KOREMATSU AND BEYOND: JAPANESE AMERICANS AND THE ORIGINS OF STRICT SCRUTINY

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I

INTRODUCTION

The story of the United States Supreme Court's epochal 1954 ruling in *Brown v. Board of Education*[1] and the legal struggle for civil rights led by the National Association for the Advancement of Colored People (NAACP) during the decade following World War II occupies a central place in many Americans' understanding both of the history of democracy in the United States and of the African American experience. Under the direction of Chief Counsel Thurgood Marshall, the NAACP's Legal Defense and Education Fund and allied attorneys brought a series of civil rights cases before the U.S. Supreme Court. Its campaign culminated triumphantly in *Brown* and its companion case *Bolling v. Sharpe*,[2] in which the Court struck down school segregation.

It was in the *Bolling* case that the Court clearly and definitively established its doctrine of "strict scrutiny." According to this doctrine, race was a "suspect classification" under the Constitution, meaning that the Court would subject any action by the government that involved a racial classification to a searching examination, rather than assume its constitutionality, and that it would hold the action to be unconstitutional unless it served a compelling state interest and was narrowly tailored to meet that interest. The Court's doctrine of strict scrutiny removed the constitutional underpinnings of Jim Crow and thus paved the way for its subsequent civil rights decisions during the 1960s.

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1. 347 U.S. 483 (1954).
2. 347 U.S. 497 (1954).

One crucial element of the story of *Brown v. Board of Education* and the battle for black equality has been obscured in the popular narrative: the role of the Nisei, U.S. citizens of Japanese ancestry, in the legal struggle leading up to *Brown*. The Nisei contribution took different forms: For example, lawyers for the Japanese American Citizens League (JACL) consulted on different occasions with NAACP counsel on the preparation of civil rights cases before the Supreme Court and lower courts, and the JACL participated in these cases as amicus curiae. Beyond the force of their arguments, the presence of the Nisei alongside African Americans served a powerful symbolic function, particularly in the decade following their mass wartime removal and incarceration (commonly called the Japanese American internment). It operated to remind both judges and the nation that racial prejudice was not simply a "black problem," but a complex phenomenon of global dimensions, and of the dangerous consequences of race-based legislation.

However, the most decisive contribution of the Japanese Americans to the legal struggle for civil rights was in laying the foundation for the doctrine of strict scrutiny on which *Brown* and the other cases were based. The doctrine was developed in significant part from principles first enunciated in the cases involving Japanese American challenges to their wartime incarceration. These principles were then elaborated and reinforced immediately after World War II in a set of cases brought by the JACL concerning the rights of Japanese Americans to live and work free of discriminatory restrictions. In the years that followed, the NAACP built upon these cases in its fight against segregation, and the Court finally absorbed and explicitly enshrined the principles first enunciated in those cases.

II

THE WARTIME JAPANESE AMERICAN CASES

A. *Hirabayashi v. United States*

The story of Japanese Americans and strict scrutiny begins with *Hirabayashi v. United States*[3] and *Korematsu v. United States*.[4] In these cases, the Court justified its upholding of race-based restrictions on American citizens of Japanese ancestry on the grounds of the exceptional demands of wartime military necessity. In the case of *Hirabayashi* and its companion case *Yasui v. United States*,[5]

3. 320 U.S. 81 (1943).

4. 323 U.S. 214 (1944). *See* Daniel Sabbagh, *"Généologie du principe de color-blindness" in* L'EGALITE PAR LE DROIT: LES PARADOXES DE LA DISCRIMINATION POSITIVE AUX ÉTATS-UNIS, 165 (2003). For a discussion of *Korematsu* and the origins of strict scrutiny, see Michael Klarman, *"An Interpretive History of Modern Equal Protection*," 90 MICH. L. REV. 213, 213-62 (1991); Reggie Oh and Frank Wu, *"The Evolution of Race in the Law: The Supreme Court Moves From Approving Internment of Japanese Americans to Disapproving Affirmative Action for African Americans*," 1 MICH. J. RACE & L. 165, 165-93 (1996); Neil Gotanda, *"The Story of* Korematsu*: The Japanese-American Cases*," *in* CONSTITUTIONAL LAW STORIES, 270-72 (Michael C. Dorf, ed., 2004).

5. 320 U.S. 115 (1943).

the Court sanctioned a special curfew for Japanese Americans. Engaging in some judicial hairsplitting, the Court considered this question separately from the mass removal and confinement that followed, which it refused to address. Chief Justice Harlan Stone, in order to underline the exceptional nature of the action, wrote that as a general rule, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."[6] The urgency of the war emergency made race-based classification imperative. However, Stone was writing for a unanimous court and kept his discussion of the issues involved in the case to a minimum to avoid dissents. As it was, Justice Frank Murphy strongly objected to the race-based curfew and circulated a dissent, which he was persuaded only under great pressure to transform into a concurrence in order to preserve unanimity.[7]

B. *Korematsu v. United States*

The *Korematsu* case involved the right of the Army to undertake the mass removal of American citizens of Japanese ancestry from the West Coast. Once again, the majority of the Court chose to frame the issue simply as evacuation, isolated from the consequent confinement of Japanese Americans. Nevertheless, the Court split on the decision. In a ringing dissent, Justice Murphy charged that the Court's action amounted to "a legalization of racism."[8] This clearly stung the author of the majority opinion, Justice Hugo Black, a Southerner sensitive to the question of racial discrimination.[9] Black vigorously rejected any suggestion that racism had guided either the Court or the officials responsible for evacuation: "To cast this case," he insisted, "into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue."[10] Still, to buttress his conclusion, Black felt compelled to add to his original draft opinion some preliminary language distinguishing the case and justifying the extraordinary military urgency that led the Court to its ruling:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restric-

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6. Hirabayashi v. United States, 320 U.S. 81, 100 (1943). Stone himself seems to have been unhappy about the government's treatment of Japanese Americans and even wrote privately that it was difficult to reconcile with any concept of civil liberties. GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 190 (2001).

7. PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES 242-50 (1993).

8. *Korematsu*, 323 U.S. at 242. For Murphy's impact on shaping Fifth Amendment protections, see Matthew J. Perry, *"Justice Murphy and The Fifth Amendment Equal Protection Doctrine: A Contribution Unrecognized*," 27 HASTINGS CONST. L.Q. 243, 266-79 (2000).

9. For Black's opinion in *Korematsu* and his views on racial matters see ROGER K. NEWMAN, HUGO BLACK 313-17 (1994).

10. *Korematsu*, 323 U.S. at 223.

> tions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[11]

This belatedly inserted and somewhat defensive passage may well have been considered dicta by the justices.[12] In that sense it resembled the first mention in the opinions of the Court of the idea of a privileged level of scrutiny for legislation in the area of minority rights. In footnote four of his opinion in the 1938 case *United States v. Carolene Products Co,* Justice Stone had noted that legislation involving racial minority groups or other "discrete and insular minorities" might well be subjected to "more exacting judicial scrutiny."[13] Later, in the 1942 case *Skinner v. State of Oklahoma Ex. Rel. Willimson*, the Court had stated that "strict scrutiny" of legislative classifications was necessary in the case of basic civil rights, although this did not involve a racial classification but one of different classes of felons.[14] Nevertheless, the Court did not further mention such a doctrine or cite these passages in civil rights cases such as *Morgan v. Virginia*[15] during the immediate postwar years.[16] This would change as Japanese Americans became engaged in the issue of equal rights to residence, both through their efforts to fight the California Alien Land Act and through their participation in the larger multigroup struggle against restrictive covenants.

III

THE OYAMA CASE

A. The Alien Land Act

California's Alien Land Act, originally enacted in 1913, barred all "aliens ineligible to citizenship" from owning, acquiring, leasing, occupying, or transferring agricultural land. The law, which soon inspired similar statutes in other West Coast states, was designed to preserve white farmers from competition by Issei (Japanese immigrant) farmers—who as Asians were barred from naturalization by federal law—and to stigmatize the Issei as undesirables.[17] Challenges to the constitutionality of the Alien Land Acts by Japanese Americans were defeated in the United States Supreme Court during the 1920s. In *Ozawa v. United States*,[18] *Terrace v. Thompson*,[19] and *Porterfield v. Webb*,[20] the Court ruled

11. *Id.* at 216.

12. Michael Jones-Correa has argued cogently that the rule expounded in *Korematsu* came about in a sense by accident, in that the majority wished to "attenuate the shocking nature" of its holding in the case by marking off its decision in that particular case as exceptional, and that otherwise the justices would never have agreed to such an explicit formulation. Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 451 (2001).

13. 304 U.S. 144, 153 n.4 (1938).

14. 316 U.S. 535 (1942).

15. 328 U.S. 373 (1946).

16. On the non-use of *Carolene Products* see Felix Gilman, "*The Famous Footnote Four: A History of the Carolene Products Footnote*," 46 S. TEX. L. REV. 163, 186-91 (2004).

17. *See* ROGER DANIELS, THE POLITICS OF PREJUDICE 58-64 (1962).

