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Book Review [Race, Rights and Reparation: Law and the Japanese American Internment]

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BOOK REVIEW

CIVIL LIBERTIES, NATIONAL SECURITY, AND THE JAPANESE AMERICAN INTERNMENT


Reviewed by Harvey Gee*

I don't want any of them (persons of Japanese ancestry) here. They are a dangerous element. There is no way to determine their loyalty. . . . It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. . . . [W]e must worry about the Japanese all the time until he is wiped off the map.¹

Well, my God! . . . We have thousands and thousands of Japanese here [in California]. We could have an invasion here.²

We now know what we should have known then—not only was that evacuation wrong, but Japanese-Americans were and are loyal Americans.³

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I. INTRODUCTION

After the September 11, 2001 ("September 11") terrorist attacks, consistent with its long history of activism, the Japanese American Citizens League, as well as other Asian Americans, spoke out almost immediately against the easy answer of racial stereotyping and scapegoating, and resoundingly called for protection of Arab and Muslim Americans' civil rights. In a panel discussion, long-time civil rights attorney Dale Minami drew parallels between the experiences of Japanese Americans interned sixty-years ago and the fallout of September 11 in the form of legislation curtailing civil rights. Minami viewed September 11 as a replay of Pearl Harbor, and he cautioned against potential ensuing hysteria by Americans directed at racial minorities who may not be perceived as American. This could lead to the deprivation of civil rights during a time of war, when judicial standards may become lax. For example, during World War II, despite subjecting the government's action to strict scrutiny, the U.S. Supreme Court upheld the mass incarceration of persons of Japanese ancestry without charges, notice, trial or due process, nor any evidence of espionage or sabotage. With the exception of panel discussions and perhaps a constitutional law, civil rights, or critical jurisprudence course, analyses combining history, contemporary social issues, and the law are typically found only in the pages of law review articles and books authored by Critical Race theorists.

Critical Race Theory is an alternative approach to addressing the Asian American identity within race jurisprudence. The Critical Race Theory Movement, comprised mostly of racial minorities situated in the nation's law

4. The Japanese American Citizens League (JACL), the nation's oldest and largest Asian American civil rights organization, was founded in 1929 to address issues of discrimination targeted specifically at persons of Japanese ancestry. Today, the JACL is committed to protecting the rights of all segments of the Asian Pacific American community. See www.jacl.org (last visited Apr. 17, 2005).


7. This laxity, at least, was evident during the 1940s, when the U.S. Supreme Court addressed the internment of Japanese Americans.

schools, seeks to challenge "the ways in which race and racial power are constructed and represented in American legal culture and . . . society . . .". In large part, Critical Race Theory offers a distinct perspective to legal scholarship by revealing the viewpoint of those who have historically been subjected to social domination and subordination. Critical Race Theory scholars question "traditional assumptions of both liberals and conservatives with respect to the goals and means of traditional civil rights reforms." In recent years, many scholars and activists have applied contemporary aspects of Critical Race Theory in their analyses of the treatment of Asian Americans in the United States in order to further their efforts to contribute to our understanding of the complexities of an increasingly multicultural and multiracial society.

Against this backdrop, I suggest that consideration and inclusion of Asian Americans is crucial to any meaningful exploration of the contemporary relationship between race and the law. Yet the place of Asian Americans in race relations remains ambiguous because they continue to exist in the outmoded, but still dominant, black/white paradigm of racial discourse in this country. The current representation of Asian Americans in race jurisprudence proves that broadening of the present race relations discourse is needed to allow those situated between black and white to articulate their experiences independent of the bipolar framework.

