executive, and its fear that second-guessing the government might lead to disaster—arise in every case reviewing military actions.<sup>63</sup>

Such institutional dynamics are built into the Constitution. Thus, although the United States has formally apologized for *Korematsu*<sup>64</sup> and both the Bush and Obama Administrations have been careful after September 11 to avoid a repeat (i.e., targeting all persons of Saudi Arabian and Egyptian descent merely because those were the nationalities of the terrorists),<sup>65</sup> such a scenario cannot be dismissed as unthinkable. For example, imagine if al Qaeda had immediately followed its 9/11 attacks by killing half of Chicago's residents with biological weapons, and the government then received reliable intelligence of a forthcoming nuclear assault on a major West Coast city. In that situation, the President would probably take drastic action (which might include discrimination based on ethnicity), and in a legal challenge the Court could hardly be expected to mechanically apply its usual rules of individualized suspicion for common crimes and strict scrutiny of racial classifications.

Third, Dean Chemerinsky argues that *Korematsu* and other war powers cases have had a destructive doctrinal effect: "In times of crisis, especially foreign-based crisis, we compromise our most basic constitutional rights only to realize in hindsight that we were not made any safer."<sup>66</sup> The lesson he derives from this phenomenon is that the Court should not abdicate its responsibility to enforce constitutional rights during military emergencies.<sup>67</sup>

In reality, however, no single war powers decision has much lasting doctrinal influence because each case is *sui generis*, and *Korematsu* is hardly a robust precedent.<sup>68</sup> Furthermore, although Chemerinsky has the luxury of

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63. See *infra* notes 71–83 and accompanying text.

64. See Civil Liberties Act of 1988, 50 U.S.C. app. § 1989 (2006) (apologizing and paying reparations to those who had been imprisoned).

65. See USA PATRIOT Act, Pub. L. 107–56, 115 Stat. 272, Titles I & X (Oct. 26, 2001) (codified in scattered sections of 8, 12, 15, 18, 20, 31, 42, 47, 49, and 50 U.S.C.) (prohibiting discrimination against Arab and Muslim Americans and providing for review of all claims of civil rights abuses).

66. Chemerinsky, *supra* note 5, at 169.

67. See *id.* at 169–70; cf. Robert J. Pushaw, Jr., *Defending Deference: A Response to Professors Epstein and Wells*, 69 MO. L. REV. 959 (2004) (arguing that federal courts usually yield to the President in wartime primarily because of political and institutional factors that are embedded in the Constitution's structure, not because the judges psychologically share the President's "skewed risk assessment" whereby threats to national security are overestimated and liberty interests are undervalued).

68. Chemerinsky concedes that the Court has never relied upon *Korematsu* in its Equal Protection rulings. See Chemerinsky, *supra* note 5, at 171. His suggestion that the case has nonetheless contributed to a culture of needlessly sacrificing constitutional rights during emergencies is debatable. If anything, *Korematsu* has had the opposite effect. For instance, in waging the War on Terrorism, President Bush and Congress took great pains to prevent "another *Korematsu*." See *supra* notes 64–65 and accompanying text. Despite their efforts, the Court has bent over backwards to thwart any perceived curtailments of the federal constitutional and statutory rights of detained enemy combatants. See *infra* note 142 and accompanying text.

hindsight, Presidents in the thick of war do not, and the Court has never judged them on that basis.<sup>69</sup> Moreover, sometimes presidential decisions that curtailed constitutional liberties most likely did make the United States safer—although such conclusions are inevitably speculative:

[I]t is impossible to say with any certainty whether or not Presidents like Abraham Lincoln and Franklin Roosevelt had to infringe constitutional liberties the way they did in order to win their wars. Perhaps they could have achieved the same results with fewer intrusions. But maybe greater solicitude for personal freedoms would have led to defeat, or to a victory that exacted a far greater cost in blood and money. Speculating about such matters is an academic exercise. All we know for sure is that these Presidents took the actions they deemed necessary to prevail, and they did. For better or worse, the Constitution commits to the President almost unbridled discretion to determine what must be done to meet a military emergency. These decisions must be made quickly and with imperfect information, and they are then judged by Congress, voters, and posterity. All of these groups tend to be quite forgiving of the President if he triumphs.<sup>70</sup>

Finally, and most importantly, the Constitution's text, structure, history, and implementing practice and precedent all refute Dean Chemerinsky's argument that the Court should apply the same standard of review in times of war and peace.

#### *B. Judicial Review of Constitutional Claims in War Powers Cases*

The Constitution contemplates that only the political branches have the democratic legitimacy, institutional competence, and political incentives to formulate and implement military and foreign policy.<sup>71</sup> Article I authorizes Congress to provide for the national defense; declare war; and create, fund,

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69. See Pushaw, *Justifying*, *supra* note 11, at 696 (making this point, and acknowledging that "with the benefit of hindsight, we can see that certain Presidential actions went beyond the pale," such as "Roosevelt's mass internment of Japanese Americans").

70. See *id.* at 675–76 (footnotes omitted); see also Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 608–10, 612–22 (2003) (setting forth and criticizing the prevalent libertarian view that presidents routinely curb civil rights and liberties to a far greater extent than is necessary to ensure military victory).