18. 260 U.S. 178 (1922).

that Congress could constitutionally make rational distinctions in the classification of aliens such that some were eligible for citizenship and others not, and that the states did not violate the Equal Protection Clause of the Fourteenth Amendment in limiting agricultural land ownership to citizens and aliens eligible for citizenship.[21] As a result of the law, Issei farmers were forced either to depend on white friends to buy and hold their land for them or to place the title to their land in the names of their American-born children, who were citizens. This was a gray area at the very least, as the law provided that any property acquired or transferred "with intent to prevent, evade, or avoid" the statute's provisions would "escheat" to the state as of the date of acquisition. Section 9(a) of the law (the product of a 1920 amendment), made explicit the legal presumption of such intent whenever an ineligible alien paid for land that was transferred to a citizen or eligible alien.[22]

The Alien Land Acts remained largely unenforced throughout the 1920s and 1930s. In the words of a contemporary commentator, "Legal loopholes, administrative inactivity, and public indifference enabled Japanese aliens to circumvent many of the prohibitions."[23] However, during World War II, white Californians lobbied for strict enforcement of the statute to discourage return to the state of incarcerated Japanese Americans. In 1944 and 1945, as Japanese Americans began preparing to leave the camps, the California legislature appropriated money for the State's Attorney General to initiate escheat proceedings to take land purchased with the funds of Japanese American aliens away from its owners. Even though by 1946 there were barely ten thousand "aliens ineligible to citizenship" farming in California, most of whom were elderly, these escheat proceedings were enormously damaging to all Japanese Americans. Title companies refused to insure Japanese American farmland, except at exorbitant rates, and numerous families lost their land or were forced to pay large sums to the state government (usually half the assessed value of the land) in order to be left alone.[24] In all, fifty-nine escheat actions were brought by the state of California against Japanese aliens in the five years after 1942, compared with fourteen in the previous thirty years.

B. Background to the Case and the Lower Court Suits

In early 1945, Fred and Kajiro Oyama brought a legal challenge to the Alien Land Act. Fred was a Nisei from the San Clemente area who had been given two small parcels of land bought by Kajiro, his Issei father, during the 1930s. The Oyamas were forced to leave their land in spring 1942, when West Coast

19. 263 U.S. 197 (1923).

20. 263 U.S. 225 (1923).

21. On development and constitutional aspects of Alien Land Laws, see, e.g., MORITOSHI FUKUDA, LEGAL PROBLEMS OF JAPANESE AMERICANS 123-91 (1980).

22. *Id.*

23. Comment, "*The Alien Land Laws—a Reappraisal*," 56 YALE L.J. 1017, 1018 (1947).

24. BILL HOSOKAWA, NISEI: THE QUIET AMERICANS 447-48 (1969).

Japanese Americans were evacuated. While the Oyamas were away, State Attorney General Robert Kenny commenced an escheat proceeding, claiming that the land had been transferred to Fred in order to evade the Alien Land Act.[25] Upon their return to California, the Oyamas, along with their neighbors Kazaburo Koda and Shichinosuke Asano, organized the Society for the Promotion of Japanese-American Civil Rights to fund a test case.[26] The Oyamas' case was taken up by JACL Counsel A.L. Wirin, a white Jewish lawyer who also was head of the Southern California branch of the American Civil Liberties Union, and by Hugh E. MacBeth, Sr., an African American lawyer from Los Angeles who had worked with the JACL's legal committee on the organization's amicus brief in *Korematsu*. In February 1945, the case of *People v. Oyama*, together with a companion case, *People v. Hirose*, was argued in the San Diego County Superior Court. In their Memorandum of Law, Wirin and MacBeth argued that even if the Alien Land Act had been upheld by the U.S. Supreme Court in the 1920s, "many living waters have [since] run under the bridges of the Constitution"; the times and circumstances had changed sufficiently that these decisions no longer were controlling.[27] Moreover, the Alien Land Act was conceived in race prejudice and penalized the defendants solely because of race, and was thereby unconstitutional. In an overt reference to the *Korematsu* case, then less than two months old, Wirin and MacBeth asserted that "Discrimination because of race is constitutionally justified only when required by pressing public necessity, under circumstances of direct emergency and peril."[28]

In March 1945 Superior Court Judge Charles G. Haines ruled against the Oyamas, on the grounds that he was bound by the earlier decisions of the courts. Haines's opinion implicitly rejected the imposition of a higher standard of scrutiny for racial classifications: "Whether in view of changed views on the subject of race, classifications stressing that consideration have ceased to be reasonable in such a sense as to render them obnoxious to limitations expressed in the Federal Constitution, is a question not very appropriate for consideration by a trial court."[29]

C. The California Supreme Court Ruling

Shortly thereafter, Wirin appealed *People v. Oyama* to the California Supreme Court. MacBeth withdrew from the case at this point, for reasons that

25. Unlike the overwhelming majority of West Coast Japanese Americans, the Oyamas were not confined in a camp. They were able to migrate to Utah during the short period during Spring 1942 when such "voluntary evacuation" was permissible. It was during their stay in Utah that the Oyama family learned of the escheat proceeding. Telephone interview with Fred Oyama (September 2004).

26. Yukio Morita, "The Japanese Americans in the United States Between 1945 and 1965, at 47-55 (1967) (unpublished M.A. thesis, Ohio State University) (on file with Young Research Library, University of California, Los Angeles).

27. A.L. Wirin, article for THE OPEN FORUM, February 24, 1945, attached draft to letter, A.L. Wirin to Clifford Forster, February 19, 1945. Alien Land law, Japanese Americans file, microfilm papers of the American Civil Liberties Union, Library of Congress [hereinafter ACLU PAPERS].

28. *Id.*

29. American Civil Liberties Union Bulletin, No, 1170 (March 19, 1945), *in* ACLU PAPERS.

are not clear. Meanwhile, the Civil Rights Defense Union of California, a fledgling Japanese American group organized to fight escheat cases, commissioned San Francisco Attorney James Purcell (who had represented Mitsuye Endo in her successful habeas corpus case challenging her confinement before the Supreme Court) to support Wirin's efforts.[30] The *Oyama* case was heard in the California Supreme Court in March 1946. By this time, prewar and wartime public hostility to Japanese Americans on the West Coast had eased. A federal judge in Orange County struck down segregated schools for Mexican Americans, citing the legal principle proclaimed by Stone in the *Hirabayashi* case as authority.[31] In November 1946 a voter initiative in California to extend the Alien Land Act was resoundingly defeated at the polls. Nevertheless, a few days before the election the California Supreme Court issued a decision that upheld the escheat actions. Although the right of a minor American citizen to receive and hold property from an alien ineligible to citizenship had been established in the 1922 California Supreme Court case *Estate of Tetsubumi Yano*,[32] the California court largely ignored in its ruling the impact of the law on Fred Oyama. Rather, the California high court judges, once again citing the United States Supreme Court's 1922–1923 decisions on the Alien Land Act as precedent,[33] held that the state's action in classifying aliens according to eligibility for citizenship had a rational basis.[34]

D. The Supreme Court Appeal and the Brief

Following the California court ruling, Wirin, with the aid of both the JACL and the ACLU, decided to appeal his case to the United States Supreme Court. Purcell and the CRDU withdrew from the case, fearing that the Supreme Court would reaffirm its previous holding.[35] Instead, Wirin joined forces on the appeal with his new law partners, Fred Okrand and former JACL President Saburo Kido (who together submitted an amicus in the name of the JACL). Meanwhile, in hopes of showcasing the case's importance, he sought an appellate lawyer with a national reputation to argue the case before the Supreme Court. With the aid of Charles Horsky, a Washington attorney who had put together

30. *Retainer Agreement Signed With Attorneys Purcell and Ferriter*, UTAH NIPPO, March 13, 1946.

31. Mendez v. Westminster Sch. Dist., 64 F. Supp. 544, 548 (S.D. Cal. 1946). When the case was appealed to the Ninth Circuit Court of Appeals, the JACL entered the case as amicus curiae—the first case in which the organization intervened on behalf of another minority—arguing that *Korematsu*, in barring classification based on "racial antagonism," forbade school segregation on grounds of ancestry. A. L. Wirin also received permission for the JACL to participate in oral argument on the case. Although the Ninth Circuit decision narrowed considerably the scope of the lower court ruling, its decision led California to repeal all school segregation laws. Toni Robinson & Greg Robinson, Méndez v. Westminster*: Asian-Latino Coalition Triumphant?*, 10 ASIAN L.J. 161, 161-83 (2003).

32. 206 P. 995 (1922).

33. People v. Oyama, 173 P.2d 794, 800-04 (1946); *see also* "Statement of Attorney A.L. Wirin on California Supreme Court Ruling in the Oyama Test Case," ACLU Papers.

