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Olivia Byrd April 14, 2020

The Calamity of Equity in American Jurisprudence: Examining Rawls and his Influence in *Brown v. Board of Education* and *Korematsu v. The United States*
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Abstract

The Calamity of Equity in American Jurisprudence: Examining Rawls and his Influence in *Brown v. Board of Education* and *Korematsu v. The United States*
By Olivia Byrd

While the impact of *Brown v. Board of Education* and *Korematsu v. The United States* on legal scholarship and societal structure is indisputable, the method of lawmaking and interpretation within the United States that has been pedestalled as one of justice and fairness seems to be absent in two of the most well-known landmark cases in American legal history. In this thesis, I have examined the histories and effects of two of the most well-known landmark cases with the most opposite contemporary societal and scholarly recognitions to explore their common Rawlsian philosophies. Ultimately, the decisions' foundations in Rawls' two principles of justice allow their authors to remain 'safe' from accusations of judicial activism while appearing to posit equitable decisions. However, their decisions that are based in an objective understanding of a 'just' society do not apply to individuals. Thus, de facto systems of law were produced, furthering inequitable societal structures within the United States. Ultimately, Ronald Dworkin's conception of "luck egalitarianism" and arguments against social contract theory as a tool for governance may have altered the effects of *Brown* and *Korematsu.* Further, *Brown's* praises and *Korematsu*'s scorn must be challenged and redirected to examine the preconceptions of landmark cases that exist within academia and American society at large.

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Introduction

The impact of landmark cases has structured the systems of law and education in the United States since *Marbury v. Madison* (1803). Definitionally, landmark cases are the cases that have established significant new legal principles or concepts, or they have substantially changed the interpretation of existing law.[1] These are the cases that are used to introduce third and fourth graders to the ideas of law, justice, and the structure of American society. They are the cases that are known forwards and backwards by law students and legal scholars, and they are the cases that have provided the foundation for the United States' 'model' system of law and justice. While the impact of these landmark cases in the United States on societal structures are indisputable, the method of lawmaking and interpretation within the United States that has been pedestalled as one of justice and fairness[2] seems to be absent in two of the most well-known landmark cases in U.S. legal history.

In this project, I have examined the histories and effects of two of the most well-known landmark cases with the most opposite contemporary societal and scholarly recognitions: *Brown v Board of Education* – one of the most celebrated cases in American history[3], and *Korematsu v The United States* – one of the least celebrated, most criticized cases in American history.[4] Both of these landmark cases are used to preach 'fundamental values' in American jurisprudence: *Brown* represents the value of equality and *Korematsu* represents the antithesis

[1] From Black's Law Dictionary
[2] "A basic purpose of the American legal system is to ensure fairness in balancing individual and societal rights and needs, while preventing excessive government power"; Harr, J., & Hess, K. (2007). *Constitutional Law and the Criminal Justice System* (4th ed., p. 38). Belmont, CA: Cengage Learning.
[3] Ogletree, Jr., C. (2004). Excerpt from All Deliberate Speed: "The Significance of Brown". *Harvard Blackletter Law Journal*, *22*, 3-4.
[4] "One of the worst aspects of American history is that at times of crisis we compromise our most basic constitutional rights…" ; Erwin Chemerinsky, University of California Irvine

of equality and what to avoid in American jurisprudence. However, neither case was written in a political language seeking "liberty and justice for all." The language, instead, reflects a Rawlsian, passive, 'maximin' ideology even before John Rawls published his 1971 work.

From my analysis, I believe that *Brown* and *Korematsu* were written from the standpoint of Rawls' original position, behind his veil of ignorance, to avoid biases of self-interest or the interest of others in these hard cases[5]; thus, the writers remain 'safe' from creating law, and seem to posit a decision of equality and fairness. However, the assumed 'equality' in these decisions provided an opportunity for proxy-systems of law – de facto segregation, social dynamics, social movements, etc. – to legally exist and dominate reality not covered by the actual legal decisions. Thus, I conclude by arguing that *Brown* and *Korematsu* are not prevalent in American jurisprudence primarily from their decisions alone, but that they have impacted society from the de facto systems of law that emerged from their decisions as a result of their justice-as-fairness ideologies. Ultimately, while I do not argue him as a replacement for Rawls in American courts, Ronald Dworkin's conception of "luck egalitarianism" and arguments against social contract theory as a tool for governance may have altered the effects of *Brown* and *Korematsu.* Further, *Brown's* praises and *Korematsu*'s scorn must be challenged and redirected to examine the preconceptions of landmark cases that exist within academia and American society at large

[5] Dworkin, R. (1977). *Taking Rights Seriously* (p. 81). Duckworth.

"The *Brown* case and the changes it brought causes many people to believe that it was the most important case of my tenure on the Court. That appraisal may be correct, but I have never thought so…"

Justice Earl Warren in *The Memoirs of Earl Warren, 306*

Brown

Possibly the most celebrated in United States adjudication history, the decision that mandated the unconstitutionality of segregated public schools, made in the collection of cases known popularly as *Brown v Board of Education,* continues to impact nearly every aspect of contemporary American jurisprudence and culture.[6] Not only has *Brown* continued to spark debates on the decision's legality[7] and intent[8] that have lasted half a century, but the indirect effects of *Brown* outside of the courtroom continue to impact the American population.[9] The principle of equality that built *Brown* and the case's impression on the role of American courts in social justice movements remain sacred in American culture. In this chapter, I will explore the following questions: Why is *Brown v Board of Education* and its recognition as the 'gold standard' of American jurisprudence potent, how has it impacted the American conception of 'justice for all'? To begin this investigation, I will examine *Plessy v. Ferguson* to lay out the logic of the Warren Court for the *Brown* decision; from here, I will discuss *Brown's* intended effects before discussing its actual impact on American law and societal structures. I will then discuss *Brown's* contemporary existence both in American jurisprudence and culture.

[6] Ogletree, Jr., C. (2004). Excerpt from All Deliberate Speed: "The Significance of Brown". *Harvard Blackletter Law Journal*, *22*, 3-4.
[7] "[H]e (Jackson) has misgivings about whether the Court was the proper institution to "decide such questions for the Nation"; Tushnet, M. (1996). *Making Civil Rights Law*. New York: Oxford University Press.
[8] Douglas H. Bryant, Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment, 53 Ala. L. Rev. 555 (2001)
[9] Wraga, W. (2006). The Heightened Significance of Brown v. Board of Education in Our Time. *Phi Delta Kappan*, *87*(6), 425-428.

A History of *Plessy* and Its Role for the Warren Court

If nothing else, *Brown v. Board of Education* partially overturned the *Plessy v Ferguson* decision of 1896.[10] *Plessy* unfolded in the aftermath of Louisiana's Separate Car Act (1890), which mandated separate train cars for Blacks and Whites.[11] Homer Plessy, a 'legally defined' black man,[12] refused to vacate the Whites-only car and was subsequently arrested. Plessy's attorneys centered his case in the Separate Car Act's violation of the Thirteenth and Fourteenth Amendments, claiming that "the enforced separation" of Blacks and Whites "stamp[ed] the colored race with a badge of inferiority."[13] In a 7-1 decision against the Plaintiff, the Court held that the Act was constitutional - though the railway cars were separated by race, the cars themselves offered equal spaces for both Whites and Blacks, maintaining the equality principles upheld in the equal protection clause of the Fourteenth Amendment.[14] Segregated railway cars did not in themselves constitute unlawful discrimination as long as each space was deemed 'equal.' Consequently, *Plessy* upheld the lawfulness of segregation throughout the United States. It, therefore, structured and legitimized social and legal principles, particularly the South[15], for the next 60 years. A segregated, but 'equal' doctrine in the American public education system[16] became one of the best examples of *Plessy's* impact on the American

[10] *Brown v. Board of Education*, 347 U.S. 483 (1954)
[11] *Plessy v. Ferguson*, 163 U.S. 537, 547 (1896)
[12] "That petitioner was a citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood"; *Plessy v. Ferguson,* 163 U.S. 538, 539 (1896)

[13] *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)
[14] No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws; U.S.Const. art. XIV, § 1.
[15] Jim Crow and Plessy v. Ferguson | Slavery by Another Name. PBS.
[16] Segregation of public school systems was used to support the 'separate but equal' principle in *Plessy*: "The most common instance of this is connected with the establishment of separate schools for white and colored

population. A school district in Pensacola, FL, implemented the 'separate but equal' doctrine in compliance with Chapter 19355, Laws of Florida, Act of 1939, which provided:

> The schools for white children and the schools for negro children shall be conducted separately. No individual, body of individuals, corporation, or association shall conduct … wherein white persons and Negroes are instructed or boarded in the same building or taught in the same classes... (Murray, 1939, pp. 78)

Though Plessy further legitimized racist values that already permeated the post-Reconstruction United States,[17] Black Americans and Black culture flourished within their forcibly segregated communities; the rise in free Black identity In America gave way to identity politics and Black political movements centered around equality and inclusion.[18] The NAACP's inception in 1909 became a paramount stepping-stone in the fight for racial equality and was, from the beginning, dedicated to eliminating racial subordination.[19] It primarily focused on crafting legal strategies to tackle the educational inequities that quite clearly favor White public schools over Black public schools in the Deep South.[20] In the late 1940s, the NAACP began to implement equality strategies in elementary and secondary school facilities; obstacles, of course, met the NAACP's efforts ranging from issues of funding to cultural rigidity. Nevertheless, the NAACP's Legal Defense team began winning cases that ensued the

children…where the political rights of the colored race have been longest and most earnestly enforced"; *Plessy v. Ferguson*, 163 U.S. 538, 544 (1896)

[17] Oberst, Paul. (1973). "The Strange Career of Plessy v. Ferguson." 15 ARIZ. L. REV. 1.

[18] Cashmore, E. (1997). *The Black Culture Industry* (1st ed., p. 12). London: Routledge.

[19] "Accordingly, the NAACP's mission was and is to ensure the political, educational, social and economic equality of minority group citizens of United States and eliminate race prejudice."; NAACP | Nation's Premier Civil Rights Organization, from naacp.org

[20] Tushnet, M. V. (1987). *The NAACP's Legal Strategy Against Segregated Education*. Chapel Hill, NC: University of North Carolina Press.

dismantling and outlawing of segregated spaces.[21] Combined with increasing Cold War anxieties[22], both the NAACP and the US Government found Jim Crow doctrines that embedded notions of segregation within American law and society to be a detriment to the country's future. Consequently, five cases were consolidated as *Brown v. Board of Education (Brown I)*: *Brown v. Board of Education of Topeka, Kansas, Briggs v. Elliott* (Clarendon County, South Carolina), *Davis v. County School Board of Prince Edward County* (Virginia), *Belton v. Gebhart* (Delaware), and *Bolling v. Sharpe* (District of Columbia).

To overrule *Plessy's* precedent, the Court's decision in *Brown* would have to uphold the value of integrated public spaces, eliminating the 'separate but equal'[23] principle that Plessy instated. Subsequently, the Court reviewed its rulings in *Sweatt*[24] and *McLaurin*[25] and evaluated studies that focused on the damaging effects of segregation for children. For the first time in its history, the Supreme Court relied on social science data and considered the detrimental effects of racial segregation[26] to recognize the role a quality education plays in the functionality of state and local governments in addition to its benevolence to society at large.[27] In May 1954,

[21] Fleming-Rife, A., & Proffitt, J. (2004). The More Public School Reform Changes, the More It Stays the Same: A Framing Analysis of the Newspaper Coverage of Brown v. Board of Education. *The Journal Of Negro Education*, *73*(3), 241-242.

[22] "It was during the first decade of the Cold War, the era of Sen. Joseph R. McCarthy, during the heyday of the House Committee on Un-American Activities, that *Brown* was decided."; Dudziak, M. (2004). Brown as a Cold War Case. *The Journal of American History*, *91*(1), 32.

[23] *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896)

[24] *Held that* the education offered to the petitioner (Sweatt) is "not substantially equal to that which he would receive if admitted to the University of Texas Law School, and the Equal Protection Clause of the Fourteenth Amendment requires that he be admitted to the University of Texas Law School; *Sweatt v. Painter,* 339 US 629

[25] Held that "the Fourteenth Amendment precludes differences in treatment by the state based upon race…(admitted students) must receive the same treatment at the hands of the state as students of other races"; *McLaurin v. Oklahoma State Regents,* 339 US 637

[26] The famed yet controversial 'doll experiment'; Martin, Jr., W.E. (1998) Brown v. Board of Education: A Brief History with Documents. New York: St. Martin's Press.

[27] *Brown v. Board of Education of Topeka*, 347 US 483, 493 (1954)

the US Supreme Court issued its landmark decision in the case of *Brown v. Board of Education of Topeka*, which struck down the "separate but equal" doctrine of *Plessy v. Ferguson* (1896). The Court famously claimed:

> Today, education is the most critical function of state and local governments…It is required in the performance of our most basic public responsibilities….it is the very foundation of citizenship…To separate them [African American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone… In the field of public education, the doctrine of 'separate but equal' has no place. Separate education facilities are inherently unequal. (Brown v Board of Education, 1954, pp. 495)

Brown's **Initial Effects**

Not surprisingly, school systems throughout the United States met *Brown* with significant resentment, protest, and the violent repression of Black schoolchildren. Almost immediately after Justice Warren read the *Brown* decision, Southern, white politicians condemned it and vowed to defy it.[28] Private academies were established[29] and run with federal funds[30] across the Southern states to oppose public school integration. Virginia governor Harry Byrd claimed *Brown* renounced states' rights, proposing his "Massive Resistance."[31] After being ordered to integrate its public schools, officials in Prince Edward County, Virginia closed its entire public school system, and kept it closed for the next five years.

[28] March 1956, 96 southern congressmen signed the Declaration of Constitutional Principles (informally, the Southern Manifesto) promising to use 'all lawful means' to reject integration and 'commend those states which have declared the intention to resist"; Kirp, D., & Yudof, M. (1974). *Educational Policy and the Law: Cases and Materials*. Berkeley, Calif.: McCutchan Pub. Corp.
[29] The Southern Manifesto and "Massive Resistance" to *Brown v. Board*. (2014).
[30] Patterson, J.T. (2001). *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy*. New York: Oxford University Press.
[31] Laws that aggressively tried to prevent school integration in Virginia; Massive Resistance.

For the Little Rock 9,[32] one of the most widely publicized and highly criticized public school integrations, opposition was so violent that President Eisenhower[33] felt compelled to call in the National Guard.

Even if they did not downright reject integration efforts, Southern school systems entirely took advantage of the still-debated phrasing in the *Brown* "with all deliberate speed."[34] Over the next decade, progress toward school desegregation was anything but 'speedy.' In 1964, only 2.14% of African American children in 7 of the 11 Southern states were attending desegregated schools.[35] The Court's orders of 'gradualism' neither provoked a sense of immediacy not set a date to reach total public school integration. Although *Brown* was its necessary precursor, substantial desegregation did not arrive in much of the South until shortly before 1970. De jure segregation in Southern public schools finally come to an end with the Supreme Court's decisions in *Green v. County School Board of New Kent County* (1968) and *Alexander v. Holmes County Board of Education* (1969).[36] Other cases dealt with a disproportionate number of African American students who were unjustly suspended and subjected to corporal punishments,[37] black students being punished more harshly than white students,[38] remaining de facto segregation in public school systems,[39] and discriminatory

[32] From *Cooper v. Aaron* (1958), reaffirming the Brown decision and states' obligation to desegregate public schools.
[33] Who also stated that "[Southern Whites] are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negros"; Brown v. Board of Education, 347 U.S. 483 (1954).
[34] Brown v. Board of Education of Topeka, 349 U.S. 294, 301 (1955)
[35] Horowitz, H., & Karst, K. (1969). *Law, Lawyers, and Social Change*. Indianapolis: Bobbs-Merrill.
[36] Clotfelter, C. (2004). Private Schools, Segregation, and the Southern States. *Peabody Journal Of Education*, *79*(2), 74-97.
[37] *Hawkins v. Coleman*, 376 F. Supp. 1337 (ND Tex. 1974).; *Sweet v. Childs,* 507 F.2d 675, 677 (5th Cir. 1975).
[38] *Tasby v. Estes*, 643 F.2d 1103 (5th Cir. 1981).

practices in educating imprisoned populations.[40] While some of these cases targeted and attempted to dissolve instances of segregation beyond targeting 'separate but equal' instances post-*Brown* (*Tasby v. Estes)* a more significant proportion upheld racist discipline tactics and isolation in many school systems across the country (*Sweet v. Childs; Hawkins v. Coleman; Fuller v. Decatur Public School*). *Save Our Children I*, a case concerning the still-present de facto segregation in Wilmington, Delaware, found:

> The [F]ourteenth [A]mendment requires an equal education. There is no constitutional guarantee of a quality education. The Constitution is satisfied if all of the students in Red Clay receive an equally bad education, regardless of race. (Coalition v. State Bd. Of Ed., 1995, pp. 350)

While *Brown* certainly did not immediately dissolve de facto segregation in public school systems, it is clear that the decision majorly impacted the legitimization of the Civil Rights movement through upholding the Due Process Clause of the Fourteenth Amendment.[41] This became the chief mechanism the federal judiciary used to reshape the American education system and, therefore, societal and cultural norms. *Brown* quite clearly had unexpected "psychological impacts on African-American communities around the South"[42] and helped launch a transformative new era in the African American struggle for freedom. *Brown* evolved into a tool of legitimacy for Civil Rights Activists of all races and backgrounds to fight for equality for all.