71. See Pushaw, *Enemy Combatant*, *supra* note 10, at 1017–23 (analyzing the pertinent constitutional provisions and historical sources).

and regulate the Army and Navy.<sup>72</sup> Article II confers on the President “[t]he executive Power”<sup>73</sup> (to implement Congress’s military measures) and makes him the “Commander in Chief” of the armed forces.<sup>74</sup> Moreover, Article II presupposes that the President can unilaterally respond to emergencies because he alone possesses all executive power, is always on duty, and can take swift and decisive action based on the expert advice of his subordinates, who filter masses of information (often confidential).<sup>75</sup>

In sum, the Constitution gives the political departments all war powers, as well as the weapons to check each other.<sup>76</sup> By contrast, the Framers excluded the Judiciary from warmaking.<sup>77</sup> Therefore, bare claims that a military act exceeded the powers of Congress under Article I, or the President under Article II, raise political rather than judicial questions.<sup>78</sup>

However, judicial review might be proper when the exercise of war powers allegedly violates a plaintiff’s individual legal rights. Unfortunately, the historical materials do not indicate whether such cases should be (1) dismissed as political questions; (2) treated the same as normal domestic

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72. U.S. CONST. art. I, § 8, cls. 1, 11–16.

73. U.S. CONST. art. II, § 1, cl. 1.

74. U.S. CONST. art. II, § 2, cl. 1.

75. See, e.g., THE FEDERALIST NO. 70, at 471–73, 476 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); AMAR, *supra* note 51, at 132–33. In contrast to the President, Congress and the courts work slowly and deliberatively in fixed sessions with frequent recesses. See AMAR, *supra* note 51, at 131–204, 351–63 (stressing such institutional differences in the Constitution’s scheme of separation of powers).

76. For instance, Congress can investigate the President’s military actions, cut off funding for them, and impeach executive officials for egregious misconduct. Pushaw, *Justifying*, *supra* note 11, at 679–80. Conversely, the President can veto bills that do not promote his military vision, exercise discretion in executing laws pertaining to the armed forces, and use the unique advantages of the unitary Executive to get his way in times of war. See *id.* (describing such checks).

77. See Pushaw, *Justiciability*, *supra* note 27, at 507–08 (demonstrating that the Constitution’s framework of shared Legislative–Executive power over military affairs necessarily excluded the Judiciary); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 176–82, 269–70, 284, 287–90, 295–96, 300 (1996) (showing that the Convention and Ratification debates contain no hint that federal judges could or would review the exercise of war powers by Congress or the President, who were given complete authority in this area and were expected to check each other).

78. See THE FEDERALIST NO. 78, at 524–25 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The Court has consistently reaffirmed this principle of nonjusticiability. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–71 (1803); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 28–33 (1827); *Luther v. Borden*, 48 U.S. (7 How.) 1, 38–45 (1849); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 251–54 (1863); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 71–77 (1867); *Johnson v. Eisentrager*, 339 U.S. 763, 770, 774–87 (1950); *Gilligan v. Morgan*, 413 U.S. 1, 5–12 (1973); see also Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 N.C. L. REV. 1165 (2002) (citing these cases and others in examining problems with the political question doctrine and proposing a solution based on historical understandings).

decisions; or (3) resolved through a compromise approach of exercising jurisdiction but showing great deference to the political branches.<sup>79</sup>

Almost all liberal scholars share Dean Chemerinsky's opinion that the Constitution requires the second approach—asserting judicial review vigorously at all times—and that therefore the Court's contrary decisions like *Korematsu* are lamentable exceptions to this rule.<sup>80</sup> This view, however, does not have a firm foundation in the Constitution, either as written or as applied.

Rather, the Court has generally recognized war as unique and hence chosen the third option, which strikes me as a sensible way of balancing the Constitution's authorization of judicial review to safeguard constitutional rights with its provisions entrusting our national defense to Congress and the President.<sup>81</sup> The degree of deference shown to the elected branches has varied with the facts and circumstances, with three considerations emerging as especially salient.<sup>82</sup> The first is the gravity and urgency of the military crisis, and the perceived necessity for the President's responsive measures. The second is the egregiousness and magnitude of the resulting violation of individual rights. The third is the likelihood that the Court's orders will be obeyed, which depends upon the President's political strength and popularity and also on whether the emergency is ongoing or has passed. Of course, such political and pragmatic calculations are made *sub silentio*, but they tend to drive the decisions far more than the formal legal analysis set forth in the Court's opinions.<sup>83</sup>

Once one recognizes the inevitably political dimension of judicial review during wartime, a historical pattern emerges. On the one hand, the Court always defers to strong Presidents in the midst of serious military conflicts when they take what they deem to be necessary steps, despite invasions of constitutional rights. On the other hand, when a crisis has passed, if a President is politically weak yet continues to act aggressively, the Court reasserts itself by questioning the need for the President's action

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79. See Pushaw, *Enemy Combatant*, *supra* note 10, at 1023.

80. See Chemerinsky, *supra* note 5, at 171–72; see also Pushaw, *Enemy Combatant*, *supra* note 10, at 1006–08 (citing like-minded academics). Some liberals have challenged this orthodoxy. See, e.g., Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 66 (approving the Court's approach of taking jurisdiction to protect individual rights yet exhibiting great respect for the military judgments of Congress and the President).

