Beyond Updating

Changing How We Use and Talk About Citators
Where Are We Headed This Morning?

• The Citator’s Role and Function at Present
• My Research Into Subsequent Negative Treatment
• Reasons to Despair
• Reasons to Hope
• Changing the Story
Do You Even *Shepardize*, Bro?
The Citator’s Role

• Verify a legal document’s current validity.

• Reliably identify all relevant subsequent negative treatment:
  • Procedurally related cases
  • “Unrelated” cases
Do You Even *Update*, Bro?
Place in the Research Process

- Traditionally, at the end.
- Now, every time a document is retrieved and at the end.
Do You Even Check the Citation Analysis Features of the Legal Research Platform, Bro?
Citing Case

Acting Case

Target Case

C
65 S.Ct. 193
Supreme Court of the United States

TOYOSABURO KOREMATSU
v.
UNITED STATES.

No. 22.
Argued Oct. 11, 12, 1944.
Decided Dec. 18, 1944.
Rehearing Denied Feb. 12, 1945.

See 324 U.S. 885, 65 S.Ct. 674.

Fred Toyosaburo Korematsu was convicted of remaining in a portion of a military area from which persons of Japanese ancestry had been ordered excluded, and to review a judgment, 140 F.2d 289, affirming his conviction, he brings certiorari.

Affirmed.
Shepard's®: Korematsu v. United States, 323 U.S. 214

Citing Decisions (536)

No negative subsequent appellate history


   Cited in Concurring Opinion at: 133 S. Ct. 2411 p.2423 186 L. Ed. 2d 474 p.490
   ... (Thomas, J., concurring in part and dissenting in part). B 1 The Court first articulated the strict-scrutiny standard in Korematsu United States, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194(1944). There, we held that "pressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can." Id., at 216, 65 S. Ct. 193, 89 L. Ed. 194. 1 The standard of "pressing public necessity" is more frequently called a "compelling governmental ..."


   ... , this Court made clear that government action that "rest[s] solely upon distinctions drawn according to race" had to be "subjected to the 'most rigid scrutiny.'" Id., at 11, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (quoting Korematsu United States, 323 U.S. 214, 216, 65 S. Ct. 193, 89 L. Ed. 194(1944)); see also McLaughlin v. Florida, 379 U.S. 184, 196, 85 S. Ct. 283 ..."

Research

- 3,800 Cases in KeyCite
  - 3,468 Red Flags
  - 227 Yellow Flags
  - 108 Not Flagged
  - 116 “Unrelated Opinions”

- Compared Set of 116 Unrelated Opinions

- Analyzed Set of 227 Yellow Flagged Cases
Findings

• Of the 116 Unrelated Cases:
  • 31 identified the same “most negative” case (26% agreement)
  • 17 cases used different explanatory phrases to describe the relationship

• Of the 227 Yellow Flags on KeyCite:
  • 57 different explanatory phrases.

• Caveats:
  • “Most negative” case comparison.
    • No actual definition of KeyCite explanatory phrases.
  • No sense of either citator’s coverage.
  • No recent independent user studies.
Signals and Flags

Good (Bad)

Ugly (Ugly)

Good (Citations)
Explanatory Phrases - What We Know

• List of Analysis Definitions Grouped by Shepard’s Signals
  https://perma.cc/XK4R-U6WW
New - Reason for Shepard’s® Signal

- Uncovers “citing passages.”
- Applies to Cases from all jurisdictions from 2003 to today (Warning & Caution treatments).
  - Will be expanding coverage and including “Questioned” signal over time.
The Be All, End All?

- What do citators do well?
  - Identify later-citing primary law.
Getting Your Money’s Worth

• A citator vocabulary:
  • signal, explanatory phrase, indirect history, citation analysis...

• Questions to ask:
  • What percentage of documents (cases, statutory sections) bear some kind of citator marking?
  • How are subsequent negative treatment designations made? Human editors?
  • What would you estimate is the value of the citator alone?
  • *How can you improve the way that your platform identifies and displays subsequent negative treatment?*