A. Overview

Race, Rights and Reparation: Law and the Japanese American Internment represents the latest development in Asian American race jurisprudence. The book is a hybrid of Critical Race Theory, which is often concentrated in anecdotal narrative, and traditional doctrinal analysis. The casebook

11. Gee, Beyond Black and White, supra note 10, at 762.
12. Id. at 763.
13. Id. at 763 n.12.
14. See id. at 763.
sets into sharp relief the standard footnote references to the WWII internment. Here, the main body of the casebook is exclusively devoted to this topic. Although released before the September 11 attacks, the historical events since have made this book even more relevant and timely. As Dale Minami and other Asian American legal scholars have observed, the internment of Japanese Americans during World War II is both the factual and legal precedent for the detainment of individuals, mostly of Muslim or Arab descent, on the basis of their conduct in alleged terrorist activities against the United States, or their ties (however strong or tenuous) to terrorist organizations. This notion is echoed in Justice Sandra Day O'Connor's rhetoric in *Hamdi v. Rumsfeld*, rejecting the reasoning and result of *Korematsu v. United States* and the internment of Japanese citizens.

The authors of *Race, Rights and Reparation* offer an in-depth examination of the internment process. The casebook is one of the most comprehensive and insightful contributions on the subject to date. As ambitious and intriguing as its title suggests, it presents a critical study of the now widely condemned internment of Japanese Americans during World War II, including the social, economic, and political reasons behind it.

*Race, Rights and Reparation* may be used in courses focusing on Asian Americans and the Law, Critical Jurisprudence, and other civil rights or constitutional law seminars. Like traditional casebooks, it can serve as the centerpiece for classroom discussion, and will encourage critical thinking. Its balance of cases and commentary provides students with sufficient context, direction, and explanation. Most of the casebook's lessons come from a rigorous reading and analysis of the internment cases themselves. Unlike many casebooks, this is not a hard-cover, expensive tome that is boring and tedious. Instead, *Race, Rights, and Reparation* is softbound, reasonably priced, and intriguing and compelling from start

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15. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). This case will be discussed in more detail in Part V of this Review. See discussion *infra* Part V.
16. 323 U.S. 214 (1944). *Korematsu* is familiar to most law students as the one case where the Court ostensibly applied the "strict scrutiny" standard of review, and still found the governmental action permissible.
18. YAMAMOTO, CHON, IZUMI, KANG, & WU, *supra* note 3, at xxiii.
19. See id. at xxiv.
Beyond cases, readers will also find rich documentary material that makes traditional doctrinal analysis and federal civil procedure more engaging. This material brings forth compelling stories of personal despair and sacrifice. For example, family photographs and personal portraits detail what daily life was like for Japanese American internees in the assembly centers and camps situated behind barbed wire under the watchful eyes of armed guards.

The book employs a comprehensive approach targeting a broad audience, including law professors and law students, graduate students in cultural studies programs, and civil rights activists. Three themes run throughout the book: (1) the tension between civil rights, civil liberties, and national security; (2) the racial components of legal and social decisions and the extent to which the U.S. Constitution’s Equal Protection Clause protects the rights of racial minorities; and, (3) the responsibility of governments to acknowledge past historical human rights violations.

_Race, Rights and Reparation_ is logically organized around these themes. The chapters contain an overview followed by a section of study modules which present talking points and questions for readers concerning the previous chapter. A list of additional readings supplements the materials at the close of each chapter. In the volume’s introduction, the authors ask the compelling question: What role did legalized racial discrimination play in the internment? An answer is sought by close examination of the fine balancing of civil liberties and national security concerns.

This Review discusses the insightful analysis offered by _Race, Rights and Reparation_. Part Two introduces the content of the casebook, explores its descriptive sections, and examines the Japanese American internment in its appropriate social, political, and historical context. Part Three revisits the Supreme Court’s reasoning and holdings in the four major internment cases discussed at length in _Race, Rights and Reparation_. Part Four discusses the Japanese American

21. See YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at xxiv.
22. Id. at 5.
23. See discussion infra Part II.
24. See discussion infra Part III.
Redress Movement of the 1980s. Part Five analyzes the Supreme Court's unlawful combatant/unlawful detention cases from the 2003 Term. The conclusion weighs the significance of Race, Rights and Reparations in the continuously expanding genre of Asian American Legal Jurisprudence.

II. THE INTERNMENT IN CONTEXT

The first two chapters of Race, Rights and Reparation offer a thematic and historical introduction to the material. The authors articulate Asian American legal history in America as largely composed of racial discrimination in immigration, citizenship and economics. Undeniably, this racial animus resulted in the internment.