81. See Pushaw, *Enemy Combatant*, *supra* note 10, at 1013–17, 1023.

82. For detailed support for the analysis in this paragraph, see *id.* at 1013–16, 1046–47.

83. Typically, these opinions discuss three questions. First, did Article II or a federal statute authorize the President to take the challenged action? Second, if so, did he nonetheless violate individual constitutional rights? Third, if there was such an infringement, was it necessary to protect national security?

and upholding individual rights. This cycle can best be illustrated by examining the Civil War and World War II.

### 1. Lincoln and the Civil War Cases

Lincoln argued that the President's duty to preserve, protect, and defend the Constitution (and the Union it created) warranted the temporary sacrifice of individual constitutional provisions.<sup>84</sup> Accordingly, he made many unilateral decisions that Dean Chemerinsky and others would decry as unconstitutional.<sup>85</sup>

The three most famous actions implicated the Due Process Clause. First, even though that provision prohibits the government from summarily taking property, Lincoln responded to the attacks on Fort Sumter by blockading Confederate ports and seizing all offending ships (and their cargo).<sup>86</sup> Second, he established and staffed military commissions instead of providing court access.<sup>87</sup> Third, Lincoln suspended the writ of habeas corpus.<sup>88</sup> His initial goal was to jail Confederate sympathizers in Maryland who were urging that slave state to secede, a move which would have crippled the war effort by cutting off Washington from the rest of the Union.<sup>89</sup> Chief Justice Taney ordered the President to cease such detentions.<sup>90</sup> Lincoln ignored Taney and justified his conduct in an address to Congress that stressed the President's paramount duty to defend the Constitution by preserving the United States Government.<sup>91</sup>

Congress backed the President and retroactively approved his actions.<sup>92</sup> The Court rolled over and upheld Lincoln's seizure of ships in *The Prize*

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84. See Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 722 (2004) (book review).

85. See Chemerinsky, *supra* note 5, at 169–70. But see DANIEL FARBER, LINCOLN'S CONSTITUTION 7–8, 15–25, 115–95 (2003) (cataloguing the measures Lincoln imposed that seemed inconsistent with many constitutional provisions, but generally defending their validity).

86. See *The Prize Cases*, 67 U.S. (2 Black) 635, 665–71 (1863) (sustaining the blockade and seizures as part of the President's powers as Commander in Chief).

87. See FARBER, *supra* note 85, at 8, 17, 19–20, 118, 144–45, 163–75.

88. *Id.* at 16–17, 19, 117, 144, 157–63, 192–95.

89. *Id.* at 16–19, 117, 144, 157–63; AMAR, *supra* note 51, at 122, 355.

90. See *Ex parte Merryman*, 17 F. Cas. 144, 147–53 (C.C.D. Md. 1861) (No. 9,487) (holding that Lincoln had usurped Congress's exclusive Article I power to suspend habeas and the Judiciary's Article III power to determine whether citizens had been detained in violation of their due process rights).

91. He said: “[M]easures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the . . . nation.’ . . . ‘[A]re all the laws, but one [i.e., the Habeas Corpus Clause], to go unexecuted, and the government itself go to pieces, lest that one be violated?’” See Paulsen, *supra* note 84, at 721, 723 (quoting Lincoln).

92. See Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326; see also Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 (specifically authorizing Lincoln's suspension of the writ of habeas corpus). Although civil libertarians continue to portray Lincoln as a tyrant, many scholars have correctly emphasized that he respected our constitutional democracy and consistently sought Congress's approval for his

*Cases*<sup>93</sup> and his use of military commissions in *Vallandigham*<sup>94</sup> on the ground that it could not review the President's exercise of his discretion as Commander in Chief to make such decisions.<sup>95</sup>

After the war had ended, Lincoln had been assassinated, and the politically weak Andrew Johnson had become President, both Congress<sup>96</sup> and the Court reasserted themselves. In *Ex parte Milligan*,<sup>97</sup> a majority of Justices invalidated a military commission on the ground that the habeas petitioner had a right to an ordinary jury trial.<sup>98</sup> The Court declared: "The Constitution . . . is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."<sup>99</sup> This grand statement conflicted with the Court's candid confession that it had failed to live up to this ideal during the Civil War<sup>100</sup> and with its later capitulation to Presidents during military crises, such as its approval of Woodrow Wilson's effective suspension of freedom of expression during and after World War I.<sup>101</sup>

Dean Chemerinsky does not mention this historical context. Rather, he echoes *Milligan*'s empty rhetoric by asserting that "[t]he Court should not abdicate its responsibility to enforce the Constitution, even in wartime. . . . The Court has to be there to enforce the Constitution for all Americans at all times."<sup>102</sup> Similarly, he claims that Lincoln restricted constitutional rights and liberties without making the country any safer.<sup>103</sup> But how does Chemerinsky know this? It is impossible to determine what would have happened if Lincoln had not done what he did. Perhaps the Union still would have won the Civil War. But it is at least equally plausible to

actions. See, e.g., AMAR, *supra* note 51, at 21, 38–39, 51–52, 118–19, 132, 146–47, 188, 196, 275, 368–73, 471–72; FARBER, *supra* note 85, at 18, 24, 118, 137–48, 192–97.