34. FRANK F. CHUMAN, THE BAMBOO PEOPLE: THE LAW AND JAPANESE AMERICANS 80-81 (1976).

35. *See Oyama Test Case*, PACIFIC CITIZEN, March 5, 1947, at 3:2; *CRDU Sudden Act to Drop Oyama Case Stirs JACL*, RAFU SHIMPO, Feb. 13, 1947, at 1:5-6.

the ACLU's amicus brief in the *Korematsu* case, the JACL contacted Dean Acheson, a distinguished Washington lawyer and former U.S. Undersecretary of State (who was shortly to become President Truman's Secretary of State). Acheson agreed to serve without fee as Chief Counsel in oral argument on the case, now called *Oyama v. California*.[36]

Wirin and his colleagues retooled their strategy in their appeal to the Supreme Court. Rather than emphasize the rights of aliens in the appellant's brief, the JACL lawyers led off their case by arguing that the Alien Land Act violated the Fourteenth Amendment rights of citizens of Japanese ancestry by imposing solely on them, and not on citizens of any other ancestry, the burden of proof that any land they received from a parent ineligible to citizenship was intended as a gift and was not made in order to avoid escheat under the Alien Land Act.[37] The JACL attorneys then bolstered their case by means of a "strict scrutiny" argument. Because the Alien Land Act was expressly race-based and anti-Japanese, it was not subject to the presumption of constitutionality that the Court usually granted to state legislative classifications. On the contrary, cases involving civil liberties, whether they concerned citizens or aliens, faced a more rigorous constitutional test than cases involving ordinary commercial transactions. "Indeed," Wirin asserted, "the presumption—and it is a strong presumption—is against any 'race' legislation."[38] The Court should examine rigorously the intent and effect of the law. As authority for this proposition, Wirin audaciously cited Justice Black's language in *Korematsu v. United States*: "[T]o begin with, . . . all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[39]

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36. According to A.L. Wirin, Horsky suggested Acheson because he had lost his first two cases before the Supreme Court and wished to burnish his reputation. *See* Frank Chuman, "Notes on Interview With A. L. Wirin," transcript, December 1971. Box 534, Frank Chuman Papers, Special Collections, University of California, Los Angeles. JACL Secretary Mike Masaoka gave a more colorful version of Acheson's recruitment. According to Masaoka's account, he went to see Acheson, who asked how much money the JACL could pay. Masaoka responded, "Five hundred dollars." Acheson commented that that would scarcely be enough to pay for the record, and he would have to serve without pay, whereupon Masaoka quickly responded, "That's wonderful, Mr. Acheson! You have a client." MIKE MASAOKA & BILL HOSOKAWA, THEY CALL ME MOSES MASAOKA 213-14 (1987). Acheson's presentation was confined to the argument that the Alien Land Act discriminated against American citizens of Japanese ancestry. *Oyama Test Case*, PACIFIC CITIZEN, November 8, 1947.

37. Brief For Petitioners at 7, Oyama, v. California, 322 U.S. 633 (1948) (No. 47-44).

38. *Id*. at 35.

39. *Id*. One interesting means of tracing the development of Wirin's position on "strict scrutiny" is by comparing the petitioner's brief with Wirin's original petition for certiorari to the Supreme Court. In that document, written in late 1946, Wirin had argued on the basis of Thomas v. Collins, 323 U.S. 516 (1945), and other precedents that cases involving civil liberties imposed a more rigid test on state action than normal commercial transactions, and that only cases involving a "grave and impending public danger" could justify such action. He proceeded to cite the operative passage in *Korematsu* as support for his claim that the impact of the Alien Land Act on aliens of Japanese origin was similar. However, Wirin then immediately retreated from that position and insisted that the Alien Land Law did not even meet the usual "reasonable classification" test for constitutionality. Petition for a writ of certiorari to the Supreme Court of California at 20-21, *Oyama*, Mike Masaoka Papers, Marriott Library, University of Utah.

While the citation of *Korematsu* in support of civil rights was seemingly unprecedented in arguments before the Supreme Court, Wirin's position on "strict scrutiny" echoed arguments that had appeared in several law journal articles on alien land legislation over the previous months. For example, Edwin Ferguson, one-time solicitor for the WRA, had written in early 1947 that a higher standard was necessary in judging alien land law cases:

> [I]t should not be enough to indulge in speculative justifications of the law . . . or to plead ignorance of local conditions and the "possibility" of a "rational basis" for the legislative judgment. Restrictive legislation stemming from race prejudice, particularly against a minority that is unable to participate in the political process, calls for [a] more searching inquiry. Such an inquiry would reveal, it is submitted, that the alien land law is unjust and unjustifiable legislation, and that it clearly violates the rights protected by the Fourteenth Amendment.[40]

E. *Oyama v. California*—the Majority Opinion

On January 19, 1948, the Supreme Court handed victory to the plaintiffs by a 6-3 margin. Chief Justice Fred Vinson, in the majority opinion, held that the Alien Land Act violated the Fourteenth Amendment rights of citizens of Japanese ancestry. He therefore found it unnecessary to revisit the earlier cases or examine the issue whether Japanese aliens also were entitled to the protection of the Fourteenth Amendment. As a result, the Supreme Court's decision did not explicitly overturn the Alien Land Act, though in practice it suspended its enforcement in California. Nevertheless, the Chief Justice left no doubt that only a truly "compelling justification" could sustain any racially discriminatory statute.[41] "There remains the question of whether discrimination between citizens on the basis of their racial descent, as revealed in this case, is justifiable. Here we start with the proposition that only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause."[42] Furthermore, Vinson declared, the Court had the duty to examine whether a law, even if fair on its face, had a discriminatory intent or effect. Contrary to the normal practice of appellate courts, the Court could take account not only of the legal issues involved but of "those factual matters with which they are commingled."[43] Thus, the majority of the Court tacitly accepted the JACL's argument that laws involving race or color faced a more rigorous

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40. Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CAL. L. REV. 61, 89-90 (1947), *cited in Land Law Analysis*, PACIFIC CITIZEN, June 21, 1947; *see also* Comment, *The Alien Land Laws: A Reappraisal*, 56 YALE L.J. 1017, 1017-36 (1947); Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7, 7-60 (1947). Evidence of the Yale article's importance is the presence of a marked-up reprint in the file with correspondence with A. L. Wirin and Director Roger Baldwin. ACLU PAPERS. Hugh E. MacBeth, Jr., son of Hugh E. MacBeth, Sr. and himself a former student of McGovney's, discussed McGovney's work with A.L. Wirin shortly after the California Supreme Court decision, and recalled that Wirin was particularly impressed with the idea of basing the Supreme Court appeal primarily on the rights of American citizens to receive property. Interview with Hugh E. MacBeth, Jr. (January 2005).

41. Oyama v. California, 332 U.S. 633, 640 (1948).

42. *Id*. at 646.

43. *Id*. at 636.

test than the Court usually applied to state laws and would now require a showing of exceptional circumstances to justify them.[44] The novelty of this position was recognized in several law journal articles in the period that followed.[45]

F. *Oyama v. California*—The Concurrences

Several of the justices went even further in their analysis than Vinson's majority opinion. In a concurrence, Justice Hugo Black stated that the Court should have overturned the Alien Land Act because its basic provisions violated the Equal Protection Clause of the Fourteenth Amendment in discriminating against Japanese aliens on racial grounds. "If there is one purpose of the Fourteenth Amendment that is wholly outside the realm of doubt," the author of the *Korematsu* opinion pointedly commented, "it is that the Amendment was designed to bar States from denying to some groups, on account of their race or color, any rights, privileges, and opportunities accorded to other groups."[46] In a second concurrence, Justice Frank Murphy presented a detailed account of the history of California's Alien Land Act, which he denounced as a blatant expression of racism and of an "anti-Oriental virus."[47] Murphy cast particular scorn on the claims of the Act's defenders regarding "the alleged disloyalty, clannishness, inability to assimilate, racial inferiority and racial undesirability of the Japanese."[48] The uncompromising language of Murphy's opinion led Justice William O. Douglas to send him a curious letter asking him to tone down or withdraw the concurrence:

> In *Oyama* you are 100 per cent right in your position and I would like to join you. The difficulty is that I fear your opinion as written will be translated by the Russians into Korean, Chinese and Japanese and widely circulated in the Orient. The racial prejudice represented by the legislation is unmistakable. But it does not represent the viewpoint of the people of our nation. In fact, it does not represent the views of a majority of Californians. A few vested interests have put the thing through. But the Russians will utilize it against all of our people. That is most unjust. I wanted to submit this angle to you for your consideration.[49]

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44. *Id.* at 637.

45. *See, e.g.*, R.A. Goater, *Civil Rights and anti-Japanese Discrimination*, 18 U. CIN. L. REV. 81, 81-89 (1949); Note, *Conflict Between Local and National Interests in Alien Landholding Restrictions*, 16 U. CHI. L. REV. 315, 315-23 (1949); Note, *1947-48 Term of the Supreme Court: The Alien's Right to Work*, 49 COLUM. L. REV. 257, 257-64 (1949); *see also* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*," 37 CAL. L. REV. 341, 341-81 (1949).

46. *Oyama*, 332 U.S. at 649.

47. *Id.* at 651 (Murphy, J., concurring).

