



**Conversations on the Constitution: The Importance of the Japanese Internment Cases with Justices Anthony M. Kennedy, Sandra Day O'Connor, and Stephen G. Breyer**

*Hirabayashi v. U.S.* (1943)

*Korematsu v. U.S.* (1944)

Essential Question: Should the executive branch have the authority to deny individual rights and liberties during times of war, even if it is done in a discriminatory way?

**Standards (Center for Civic Education)**

- II. What are the Foundations of the American Political System?
  - a. American idea of constitutional government
  - d. Basic values and principles
- III. Purposes, Values, and Principles of American Democracy
  - a. Distribution, sharing, and limits of power and responsibility
  - b. Organization and functions of the national government
  - d. Place of law in the American constitutional system
- V. What are the Roles of the Citizen in American Democracy?
  - b. Rights of citizens

**Outcomes**

As a result of this lesson, students will be able to:

- Know the facts and decisions of the *Hirabayashi* and *Korematsu* cases.
- Consider the impact of war-time pressures on governmental decision-making.
- Consider the extent to which the judicial and legislative branches should defer to the executive.
- Apply the concepts of discrimination and rigid scrutiny to contemporary scenarios.

**Materials**

- DVD (*A Conversation on the Constitution: The Importance of the Japanese-American Internment Cases with Justices Anthony M. Kennedy, Sandra Day O'Connor, and Stephen G. Breyer*) and DVD player
- Worksheets for each student

## Preparing to teach

- Read the Teacher Briefing provided
- Duplicate Handout 1 (one per student) and Handout 2 (if using extension activity)
- Set up DVD and player

## Lesson



### Activating Prior Knowledge (5 minutes)

1. Pass out Handout 1.
2. Ask students to respond to each question in the section marked “Before Watching the Film.” This will enable students to better appreciate the historical timeline pertinent to these cases.



### Processing (35 minutes)

1. Begin the film.
2. The students can take a few notes where appropriate on the worksheet: *Hirabayashi*, *Korematsu*, *Brown*, and *Adarand*. There won't be time for involved notes; students should just jot down some information about the facts, the issue, and the Court's decision. Not all cases are discussed in equal detail. Students should write what they can.
3. At minute 12:00, pause the DVD briefly. Ask the students whether or not they feel this discrimination (curfew, relocation) was uniquely related to the war. Continue the film. It will indicate that there was a pattern of discrimination, for example, regarding property ownership, that predated World War II. Pause again. Ask them if this information changes their view. Should it have entered into the Court's opinion? Why didn't it?



### Synthesizing (10 minutes)

1. When the film is completed, ask students to complete the section marked “After the Film.” This will help them to anticipate the ruling of the Court in the future and to determine, after reading the excerpt from *Adarand*, what standard the Court should apply.
2. Discuss responses as time allows.

## Extension Activity (optional)

Students will take the hypothetical facts they have already written (for question 2 in the “After the Film” section of Handout 1) and write their opinion as a justice of the Supreme Court. Students should give their decision in the hypothetical case and their rationale.

## Assessment

Assess student progress toward outcomes by evaluating:

- Students' completion of “Before the Film” section on Handout 1.
- Students' comprehension of the *Hirabayashi*, *Korematsu*, and *Brown* cases.
- Students' answers in the “After the Film” section of Handout 1. Students' answers to question 5 should be consistent with the *Adarand* opinion presented in #4.
- Written opinions, if students are assigned the Extension Activity.

## Additional Resources

- Street Law, Inc. and the Supreme Court Historical Society publish a collection of Landmark Supreme Court cases. Go to [www.landmarkcases.org](http://www.landmarkcases.org) to see the *Korematsu v. U.S.* and *Brown v. Board of Education* cases analyzed.
- To find the opinion for *Hirabayashi v. U.S.*, *Korematsu v. U.S.*, *Brown v. Board of Education*, *Adarand Constructors v. Pena* and other Supreme Court cases, visit the Oyez Project ([www.oyez.org](http://www.oyez.org)) or the Cornell University Law School Legal Information Institute ([www.law.cornell.edu/supct/search/search.html](http://www.law.cornell.edu/supct/search/search.html)).

Credits: *A Conversation on the Constitution: The Importance of the Japanese-American Internment Cases with Justices Anthony M. Kennedy, Sandra Day O'Connor, and Stephen G. Breyer.* The Annenberg Foundation Trust at Sunnylands.