93. 67 U.S. (2 Black) 635, 665–82 (1863).

94. *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 243, 252–54 (1864).

95. See *The Prize Cases*, 67 U.S. (2 Black) at 670; *Vallandigham*, 68 U.S. (1 Wall.) at 253–54.

96. Controlled by Republicans (the same party as Lincoln), Congress pushed through legislation over the vetoes of the Democrat Johnson and eventually impeached him. See MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 1–5, 89–95 (1973).

97. 71 U.S. (4 Wall.) 2 (1866).

98. *Id.* at 118–27.

99. *Id.* at 120–21.

100. *Id.* at 109.

101. The Court went along with Wilson after he persuaded Congress to enact sweeping legislation instituting a draft, mobilizing domestic resources for the war effort, and curbing First Amendment rights to criticize the United States. See CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 94–96 (1976) (analyzing the relevant statutes and the Court's decisions upholding them).

102. Chemerinsky, *supra* note 5, at 172.

103. *Id.* at 169–70.



conclude that Lincoln's forceful actions helped save our constitutional government, defeat the Confederacy, and end slavery.<sup>104</sup> Why is Chemerinsky more concerned about the rights of Confederate sympathizers than with their hundreds of thousands of military victims, not to mention the plight of four million slaves?

In short, the Court yielded to Lincoln—a strong and determined President who defied the Judiciary, yet enjoyed congressional support—because it could not realistically overturn his discretionary judgments that his actions (even those that seemed to flagrantly violate the Constitution) were necessary to win a war for the very survival of our nation. Once the emergency had passed, the Court took the offensive against a politically vulnerable President by upholding individual rights in the face of the Executive Branch's invocation of military necessity.<sup>105</sup>

The same pattern recurred in the mid-twentieth century. The Court caved in to the popular Franklin Roosevelt when he infringed constitutional rights during the cataclysmic World War II, then reversed course in 1952 against the politically weak Harry Truman at the tail end of the Korean War.

## 2. World War II and *Korematsu*

*Korematsu* becomes intelligible if viewed through the lens of history. The Justices involved in the case were seasoned politicians. Seven of them had been appointed by the immensely popular FDR, who shattered the tradition of two-term Presidents as he led America through the Depression and World War II.<sup>106</sup> Furthermore, the Court understood the gravity of the emergency: Totalitarian regimes menaced not only the United States but all democracies. Perhaps most significantly, the Justices did not naively believe that they could stop Roosevelt from taking actions he had determined were needed to win the war, even those that seemed to run afoul of the Constitution.<sup>107</sup>

Indeed, as early as the mid-1930s, FDR had made it clear that he was willing to defy the Court, which initially attempted to thwart his New Deal

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104. See Pushaw, *Justifying*, *supra* note 11, at 677.

105. *Id.* at 694.

106. Roosevelt was elected four times with decisive majorities. See *United States Presidential Election Results*, DAVID LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS> (select "General by Year," then follow the links to 1932, 1936, 1940, and 1944) (last visited Oct. 22, 2011). He appointed political professionals who were sympathetic to his policies, not experienced judges who might be more independent-minded. See William P. Marshall, *Constitutional Law as Political Spoils*, 26 *CARDOZO L. REV.* 525, 525 (2005). The only non-FDR appointees left on the Court by 1944 were Chief Justice Stone and Justice Roberts. See IRONS, *supra* note 2, at 228, 310, 313–14, 318–19.

107. For example, the President seized over sixty plants where labor disputes and other difficulties had hindered the war effort. See ROSSITER, *supra* note 101, at 59–63 (describing Roosevelt's action and the Court's wimpy response). The Court delayed until the war's end before entertaining Fifth Amendment challenges to those seizures, then dismissed the cases as moot. *Id.*

programs as unconstitutional.<sup>108</sup> In 1942, he again manifested that disdainful attitude after the Court in *Ex parte Quirin*<sup>109</sup> agreed to hear the appeal of Nazi saboteurs (including an American citizen) who had been captured in New York. They claimed that the imposition of the death penalty by a Roosevelt-appointed military commission had violated their due process right to an ordinary trial.<sup>110</sup> The American public was outraged by the Court's interference, and the President let the Justices know through back channels that he was going to execute the spies no matter what.<sup>111</sup> The Court immediately folded.<sup>112</sup>

In short, by 1944 it had become obvious that the Court was neither willing nor able to incur the wrath of Roosevelt by striking down his major war measures, however egregiously they might have invaded constitutional rights. Hence, it is not surprising that the Court in *Korematsu* held that the government's overriding interest in national security outweighed the infringement of Japanese Americans' rights to liberty and equality:<sup>113</sup>

To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. 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, [and] because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West

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108. Roosevelt reacted to these unfavorable cases by threatening to expand the Court's size to fifteen and to appoint six new Justices who favored his positions. See F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 671–73 (2009) (outlining this Court-packing plan). Similarly, in 1935, if the Court had invalidated FDR's decision to take the United States off the gold standard, he was prepared to defy the Court and precipitate a constitutional crisis. See William E. Leuchtenburg, *Charles Evan Hughes: The Center Holds*, 83 N.C. L. REV. 1187, 1191 (2005). Thus, the Justices realized that Roosevelt was unlikely to alter his war policies because of an adverse Court holding. As his Attorney General remarked, FDR illustrated that "the Constitution has never greatly bothered any wartime President." See FRANCIS BIDDLE, IN BRIEF AUTHORITY 219 (1962); see also Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 278 (2002) (noting the popularity of, and respect commanded by, Roosevelt and Biddle).