48. *Id.* at 651, 667. For a commentary on Murphy's uncommonly blunt denunciation of racism, see Randall Kennedy, *Justice Murphy's Concurrence in* Oyama v. California*: Cussing Out Racism*, 74 TEX. L. REV. 1245, 1245-46 (1996). Klarman mentions *Oyama* as a relevant case in the history of equal protection, but he ignores the majority opinion and curiously focuses only (and not altogether accurately) on Murphy's striking down of racial classifications as irrational. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV., 213, 233 (1991).

49. Letter from William O. Douglas to Frank Murphy (January 14, 1948) (on file with William O. Douglas Papers, Box 161, Library of Congress, Washington, D.C.).

G. *Korematsu* and *Oyama*

Although the majority opinion did not cite *Korematsu*, the specter of the wartime internment of the Japanese Americans hung over the Supreme Court and clearly helped shape the decision. The Court that decided *Oyama* was, with only two exceptions, the same Court whose members had upheld the constitutionality of the Army curfew and evacuation of people of Japanese ancestry a few years before.[50] The government's claims of military necessity and Japanese American disloyalty, which the justices had then accepted as sufficient to justify the evacuation, were swiftly discredited after the end of the war by commentators such as Eugene Rostow.[51] In the months before the Court rendered its decision, the United States President's Committee on Civil Rights, in its historic report *To Secure These Rights*, had advocated an investigation of the wartime injustice to Japanese Americans and had called for legislation compensating them for their losses.[52] The Court was very conscious of the connection between the discriminatory provisions of the Alien Land Act and the pressures that had led to the internment, although Chief Justice Vinson's majority opinion took pains to distinguish the Court's ruling in *Oyama* from that in *Hirabayashi*. Vinson referred to *Hirabayashi* as a war measure which had presented "exceptional circumstances," contrary to the "general rule" against racial distinctions mentioned in that case.[53] Still, Justice Murphy, citing his dissenting opinion in *Korematsu*, explicitly connected the bigoted attitudes that underlay the Alien Land Act with the "misrepresentations, half-truths and distortions" that made up the government's case for evacuation. Paraphrasing the language of that dissent and thereby emphasizing the link, Murphy then called on the Court to overturn its previous decisions, since they gave sanction to legalized racism.[54]

IV

THE RESTRICTIVE COVENANT CASES

A. Historical Background

In addition to defending the rights of Japanese American farmers, both the opinion in *Oyama* and the JACL attorneys who brought the test case would

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50. C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937–1947, at 283 (1948) (asserting that the *Oyama* decision represented the Supreme Court's atonement for its mistake in *Korematsu*). *See generally* C. HERMAN PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT (1954).

51. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 489-534 (1945); *see also* CAREY MCWILLIAMS, PREJUDICE: JAPANESE-AMERICANS, SYMBOL OF RACIAL INTOLERANCE (1944); MINÉ OKUBO, CITIZEN 13660 (1946). The War Relocation Authority, the government agency responsible for operating the camps, had cast doubt on the necessity for evacuation in its official history. U.S. Department of the Interior, War Relocation Authority, WARTIME EXILE: THE EXCLUSION OF THE JAPANESE AMERICANS FROM THE WEST COAST (1946).

52. United States President's Committee on Civil Rights, TO SECURE THESE RIGHTS 31, 34 (1947).

53. *Oyama*, 332 U.S. at 646.

54. *Id.* at 671-72.

provide strong support for the NAACP's contemporaneous fight against restrictive covenants. Restrictive covenants—reciprocal promises by groups of homeowners, usually included in the deeds to their homes—then expressed the promise not to sell or rent those homes to members of minority or "colored" groups such as blacks, Native Americans, Latinos, Asian Americans, and Jews, and to make future buyers' signing the covenants an express condition of sale. The covenants were effective means of perpetuating housing segregation in urban areas. The U.S. Supreme Court had previously rejected an attack on the constitutionality of restrictive covenants in *Corrigan v. Buckley*.[55] Because the covenants were private agreements, the Court held, they did not violate the Equal Protection Clause of the Fourteenth Amendment, which prohibited racial discrimination only by state governments.[56]

During the postwar years, when housing shortages were chronic, however, restrictive covenants cut sharply into the total housing available for minority groups and fostered extreme overcrowding in ghetto areas. This made them a crucial public policy issue. In 1946, the NAACP and its allies again sought to disarm restrictive covenants by bringing lawsuits on behalf of the African American buyers and renters of houses covered by restrictive covenants and on behalf of would-be white sellers, all of whom had been enjoined in state court by the owners of other houses subject to the covenants who sought to enforce the covenants, vacate the sales, and evict the buyers and renters. When a St. Louis case, *Shelley v. Kraemer*, and a Detroit case, *McGhee v. Sipes*, ended in defeat for the NAACP plaintiffs in their respective state supreme courts, NAACP lawyers successfully petitioned for certiorari to the U.S. Supreme Court, which consolidated the two cases under the title *Shelley v. Kraemer*.[57] NAACP lawyers hoped to persuade the Court that even if restrictive covenants were private agreements, judicial enforcement of them by state courts constituted discriminatory state action, which violated the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court also agreed to hear *Hurd v. Hodge*,[58] a case that involved a restrictive covenant in the District of Columbia, where the Fourteenth Amendment did not apply.[59]

B. Loren Miller, A.L. Wirin, and the NAACP Brief

In its preparation for the briefs in the restrictive covenant cases, the NAACP turned to Los Angeles lawyer Loren Miller, a recognized expert on the

55. 271 U.S. 323 (1926).

56. The classic study of restrictive covenants, although it does not mention the role of Japanese Americans, is CLEMENT VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES (1959); *see also* Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541, 541-68 (2000).

57. 334 U.S. 1 (1948).

58. 334 U.S. 24 (1948).

59. LOREN MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO 321-26 (1966); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 85-90 (1994).

subject of housing discrimination, who in turn sought assistance from his long-time ally A.L. Wirin.[60] In December 1945, Miller had won the first victory over restrictive covenants, successfully defending Ethel Waters and a number of other black entertainers who had bought houses in Los Angeles's West Adams Heights district from eviction under a restrictive covenant. Superior Court Judge Thurmond Clarke had ruled in that case that the restrictive covenants in and of themselves violated the Fourteenth Amendment.[61]

Following the decision, Wirin, who had long been involved in fighting restrictive covenants on behalf of the ACLU, persuaded the JACL to support a multi-ethnic struggle against restrictive covenants in the Los Angeles area. In 1946 Miller and Wirin began a widely publicized and ultimately triumphant campaign against restrictive covenants on publicly owned land in South Pasadena.[62] However, Wirin's experience was initially less successful than Miller's had been. In 1946, with legal advice from Miller, the JACL sponsored a pair of suits, *Kim v. Superior Court* and *Amer v. Superior Court*. These involved, respectively, a Chinese American and a Korean American ex-GI, each of whom had purchased homes subject to restrictive covenants excluding "Mongolians." In August 1947, the California Supreme Court upheld enforcement of both restrictive covenants in question.[63]

After securing Miller's assistance, the NAACP scheduled a conference in Chicago over Labor Day weekend 1947. The purpose of the conference, which was attended by civil rights lawyers and representatives of liberal organizations from all over the country, was to formulate strategies for fighting *Shelley v. Kraemer* and *Hurd v. Hodge*, the restrictive covenant cases then pending before the Supreme Court. In the end, the consensus of the conferees was that the NAACP should prepare a "Brandeis brief"—a brief that concentrated less on legal precedent than on presenting sociological and statistical data (in this case, on the negative effects of restrictive covenants). In pursuit of this plan, the NAACP distributed supporting materials to representatives of the other ethnic groups for them to use in writing amicus curiae briefs that would contain data on the harmful and degrading effects of restrictive covenants.[64] Wirin, attending the conference, reminded his colleagues that the *Oyama* case would soon be

60. For Miller's expertise, see LOREN MILLER, "RESTRICTIVE COVENANTS V DEMOCRACY," IN MILLER AND MOST REVEREND BERNARD J. SHEIL, RACIAL RESTRICTIVE COVENANTS, (Chicago Council Against Racial and Religious Discrimination, 1946); Loren Miller, *Covenants in the Bear Flag State*, 35 THE CRISIS 138, 138-40, 153 (1946). For Miller and Wirin, see letter from Thurgood Marshall to Loren Miller (February 13, 1947) (on file with Loren Miller, Restrictive Covenant Files, Legal File, NAACP Papers).

61. *Month in Building News*, THE ARCHITECTURAL FORUM (1946).

62. *See Housing Segregation Suit Lost by Pasadena FPHA*, RAFU SHIMPO, July 26, 1947, at 1:5-6.

63. *Chinese Vet Fights Against Restrictive Covenants*, RAFU SHIMPO, May 15, 1956, at 1:3-4; *California Supreme Court Upholds Housing Covenants*, RAFU SHIMPO, August 22, 1947, at 1:5-6; *High Court Ruling Hurts Minorities*, L. A. TRIB., August 20, 1947, at 1:6.