[39] *Green v. County School Board of New Kent County*, 391 US 430 (1968); *United States v. Montgomery Country Board of Education*, 395 US 225 (1969); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 US 1 (1971); *Coalition to Save Our Children v. State Board of Education (Save Our Children I)* 757 F. Supp. 328, 336, (D. Del. 1991);

[40] Handberry v. Thompson, 92 F. Supp. 2d 244, 249 (SDNY. 2000)

[41] "Brown v Board of Education (1954) was the starting point in some ways…it itself was the product of a long and tortuous development."; Friedman, Laurence M. (1985). Total Justice, 87

[42] Constance Baker Motley, The Historical Setting of Brown and Its Impact on the Supreme Court's Decision, 51 Fordham L. Rev. 9, 16 (1992).

For many critics of *Brown*, it is simply a fundamental rights case that extends equality to Black Americans only within the context of public education systems. Thus, the most apparent idea that the *Brown* decision lays out is the unconstitutionality of segregation in public education systems; it does not encourage an integrated society. The Constitution did not "require integration," it only "forbids the use of governmental power to enforce segregation."[43] More recent scholarship[44] understands *Brown* as one of the most critical judicial decisions within United States history; the Court's decision to render 'separate but equal' educational facilities unconstitutional, for the first time, affirmed fundamental educational ideals and rights for all. This implicitly stressed the unifying function of public schooling and explicitly, emphasized the value of a citizenship-education and for a publicly supported system of education.[45] Furthermore, *Brown* not only partially overturned *Plessy,* but it also heightened the importance of the Fourteenth Amendment[46] and created a space and culture for American courts to be facilitators of social justice movements for years to come. *Brown's* most distinguished legal impact was that it established a fundamental principle equality for constitutional law; the civil rights policies of the United States in the last half-century has been premised on the correctness of *Brown*.[47] By addressing the issues of public school segregation,

[43] *Briggs v. Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955)
[44] Brown "marked the first visible time an elite white institution ruled against the interest of millions of white Americans, more than a few them quite powerful, knowing full well that it would shake the foundations of American culture well beyond the walls of public schools."; Gregg Ivers, American University
[45] Justice Marshall emphasized that he believed an individual's interest in education is fundamental and that this belief "is amply supported by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values."; *Plyler v. Doe* 457 U.S. 202 (1982)
[46] Specifically, the importance of the Equal Protection Clause; U.S.Const. art. XIV, § 1.
[47] Balkin, J., & Ackerman, B. (2002). *What Brown v. Board of Education Should Have Said* (p. 4). New York: New York University Press.

therefore honing in on America's most vulnerable populations of minority children, the country attempted to streamline its desires to be seen as a proponent of human rights.[48]

Brown's **Legacy**

Brown's impact continues to be widely debated[49], most commonly in spaces touting social justice agendas. This upcoming May (2020), *Brown* will celebrate its 66th birthday; however, it is unclear whether the decision was as impactful as both the general public and academic circles have assumed for decades. Many scholars[50] accept that the Supreme Court's decisions in *Brown* and all its subsequent cases have accelerated the federal courts' drives to end existing de facto 'separate but equal' spaces to provide equitable opportunities for all students that extend into a more equitable world. *Brown* succeeded in eliminating de jure segregation in public education and, most likely, the case made way for the crumbling of Jim Crow[51], the upheaving of the Civil Rights Movement,[52] and the changing of mindsets for future generations. *Brown* formed the base for subsequent developments in law[53] and policy[54], but *Brown's* most clear goal remains one of the biggest problems plaguing the United States.

[48] Dudziak, M. (2004). Brown as a Cold War Case. *Journal Of American History*, *91*(1).
[49] Michael Klarman, the most famous critic of *Brown's* impact, claims the decision was merely a stop along the road of Civil Rights, claiming that "*Brown* could not have happened unless a nascent civil rights movement was already underway."
[50] Shaw (2005), Tushnet (1994), Chafe (1980)
[51] Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 241 (1964)
[52] Chafe, W. (1980). *Civilities and Civil Rights*. New York: Oxford University Press.
[53] The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax; U.S.Const. art. XXIIIV, § 1.
[54] Fair Housing Act, No Child Left Behind, Every Child Succeeds

It is jarring that the most original intent of the *Brown* decision remains problematic today. American public schools are just as, if not more, segregated today than they were during the Civil Rights movement. The earliest integrated students suffered from severe physical and mental abuse from opposers of *Brown*. These consequences prevented the majority of suffering Black students from bringing legal action against school systems that did not protect its students.[55] Additionally, the threat of physical and mental harm averted Black students from enrolling in predominantly white schools for decades. Only within the past few years have predominately white universities had a close-to-representational class of Black students enroll. Pockets of significant progress for marginalized groups – not just African Americans – have, of course, been made in the educational sector since the *Brown* decision: graduation rates have increased exponentially for all marginalized groups[56], college matriculation and completion rates have increased[57], and many academic organizations continue to uphold the value of a diverse and representative teaching and administrative staff, along with a diverse student body[58]. *Brown's* impact throughout desegregation cases heard over 60 years has not been entirely fruitful for equitable practices in American public education systems. De facto racially separate but 'equal' facilities, districts, and societal customs continue to dominate many areas

[55] Brown, F. (2004). The First Serious Implementation of Brown: The 1964 Civil Rights Act and Beyond. *The Journal Of Negro Education*, *73*(3), 184.
[56] The Condition of Education - Preprimary, Elementary, and Secondary Education - High School Completion - Public High School Graduation Rates - Indicator May (2019) (from the National Center for Education Statistics).
[57] Indicator 23: Postsecondary Graduation Rates (from the National Center for Education Statistics).
[58] In 2020, there will be more children of color than white children in America, according to Census Bureau projections.; SMASH » How the nation's growing racial diversity is changing our schools.

of the United States. If anything, the legal mandate of ‘separate but equal’ has been lifted, but the normalization of “Black schools” and “White schools” continues to exist.

Clearly, the principles of equality that built *Brown* have not been entirely adopted by the American legal system, the case is most commonly acknowledged as the ‘gold standard’ of Supreme Court decisions and an emblem of hope and progression for the United States. All things considered, it is questionable: was *Brown* was decided with the egalitarian/equitable mindset that is most often understood of the case, or did *Brown* reflect a neutral, Rawlsian ideal to prevent a ‘politicization’ of the justice system; did the writers inflict a mantra of a ‘color-blind’ Constitution that, ultimately, is presented as a pseudo-success and continues to trap students in cycles of ‘separate but equal’ existences?

"Every day in school, we said the pledge to the flag, 'with liberty and justice for all,' and I believed all that."

Fred Korematsu, 1942

Korematsu

Potentially one of the most criticized cases in American legal history, *Korematsu v. The United States* and its condemnations can be summarized with Yale Law's Dr. Eugene Rostow's 1945 commentary on the case: "…the internment of the West Coast Japanese is the worst blow our liberties have sustained in many years."[59] The case has been epitomized as the typical response given by the United States to national security issues during times of war,[60] making true the phrase '*inter arma enim silent leges'* (in times of war, the laws fall silent)[61]. Despite its criticisms, the 1944 decision has not been overruled. Thus, *Korematsu* serves as both a cautionary tale of how American law should not function and as legal precedent. *Korematsu's* standing legitimizes the utility of judicial passivity in hard cases.[62]

Like in my previous chapter, I will lay out the history of *Korematsu v. The United States* before discussing its effects on American society and law. This will form the groundwork to discuss both cases in the context of John Rawls' original position in my next chapter where I will discuss the presence of judicial passivity within *Korematsu* that, I argue, indirectly legitimized racial bias against Japanese Americans.