The internment of 120,000 Japanese Americans during World War II is considered one of the twentieth century's most prominent mass trampling of civil liberties. It has been widely condemned as racist governmental and judicial conduct toward the Japanese and Japanese Americans. According to the authors, "[t]he internment was a process, not a single event. Although the events leading to the incarceration of Japanese Americans at the assembly centers occurred quickly, they were neither immediate nor simultaneous." Remarkably, at the time, none of the reports of the Federal Bureau of Investigation, Federal Communications Commission, and Office of Naval Intelligence, rejecting the military's assertion about Japanese Americans' espionage and sabotage, were made public. Even before the attacks on Pearl Harbor, Japanese immigrants and their American-born children endured great hardship in this country because they were perceived as economic threats. As such, they were subjected to

25. See discussion infra Part IV.
26. See discussion infra Part V.
27. See discussion infra Part VI.
28. YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at 3-92.
30. YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at xxiii.
31. See id.
32. Id. at 104.
33. Id. at 161.
34. See id. at 37.
official discrimination and political protest. Through legislation, boycotts, school segregation, and propaganda, the Japanese faced exclusion driven by fear and hostility. The flames of anti-Japanese animus were further fueled by the bombing of Pearl Harbor.

Race, Rights and Reparation succinctly, yet comprehensively, summarizes the events leading up to the internment and the administrative procedures excluding Japanese Americans from the West Coast. Although certain high-ranking government officials, including Attorney General Francis Biddle, opposed the evacuation of Japanese Americans, President Franklin D. Roosevelt still signed Executive Order 9066, granting the military the power to exclude persons from specified areas. President Roosevelt based his decision on the Roberts Commission's report concluding that the Japanese living in America had committed espionage. Order 9066 implemented a racially based military system of curfew, exclusion and internment of Japanese Americans. Specifically, the military ordered the internment of 120,000 persons of Japanese ancestry, including 70,000 United States citizens, until the end of the war. The military declared the entire West Coast a designated military area under Executive Order 9066, despite the absence of evidence that Japanese Americans posed a danger of espionage. High-ranking military officials and European Americans were encouraged by propaganda and the persistent stereotype of the Japanese as...

35. See id. at 37-38.
36. See YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at 37-40.
37. Id. at 38.
39. Id.
40. See YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at 99. Hastily drafted "by Supreme Court Justice Owen Roberts, the Roberts Commission report concluded that Japanese living in America had committed espionage, contributing to the Pearl Harbor attacks." Id.
41. Executive Order 9066 granted to the Secretary of War the power to exclude all persons of Japanese ancestry from designated areas of special security concern, notably large areas of the Pacific Coast. See Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).
“foreigners” or treacherous saboteurs intent on conquering the West Coast.\textsuperscript{43}

It was made clear that the exclusion order was actually a \textit{Japanese} exclusion order by its selective enforcement only against persons of Japanese ancestry.\textsuperscript{44} Although persons of Italian and German ancestry were able to take loyalty oaths at hearings, Japanese Americans were not.\textsuperscript{45} As a result, loyal Japanese Americans were uprooted from their homes and separated from their families.

Chapters Three and Four describe the legal challenges to the internment.\textsuperscript{46} The analysis begins with a background discussion of the strict scrutiny standard of review. Over the years, \textit{Korematsu} has been taken for granted by mainstream legal commentators as the obligatory citation for the origin of the Supreme Court’s strict scrutiny standard of review.\textsuperscript{47} However, contrary to the popular perception that the Court addressed the constitutionality of the internment, it did not.\textsuperscript{48} \textit{Korematsu} only discussed the constitutionality of the \textit{exclusion order}.\textsuperscript{49} In a separate article published after \textit{Race, Rights and Reparation}, co-author Frank Wu wrote:

Strangely, the internment cases appear to have evaded

\textsuperscript{43} See YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at 38. General John L. DeWitt, head of the Western Defense Command, quoted at the beginning of this review, shared a similar view, fearing that Japanese Americans were aiding the Japanese Empire in the war effort. Specifically, “General DeWitt feared that Japanese Americans were aiding the submarines by signaling them from shore.” \textit{Id.} at 98.