64. RICHARD KLUGER, SIMPLE JUSTICE 253-55 (1976).

heard, and it was agreed that the link between the Alien Land Act and restrictive covenants should be underlined.[65]

C. The JACL Amicus and the Asian Restrictive Covenant cases

No doubt hoping to follow up on this proposal, the JACL decided after the conference ended to submit to the Court an amicus curiae brief in support of the NAACP that would provide information on restrictive covenants against Japanese Americans. On September 16, 1947, Ina Sugihara, a Nisei active in the New York branch of the JACL who had attended the conference as a representative of the Protestant Council of New York City (and reported on it for *The Pacific Citizen*), wrote Marian Wynn Perry of the NAACP to inform her that the National JACL wished to file an amicus brief in the restrictive covenant cases, but that it needed information on how to file such a brief since it had never done one before.[66] Perry sent the requested materials to JACL Secretary Masao Satow and enclosed a note saying, "We are very happy you are going to join with us in these cases."[67] The firm of Wirin, Kido and Okrand then began work on the brief. Frank Chuman, a Nisei former camp inmate who was the firm's new associate, did much of the initial drafting.

Meanwhile, Miller and Wirin together petitioned the Supreme Court to grant certiorari in the *Kim* and *Amer* cases, and they filed a separate amicus brief in the name of the JACL urging the Court to hear the two cases because they illustrated how restrictive covenants affected racial groups other than African Americans.[68] On October 31, 1947, Wirin wrote Thurgood Marshall, asking that the NAACP also file an amicus brief in support of granting certiorari in *Kim* and *Amer*.[69] Although Marshall privately expressed his gratitude for Wirin's efforts to bring *Kim* and *Amer* as support for the NAACP, he seems not to have drafted the requested amicus brief—no doubt he had too much on his plate already.[70] In the end, the Court did not immediately grant certiorari in ei-

65. Minutes of discussion, Sunday afternoon, Shelley v. Kraemer lawyer Conference, Restrictive Covenant Files, NAACP Papers, Series II, Library of Congress [hereinafter NAACP Papers].

66. Letter from Ina Sugihara to Marian Wynn Perry (September 16, 1947) (on file with NAACP Papers, Japanese (Nisei) file). The reasons for the JACL's ignorance regarding amicus curiae briefs are not clear. The organization already had submitted such a brief to the Supreme Court in the *Korematsu* case and had intervened in the *Méndez v. Westminster* case (*see* note 31, *supra*) and others, including a restrictive covenant case involving African Americans in New York. *Deplore Racial Ban in Housing*, RAFU SHIMPO, January 11, 1947.

67. Letter from Marian Wynn Perry to Masao Satow (September 18, 1947) (on file with NAACP Papers, Japanese (Nisei) file).

68. Add New "Color" to Supreme Court Case, THE OPEN FORUM, Vol. 24, No. 21 (October 18, 1947), 1:2.

69. Letter from A.L. Wirin to Thurgood Marshall (October 31, 1947) (on file with NAACP Papers, Japanese (Nisei) file); letter from A.L. Wirin to Thurgood Marshall (December 16, 1947) (on file with NAACP Papers, Japanese (Nisei) file).

70. Letter from Thurgood Marshall to Roger Baldwin (December 30, 1947) (on file with NAACP Papers, Japanese (Nisei) file).

ther *Kim* or *Amer*, and the decisions in *Shelley v. Kraemer* and *Hurd v. Hodge* eventually mooted those two cases.[71]

The JACL's brief in the restrictive covenant cases (which, for reasons that are not clear, was nominally addressed only to *Hurd v. Hodge*) was filed on December 1, 1947. In it, Wirin, Kido, Okrand, and Chuman described how restrictive covenants were used to discriminate against Japanese Americans, making it impossible for Nisei veterans to find housing for their families and forcing citizens of Japanese ancestry to live in overcrowded and unhealthy "little Tokyo" areas.[72] Charles H. Houston, attorney for Hurd, apparently believed that the information presented by the JACL about restrictive covenants in South Pasadena and the attempts to turn the South San Francisco peninsula into an all-white area was of sufficient importance that he cited the JACL brief in the petitioner's reply brief in *Hurd*. No other amicus received a similar compliment.[73]

D. The Justice Department Amicus

During Fall of 1947, twenty-eight organizations filed amicus briefs supporting the NAACP's position in *Shelley v. Kraemer* and *Hurd v. Hodge*. Many of these, such as the ACLU and the American Jewish Congress, were groups that had filed amicus briefs in *Oyama*. One crucial supporter, the United States Justice Department, had not.[74] In November 1947, U.S. Attorney General Tom Clark agreed to have the federal government file an amicus brief against the enforcement of restrictive covenants. Clark's decision was heavily publicized, since it marked the first time the Justice Department had ever intervened as amicus curiae in a civil rights case. The decision to file a brief was the product of a complex set of factors, including political calculation regarding the upcoming presidential election, internal lobbying by officials in the Justice Department and the Indian Bureau (which opposed restrictive covenants against Native Americans), and the Report of the President's Committee on Civil Rights, which called for the banning of restrictive covenants.[75] The treatment of the Japanese Americans also may have played a role in Clark's decision. Clark had

71. *Id.*; *see also Supreme Court Declares Restrictive Covenant Out*, RAFU SHIMPO, May 3, 1948 at 1:5-6.

72. *National JACL Will Enter Restrictive Covenant Cases Before U.S. Supreme Court*, PACIFIC CITIZEN, September 29, 1947.

73. Brief of the Japanese American Citizens League, amicus curiae, Hurd v. Hodge, 334 U.S. 24 (1948) at 8, *cited in Hurd* reply brief at 6. Houston also referred during oral argument to the *Kim* and *Amer* cases.

74. There is some evidence that the Justice Department considered and rejected the filing of such a brief in the *Oyama* case. *See* Remarks by Phineas Indritz, in Minutes of Discussion, Sunday Morning, *Shelley v. Kraemer* Lawyer Conference, Restrictive Covenant Files, NAACP Papers. *See also* Letter from Philleo Nash to David K. Niles (April 8, 1947) (on file with Philleo Nash papers, Harry S. Truman Library, Independence, MO, Correspondence file).

75. On Clark's role in the government's decision to file an amicus, see KLUGER, *supra* note 64, at 252-53; Philip Elman (Interviewed by Norman Silber), *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 818-20 (1987).

been a central participant in formulating the West Coast evacuation policy during Spring 1942, and he later publicly expressed his remorse over his actions.[76]

In any event, the government's amicus brief, which declared that judicial enforcement of restrictive covenants was contrary to the public policy of the United States, referred prominently to the wartime Japanese American cases in its argument. It cited not only the language from *Hirabayashi* about race-based distinctions in law being "odious to a free people," but also quoted, as the JACL had done shortly before in its *Oyama* brief, from the passage in the *Korematsu* opinion to describe the "attitude" the Supreme Court should adopt in dealing with state action based on racial distinctions:

> [A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[77]

The government's brief concluded that since distinctions based on race or color were constitutionally invidious and could be justified, if at all, only by "the weightiest countervailing interests," the Court should make the most searching inquiry into the sufficiency of any grounds asserted to justify racially discriminatory legislation.[78] The government asked the Court to apply this doctrine and thereby strike down judicial enforcement of restrictive covenants.[79]

E. *Shelley* and *Hurd*

On May 3, 1948, the Court issued its decisions in *Shelley v. Kraemer* and *Hurd v. Hodge*. By a 6-0 margin (Justices Reed, Jackson, and Rutledge recused themselves from both cases, presumably because they owned property subject to restrictive covenants), the Court determined that restrictive covenants based on race or ancestry violated the Equal Protection Clause of the Fourteenth Amendment and were thereby unenforceable in the courts.[80] Chief Justice Vinson's unanimous opinion in *Shelley* relied heavily on his recent majority opinion in *Oyama* (which it cited in two places), particularly in its central conclusion, namely that any government action "which denied equal enjoyment of property rights to a designated class of citizens of specified race and ancestry, was not a legitimate exercise of the state's police power but violated the guaranty of the equal protection of the laws."[81] While the petitioners in *Shelley* and *Hurd* were African Americans—although Hurd himself insisted he was a Mohawk In-

76. *See*, *e.g.*, Tom C. Clark, *Preface*, to CHUMAN, *supra* note 34, at vii.

77. Brief for the United States as amicus curiae at 48, 53, Shelley v. Kraemer, 334 U.S. 1 (1948) (Nos. 47-72, 47-87, 47-290, 47-291).

78. *Id.* at 54

79. *Id.* Solicitor General Philip Perlman reaffirmed this position when he stated during oral argument before the Supreme Court that restrictive covenants affected "the lives, health and well-being of not only millions of Negroes but of Jews, Chinese and Japanese." There was no detectible irony in the Justice Department's use of the *Korematsu* case, which it had defended barely two years earlier, to press the Court to defend equal rights for minorities, including Japanese Americans.