109. 317 U.S. 1 (1942).

110. *Id.* at 22–48 (setting forth and rejecting this argument).

111. See, e.g., A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV. 309, 319–32.

112. *Id.*

113. *Korematsu v. United States*, 323 U.S. 214, 215–25 (1944).

Coast temporarily . . . . [T]he need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.<sup>114</sup>

In other words, the Court recognized that Presidents in the heat of war must make swift decisions based on military and foreign policy intelligence that is constantly shifting, and thus judged Roosevelt's conduct based on the facts available to him, not those that later emerged.<sup>115</sup>

The attack on Pearl Harbor floored FDR and panicked the nation.<sup>116</sup> The President immediately investigated this disaster through various military and civilian advisers and committees. Many of these experts (including his Secretary of the Navy and a commission headed by Justice Owen Roberts) concluded that the attack on Hawaii had been facilitated by Japanese spies and saboteurs living on the island, and that similar dangers lurked on the West Coast.<sup>117</sup> Roosevelt understood that even one successful act of sabotage on a key target (such as a dam or bridge) could imperil the entire war effort.<sup>118</sup> Furthermore, Western politicians, citizens, interest groups, and

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114. *Id.* at 223–24.

115. *See id.* at 218–19, 223–24; *see also* Posner & Vermeule, *supra* note 70, at 608–10, 620, 623–26 (arguing that we should evaluate the actions of government officials during crises based not on hindsight, but rather on the facts and circumstances that existed at the time those leaders made their decisions); Tushnet, *supra* note 9, at 287 (to similar effect).

116. Many historians have exhaustively examined Roosevelt's response to this emergency, which culminated in his order excluding Americans of Japanese descent from the Pacific Coast. *See, e.g.*, MORTON GRODZINS, *AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION* 231–302, 362–74 (1949); ROBINSON, *supra* note 57, at 72–124.

117. Secretary of the Navy Frank Knox went to Hawaii to investigate and reached this conclusion. *See* REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* 55–56 (The Civil Liberties Public Education Fund 1997) [hereinafter REPORT OF THE COMMISSION]. Similarly, Justice Roberts's special commission found that Japanese nationals had committed espionage in Hawaii before Pearl Harbor, and Roberts had privately told FDR and Secretary of War Henry Stimson that Japanese Americans were untrustworthy. *See, e.g.*, ROBINSON, *supra* note 57, at 94–95; William H. Rehnquist, *When the Laws Were Silent*, *AM. HERITAGE*, Oct. 1998, at 76. Roosevelt also created his own informal intelligence system through journalist John Franklin Carter and businessman Curtis Munson, and the cover letter summarizing their reports could have given the impression that Japanese Americans posed a great danger (assuming Roosevelt failed to read their full findings, which he often did). *See, e.g.*, ROBINSON, *supra* note 57, at 66–68; *see also* BIDDLE, *supra* note 108, at 187 (describing how Roosevelt would put his papers in a pile if they were too long or boring, to be removed by his secretary).

118. In a letter to FDR, John Carter summarized five key points from a report by Curtis Munson. The fifth point stated:

[D]ams, bridges, harbors, power stations, etc. are wholly unguarded everywhere. The harbor at San Pedro could be razed by fire completely by four men with grenades and a little study in one night. Dams could be blown and half of lower California might actually die of thirst. One railway bridge at the exit from the mountains in some cases could tie up three or four main railroads.

the media were clamoring for the removal of Japanese Americans.<sup>119</sup> Ultimately, Roosevelt chose this fateful course of action based on the recommendation of Secretary of War Henry Stimson, who in turn had relied heavily upon General John DeWitt, the military commander on the West Coast.<sup>120</sup> FDR thought that such military experts were in the best position to evaluate the threat,<sup>121</sup> even though other executive officials disagreed with the evacuation.<sup>122</sup>

Like all Presidents in wartime, Roosevelt had to act quickly by using his best judgment about how to achieve military success in light of the (often conflicting) advice of his subordinates. He signed the exclusion order within hours of it being placed on his desk, and this subject was never discussed at a Cabinet meeting.<sup>123</sup> FDR did not have much time to ponder the constitutional implications of this action because he was preoccupied with making critical strategic decisions in a truly global war (with Nazi Germany an especially formidable foe).<sup>124</sup>

Roosevelt also knew that defeating America's far-flung enemies would require massive manpower. But America's mothers and fathers (particularly

ROBINSON, *supra* note 57, at 68 (quoting Memo, John Franklin Carter to FDR, Nov. 7, 1941, RG 210, Box 573, NA, rpt. in CWRIC Papers, p. 3663 (reel 3, p. 638)). Roosevelt sent the report to the Secretary of War, highlighting only this fifth point about the danger of sabotage. *See id.*

119. *See* GRODZINS, *supra* note 116, at 2–3, 19–179, 204–25, 253–59, 320–48, 361–65, 371–74; IRONS, *supra* note 2, at 38–47, 268–69; ROBINSON, *supra* note 57, at 87–93, 95–98.