[59] Rostow, Eugene. (1945). The Japanese American Cases - A Disaster, 54 Yale L.J. 490
[60] Tushnet, M. (2003). Defending Korematsu?: Reflections on Civil Liberties in Wartime. *SSRN Electronic Journal*, 273.
[61] Justice Antonin Scalia on *Korematsu* (2014)
[62] Dworkin, R. (1977). *Taking Rights Seriously* (p. 81). Duckworth.

The Case and its Effects

The December 1941 attack on Pearl Harbor changed the course of history for the United States and its involvement in World War Two both in and outside of the country. Shortly after the attack, President Franklin Roosevelt executed Executive Order 9066, approving military action within any areas the Secretary of War deems "necessary or desirable."[63] While racially neutral, Roosevelt's language in Executive order 9066 authorized racially charged military actions against Japanese Americans:

> I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action *necessary* or *desirable*, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded… (Executive Order No. 9066, 1942)

Consequently, the order justified the implementation of the racial curfew, removal, and mass incarceration[64] of Japanese Americans. Many of those who refused relocation, including Fred Korematsu, were arrested. While awaiting trial, Korematsu decided to challenge the constitutionality of Executive Order 9066, and within a year of its execution, Fred Korematsu,[65] Gordon Hirabayashi,[66] and Minoru Yasui[67] separately challenged Executive Order 9066. In 1944, *Korematsu v. United States* upheld Executive Order 9066 based on their observance of military documents falsely claiming, 'group disloyalty' (of Japanese Americans).[68] The majority found that Executive Order 9066 did not show racial prejudice, thus violating Korematsu's Fifth

[63] The order authorized the War Department to designate military zones where persons of 'enemy' ancestry would be excluded; Roosevelt, Franklin (1942). "Executive Order 9066". U.S. National Archives & Records Administration.
[64] Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).
[65] *Korematsu v. United States*, 323 U.S. 214 (1944)
[66] *Hirabayashi v. United States*, 320 U.S. 81 (1943)
[67] *Yasui v. United States*, 320 U.S. 115 (1943)
[68] *Korematsu v. The United States*, 323 U.S. 214 (1944)

Amendment rights. Rather, the court found that the Executive Order responded to the necessity to keep the United States secure from invasion, particularly during times of war. The decision accepted and upheld that the use of racial classification and discrimination was just and necessary due to national interest.[69] Therefore, the Court justified the removal and mass imprisonment of 120,000 Japanese Americans – who were mostly American citizens[70] – absent of charges, trials, or evidence of 'disloyalty' despite the 5th Amendment's due process clause looming over the decision.[71] Throughout the opinion, Justice Black noted the "circumstances of direst emergency and peril" to defend the majority opinion.[72] Justice Jackson warned that the decision to uphold the executive order despite the lack of bona fide proof of "pressing public necessity" set a dangerous precedent for the future violations of civil liberties.[73]

As the second World War drew to a close in 1945, President Roosevelt rescinded Executive Order 9066, terminating American internment camps. Though the camps were closed, for Japanese Americans, effects of *Korematsu* continued to permeate Japanese existence on American soil. Expectedly, postwar Japanese Americans returning to their homes and workplaces were welcomed back with verbal abuse and discrimination,[74] discussions of incarceration were hushed within Japanese American families, and the event's tragedies and effects were absent and remained absent from public discourse and textbooks. Prospective

[69] "Public opinion was on their side, so that there was no question of any substantial opposition, which might tend toward the disunity that at all costs he must avoid…"; Attorney General Francis Biddle
[70] U.S. Commission on Wartime Relocation and Internment of Civilians (USCWRIC). (1997). Personal justice denied: Report of the Commission on Wartime Relocation and Internment of Civilians. Seattle, WA: University of Washington Press.
[71] Nagata, D., Kim, J., & Wu, K. (2019). The Japanese American wartime incarceration: Examining the scope of racial trauma. *American Psychologist*, *74*(1)., 2.
[72] *Korematsu v. The United States*, 323 U.S. at 220.
[73] *Korematsu v. The United States*, 323 U.S. at 216. *See id.* at 242-48 (Jackson, J., dissenting)
[74] Loo, C. M. (1993). An integrative-sequential treatment model for posttraumatic stress disorder: A case study of the Japanese American internment and redress. *Clinical Psychology Review, 13*(2), 89–117.

Asian immigrants not just from Japan were subject to severe quotas that would not be lifted until 1965 (quotas that European immigrants from Germany, Poland, etc. did not experience).[75] Moreover, the effects on Japanese family dynamics were, perhaps, the most culturally salient effect of the atrocities of American internment camps. Victims of incarceration, for the most part, remained silent on their experiences and resulting traumas, creating an "acute Sensei awareness of an ominous gap in family historie[s]."[76] The silence constituted a kind of 'social amnesia' by an the entirety of Japanese Americans to suppress the experience.[77] Overall, *Korematsu's* justification of Japanese internment solidified the group consciousness of alienation for Japanese Americans. Thirty years later, in 1980, Congress formed the Commission on Wartime Relocation and Internment of Civilians to evaluate the circumstances surrounding and effects of the incarceration of Japanese Americans. These helped conclude that the order was not a justified military necessity but a presentation of "race prejudice, war hysteria, and a failure of political leadership."[78]

***Korematsu* Today**

Korematsu continued to be a legal eye sore through the late 20th and early 21st centuries, with scholars discounting its relevance for the principles of US law for decades. However, December 2020 marks the case's 76th birthday, and *Korematsu v. the United States* has yet to be formally overruled.[79] While most scholars considered the case dead letter,[80]

[75] Dayal, S., & Ancheta, A. (1999). Race, Rights, and the Asian American Experience. *MELUS*, *24*(4), 19.
[76] Nagata, D., Kim, J., & Wu, K. (2019). The Japanese American wartime incarceration: Examining the scope of racial trauma. *American Psychologist*, *74*(1)., 2.
[77] Kashima T (1980). Japanese American internees: Return, 1945–1955: Readjustment and social amnesia. Phylon, 41, 107–115.
[78] USCWRIC, 1997, p. xi
[79] *See* Greene, *supra* note 5, at 386-90; Jamal Greene. (2019). *Is Korematsu Good Law*, 128 YALE L.J.F. 629.

courts continue to cite Korematsu's favorable precedence to justify racial and discriminatory decisions disguised as national security measures.[81] As a reaction to the terroristic acts on September 11, 2001, Peter Kirsanow - a Bush appointee to the U.S. Civil Rights Commission - suggested that "Arab Americans would be interned en masse if the United States suffered another major terror attack," invoking *Korematsu* as precedent for his statement.[82] Most legal scholars and historians have highlighted it as a cautionary-tale: what 'not to do' to uphold the fundamental liberties of civil and political rights during times of war.[83] Eugene Rostow, a leading *Korematsu* scholar in the late 20th century claimed, "I would submit that *Korematsu* has already been overruled in fact, although the Supreme Court has never explicitly overruled it. The case has been overruled in fact because of the criticism it has received…"[84] Moreover, the case exemplifies the truth in American jurisprudence that courts tend to sacrifice constitutionally protected liberties in the face of fears about the nation's security: *Inter arma enim silent leges* (in times of war, the laws fall silent).