\textsuperscript{44} See \textit{id.} at 39; see also Alfred C. Yen, \textit{Praising with Faint Damnation - The Troubling Rehabilitation of Korematsu}, 40 B.C. L. REV. 1, 1 (1998) (“These People were forced to leave their homes, businesses, jobs and communities despite never being formally charged with any civil or criminal offense. The government’s justification for this was simple and chilling: the ancestry of Japanese Americans made them likely to side with Japan during World War II”).

\textsuperscript{45} Korematsu v. United States, 323 U.S. 214, 240-41 (1944) (Murphy, J., dissenting) (asserting that although persons of German and Italian descent engaged in disloyal activities, they, unlike the Japanese, were not deprived of their constitutional rights).

\textsuperscript{46} YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at 95-274.


the most basic question. That question is whether it is constitutional to order the mass incarceration of persons as to whom no individual showing of guilt has been made, ostensibly because of national security, though also with the use of racial classifications.\(^5\)

The analysis offered in *Race, Rights and Reparation* demonstrates that the invocation of strict scrutiny, the strongest form of equal protection judicial review, is generally fatal to race-based government action, but not when applied to Asians and Asian Americans.\(^5\) This occurs despite the fact that strict scrutiny was a powerful tool later used regularly to strike down Jim Crow segregation throughout public facilities.\(^5\) In an effort to reconcile this contradiction, *Race, Rights and Reparations'* trenchant examination of the internment cases offers a plausible explanation.

### III. THE INTERNMENT CASES

Equal protection jurisprudence in the 1940s did not resemble, much less function like, equal protection jurisprudence at present. The authors argue that *Hirabayashi v. United States*\(^5\) (and *Korematsu* the following year) did not embrace the contemporary three-tiered standard of means-ends analysis.\(^5\) Instead, the Supreme Court merely looked at

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51. Legal scholar Neil Gotanda argues that Japanese Americans were treated as "foreign" and not as "Americans," and because of this social construction as foreigners, the traditional equal protections of the Fourteenth Amendment did not apply. See Neil Gotanda, "Other Non-Whites" in American Legal History: A Review of Justice at War, 85 COLUM L. REV. 1186, 1188 (1985) (book review of *Justice at War* by Peter Irons).
53. 320 U.S. 81 (1943).
54. YAMAMOTO, CHON, IZUMI, KANG, & WU, *supra* note 3, at 103, 122, 353. The Court conducts its constitutional analyses within an established framework. Because the protection of the Fourteenth Amendment only applies to state action, the Supreme Court must first evaluate race-based affirmative action programs to determine if state action is involved. If so, the program is subject to judicial review under traditional equal protection analysis. In the years following the passage of the Fourteenth Amendment, the Court recognized that the minimal scrutiny standard of review was inadequate to protect persons from racial discrimination. In response, the Court created a more searching standard of review for race-based discrimination, making it harder for programs employing racial criteria to be deemed constitutional. *Fullilove v. Klutznick*, 448 U.S.
the appropriate degree of judicial scrutiny of the government's "military necessity" justification for the curfew, exclusion, and internment. In doing so, it paid great deference to the military.

Race, Rights and Reparation suggests that the war and public perception at the time provide a partial explanation of the Court's unanimous decisions in Hirabayashi and Yasui v. United States, while the Court split in the later two cases, Korematsu and Endo. The casebook is especially critical of the Court's failure to closely examine the military's action in hindsight. The authors argue that the majority Justices largely disregarded the amicus briefs portraying Japanese Americans as completely assimilated into the American community. The legal history of the four most important cases is then presented along with a detailed description of the process allowing for the creation and maintenance of concentration camps for all individuals of Japanese descent, including American citizens fully assimilated into the mainstream American culture. By all reasonable social measures other than their skin color, each internee was just like other Americans. But nevertheless, to the government and the courts, they were presumptively disloyal.