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<b>Before Watching the Film</b>	
<p>1. At what point in U.S. history do you think people became most concerned about abolishing discrimination based on race?</p> <p>2. When was the Civil Rights movement?</p> <p>3. Was that before or after World War II?</p> <p>4. Do you think the President should have more power to limit rights during wartime than peacetime?</p> <p>What do you think the Framers of the Constitution thought?</p> <p>Should there be a limit on the President's power?</p> <p>Where should the line be drawn?</p>	
<b>During the Film</b>	
<p><i>Hirabayashi v. U.S.</i> (1943)</p> <p>Facts:</p> <p>Issue:</p> <p>Decision:</p>	<p><i>Korematsu v. U.S.</i> (1944)</p> <p>Facts:</p> <p>Issue:</p> <p>Decision:</p>
<p><i>Brown v. Board of Education</i> (1954)</p> <p>Facts:</p> <p>Issue:</p> <p>Decision:</p>	<p><i>Adarand Constructors v. Peña</i> (1995)</p> <p>Facts:</p> <p>Issue:</p> <p>Decision:</p>

### After the film

1. Do you think the Supreme Court would reach the same decision in *Korematsu* today?

What did Justice O'Connor think?

Why didn't Justices Kennedy and Breyer give an opinion?

2. There will probably never be another situation identical to the facts in *Korematsu*, but there could be something similar that raises the same issue of racial discrimination during wartime. What could that case look like? Write the facts for that hypothetical case here:

3. If you were a judge on the Court, what information would you need to consider in that case? What questions would you ask?

4. Read this excerpt from the Court's decision in *Adarand*. Does it help you form your opinion?

"Our action today makes explicit... : Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest. ... We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means. *Korematsu* demonstrates vividly that even "the most rigid scrutiny" can sometimes fail to detect an illegitimate racial classification.... Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." *Adarand Constructors v. Peña* (1995).

5. Write a final statement of the standard you would apply in this case by completing the following:

In times of war as defined as \_\_\_\_\_,

the president may deny individual rights and liberties if he or she finds the following:

- 
- 
- 
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(Use as many bullet points as you think are appropriate.)

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EXTENSION ACTIVITY

Consider the facts you wrote in question 2 in the "After the Film" section of Handout 1. Now, pretend you are a Supreme Court justice and decide the case using the questions and standard you outlined in questions 3 and 5. Write your opinion (your decision) and be sure to give your reasons:

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#### TEACHER BRIEFING

#### Summary of the Subject Matter:

During World War II, President Franklin Delano Roosevelt issued an executive order which allowed the military to take certain steps to protect the West Coast. The government decided to exclude those of Japanese descent, citizens or not, from the west coast of the United States and to require persons to relocate to internment camps in designated areas. Fred Korematsu was arrested for failing to comply and appealed his case to the Supreme Court, which upheld his arrest and conviction.

Similarly, Gordon Hirabayashi was arrested for violating a curfew for those of Japanese descent. That arrest was upheld by the Supreme Court in a unanimous opinion.

Despite apologies years later, these men were denied individual rights on the basis of their race. The issue that the justices in the film discuss are whether such a decision would be reached today. Only Justice O'Connor gives a response. Being a retired justice, she will not be called upon to decide such a case. Sitting justices do not comment on the facts of cases which may be brought before them. She indicates that today such an outcome would not be likely and the case in which she wrote such an opinion (*Adarand*) is referenced.

Additionally, the justices suggest that the government could have used less intrusive means. They indicate that England was able to conduct hearings for 75,000 persons where there were concerns about enemy sympathy and that only about 2,000 people were restricted as a result. They also point out that there was a prior pattern of discrimination, especially regarding property ownership. The country was not yet fully sensitive to the issue of racial discrimination. The Court may have stated the correct test ("most rigid scrutiny") but still failed to perceive the injustice.

#### Lesson Overview and Teacher Guide:

See the Answers to Handout 1, which follow. Students will understand that the Civil Rights movement followed World War II, which may explain in part the racial insensitivity of the curfew and internment cases. Following the *Hirabayashi*, *Korematsu*, *Brown*, and *Adarand* cases will help them see the evolution of the Court's opinion on race as a basis for discrimination. Students will be asked to create their own set of facts, ask questions, and design a standard by which to determine if the discrimination or other limitation on individual rights and liberties can be justified in time of war.