In 1983, *Korematsu v. The United States* was reopened under a writ of coram nobis to overturn Fred Korematsu's criminal conviction– a means of reopening a "manifestly unjust" criminal conviction after time has been served and, as a result, a community continues to suffer prejudice. Usually, evidence that the government has "knowingly us[ed] perjured testimony or with[held] materially favorable evidence" are sufficient for issuing a writ of coram nobis.[85] With

[80] Lin, E. (2003). Korematsu Continued ... *The Yale Law Journal*, *112*(7), 1912.
[81] William J. Hopwood, Letter to the Editor, WALLST. J., Dec.18,2001, at A17
[82] Harris, *supra* note 4, at 22
[83] Yamamoto, E., & Oyama, R. (2019). Masquerading Behind a Facade of National Security. *The Yale Law Journal*, *128*.
[84] Charles J. Cooper et al., (1998), What the Constitution Means by Executive Power, 43 U. MIAMI L. REV. 165, 196-97
[85] *United States v. Taylor,* 648 F.2d 565, 571 (9th Cir. 1981); *see* YAMAMOTO, *supra* note 4, at 165 n.3

its reopening, the courts found that the United States government deliberately misled the American public and courts about the ostensible threat posed by Japanese Americans in *Korematsu v. The United States*.[86] Even with this discovery, the *Korematsu v. The United States* remains, officially, 'good law.' Professor Mari Matsuda of the William S. Richardson School of Law at the Univeristy of Hawaii criticized *Korematsu's* status in her 2019 contribution to The Yale Law Journal:

> A true overruling of Korematsu would respond to the broader neofascist threat with a generative interpretation of our Constitution to uphold the inherent dignity of all human beings. This would not simply outlaw the incarceration of immigrant children and end the 'Muslim ban' – it would also introduce a notion of positive liberty to our interpretation of the Bill of Rights, ending the entire project of organizing political life around grabbling, smashing, and dominating. (Matsuda, 2019, para. 1)

The 2017 Supreme Court case of *Trump v. Hawaii* regarding President Donald Trump's travel ban claimed to have overruled *Korematsu*. Chief Justice Roberts observed the "reference to *Korematsu* . . . affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history and has no place in law under the Constitution."[87] However, scholars still largely consider *Korematsu* 'good law,' with their skepticism in the SCOTUS's claims based in the court's inaccurate criticisms of *Korematsu* (which were the foundation of *Trump v. Hawaii's* 'replacing' of *Korematsu*).[88] Further, the majority in *Hawaii* did not specify which aspect of the *Korematsu*

[86] Yamamoto, E., Chon, M., Izumi, C., Kang, J., & Wu, F. (2013). *Race, Rights, and Reparation: Law and the Japanese American Internment* (2nd ed., p. 5). New York: Wolters Kluwer.
[87] *Trump v. Hawaii*, 138 S. Ct. at 2423 (quoting *Korematsu*, 323 U.S. at 248.)
[88] "Roberts provides an incorrect and misleading account of *Korematsu* itself—which means that the decision he purports to "overrule" is not quite the one that the *Korematsu* Court itself actually rendered…"; Kalhan, A.

decision is was overruling; it "condemns racism with one hand but deploys tokenism with the other."[89] Most importantly, *Korematsu* describes a 'national origin,'[90] but *Trump v. Hawaii* defended *Korematsu's* scope was limited to race,[91] leaving the possibility open to discriminate based on national origin.[92] For scholars that do, in fact, believe *Trump v. Hawaii* effectively overruled *Korematsu v. the United States*, they simultaneously believe the 2017 decision essentially recreated the *Korematsu* doctrine under another name. UCLA law professor Hiroshi Motomura, in the *Hawaii's* aftermath, defends this position by saying: If courts really wanted to bury Korematsu, they would have struck down the travel ban.[93]

(2018). Trump v. Hawaii and Chief Justice Roberts's "Korematsu Overruled" Parlor Trick [Blog]. Retrieved from https://www.acslaw.org.

[89] Greene, J. (2019). Is *Korematsu* Good Law?. *The Yale Law Journal*, *128*.

[90] *Korematsu v. The United States*, 323 U.S. at 217-20

[91] *Trump v. Hawaii*, 138 S. Ct. at 2423

[92] Greene, J. (2019). Is *Korematsu* Good Law?. *The Yale Law Journal*, *128*.

[93] Savage, C. (2018). Korematsu, Notorious Supreme Court Ruling on Japanese Internment, Is Finally Tossed Out. *The New York Times*.

"If liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be best attained when all persons alike share in government to the utmost."

Aristotle

Rawls

In his 1971 *A Theory of Justice*, John Rawls challenges the contemporary understanding of social contract theory and shifts theories of distributive justice from a utilitarian ethic of aiming to achieve maximum happiness[94] to a focus on individual rights and freedoms[95]. For Rawls, a just society (mainly, principles of justice that conduct a just society) is produced in the hypothetical original position through collective, contractarian decision made by the rational citizens' that exist under a veil of ignorance.[96] While Rawls' discourse offers a highly-celebrated theory of distributive justice for the 20th century, its central tenants, when applied to real systems of law and justice, are trivialized. In this chapter, I will break down some central ideas in Rawls' *A Theory of Justice* before discussing these philosophies alongside the judicial practices and consequential trivialization that evident in *Brown v. Board of Education* and *Korematsu v. The United States* in my next chapter.

[94] "My (Rawls') aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke [Second Treaties of Government], Rousseau [The Social Contract], and Kant [The Foundations of the Metaphysics of Morals]."; Rawls, J. (1971). *A Theory of Justice* (p. 10). Harvard University Press.
[95] Id. at 53
[96] Id. at 10

***A Theory of Justice* – an Overview**

Rawls' intent for *A Theory of Justice* focused on his critique of theories of utilitarianism that dominated theories of justice and the distribution of justice for decades. He sought to further develop social contract theory, originally conceived by the Lock, Rousseau, and Kant.[97] In the words of Joel Feinberg in his 1972 review, "Justice, Fairness, and Rationality," "Lengthy and thorough as this book is, it is still not a complete theory of justice."[98] This opinion fuels the majority of my argument of the shortcomings of Rawls' discourse; in general, I argue that Rawls' philosophies do not create a just society when applied in reality.

The central components to his discourse are broken down as follows: social contract, the veil of ignorance, Rawls' principles, and the difference principle or maximin rule within his second principle. This portion is dedicated to providing an overview of Rawls' discourse in *A Theory of Justice* before highlighting some of its central components in more depth. I find that its most important components for my discourse is his assumption of strict, collective compliance and the distributive justice that results from his two principles of justice, particularly his difference principle, 'maximin.'

Rawls ultimately argues that a just society is made possible by his two principles of justice that are the object of his hypothetical "original position."[99] For Rawls, the original

[97] Relating Rawls's theory to Lockean and Kantian thought; Freeman, S. (2003). *The Cambridge Companion to Rawls* (pp. 6-9). Cambridge University Press.
[98] Feinberg, J. (1972). Justice, Fairness and Rationality. *The Yale Law Journal*, *81*(5), 1014.
[99] "Rawls describes what he takes to be a test for the truth of his proposed principles of social justice, a test that is necessarily formulated in the subjunctive mood."; Feinberg, J. (1972). Justice, Fairness and Rationality. *The Yale Law Journal*, *81*(5), 1012.

position[100] is a thought experiment that is governed by the "veil of ignorance" where individuals[101] make choices, "in one joint act…to decide…what is to count among them as just and unjust,"[102] based on their indistinguishable position in society to create a social contract about how to conduct their society. Because these agreements are formulated under a "veil of ignorance," the individuals in this thought experiment do not know about their specific situations and abilities (class, social status, wealth, natural assets and abilities, etc.),[103] and they only know about their general situation of being a human and human nature. The veil of ignorance is vital for Rawls' argument; presumably, if people were aware of their 'positions' (i.e. race, class, gender, abilities, etc.), individuals would likely choose laws that would further their own position; a Christian, middle class European would choose principles that advance all Christian, middle class Europeans. The veil of ignorance, thus, encourages people existing under it to choose laws that are advantageous to each.[104] Further, given their limited knowledge of the world and their position within it, Rawls argues that people existing in the original position will agree to two principles of justice[105]:

[100] Rawls, J. (1971). *A Theory of Justice* (p. 10). Harvard University Press.

[101] Rawls assumes that the liberal society in question is marked by reasonable pluralism and that it is under reasonably favorable conditions: there are enough resources for everyone's needs to be met.
[102] Rawls, J. (1971). *A Theory of Justice* (p. 11). Harvard University Press.
[103] Id. at 11
[104] "In justice as fairness, men agree to share one another's fate."; Rawls, J. (1971). *A Theory of Justice* (p. 102). Harvard University Press.
[105] "Rawls, J. (1971). *A Theory of Justice* (p. 53). Harvard University Press.

First Principle (Liberty Principle): Each person has the same claim to a fully adequate structure of equal basic liberties for social and economic equality that compatible with the structure for all liberties.

Second Principle: If social and economic inequalities exist, they are to satisfy two conditions:

- Principle of Fair Equality of Opportunity: They are to be attached to offices and positions open to all under conditions of fair equality of opportunity.
- Difference Principle: They are to be to the greatest benefit of the least-advantaged members of society (the difference principle).

For Rawls, the first principle of justice is more important and his priority in the construction of society.[106] His second principle implies the only way to justify an instance of inequality is to ensure the inequality benefits everyone. Here, Rawls' account of the nature of justice becomes apparent: because these choices about principles of justice are created within the original position, for Rawls, these choices are inherently fair principles. Biases towards a specific group of people should not exist *unless* this inequality benefits all of society. Applied in 'real' society, justice as fairness describes a just arrangement of the most basic, major political and social institutions of a liberal society.