448, 473 (1980); see also William Van Alstyne, Rites of Passage: Race, the Supreme Court, and the Constitution, 46 U. CHI. L. REV. 775 (1979). This highest level of review, strict scrutiny, is employed in cases involving suspect classifications such as race, religion, alienage or ethnicity. The Court has set forth a two-pronged test for strict scrutiny review. To survive strict scrutiny, a racially discriminatory law must further a compelling government interest or purpose and the means employed by the law must be narrowly tailored to that purpose. See Holly Dyer, Comment, Gender-Based Affirmative Action: Where Does It Fit in the Tiered Scheme of Equal Protection Scrutiny?, 41 U. KAN. L. REV. 591, 594 (1993) (describing the Court's three standards of equal protection review); see also Jeffrey M. Shaman, Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny, 45 OHIO ST. L.J. 161, 172-77 (1984) (discussing potential failings of the Court's use of multi-level scrutiny); see also Mark Strasser, The Invidiousness of Invidiousness: On the Supreme Court's Affirmative Action Jurisprudence, 21 HASTINGS CONST. L.Q. 323, 338 (1994) (asserting that the Court's invidious jurisprudence is "schizophrenic" because the Court changes its definition of invidious so often).

55. YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at 353.
56. 320 U.S. 115 (1943).
57. Ex parte Endo, 323 U.S. 283 (1944).
58. See YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at 124-25.
59. Id.
60. See id. at 104-20 (discussing Gordon Hirabayashi's upbringing in Washington state and his participation in civic activities and the Court's writing in Hirabayashi v. United States that Japanese Americans are presumptively dis-
A. Hirabayashi v. United States

Gordon Hirabayashi was convicted for violating Public Proclamation No. 3, which imposed a curfew on all enemy aliens and citizens of Japanese descent. Hirabayashi was born and raised in Seattle, Washington, and had never been to Japan. He had no personal contacts in Japan. Like all Japanese Americans, Hirabayashi was subject to General DeWitt's curfew order, requiring him to be at home each night from 8:00 p.m. until 6:00 a.m. He was a student at the University of Washington when he decided that he wanted to challenge the constitutionality of the curfew and the exclusion order. He did so by violating it on separate occasions.

Hirabayashi was convicted of two separate counts: intentionally violating the evacuation order and the curfew order. The Ninth Circuit Court of Appeals certified questions of law about each conviction to the United States Supreme Court. There, the Court avoided the difficult issues of evacuation and internment, and instead simply upheld Hirabayashi's conviction for violating the curfew. Chief Justice Stone wrote the majority opinion, which reflected the established social mood and political climate of the time. He explained that at the time of the Japanese attacks on Pearl Harbor, approximately two-thirds of those of Japanese descent on the West Coast were United States citizens. It was only racism and discrimination, he insisted, that "prevented their assimilation as an integral part of the white population." But when weighed against national security, Justice Stone reasoned that there was a reasonable basis for the curfew: "[w]e cannot close our eyes to the fact, demonstrated by experience,

61. 320 U.S. 81 (1943).
63. Hirabayashi, 320 U.S. at 88.
64. Id. at 84.
65. Id.
66. Id. at 83-84.
67. Id. at 84.
68. Id.
69. YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at 105.
70. Hirabayashi, 320 U.S. at 84-85.
71. Id. at 105.
72. Id. at 96. Justice Stone noted that most resided in California, Oregon, and Washington at the time of the military regulation. Id.
73. Id.
that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry.\textsuperscript{74} The Court's ultimately narrow ruling allowed the important social data and anecdotal evidence discussed in the opinion to fall by the wayside. Justice William Douglas, in his concurrence, simply noted that the curfew order, as opposed to an individualized process of investigations and hearings, was the most practical measure at the time.\textsuperscript{75} Even Justice Frank Murphy, a well-known civil libertarian jurist, concurred with the majority opinion.\textsuperscript{76} Though he condemned racism, he nevertheless concluded that after the Pearl Harbor attack, military necessity required a substantial restriction of the personal liberty of U.S. citizens.\textsuperscript{77}