80. Shelley v. Kraemer, 334 U.S. 1 (1948).

81. *Id.* at 21.

dian[82]—the Court acknowledged in a footnote its understanding that restrictive covenants were used to discriminate against various groups, including "Japanese."[83] Indeed, the covenant at issue in *Shelley* explicitly banned use by "people of the Negro or Mongolian race."[84]

The companion opinion in *Hurd* reached the same result as *Shelley*. However, since *Hurd* involved the District of Columbia, whose residents were not protected by the Fourteenth Amendment, the Court reached its decision on other grounds. The plaintiffs had sought to persuade the Court that the Due Process Clause of the Fifth Amendment encompassed a guarantee of equal protection similar to that of the Equal Protection Clause of the Fourteenth Amendment. For this purpose, the *Hurd* plaintiffs cited both *Hirabayashi* and *Korematsu*, which had been decided on the basis of the Fifth Amendment. However, the Justices were not ready to explore this issue, which they stated was unnecessary in order to decide the case. Instead, the Court premised its conclusion on a federal statute, the Civil Rights Act of 1866, which had expressly provided that all citizens had equal rights to "real and personal property."[85]

V

THE TAKAHASHI CASE

A. Background and Lower Court Decisions

A third case, *Takahashi v. California Fish and Game Commission*,[86] further extended the evolution of strict scrutiny. Torao Takahashi was one of approximately 700 licensed Issei commercial fishermen who worked in California in the years before World War II. In 1943, while Takahashi and the rest of the West Coast Japanese Americans were incarcerated in camps, the California legislature amended its Fish and Game Law to bar all "Japanese aliens" from obtaining fishing licenses. The clear purpose of the new law, which was part of the wave of anti-Japanese legislation introduced in the legislature during that year, was to express hostility toward the Japanese Americans and to discourage them from returning to California following their release from the camps by making it impossible for them to practice their trade. In 1945, amid concerns that the statute unconstitutionally singled out Japanese aliens, the legislature amended its wording to deny fishing licenses to "aliens ineligible to citizenship," among whom Japanese were effectively the only representatives. In 1945, after Takahashi returned to California and was denied a fishing license, the JACL and the Southern California Japanese Fishermen's Association together agreed to spon-

82. Hurd v. Hodge, 334 U.S. 24, 27 n.2 (1948).
83. *Shelley*, 334 U.S. at 21 n.26.
84. *Id.* at 5.
85. *Hurd*, 334 U.S. at 30-31.
86. 334 U.S. 410 (1948).

sor a test case, and A.L. Wirin, assisted by his partners John Maeno and Saburo Kido, served as counsel.[87]

Unlike the Oyamas, Takahashi was initially victorious. In 1946, the Los Angeles County Superior Court ruled that Takahashi had a constitutional right to fish outside the three-mile belt representing the state's territorial waters. The Superior Court bitingly characterized the law as an effort to conceal anti-Japanese discrimination, "the thin veil used to conceal a purpose being too transparent."[88] The State appealed to the California Supreme Court, which in October 1947 overturned the Superior Court's decision. By a narrow 4-3 vote, the high court ruled that the state had a proprietary interest in the fish in its ocean waters and could constitutionally restrict fishing licenses to citizens and aliens eligible for citizenship in order to preserve its natural resources.[89] This decision attracted widespread negative comment in the national press. The President's Committee on Civil Rights called for the statute's repeal.[90]

B. The Cert Petition and the Search For Allies

Wirin waited to decide whether to appeal *Takahashi* until the Court had ruled on the *Oyama* case.[91] Once the Court did so, the appeal was a foregone conclusion. The main opinion in *Oyama* (no doubt in order to build a majority more easily) had confined its analysis to citizens and had deliberately avoided deciding whether race-based discrimination against aliens violated the Fourteenth Amendment. Still, four of the justices in the *Oyama* majority already had joined in concurring opinions stating that discrimination against Japanese aliens on the basis of race or ancestry violated the Equal Protection Clause of the Fourteenth Amendment. Indeed, in his concurring opinion, Justice Black had pointed to the statute in *Takahashi* as an example of such discrimination against Japanese aliens.[92] Thus, even before the Supreme Court acted on a petition for certiorari, there appeared to be four justices ready to rule in the JACL's favor.

Nevertheless, Wirin was taking no chances. In October 1947, at the same time he wrote Thurgood Marshall about the *Kim* and *Amer* cases, he also informed Marshall that *Takahashi* had been decided in California and was being appealed to the Supreme Court. He asked that the NAACP prepare an amicus brief in support of granting certiorari. On December 31, 1947, Samuel Ishikawa of the JACL's Anti-Discrimination Committee met with Marian Wynn Perry of

87. CHUMAN, *supra* note 34, at 230-31; *see also* Lilian Takahashi Hoffecker, *A Village Disappeared*, 52 AMERICAN HERITAGE 64, 64-71 (2001).

88. Takahashi v. Fish and Game Comm'n., *cited in* Brief of the Japanese American Citizens League, amicus curiae at 42, *Takahashi* (No. 47-533); *see also* Robert Kirsch, *Judge Orders Issuance of Fishing License to Issei: Rules Ban is Unconstitutional*, RAFU SHIMPO, June 14, 1946 at 1:5-6.

89. Takahashi v. Fish & Game Comm'n, 185 P.2d 805 (1947).

90. United States President's Committee on Civil Rights, TO SECURE THESE RIGHTS 162 (1947).

91. *Ask Supreme Court Hearing on Takahashi Case Testing California Fish, Game Code*, PACIFIC CITIZEN, January 17, 1948 at 1:1-2.

92. Oyama v. California, 332 U.S. 633, 648 (1948).

the NAACP and repeated Wirin's request. Ishikawa then proposed that the NAACP contact the U.S. Attorney General to urge the government to submit an amicus brief, as it had in *Shelley*.[93] Solicitor General Philip Perlman, cheered by the positive reception of the government's *Shelley* brief, was inspired to intervene on behalf of Japanese Americans.[94] In February 1948, Perlman wrote to the JACL lawyers that the government had decided to file a brief in support of their case. The *Takahashi* case, Perlman said, "raises civil liberties issues of such national importance and affecting such a large number of persons as to warrant intervention by the Government."[95] Thus, barely three years after the *Korematsu* decision, the same Justice Department that had defended mass violation of the civil liberties of Japanese Americans now was officially committed to their defense. Ishikawa thereafter wrote Perry to express the JACL's gratitude to the NAACP for its lobbying of the Attorney General.[96]

C. Comparison of the JACL, NAACP, and Justice Department Briefs

In March 1948, the Supreme Court granted certiorari in *Takahashi*. The NAACP then agreed to submit an amicus brief in support of the JACL. Both the appellant's brief and the NAACP's amicus brief, in which the National Lawyers Guild joined, argued that the California fishing law denied legal residents of the United States the opportunity to earn a living in a common occupation because of their Japanese ancestry. Like the JACL appellate brief, the NAACP brief asserted that the law was racist in purpose and effect (the NAACP lawyers pointed out that the fishing law had the same purpose and effect as the Alien Land Act that the Court had recently addressed in *Oyama*), and thus violated the appellant's rights to equal protection and due process under the Fourteenth Amendment as well as the United Nations Charter. In addition, both briefs charged that the California law improperly interfered with the supreme right of the federal government to make immigration and foreign policy, since its primary effect was to exclude aliens legally admitted to the United States from residing in the state.[97]

Oddly, neither the JACL nor the NAACP lawyers attempted to build on the JACL's contention in its *Oyama* brief that "pressing public necessity" was required to constitutionally justify a racially discriminatory statute, even though the Court had tacitly accepted this doctrine in its *Oyama* opinion. Rather, both

93. Letter from A. L. Wirin to Thurgood Marshall (October 31, 1947) (on file with Collections of the Manuscript Division, Library of Congress); Memorandum to Mr. Marshall from Marian Wynn Perry (December 31, 1947) (on file with NAACP Papers, Japanese (Nisei) file).

94. Elman, *supra* note 75, at 819-20.

95. Letter cited in THE OPEN FORUM Vol. XXV, No. 4, 1:1. Presumably the "large number of persons" to whom Perlman [misidentified in the article as "Pearlman"] referred were not the Issei fishermen, of whom there were barely 200, but Japanese Americans and minorities generally.

96. Letter from Samuel Ishikawa to Marian Wynn Perry (February 6, 1948) (on file with NAACP Papers, Japanese (Nisei) file).