[106] "These principles are to be arranged in a serial order with the first principle prior to the second."; Rawls, J. (1971). *A Theory of Justice* (p. 53). Harvard University Press.

Social Contract

If nothing else, *Justice as Fairness* outlines a contractarian theory of justice, in the tradition of Rousseau and Kant.[107] For Rawls, deriving principles of justice from social contract creates objective principles of justice and judicial distribution; because these were chosen by rational members of his hypothetical society under the original position, their collective decision forms an objective, rational 'right' and 'wrong' method for conducting society. Further, the objectivity of principles of justice and judicial distribution legitimizes their codification and usage in "ordinary life, public arenas, and courts of law."[108] Thus, Rawls argues a truly just society would function under his two principles organically; this echoes Enlightenment philosophers, predominantly Rousseau, and the understanding of true human nature.

While Rawls is interested in the rights and freedoms of the individual (opposing the 'collective' mentality that is seen in utilitarian theories), the contractarian nature of principles of justice creates a collective 'right' and 'wrong' understanding that, for Rawls, should be utilized by political and economic institutions, not individuals.[109] Feinberg criticizes this in his 1972 review of *Justice as Fairness*: Rawls' book then is essentially a treatise in "strict compliance theory" as opposed to "partial compliance theory."[110] Rawls' theory is structured on the collective action of individuals, but he does not propose a discourse for individuals; he relies on the collective, "strict" compliance of the principles of justice decided on by the

[107] Laws are binding only when they are supported by the general will of the people (Rousseau in *The Social Contract*) and a social contract is the rational justification of the state to guarantee the realization of freedom (Kant in "Theory and Practice")
[108] Feinberg, J. (1972). Justice, Fairness and Rationality. *The Yale Law Journal*, *81*(5), 1016.
[109] "…he (Rawls) is almost exclusively concerned with the justice of basic political and economic *institutions*, as opposed to the justice of individual actions, persons, or policies"; Id. at 1012.
[110] Rawls, J. (1971). *A Theory of Justice* (p. 8). Harvard University Press.

collective. This emphasizes the incomplete nature of Rawls' system of justice as fairness, and, specifically, its shortcomings in a real-life society that does not function under the original position. This is problematic because Rawls argues the concrete application of his theories will produce an objective, collective understanding of how to conduct society justly, but a collective understanding of societal conduct does not always translate to an individual understanding. Because this account lacks any mention of individual application of these principles of justice (between individuals), this leaves opportunity for individual biases to manifest. As a result, biases create opportunities for proxy systems of law that are vulnerable to structure systems of inequality that do not further the potential for an equitable society.

The Veil of Ignorance

Perhaps most important for Rawls' discourse, his proposal of a 'veiled' society sets his theories for developing a system of justice a great distance apart from previous discourses. The veil's primary function is to prevent self-dealing and, consequently, escape bias within the system of justice created by a collective; he is clear in arguing that people within a society should be required to make a collective decision in advance so that no one can tailor canons to fit special conditions. To accomplish this, the veil strips individuals of all distinguishing characteristics which, in turn, prevents these individuals of knowing facts about future conditions that could tempt them (as self-interested beings) to base their choices on personal desires to the disadvantage of others. Essentially, contractors do know what position in society they will occupy (wealthy, poor, White, Black, Hispanic, handicapped, healthy, etc.), so being unaware of 'future' conditions (after the veil is lifted and individuals are able to see and

understand their position in society) ensures a distribution that allocates the index[111] of the least advantaged, or minimum position, for that society. Essentially, the veil alleviates this society from collective biases. Moreover, the veil, for Rawls, ensures the contractors' agreeance to and compliance with Rawls' own two principles of justice, as they exist on behalf of the veil. Again, this is successfully implemented into society only when there is collective, strict compliance to these principles of justice with no room for individual biases to compromise the function of Rawls' two principles.

Rawls' Principles (Justice as Fairness)

Like I mentioned above, Rawls' establishment of his two principles of justice are paramount to his discourse; they structure a just society that exists within the original position. He considers his "two principles as the maximin solution to the problem of social justice"; essentially, if society utilized Rawls' maximin philosophy in choosing principles of justice in the original position, the society would choose his two principles of justice:

First Principle (Liberty Principle): Each person has the same claim to a fully adequate structure of equal basic liberties for social and economic equality that compatible with the structure for all liberties.

Second Principle: If social and economic inequalities exist, they are to satisfy two conditions:

- Principle of Fair Equality of Opportunity: They are to be attached to offices and positions open to all under conditions of fair equality of opportunity.

[111] Of primary social goods; Rawls, J. (1971). *A Theory of Justice* (p. 80). Harvard University Press.

- Difference Principle: They are to be to the greatest benefit of the least-advantaged members of society (the difference principle).

Rawls prioritizes his first principle over his second, maintaining that liberty above all is essential for the functionality of a justice society and suggesting that "liberty can be restricted only for the sake of liberty"[112] Moreover, this principle defends the necessity of a political constitution that affirms that all citizens should possess basis rights and liberties: freedom of speech and association, rights to vote and hole public office, to be treated in accordance with the law, etc. This is foundational for Rawls' discourse; no policy or law made can infringe upon these basic rights and liberties even if an instance of inequality would be beneficial for society as a whole. Rawls' first principle prevents, for example, a policy that would prevent reality television stars from running for public office; while this policy may benefit society as a whole, the policy infringes upon reality television stars' rights to run for public office and, therefore, violates Rawls' first principle.

His second principle is more economics focused. The first part requires that "In all parts of society there are to be roughly the same prospects of culture and achievement for those similarly motivated and endowed."[113] Essentially, those with the same aptitudes and drive would have the same opportunities regardless of socioeconomic status. Its second part, the difference principle or 'maximin rule' instructs society to rank alternatives by their worst possible outcomes: the alternative the worst outcome of which is superior to the worst

[112] Id. at 53
[113] Rawls, J. (1971). *A Theory of Justice* (p. 44). Harvard University Press.

outcome of the others must be adopted.[114] Essentially, groups are to be treated equally without exception unless there is a sufficient reason to treat them differently. A reason for departing from equality in the distribution of primary social goods[115] is sufficient only when that unequal distribution would be to *everybody's* advantage within the society[116]: "the limitation of liberty is justified only when it is necessary for liberty itself…[or] to avoid an even greater loss of liberty."[117] According to the maximin rule, this maximizes the utility of the worst outcome.

[114] Id. at 132-133

[115] For Rawls, the primary goods whose distribution is to be regulated by this principle are the basic liberties of citizenship of the sort conferred by the American Bill of Rights (right to vote and run for public office, the right to free speech and assembly, etc.); Feinberg, J. (1972). Justice, Fairness and Rationality. *The Yale Law Journal*, *81*(5), 1022.

[116] Satisfying Rawls' first principle (the Principle of Justice) of distribution of political rights and duties; "Justice As A Rational Choice," 5

[117] Feinberg, J. (1972). Justice, Fairness and Rationality. *The Yale Law Journal*, *81*(5), 1023

"I wish I could say that racism and prejudice were only distant memories. We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred and the mistrust... We must dissent because America can do better, because America has no choice but to do better."

Thurgood Marshall, The Liberty Medal Acceptance Speech

The Calamity of Equity

In this final chapter, I argue that *Brown v. Board of Education* and *Korematsu v. The United States* were decided with Rawlsian philosophies in mind to achieve 'fair' outcomes; in practice, their 'safe' decisions that avoided accusations of judicial activism justified de facto inequalities. Underlying both of these decisions is Rawls' protection of liberties: *Brown* and *Korematsu,* given the understanding that they were decided within Rawlsian principles, limit the range and strength of equality that resulted from their decisions. Consequently, these restrictions would allow for "securing a more extensive system of rights," upholding the Rawlsian value of liberty which, ultimately, epitomizes a 'just' society.[118] While these courts may operate under Rawls' original position, American society does not. Ultimately, I will briefly discuss Ronald Dworkin's discourse on "luck egalitarianism" and social contract theory as a hypothetical alternative to the Rawlsian applications in *Brown* and *Korematsu* that may have resulted in fewer instances of de facto inequalities. Moreover, *Brown* and *Korematsu* understood through Rawlsian philosophies begs for a different view of the landmark cases; perhaps American law and academia are too quick to label *Brown* as the golden child and *Korematsu* as the disowned cousin, twice removed. Through this new view, both cases retain their potencies in the development of law, however, this new understanding urges scholars and

[118] Griffin, S. (1987). Reconstructing Rawls's Theory of Justice: Developing a Public Values Philosophy of the Constitution, 62 N.Y.U. L. REV. 715, 764

lawmakers to rethink how the values of fairness are realistically implemented into law and society.