B. Yasui v. United States\textsuperscript{78}

Minoru Yasui was a U.S. citizen and Second Lieutenant in the Army Infantry Reserves.\textsuperscript{79} He was educated as a lawyer, employed in a Japanese consular office, and actively involved in the Japanese Americans Citizens League.\textsuperscript{80} He and his family were ordered to leave their home and report for internment.\textsuperscript{81} Yasui, in fact, attempted to report for active duty with the Army after the bombing of Pearl Harbor.\textsuperscript{82} He was denied eight times.\textsuperscript{83} Decided the same day as Hirabayashi, Yasui's conviction was sustained for the same reasons.\textsuperscript{84}

C. Korematsu v. United States\textsuperscript{85}

The authors of the casebook postulate that legal analysis

\textsuperscript{74} Id. at 101.
\textsuperscript{75} Id. at 106-07.
\textsuperscript{76} Hirabayashi, 320 U.S. at 109.
\textsuperscript{77} Id. at 112-13. Justice Murphy concluded that although the civil liberties of certain U.S. citizens may be temporarily restricted during a time of war, they should be fully restored after the crisis has passed. Id. at 114.
\textsuperscript{78} 320 U.S. 115 (1943).
\textsuperscript{79} Id. at 116.
\textsuperscript{80} YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at 126.
\textsuperscript{81} See id. at 126-28. Yasui's father was a Japanese immigrant businessman and farm owner. Like Yasui, he was interned without evidence of potential threat. See id. at 126-27.
\textsuperscript{82} Id. at 127
\textsuperscript{83} Id.
\textsuperscript{84} Yasui, 320 U.S. at 117.
\textsuperscript{85} 323 U.S. 214 (1944).
superceded factual analysis in Korematsu.\textsuperscript{86} They explain that the Court restricted its Korematsu holding to the question of the evacuation alone, again avoiding the issue of the internment's constitutionality.\textsuperscript{87} As Hirabayashi had addressed the curfew order, so Korematsu involved the exclusion order. The majority treated Hirabayashi as precedent, although it had only addressed the curfew, and it was further persuaded that there was some difference between a nighttime curfew restriction and the indefinite mass exclusion of members of one racial group from their homes and work places.\textsuperscript{88}

In Korematsu, Justice Black wrote for five members of the Court, while Justice Frankfurter wrote a concurring opinion, and Justices Roberts, Murphy, and Jackson dissented. Fred Korematsu's lawyers wanted to characterize the internment as about race, since from the outset, Japanese Americans were excluded from the West Coast under threat of force, detained, and then immediately interned.\textsuperscript{89} In his dissent, Justice Roberts agreed with framing the issue in these terms.\textsuperscript{90} Though Korematsu argued that when Exclusion Order No. 34\textsuperscript{91} was promulgated in May of 1942, all danger of Japanese invasion of the West Coast no longer existed, the Court was persuaded by the government's claims of military necessity and reasoned that although Exclusion Order No. 34 may have been both over- and under-inclusive, it was the practical measure at the time.\textsuperscript{92} The Court based its decision upon General DeWitt's unsubstantiated finding that Japanese Americans posed a real danger of espionage on the West Coast.\textsuperscript{93} Accordingly, the Court upheld the Exclusion

\textsuperscript{86} YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at 153-58.
\textsuperscript{87} Id. at 155.
\textsuperscript{88} Korematsu v. United States, 323 U.S. 214, 231 (1944); see also YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at 163.
\textsuperscript{89} YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at 154.
\textsuperscript{90} Korematsu, 323 U.S. at 225.
\textsuperscript{91} Id. at 216-17. Exclusion Order No. 34 was substantially based upon Executive Order 9066. Id. See Executive Order 9066, supra note 38.
\textsuperscript{92} Korematsu, 323 U.S. at 219.
\textsuperscript{93} Id. at 227-29. The casebook authors note: The Korematsu majority described itself as compelled by military necessity to legitimate the exclusion. Yet the Court, by its own words, did not then and does not now accept as dispositive the government's mere invocation of "military necessity" or "national security." The question therefore is not
According to Justice Black, the constitutionality of Civilian Restrictive Order No. 1, which came into effect eleven days before Korematsu’s arrest, and provided the authority to detain individuals of Japanese ancestry, was never considered by the Court largely because it was not necessary to do so. Justice Black closed his opinion by reiterating that Japanese and Japanese Americans were not imprisoned solely because of their race.