97. Motion and Brief for the National Association for the Advancement of Colored People as amicus curiae, *Takahashi* (No. 47-533); Brief for Petitioner, *Takahashi* (No. 47-533).

the JACL and the NAACP lawyers held to the less rigorous legal standard of whether the law's racial distinctions bore a "rational relationship" to its purpose. Both briefs devoted much of their argument to demonstrating that there was no rational relationship between preventing Japanese aliens from commercial fishing and the state's ostensible interest in conservation.[98]

In contrast, the argument for a higher standard and heightened scrutiny was put forward in a short amicus by the Justice Department. As in its *amicus* brief in *Shelley*, written two months before, the Department took the position in its *Takahashi* brief that any racial classifications were prima facie invalid and that the state had an obligation to justify any race-based legislation under the Fourteenth Amendment. Courts meanwhile should subject any purported justification to the "most searching inquiry." The Justice Department thus called upon the Court to exercise heightened scrutiny of the California fishing law because it involved a race-based classification, and to overturn it because California could not show, as *Korematsu* demanded, that the law was required by "pressing public necessity."[99]

D. *Takahashi* and its Influence

On April 22 and 23, 1948, the Court heard oral argument in *Takahashi*. As in *Oyama*, Dean Acheson served as Chief Counsel for the JACL. Six weeks later, on June 7, 1948, the Court announced its decision. The same justices who previously had voted with the majorities in *Oyama* and in *Shelley* (plus Burton, who had dissented in *Oyama*, and Rutledge, who had recused himself in the restrictive covenant cases) struck down the California fishing law. Justice Black, writing for the majority, held that the protection of the Fourteenth Amendment extended to aliens as well as citizens.[100] Black based his opinion on the rights of aliens under the Fourteenth Amendment. In addition, he agreed with petitioner's claims that a state law infringed on the federal government's exclusive authority over immigration when it prevented an alien lawfully admitted to the United States from earning a living in the same manner as other residents of the state. Finally, Black stated, he was unable to find any "special public interest" in support of California's discriminatory fishing law that would serve as a legitimate basis for upholding it.[101] Although he refused to address the question whether the law was prompted by racial hostility against the Japanese, he "vigorously denied" that it was simply a conservation measure.[102] Although Black played down the racial aspects of the case, Murphy issued a concurring opinion,

98. *Id.*

99. Brief for the United States as amicus curiae at 5-6, *Takahashi* (No. 47-533).

100. *Takahashi*, 334 U.S. 410. Although Black had expressed this conclusion in his concurring opinion in *Oyama*, his *Takahashi* opinion cited not *Oyama* on this point but the Court's barely month-old decision in *Hurd v. Hodge*.

101. *Id.* at 419.

102. *Id.* at 421.

as in *Oyama*, that provided an extended exposition of the anti-Japanese history of the fishing law and the racist intent of the lawmakers.

The *Takahashi* victory halted California's long history of legal discrimination against Japanese aliens, although the Issei did not attain full equality until 1952, when Congress passed the McCarran-Walter Immigration Act. The Act removed all racial and national restrictions on the naturalization of immigrants, thus eliminating in a stroke the category of "aliens ineligible to citizenship." A far more lasting product of the case was its contribution to the development of the "strict scrutiny" doctrine as a weapon in eliminating Jim Crow, as Thurgood Marshall recognized in an article published shortly afterwards.[103]

VI

THE SCHOOL SEGREGATION CASES

A. The NAACP's Campaign Against Inequality

By the time the *Takahashi* case was argued, NAACP lawyers were reaching the end stages of a long-term legal assault on racial segregation. According to the Supreme Court's then-prevailing "separate but equal" doctrine, first enunciated in the 1896 case *Plessy v. Ferguson*,[104] racial segregation was not unconstitutional as long as the separate facilities provided were "substantially equal." Beginning in the 1930s, NAACP lawyers, following a plan developed by Nathan Margold, decided that public education would be a promising field for litigation because public schools involved a heavy investment by states and because the inequalities in segregated education were so apparent. In the mid-1930s, then-NAACP Chief Counsel Charles H. Houston decided as a first step to fight educational inequality without directly addressing *Plessy* by challenging the exclusion of African Americans from higher education. Successful court suits would establish a record and a momentum in favor of nonsegregated equality by forcing Southern states either to admit blacks to white institutions or maintain a prohibitively expensive dual educational system. In 1938, the NAACP won its first Supreme Court victory in the educational field in *Missouri ex rel Gaines v. Canada*.[105] The Court ordered the University of Missouri's Law School to admit Lloyd Gaines, an African American, since it maintained no law school for blacks.[106]

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103. Thurgood Marshall, *The Supreme Court as protector of Civil Rights: Equal Protection of the Laws*, 275 ANNALS AM. ACAD. POL. & SOC. SCI. 101, 101-10 (1951), *reprinted in* THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 116, 119-21 (Mark V. Tushnet, ed., 2001).

104. 163 U.S. 537 (1896).

105. 305 U.S. 337 (1938).

106. KLUGER, *supra* note 64, at 195-213; MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, 70-77 (1987).

B. The Postwar Graduate School Cases

After the end of World War II, the NAACP expanded its efforts to secure the admission of African Americans to graduate and law schools. In 1948, the Court issued a per curiam opinion in *Sipuel v. Board of Regents of University of Oklahoma*,[107] reaffirming its ruling in *Gaines* that a state must provide to all persons facilities equal to those it provided for whites, and ordering that it must provide those facilities as soon as it did so for whites. Following this victory, the NAACP brought two further cases, *McLaurin v. Oklahoma*[108] and *Sweatt v. Painter*,[109] which grew out of the Court's rulings in *Gaines* and *Sipuel*. *McLaurin* involved an African American who had been admitted to the University of Oklahoma's School of Education, but who, once inside, was made to sit in a separate area of his classroom (originally in an alcove, later in a cordoned-off row of seats) and restricted to his own special assigned table in the school's cafeteria and library. *Sweatt* concerned another African American, Heman Marion Sweatt, who had applied for admission to the University of Texas Law School. In order to avoid being forced to admit him, Texas state authorities had established a separate law school for blacks in a "temporary" location in the basement of the state's capitol in Austin.[110]

C. *McLaurin*: The NAACP JACL Briefs

On January 7, 1949, the NAACP held a conference of civil rights lawyers and supporting organizations on the upcoming *McLaurin* and *Sweatt* cases. A number of liberal, labor, and Jewish groups were invited, with the JACL being the only non-black racial minority organization included.[111] As in the restrictive covenant cases, the NAACP sought to coordinate strategies and encourage the writing of amicus briefs. The JACL complied with a short brief (which was formally addressed only to *McLaurin*) signed by Edward Ennis, the former Justice Department lawyer who had been named JACL Counsel, as well as by a group of fifteen Nisei lawyers listed as "of counsel" (including Minoru Yasui, whose conviction for disobeying wartime evacuation orders had been upheld by the Supreme Court simultaneously with the *Hirabayashi* decision).[112] The JACL brief stated that separate facilities for blacks and other racial minorities were never equal in practice and asked the Court to overturn the *Plessy* "separate but equal" doctrine on that basis. Subtly connecting Jim Crow with the wartime

107. 332 U.S. 631 (1948).

108. 339 U.S. 637 (1950).

109. 339 U.S. 629 (1950).

110. TUSHNET, *supra* note 102, at 126.

111. *Sweatt v. Painter* file, schools cases, legal file, Series II NAACP Papers. Although the JACL had no direct involvement in the schools cases before the conference, A.L. Wirin had argued a case involving the segregation of Mexican American schoolchildren in Texas (in connection with which he borrowed from Thurgood Marshall the lower court transcript in *Sweatt* as a reference) and the JACL brief in *Takahashi* used *Sipuel* as its precedent for a Supreme Court remand to a lower court.

112. Brief of the Japanese American Citizens League as amicus curiae, McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950) (No. 49-34).

internment cases, the brief further argued that "[d]uring the recent war hostilities an unfortunate and mistaken exercise of the war power involving racial discrimination was allowed as a temporary emergency matter" but that "since the end of hostilities racial discrimination by governmental action has been consistently condemned as unconstitutional." As evidence of this trend, the brief cited *Oyama*, *Shelley*, and *Takahashi*.[113]

Meanwhile, in its appellant's brief in *McLaurin*, the NAACP lawyers adopted for the first time a version of the "strict scrutiny" argument that the JACL had first put forward and the Justice Department had subsequently expanded. The NAACP brief argued that laws involving racial or religious classifications were subject to a special test. "In the absence of an overwhelming public necessity, this Court has never allowed governmental regulation of this constitutionally preferred area and has nullified all such unreasonable and irrational classifications."[114] The NAACP contended that in the matter at hand the state had not and could not show the clear and "overwhelming public necessity" required to legitimize racial classifications. As the JACL had done in *Oyama*, and the Justice Department had done in *Shelley* and *Takahashi*, the NAACP held that governmental action based on race or color bore a presumption of unconstitutionality. In support of this assertion, it cited large sections from the "recent decisions" of *Hirabayashi*, *Korematsu*, *Oyama*, and *Takahashi* and their concurrences to show that "racial distinctions have incurred such constitutional odium" as to be "presumptively void."

D. *McLaurin* and *Sweatt*: The Supreme Court Decisions

On June 5, 1950, the Supreme Court unanimously ruled in favor of the African American petitioners in both *McLaurin* and *Sweatt*, finding in both cases that the education being offered to the petitioners was not equal to that of whites and thus violated the Fourteenth Amendment's Equal Protection Clause. Since the Court found that the facilities were unequal, it did not explicitly address whether the *Plessy* doctrine was wrong or irrelevant. However, significantly for the NAACP position, the Court concluded in *Sweatt* that equality of schooling rested in part on "intangible" factors such as a school's reputation and the opportunity to exchange ideas with other students, and in *McLaurin* that no matter how nominal the differences were in the facilities afforded McLaurin and those offered to his fellow students, they signified that the state set him apart on a racial basis and thus handicapped him in his pursuit of effective graduate education.[115]

113. *Id.* at 3.