Equity

Underneath this entire defense is the understanding of equity. The concept of equity, or fairness, was first discussed around 340 B.C. by Aristotle, who commented, "For that which is equitable seems to be just, and equity is justice that goes beyond the written law."[119] It has a lengthy history in American law, as it was transferred from its English roots.[120] U.S. Supreme Court Justice Joseph Story explained in 1835:

> In the most general sense, we are accustomed to call that Equity which in human transactions, is founded in natural justice, in honesty and right, and which properly arises *ex aequo et bono* .... Equity must have a place in every rational system of jurisprudence, if not in name, at least in substance. It is impossible, that any code, however minute and particular, should embrace, or provide for the infinite variety of human affairs, or should furnish rules applicable to all of them. (Story, 1972, p. 62)

Moreover, the image of the United States judicial system as a of fair, equitable body has dated back to its creation. Enlightenment theories that emerged in the late 18th and 19th centuries encouraged scholars to defend equity as a basis for social conduct.[121] Rawls wrote *A Theory of Justice* to reestablish the ideal of an equitable social existence; he explains that "justice as fairness [is] a theory of justice that generalizes and carries to a higher level of abstraction ... the [concept of] social contract."[122] This is problematic, primarily, because Rawls

[119] McDowell, G. (1982). *Equity and the Constitution* (p. 17). University of Chicago Press.
[120] Kovacic-Fleischer, C. (2011). *Equitable Remedies, Restitution, and Damages* (8th ed., pp. 64-65). Thomson/West.
[121] Natural rights include equality and freedom, the right to preserve life, and the right to preserve property (Locke and Rousseau)
[122] Rawls, J. (1971) *A Theory of Justice*, Oxford: Oxford University Press., 3.

assumes a general acceptance of his principles of justice within society. Because his discourse is based in the original position which exists under the veil of ignorance, Rawls is able to make these assumptions based on a 'clean slate' society with the ability and predisposition to make equitable decisions. If a 'clean slate' society was to exist, Rawls' principles might genuinely result in a just and fair society. However, the same expectations of an equitable society cannot be placed upon a society that is already rooted in bias.

Rawls in *Brown v. Board of Education*

A concern for equity and fairness existed in virtually every aspect of the Earl Warren's and the Warren Court's jurisprudence.[123] He insisted that fairness should be the foundation for judiciary language. His social justice-esque motivations in the courtroom are summarized on his tombstone dedication from 1975:

> Where there is injustice, we should correct it; where there is poverty, we should eliminate it; where there is corruption, we should stamp it out; where there is violence we should punish it; where there is neglect, we should provide care; where there is war, we should restore peace; and wherever corrections are achieved we should add them permanently to our storehouse of treasures. (Schwartz, 1996, pp. 378)

Commonly understood by American society, the Warren court ended de jure racial segregation[124] not only in public education systems, but also in churches, grocery stores, public transportation, and, eventually, in every aspect of American life.[125] Inarguably, *Brown* altered

[123] Warren's 1963 law clerk Frank Beytagh referred to as "overwhelming dedication to fairness." Anderson, M., & Cain, B. (2007). Venturing Onto the Path of Equal Representation: The Warren Court and Redistricting. In H. Scheiber, *Earl Warren and the Warren Court: The Legacy in American and Foreign Law* (p. 44). Lexington Books.
[124] Lawrence, M. (2016). *Justice-as-Fairness as Judicial Guiding Principle: Remembering John Rawls and the Warren Court*, 81 Brook. L. Rev. 673, 686.
[125] Balkin, J., & Ackerman, B. (2002). *What Brown v. Board of Education Should Have Said* (p. 4). New York: New York University Press.

the way the Fourteenth Amendment's equal protection clause was understood in U.S. courts, acting as precedent in future civil rights cases; the Warren Court's revolutionized what it meant to enjoy "equal protection of the laws" in America. However, this understanding of equal protection seems to mirror the Rawlsian principles for justice. The Warren Court's practice of applying 'equitable' decisions for 'fair' outcomes closely resembles Rawls' justice-as-fairness model. Par for the course, both Rawls and the Warren Court suggest that in order to achieve a just or 'fair' outcome, they should operate from a position of equality, behind a 'veil of ignorance' to prevent any individuals from 'hedging their bets.' For Rawls, this results in a decision that is 'fair' for all; for the Warren Court (Rawls applied to 'real life'), it resulted in a safer decision derived from Constitutional interpretation, that is easily 'loopholed' through proxy systems of law. In practice, the interpretation of the equal protection clause in *Brown* leads to the dismissal of de jure racial segregation only in public school classrooms and school busses. It does not require integration in public schools, nor does it dismiss de facto segregation for preconceived, racially associated circumstances[126] (mental handicaps, financial inequalities, zoning issues, etc.). Effectively, innately unconstitutional law – that is, segregationist law that is based solely on race for *Brown* – is deemed so; however, a wider interpretation of segregation beyond a pure racial component is not deemed unconstitutional.

For Rawls, this seems to fit his model: some amounts of social inequalities are permitted in his ideal, just society as long as these inequalities are for the good of each member of

[126] "Nationwide, low-income black children's isolation has increased. It's a problem not only of poverty but of race… Twenty years ago, black students typically attended schools in which about 40 percent of their fellow students were low-income; it is now about 60 percent"; Rothstein, R. (2014). *Modern Segregation*. Presentation, Atlantic Live Conference, Reinventing the War on Poverty, Washington, D.C.

society. He states, “Rights may also be restricted, which is to say they may be limited for the purpose of securing an even more extensive system of rights.”[127] The *Brown* decision, while failing to protect, in many ways, the social and economic rights and privileges described in his second principle, basic rights of speech, association, etc. that are described in his first principle are still, technically, protected. Thus, any proxy systems of law that results in inequalities, for example, still-existent issues innate-racism in public school districting based on property taxes, can exist in Rawls’ ‘just’ society.

Moreover, Rawls’ just society exists in and is built on an ideal society where individual citizens engage with each other on the egalitarian bases on mutual respect and cooperative reciprocity.[128] Legal philosopher Joel Feinberg finds Rawls’ hierarchical system problematic: it requires an “undifferentiated interest” in liberty[129] for all members of the hypothetical society with no other interest in maintaining liberties other than basic liberties. According to Feinberg:

> Sometimes one person’s interest of one kind must be interfered with for the sake of other persons’ interests of the same or a different kind. The justification for such interferences is not that they are necessary to prevent even greater depletions in the overall supply of some homogeneous thing called “liberty,” but rather than some interests are more important, more worth protecting, than others. (Feinberg, 1972, pp. 1023-1024)

Rawls’ ranking basic liberties over more ‘obsolete’ liberties reveals his assumption that a collective real-world society would share the same values in liberties weakens his ordering, and sets up a problematic hierarchy, especially when his difference principle is introduced. In short,

[127] Griffin, S. (1987). Reconstructing Rawls's Theory of Justice: Developing a Public Values Philosophy of the Constitution, 62 N.Y.U. L. REV. 715, 764

[128] Freeman, S. (2003). *The Cambridge Companion to Rawls* (pp. 9). Cambridge University Press.

[129] From Rawls’ first principle of justice: Each person has the same claim to a fully adequate structure of equal basic liberties that compatible with the structure for all liberties; Rawls, J. (1971). *A Theory of Justice* (p. 53). Harvard University Press.

his first principle and its priority bases Rawls' resulting discourse in 'equality of opportunity to make the most of and advance individual societal statuses' without keeping in mind the 'obsolete' details that might fall under members' differing positions in society. In *Brown*, Feinberg's criticism of Rawls' defense of a collective agreement aligns well with the realities of the case's outcome: no collective agreement existed. A collective respect and reciprocity[130] would not have, I believe, resulted in systems of de facto segregation and discrimination that still exists nearly 70 years after the *Brown* decision. Rawls' entire argument for a just society is based in the collective society that was created by the veil of ignorance, yet, this veil does not exist in the United States.