120. DeWitt urged the relocation of Japanese Americans as a military imperative. *See, e.g.,* BIDDLE, *supra* note 108, at 217–18; GRODZINS, *supra* note 116, at 40–41, 274–322, 337, 362–63, 365–66, 370; IRONS, *supra* note 2, at 25–64, 364–65; ROBINSON, *supra* note 57, at 84–89, 96–97, 101, 105–07. Roosevelt generally deferred to the military on defense issues. *See* BIDDLE, *supra* note 108, at 219; *see also* ROBINSON, *supra* note 57, at 110.

121. *See* ROBINSON, *supra* note 57, at 110; *see also* IRONS, *supra* note 2, at 58, 363–65.

122. For example, the FBI and the Office of Naval Intelligence believed that they had adequately identified members of the espionage network and that therefore the proposed mass removal was unnecessary. *See* IRONS, *supra* note 2, at 21–23. Similarly, Attorney General Biddle concluded that the military had failed to demonstrate the need for such an evacuation, and he attempted to convey his opinion to Roosevelt. *See, e.g.,* REPORT OF THE COMMISSION, *supra* note 114, at 78; *see also* ROBINSON, *supra* note 57, at 86–88, 92–94, 97–109 (describing Biddle's opposition to internment).

123. *See* GRODZINS, *supra* note 116, at 271–72.

124. *See* ROBINSON, *supra* note 57, at 92. Roosevelt left no record of his thoughts on the removal and detention of Japanese Americans, thereby forcing us to speculate about his state of mind. *See* IRONS, *supra* note 2, at 354, 364–65. We do know that FDR was focused on overall war planning and hence entrusted the internment decision—which he considered to be comparatively unimportant—to his military advisers, without consulting his Cabinet or requiring a thorough independent review. *Id.* at 58, 363–65. Moreover, unlike Lincoln, Roosevelt was neither an attorney nor a constitutional thinker. Consequently, it seems likely that he either did not consider the constitutional ramifications of his order or simply assumed that the President could take any actions he deemed militarily necessary. *Id.* at 364. Overall, FDR appears to have been negligent, in both a human and legal sense, in failing to devote more attention to the plight of Americans of Japanese descent. *Id.* at 57, 364.

in the West) would be reluctant to send their sons to fight overseas if they felt insecure at home.<sup>125</sup> Such fears, whether well-founded or not, became part of FDR's calculus.<sup>126</sup> He apparently made the cold-blooded determination that Japanese Americans would have to endure disproportionate sacrifices to ensure the success of the overall war effort.<sup>127</sup>

Of course, as Dean Chemerinsky stresses, many of Roosevelt's trusted advisers (especially his West Coast military leaders)—not to mention politicians, journalists, and citizens—were motivated by raw racial prejudice.<sup>128</sup> Especially shameful were FDR's executive subordinates who manipulated intelligence data to wildly exaggerate the threat posed by Japanese Americans<sup>129</sup> and Justice Department officials who withheld crucial information from the Judiciary in the *Korematsu* litigation.<sup>130</sup> Here, however, I am focusing on the actions of Roosevelt himself and the Court that sustained his exclusion order, and I do not think that their behavior can be attributed to simple racism.<sup>131</sup> Rather, FDR had to consider multiple factors under extreme time pressure,<sup>132</sup> and the Court felt compelled to reach

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125. I thank Akhil Amar for bringing this point to my attention.

126. Roosevelt's internment decision was influenced in part by the widespread public apprehension, based largely on hysteria and racism, that Japan might invade the West Coast and receive assistance from Japanese-American spies and saboteurs. See GRODZINS, *supra* note 116, at 129–79, 204–25, 231–302, 361–65, 371–74; IRONS, *supra* note 2, at 26–28, 33–64, 362–65; ROBINSON, *supra* note 57, at 74, 81, 87–99, 101–02, 105–24.

127. See ROBINSON, *supra* note 57, at 106–24 (analyzing the political, social, legal, moral, racial, and practical aspects of the evacuation decision and concluding that FDR acted more out of indifference to Japanese Americans than malice towards them).

128. See Chemerinsky, *supra* note 5, at 168–69.

129. See IRONS, *supra* note 2, at 25–64; ROBINSON, *supra* note 57, at 77, 84–87, 92, 94–99, 101, 104–19, 122–24, 184–85, 209–10, 257.

130. The Department of Justice deliberately suppressed evidence showing that the War Department's reports of Japanese-American sabotage and espionage, which were critical to the government's "military necessity" justification, had no factual basis. See IRONS, *supra* note 2, at 278–310; see also *id.* at 186, 202–18 (documenting similar unethical conduct in earlier related cases).

131. See Tushnet, *supra* note 9, at 287–91 (emphasizing that the racial bigotry of certain subordinate executive officials, such as General DeWitt, cannot necessarily be attributed to the "higher ups" who ultimately made wartime decisions, most notably Roosevelt).