114. Brief for Appellant at 30-34, *McLaurin* (No. 49-34).

115. McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950).

E. The School Segregation Cases—Background and Supreme Court Briefs

The way was now prepared for a direct assault on "separate but equal" in the central area of primary education. This had always been the NAACP's ultimate goal. The previous graduate school cases had affected only a very few people. The school cases the NAACP prepared to bring would affect thousands of children. In Fall 1950, Thurgood Marshall and the NAACP lawyers directed or assisted in bringing five separate lawsuits, which challenged segregation in school districts in Kansas, South Carolina, Virginia, Delaware, and the District of Columbia. The NAACP provided massive expert witness testimony from educators and psychologists on the harmful effects of segregation on African American children (notably the famous "doll" experiments of Drs. Mamie and Kenneth B. Clark). In four of the cases, the lower courts ruled that "separate but equal" education did not violate the constitutional rights of African Americans, even though the Kansas judge found that segregated schools were harmful to African American children. Only in the Delaware case did the local judicial authorities order the district schools desegregated. In 1952, the U.S. Supreme Court granted certiorari in all five cases, which were consolidated under the title of the Kansas case, *Brown v. Board of Education of Topeka, Kansas*.[116]

The galaxy of appellate briefs submitted by Marshall and his colleagues on these cases included an impressive mass of sociological and psychological data. Their legal arguments against segregation resembled those in *McLaurin* and *Sweatt*. As in those briefs, the NAACP lawyers argued that the Court should exercise "strict scrutiny" in judging laws involving race or color. Since classifications based on race served no "legitimate state purpose," they were not defensible.[117]

F. *Brown v. Board of Education*: The Supreme Court Case

On December 9, 1952, the five cases that collectively comprised *Brown v. Board of Education* were argued in the U.S. Supreme Court. The Court immediately found itself deadlocked over whether the Fourteenth Amendment provided any basis on which to overrule *Plessy v. Ferguson*.[118] In order to clarify the issues and to gain further time to resolve its own inner conflict, the Court

116. Brown v. Bd. of Educ., 347 U.S. 483 (1954). *See generally* KLUGER, *supra* note 64, at 543-82.

117. The JACL did not submit a separate brief in *Brown*. Rather, in November 1952 the national JACL joined five other organizations in a consolidated amicus brief, on which Saburo Kido was listed as of counsel. A month later, the JACL Washington, D.C. branch, represented by Rikio Kumagai, joined a separate consolidated amicus brief directed at the District of Columbia case, *Bolling v. Sharpe*. Internal evidence suggests that the JACL did not take part in the writing of either brief and that the organization's presence in them was simply an expression of solidarity. The two amicus briefs were similar. Both asserted, as the NAACP briefs did, that the Court should apply strict scrutiny and thereby overturn the state and District laws at issue because they made racial distinctions in the absence of grave necessity. Brief of the American Civil Liberties Union, American Ethical Union, American Jewish Committee, Anti-Defamation League of B'Nai B'rith, Japanese American Citizens League and Unitarian Fellowship for Social Justice as amicus curiae, *Brown* (No. 52-8). Brief of the Unitarian Council on Human Rights as amicus curiae, *Bolling* (No. 4).

118. 163 U.S. 537 (1896).

asked the parties to return the following fall for reargument on the question whether the framers of the Fourteenth Amendment had intended to forbid segregated schools. In September 1953, as the two sides were preparing their briefs, Chief Justice Fred Vinson suddenly died. His replacement as Chief Justice was California governor Earl Warren.[119] Ironically, during Spring 1942, Warren, then California's Attorney General, had been among the principal instigators of the removal of the Japanese Americans. Although Warren never publicly discussed his wartime actions regarding Japanese Americans in the decades that followed, in his last years and in his posthumously published autobiography he expressed his profound regret over them.[120]

In December 1953, the *Brown* reargument took place. In their conference afterwards, the justices found a majority in support of overturning *Plessy*. In the months that followed, Chief Justice Warren prepared the opinion of the Court and successfully exerted pressure on potential dissenters to join the majority (the two most reluctant justices were Jackson and Reed, the dissenters in *Oyama* and *Takahashi*).[121] On May 17, 1954, the U.S. Supreme Court unanimously declared that segregated schools violated the Equal Protection Clause of the Fourteenth Amendment. The decision was not based primarily on legal precedent but on evolving standards of fair treatment and the demonstrated psychological harm imposed on African American children by segregation. As the Court declared in ringing tones: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[122]

G. *Bolling v. Sharpe* and the Establishment of Strict Scrutiny

Somewhat lost in the glare of attention over the *Brown* decision was Chief Justice Warren's opinion in the companion case, *Bolling v. Sharpe*.[123] In *Bolling*, as previously in *Hurd v. Hodge*, the Court had to deal with racial discrimination in the District of Columbia, where the Fourteenth Amendment did not apply. Unlike in *Hurd*, however, there was no specific statute that the Court could say prohibited racial segregation in the District's schools. The brief submitted by NAACP lawyer James Nabrit, counsel for the petitioners in *Bolling*, had taken up and built upon the argument previously made by the petitioners in *Hurd*—namely, that the Due Process Clause of the Fifth Amendment barred racial distinctions in federal law the same way that the Equal Protection Clause of the Fourteenth Amendment did with regard to state law.[124] Warren's opinion relied

119. KLUGER, *supra* note 64, at 582-665.

120. EARL WARREN, THE MEMOIRS OF EARL WARREN 147-49 (1977). On Warren's role in the evacuation and subsequent attitude, see G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 67-77 (1982).

121. KLUGER, *supra* note 64 at 678-99.

122. *Brown*, 347 U.S. at 495.

123. 347 U.S. 497 (1954).

124. Brief for Petitioners on Reargument at 17-18, 41-42, 60-64, Bolling v. Sharpe, 347 U.S. 497 (1954) (No. 53-8).

on this argument. Although due process and equal protection were not mutually exclusive, Warren stated, as the first was not as explicit a guarantee as the second, both stemmed from "our American ideal of fairness," and discrimination barred under equal protection may be so unjustifiable as to violate due process. "Liberty," he continued, was not confined to "mere freedom from bodily restraint." Rather, it extended to the "full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." Since segregation in public schools was not reasonably related to any "proper governmental objective," it imposed an arbitrary deprivation on the liberty of African American children that violated the Fifth Amendment's Due Process Clause. In any case, Warren concluded, it would be "unthinkable" that the Constitution should impose a lesser duty on the federal government than on the states.[125]

In support of his assertion that segregation was not related to any legitimate governmental purpose, a more exacting standard than the preexisting "rational basis" test, Warren's opinion expressly adopted the "strict scrutiny" doctrine that first the JACL, then the Justice Department, and finally the NAACP had urged on the Court. Citing to *Korematsu* and *Hirabayashi* in a footnote, without apparent irony, the Chief Justice stated: "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." Almost ten years after World War II, the man who had done so much to deprive West Coast Japanese Americans of their liberty used the cases that endorsed those shameful actions as support for ending a shameful era of segregation in the nation's public schools.[126]

VII

CONCLUSION

Both the Supreme Court's rejection of the "separate but equal" rule in *Brown* and its adoption of the "strict scrutiny" doctrine in *Bolling* are landmarks in American history. Since 1954, the "strict scrutiny" doctrine has become central to the Supreme Court's approach to racial issues. During the 1950s and 1960s, the Court relied on "strict scrutiny" to strike down state and local segregation laws, as well as to remove restrictions on the rights of African Americans to vote (even as in more recent years it has served as the basis for the Court's rulings against affirmative action and preferential treatment for racial minorities).

The role of the *Korematsu* case as both precedent and warning in the evolution of equal protection deserves further attention. It is a historical irony that *Korematsu*, whose practical impact (as compared to the Court's simultaneous ruling in the *Endo* case) was effectively nil, should have had such a full and con-

125. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).
126. *Id.* at 499 n.3.

tentious afterlife.[127] Furthermore, the postwar Japanese American cases, and the role of Japanese Americans in the restrictive covenant cases, have been unjustly ignored in the history of civil rights in the United States. A.L. Wirin, in later years, stated that the *Oyama* and *Takahashi* cases were the most important he had ever handled "because they were able to establish principles which were the forerunners of the United States Supreme Court cases involving Negroes and affording them the rights to equal treatment and equal protection of the law under the [Fourteenth] Amendment."[128] The critical place of these cases in the development of the strict scrutiny doctrine reminds us, once again, how richly the struggles of Japanese Americans have contributed to building the edifice of American freedom.

127. Patrick O. Gudridge, "*Remember* Endo?" 116 HARV. L. REV. 1933, 1933-70 (2003) (explaining that the *Ex Parte Endo* decision had much greater immediate ramifications than *Korematsu*).

128. Frank Chuman, Notes on Interview with A.L. Wirin 3.