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#### WORKSHEET – ANSWERS

<b>Before the Film</b>	
<p>1. At what point in U.S. history do you think people became most concerned about abolishing discrimination based on race? While the American Civil War was fought to end slavery, the movement for full equality developed in the 1950s and 1960s.</p>	
<p>2. When was the Civil Rights movement? 1950s and 1960s</p>	
<p>3. Was that before or after World War II? After</p>	
<p>4. Do you think the President should have more power to limit rights during war-time? Answers will vary. The most realistic would be: Yes, probably, subject to some scrutiny by the courts and legislatures</p>	
<p>What do you think the Framers of the Constitution thought? They realized that habeas corpus, for example, might have to be curtailed in time of rebellion or invasion, but they addressed that in Article I which talks about the power of Congress, not the president.</p>	
<p>Should there be a limit on the President's power? Absolutely</p>	
<p>Where should the line be drawn? This is the hardest question and the subject of the exercise. Responses will vary.</p>	
<b>During the Film</b>	
<p><i>Hirabayashi v. U.S.</i> (1943)</p> <p>Facts: Kiyoshi (Gordon) Hirabayashi is arrested for curfew violation. Those of Japanese descent were subject to the curfew.</p> <p>Issue: Is it unconstitutional to discriminate on the basis of race for curfews during war?</p> <p>Decision: In a 9-0 decision, the Supreme Court upheld the curfew law.</p>	<p><i>Korematsu v. U.S.</i> (1944)</p> <p>Facts: Toyosaburo (Fred) Korematsu is arrested for failing to leave an exclusion zone, as was required for those of Japanese descent.</p> <p>Issue: Is it unconstitutional to discriminate on the basis of race in requiring persons, including citizens, to leave a particular zone and relocate in another designated area?</p> <p>Decision: In a 6-3 decision, the Supreme Court applied "the most rigid scrutiny," but still upheld the relocation.</p>

<p><i>Brown v. Board of Education</i> (1954)</p> <p>Facts: Black school children were required to attend separate schools on the basis of their race, which school districts argued was consistent with the prior ruling in <i>Plessy v. Ferguson</i> that facilities could be separate but equal.</p> <p>Issue: Can states require segregation in education based on race?</p> <p>Decision: In a unanimous decision, the Court overruled <i>Plessy</i> and stated that the nature of segregation in itself created the implication of inferiority and was therefore unconstitutional.</p>	<p><i>Adarand Constructors v. Pena</i> (1995)</p> <p>Facts: Students will have little information from the film other than that this case was a recent decision on discrimination in which Justice O'Connor wrote the opinion.</p> <p>Issue:</p> <p>Decision:</p>
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**After the film**

1. Do you think the Supreme Court would reach the same decision in *Korematsu* today? No  
 What did Justice O'Connor think? While *Korematsu* is still on the books as a precedent, views have changed and there would be a different decision today.  
 Why didn't Justices Kennedy and Breyer give an opinion? As sitting justices, they may have to rule on such a case, so they won't voice an opinion in advance.

2. There will probably never be another situation identical to the facts in *Korematsu*, but there could be something similar that raises the same issue of racial discrimination during wartime. What could that case look like? Can you write the facts for that hypothetical case here:  
 Responses will vary, but may include the detention of enemy combatants, which is addressed in the *Landmark Cases* site on *Korematsu* (included in the Additional Resources section).

3. If you were a judge on the Court, what information would you need to consider? What questions would you ask? Responses will vary and may include whether the law is fairly applied, whether any particular racial group is singled out, whether that is an act of racial discrimination or if it is really related to national security, whether there is a prior practice of discrimination against the persons in question, whether the consequences of the limitation on liberties will really make the country more secure, whether there has been any due process.

4. Read this excerpt from *Adarand Constructors v. Pena* (1995). Does it help you form your opinion?  
 (Text omitted) Students will see that the Court must look closer to avoid the mistake of *Korematsu* regarding outright racial discrimination, that the government must have a compelling governmental interest, and that the restriction must be narrowly tailored to suit the purpose.

5. Write a final statement of the standard you would apply here by completing the following:  
 In times of war as defined as \_\_\_\_\_,  
 the president may deny individual rights and liberties if he or she finds the following:

- -
- -
- -
- -

Responses will vary. Students can critique each others' standards, if desired, to try to arrive at a consensus opinion.