132. To be clear, I am attempting to provide a rational explanation for Roosevelt's *initial* decision to evacuate Japanese Americans in the chaotic aftermath of Pearl Harbor. By contrast, I find totally inexcusable the President's failure to free these detainees in early 1944 after his military advisers informed him that there was no longer any military necessity for the internment. See IRONS, *supra* note 2, at 269–77, 365. FDR delayed consideration of their liberation to gain a partisan advantage for Democratic candidates in the November 1944 elections, and only then began the process of closing the prison camps. *Id.*

Moreover, this background helps us understand the relatively limited significance of *Korematsu*'s companion case, *Ex parte Endo*, 323 U.S. 283 (1944). Seeking a writ of habeas corpus, Endo argued that the federal War Relocation Authority (WRA) had violated her Fifth Amendment Due Process right to liberty by holding her without charges and without challenging her claim of loyalty to the United States. *Id.* at 298–302. The Court avoided this constitutional issue by ruling that Congress had failed to authorize detention of such patriotic Americans. *Id.* at 297, 300–04. This statutory construction seems preposterous, as Congress had approved and funded precisely such undifferentiated imprisonment with FDR's backing. Nonetheless, this interpretive move exonerated

its result as a political and pragmatic matter. As in the Civil War cases, a powerful President with broad congressional support had made a major decision in seeming violation of the Constitution because he had concluded that this drastic action was essential to win a high-stakes war, and he would likely defy any judicial decree to desist.

Nonetheless, I believe that such political realities should not have led the Court to uphold *on the merits* a presidential measure that was of such dubious constitutionality, because doing so affirmatively legitimated Roosevelt's conduct and tarnished the Court's reputation.<sup>133</sup> Rather, the Court should have dismissed the case on political question grounds by conceding that it could not meaningfully review the President's exercise of his Article II power to take actions that he believed were militarily necessary based on the expert advice of his executive subordinates, who possessed extensive (and often secret) information.<sup>134</sup> Admittedly, a dismissal predicated on justiciability would have been cowardly, but that result would have been preferable to what the Court actually did.

Overall, at first glance, *Korematsu* seems to be an obviously awful decision. However, deeper research into the situation facing Roosevelt in the early 1940s and the Court's historical record in war powers cases helps to explain, if not justify, the *Korematsu* opinion.

### 3. The Cycle Continues: The Cold War and the War on Terrorism

After FDR had died, the epic crisis of World War II had ended, and the unpopular Harry Truman had become President, the Court reasserted itself.<sup>135</sup> Most famously, in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>136</sup> six

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Congress and the President of violating the constitutional rights of Japanese Americans by shifting responsibility to a small agency, the WRA. See Pushaw, *Enemy Combatant*, *supra* note 10, at 1038–39. Furthermore, the Court postponed the release of its *Endo* judgment until the day after FDR announced he would end the internment. *Id.* at 1039 n.148 and accompanying text.

In short, *Endo* involved only one petitioner, and future requests for habeas writs would be moot because the Japanese Americans were being freed. Furthermore, neither *Endo* nor *Korematsu* held that these persons' constitutional rights had been transgressed by Roosevelt. Thus, the Court did not dare to challenge the constitutional validity of the President's actions or order him to do anything against his will.

133. I flesh out this position in Pushaw, *Enemy Combatant*, *supra* note 10, at 1081–83.

134. Cf. *Korematsu v. United States*, 323 U.S. 214, 242–48 (Jackson, J., dissenting) (relying on this rationale to contend that the case should have been dismissed as nonjusticiable, but asserting that the Court, having exercised jurisdiction, should have invalidated the exclusion order because it violated the detainees' constitutional rights). I would confine my "political question" expedient to unusual and extreme situations such as that presented in *Korematsu*.

135. See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304, 315–23 (1946) (interpreting an Act of Congress that imposed martial law in Hawaii as prohibiting the Executive Branch from using

Justices rejected Truman's claim of Article II power to order the seizure and operation of domestic steel mills in response to a nationwide strike that jeopardized steel production critical to fighting the Korean War.<sup>137</sup> Even though Lincoln and Roosevelt had successfully seized private property as part of their war efforts,<sup>138</sup> the Court apparently concluded that (1) the Korean War was not that important and that Truman's order was unnecessary; (2) taking property was an egregious Fifth Amendment violation; and (3) Truman lacked the congressional and popular support to resist the Court's judgment.<sup>139</sup>

During the next half century, however, the usual posture of judicial deference returned.<sup>140</sup> Furthermore, I do not believe that the Court would have dared challenge George W. Bush in the immediate aftermath of the September 11, 2001 attacks. Rather, a majority of Justices waited until the emergency had passed, and Bush's popularity had plunged,<sup>141</sup> before proclaiming that his treatment of "enemy combatants" had needlessly violated important federal statutory and due process standards.<sup>142</sup> Although constitutional law professors like Chemerinsky hailed these decisions as portending a new age of vigorous judicial enforcement of individual rights against Presidents during wartime, the lesson of history is that the Court will be unable to maintain this momentum if a popular President takes drastic action in a serious military crisis.<sup>143</sup>

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military commissions to try loyal citizens who had been charged with ordinary crimes that had no impact on national security).