Rawls in *Korematsu v. The United States*

While the Supreme Court has, historically, received criticism for judicial activism,[131] *Korematsu v. The United States* very clearly standardized the practice of judicial passivity[132] in the United States during times of social and political unrest.[133] This is supported by Chief Justice William Rehnquist's defense of *Korematsu*: "…during hostilities, in light of the government's broad war and national security powers…the courts should enforce all laws, but they need not

[130] Freeman, S. (2003). *The Cambridge Companion to Rawls* (pp. 9). Cambridge University Press

[131] "An activist judge was someone who ignored the will of Congress, ignored the democratic processes, and tried to impose judicial solutions on problems instead of letting the process work for itself."; Barack Obama in 2010

[132] "Judicial activism and judicial passivity are competing theories of judicial attitude to the interpretation of the constitution…the latter assigns a passive role in the courts, namely to declare what the law is (legem dicere) but not to make it (legem facere)…"; Okere, B. (1987). Judicial Activism or Passivity in Interpreting the Nigerian Constitution. *International And Comparative Law Quarterly*, *36*(4), 788.

[133] Tushnet, M. (2003). Defending Korematsu?: Reflections on Civil Liberties in Wartime. *SSRN Electronic Journal*, 273.

and should not during hostilities fully enforce the Constitution's protection of civil liberties."[134] Rawls echoes this mindset:

> Rawls envisions two sorts of cases: restrictions on the rights of political participation to protect other rights ... , and restrictions of an emergency nature necessary to protect the entire system of rights in time of war or other constitutional crisis. Both cases are familiar enough in our constitutional law. (Griffin, 1987, p. 764)

In short, the *Korematsu* court's upholding of an effectively 'equal' Executive Order (on paper) and simultaneous knowledge of the order's racially-charged effects in reality exemplifies the court's ability to concurrently act as a pillar of equality and 'justice for all' and permit unequal interpretations of their 'equality-based' rulings.

In general, judicial passivity allows a court to avoid accusations of legislative actions; this, in turn, helps to preserve the traditional duties of a judge that are limited to the interpretation of law, not its creation. For civil rights related case such as *Brown v. Board of Education* and *Korematsu v. The United States*, judicial passivity seems to serve as an 'out' for courtrooms. This also makes sense – there is significant controversy surrounding 'politically-based' judicial actions. However, the acts of judicial passivity in *Brown* and *Korematsu* specifically, I argue, strongly align with Rawls' ideal of 'justice as fairness' – that just judicial decisions adhere to Rawls' principles of justice that accept inequalities under a 'maximin' philosophy. Because both *Brown* and *Korematsu* resulted in inequalities from rulings based in the principle of equality – one based in the equality of access (*Brown*) and one based in the 'equality' of receiving militant actions (*Korematsu)* – I argue these were made possible by the court's adherence to the Rawlsian philosophy of 'maximin.'

[134] Yamamoto, E. (2018). *In the Shadow of Korematsu* (p. 79). Oxford: Oxford University Press.

Dworkin

Up to this point, I have aligned the decisions in *Brown v. Board of Education* and *Korematsu v. The United States* with the justice-as-fairness philosophy of John Rawls's *A Theory of Justice*. While I do not intend on offering a 'solution' to the inequalities that resulted from Rawls' hypothetical philosophies that were applied to reality, over the next section, I will argue that Ronald Dworkin's concept of "luck egalitarianism," if applied in the *Brown* and *Korematsu* decisions, could have resulted a more equitable outcome for both.

In his 1981 essays, both titled "What is Equality?,"[135] Ronald Dworkin offers one of the most well-read interpretations of distributive justice and, in many ways, furthers and critiques many of Rawls' arguments in *A Theory of Justice*. The term "luck egalitarianism" evolved from Dworkin's distinction between option luck – a "matter of how deliberate and calculated gambles turn out" – and brute luck – a "matter of how risks fall out that are not in that sense deliberate gambles."[136] Essentially, he differentiates between ambition and endowments in society. Because of these distinctions, Dworkin argues Rawls' difference principle as it fails to 'recover' utilities that those with bad brute luck might suffer. [137] Thus, a more comprehensive system to guarantee equality of resources should be implemented into Rawls' 'just' society. [138]

For *Brown* and *Korematsu*, a kind of 'supplemental push for equality' might have helped ensure the outcomes of justice and fairness that both Rawls' discourse and American courts implement. This would also rely less on collective agreeance on Rawls' principles of justice that would, for Rawls, structure a fair society when applied. In an earlier text, Dworkin tackles Rawls'

135 Dworkin, R. (1981). What is Equality? Part 1: Equality of Welfare. *Philosophy & Public Affairs*, *10*(3). & Dworkin, R. (1981). What is Equality? Part 2: Equality of Resources. *Philosophy & Public Affairs*, *10*(4).
136 Id. at 293 (Part 2)
137 Id. at 339
138 Id. at 341

discourse of justice-as-fairness as social contract theory, arguing that only actual contracts or agreements can impose obligations and commitments.[139] Effectively, a 'social contract' is not a legitimate means for governing a society. He later writes:

> So some political philosophers have been tempted to say that we have in fact agreed to the social contract of that kind tacitly…But no one can argue that very long with a straight face. Consent cannot be binding on people, in the way this argument requires, unless it is given more freely…And even if the consent were genuine, the argument would fail as an argument for legitimacy… (Dworkin, 1986, p. 192)

If, in a hypothetical world, *Brown* and *Korematsu* had not been decided, what would their effects look like without their Rawlsian roots? From Dworkin's discourses, perhaps there would have been a more concrete promise of equity for Black schoolchildren and a more critical eye on Roosevelt's Executive order. Without the assumption of group agreeance to create a just society, perhaps instances of de facto segregation would have failed because their reasoning for creating these de facto systems – to continue previous systems of de jure systems of law - would not exist. These questions, ultimately, die as thought experiments, however, Dworkin's discourses, for *Brown* and *Korematsu* seem to offer a better 'middle ground' between judicial passivity and activism.

How should we see *Brown* and *Korematsu* now?

While *Brown v. Board of Education* and *Korematsu v. The United States* will retain their reputations in American jurisprudence, from my conclusions in this thesis, I argue they deserve to be rediscovered not as a 'pillar of equality' and a 'trough of inequality,' but as Rawlsian cases that both grew out of a justice-as-fairness mentality. Ultimately, neither resulted in justice or

139 Dworkin, R. (1977). *Taking Rights Seriously* (p. 150). Duckworth.

fairness. De facto segregation and de jure systems of inequality exist in the United States to this day, particularly in systems of public education.[140] More broadly, landmark cases, while their impact on history and legal development is indisputable, deserve to be questioned more often. Neither *Brown*, nor *Korematsu* originated as landmark cases, however, their societal effects rendered them some of the most important cases in American history. Their stagnant reputations, however, seem to point towards the condition of equity in the United States – each as symbols of 'successful inequity' and 'unsuccessful inequity' to maintain the United States' innately inequitable justice-as-fairness systems of justice.

[140] Rothstein, R. (2014). *Modern Segregation*. Presentation, Atlantic Live Conference, Reinventing the War on Poverty, Washington, D.C.

"The year was 2081, and everyone was finally equal."

Kurt Vonnegut, 1961

Conclusion

John Rawls' discourse of justice-as-fairness to create a 'just' and 'fair' society permeate both *Brown v. Board of Education* and *Korematsu* – landmark cases with polar-opposite preconceptions in academia and society at-large – long before his *magnum opus, A Theory of Justice*, was published. Rawls' effects on both, however, are surprisingly similar. In particular, they draw from Rawls' difference principle/maximin rule and assumption of collective agreeance in society. Because Rawls writes his discourse for a hypothetical thought-experiment, its real-world application is unsuccessful as original position – including the veil of ignorance – does not exist or act upon contemporary American society. Ronald Dworkin's "luck egalitarianism" may alleviate some of these inequalities that result from the improper application of Rawls in American courts, however, I do not intend to offer this as a solution, but to discuss the possibility of how *Brown* and *Korematsu* could have turned out if Rawls' wasn't the primary philosophy applied.

With the realities of equity and fairness playing out in American jurisprudence daily – in our classrooms, prison yards, and politicians – the United States, both legal scholars and society at large, are forced to consider equity's effects (or lack of them) on the nation. While *Brown v. Board of Education* and *Korematsu v. The United States* remain two of the most important judicial decisions in American history, their seemingly stagnant effect on equity in American courts is concerning; instead of praising *Brown* and condemning *Korematsu*, perhaps their long-understood 'labels' are a bit more complex than commonly understood.

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