136. 343 U.S. 579 (1952).

137. See *id.* at 582–89; see also Pushaw, *Enemy Combatant*, *supra* note 10, at 1042–44 (examining *Youngstown*).

138. See *supra* notes 86, 93, 107 and accompanying text.

139. See Pushaw, *Enemy Combatant*, *supra* note 10, at 1043–44 (supporting each of these points).

140. See *id.* at 1044–45 (citing relevant cases).

141. See Pushaw, *Justifying*, *supra* note 11, at 690–91, 695 (documenting Bush's waning popularity at the time of each of the Court's major decisions).

142. The key cases, in chronological order, are: *Rasul v. Bush*, 542 U.S. 466, 473–85 (2004) (interpreting the federal habeas corpus statute as extending to petitions filed by alien detainees held in the United States-controlled prison at Guantanamo Bay, Cuba, despite contrary precedent); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509–39 (2004) (holding that indefinitely detained "enemy combatants" who were American citizens had a due process right to notice and a hearing before an impartial decisionmaker); *Hamdan v. Rumsfeld*, 548 U.S. 557, 566–95 (2006) (creatively construing an Act of Congress that appeared to repeal the Court's appellate jurisdiction over Guantanamo Bay prisoners and to authorize the President to try them by military commissions as not intended to do these two things); and *Boumediene v. Bush*, 553 U.S. 723 (2008) (concluding, for the first time, that the Constitution's privilege of the writ of habeas corpus may be invoked by noncitizen enemy combatants who have been captured and detained outside the territorial jurisdiction of the United States). With the exception of *Hamdi*, all of these cases contain dubious legal reasoning. See Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?*, 84 NOTRE DAME L. REV. 1975, 1999–2051 (2009) [hereinafter Pushaw, *Creating*] (providing an extensive critique of these decisions).

143. See Pushaw, *Creating*, *supra* note 142, at 1976–81, 2046–50. One of the lessons that Dean Chemerinsky draws from *Korematsu* is that detention should only be based on individualized suspicion of a crime. He assails the Bush and Obama Administrations for imprisoning hundreds of

## III. CONCLUSION

As our debate over *Korematsu* illustrates, Dean Chemerinsky and I have adopted quite different approaches to constitutional law. He believes that the Court should use the Constitution instrumentally to identify and protect rights that embody liberal ideals of social and moral justice. By contrast, I adhere to a “Neo-Federalist” methodology, which seeks to restrain the Justices’ discretion by requiring them to (1) formulate rules of law that are rooted in the Constitution’s language, structure, history, and early precedent; and (2) apply such rules without regard to whether they conform to the Justices’ ideology or politics. I believe that a Neo-Federalist perspective would clarify and improve almost all areas of constitutional law.

One notable exception is judicial review of the exercise of war powers. Although my textual and historical approach provides some valuable insights on this subject, I readily confess that it does not yield workable legal principles that can be applied consistently and apolitically. Indeed, I have concluded that this problem is intractable because each military situation is unique and raises myriad legal, political, and pragmatic considerations that resist facile lawyerly categorization and analysis.

It is against this backdrop that I have examined Dean Chemerinsky’s seemingly irrefutable argument that *Korematsu* is one of the worst decisions in American history. My modest purpose has been to explain, not defend, *Korematsu*. I have tried to show that this case follows a historical pattern in which the Court treats constitutional rights and liberties with far less respect during military crises.

The Justices have always properly recognized that the Constitution commits all war powers to the political branches, which have a paramount duty to protect national security. Even when the assertion of those powers allegedly violates individual rights, the Court has tended to defer to the President’s judgment that a particular action is militarily necessary, which rests upon the expert advice of his executive subordinates who have

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people in Guantanamo Bay without such probable cause and without affording them a meaningful due process hearing. *See* Chemerinsky, *supra* note 5, at 171.

This criticism overlooks two important points. First, although citizens who have committed ordinary crimes domestically enjoy the benefits of the Fourth and Fifth Amendments, alien enemy combatants who have been captured and are being detained outside of the United States do not. *See* Pushaw, *Creating*, *supra* note 142, at 2005–08, 2014–17, 2022–44. Second, Congress has provided such detainees with comprehensive administrative and judicial review (including the right to appeal to the Supreme Court)—indeed, the most elaborate legal protections ever granted to military prisoners. *See id.* at 2008–10, 2020–21, 2033, 2042. Pursuant to these procedures, hundreds of these men have been released, and at least thirty of them have committed further acts of terrorism. *Id.* at 2044. Their victims should be kept in mind as America determines how best to deal with suspected enemy combatants.



processed huge amounts of information. Furthermore, the Court often has no realistic option but to yield to a strong President who enjoys popular and congressional support when he makes such decisions.

Thus, *Korematsu* is not an aberration, but rather followed precedent set during the Civil War (such as *The Prize Cases* and *Vallandigham*) and World War I.<sup>144</sup> My study of history convinces me that it is simply wishful thinking to hope that the Court will avoid similar decisions in the future.

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144. See *supra* notes 84–101 and accompanying text (discussing such decisions).