Justices Roberts and Murphy rejected the majority’s findings in their powerful separate dissents:

This is not a case of keeping people off the streets at night . . . nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry . . . .

The Government’s argument, and the opinion of the court, in my judgment, erroneously divide that which is single and indivisible and thus make the case appear as if the petitioner violated a Military Order . . . .

This exclusion of “all persons of Japanese ancestry, both alien and non-alien,” from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over “the very brink of constitutional power” and falls into the ugly abyss of racism.

The tension between the majority and the dissenters reveals the two ways the issues may be framed, respectively: (1) the internment was a colorblind process; or (2) it was based on racial classifications motivated by discrimination. As it had been before, in Hirabayashi, it was no surprise that even

whether the courts should ever intervene in political/military decisions restricting civil liberties, but rather when.

YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at 155.

97. See id. at 223.
98. Id. at 225-26 (Roberts, J., dissenting) (internal citation omitted).
99. Id. at 233-34 (Murphy, J., dissenting).
the Supreme Court was influenced by the great racism which existed against Japanese American citizens during the 1940s. *Race, Rights and Reparation* is critical of the *Korematsu* Court's apparent contradictions: first, it announced the strict scrutiny standard for evaluating racial classifications, while simultaneously declaring the case was never about race; and second, despite announcing strict scrutiny, the Court deferred to the government's "military necessity" rationale.  

**D. Ex Parte Endo**

In contrast to the previous three cases, Mitsui Endo's arose from a *habeas corpus* petition. Mitsui Endo, an American citizen of Japanese ancestry, was initially removed to the Tule Lake War Relocation Center, in California, and later transferred to the Central Utah Relocation Center. Endo was never served with process, nor did she appear in the proceedings. Endo alleged that she was a loyal and law abiding American citizen, and as such was being held unlawfully and against her will, because no formal charges were brought against her. Her petition for a writ of *habeas corpus* was denied by the District Court.

Yet again, Justice Douglas gave President Franklin D. Roosevelt and Congress the benefit of the doubt, and avoided the constitutional issue. The majority opinion focused on *Hirabayashi* and described the series of 108 Civilian Exclusion Orders issued by General DeWitt. The Court in *Endo* also spent considerable time discussing the establishment of the War Relocation Authority ("WRA"). Despite Justice

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100. YAMAMOTO, CHON, IZUMI, KANG, & WU, *supra* note 3, at 159.
102. *Id.* at 285. The trial court held the petition in abeyance until *Hirabayashi* and *Yasui* were decided. YAMAMOTO, CHON, IZUMI, KANG, & WU, *supra* note 3, at 173.
103. *Endo*, 323 U.S. at 284-85. The Tule Lake War Relocation Center was in Newell, Modoc County, California. Endo was removed from there to the Central Utah Relocation Center in Topaz, Utah. *Id.* at 285.
104. *Id.* at 285.
105. *Id.* at 294.
106. *Id.* at 286.
109. *Id.* at 290-91. *See* Public Proclamation No. 8, 7 Fed. Reg. 8346 (Oct. 16, 1942). The WRA was characterized as a program with three goals: (1) maintaining the Relocation Centers as places of residence for evacuees; (2) segregating the loyal from the disloyal; and (3) relocating the loyal to selected communi-
Douglas's strong critique of the Department of Justice's rationale for its process, Endo was nevertheless devoid of any discussion of the persistent underlying constitutional issue.

Considered together, these four test cases, especially Korematsu and Hirabayashi, represent internment jurisprudence, and have become obligatory citations for the strict scrutiny standard of review. Race, Rights and Reparation gives each case significantly deeper treatment than most casebooks, illuminating this critical time in American legal history.

IV. THE REDRESS MOVEMENT

It was not until Congress established the Commission on Wartime Relocation and Internment of Civilians to review the facts and circumstances surrounding Executive Order 9066 that an examination of the effects of the order on American citizens and permanent residents was made. The Commission reviewed the U.S. military directives requiring the relocation and detention of Japanese Americans, and its findings and conclusions were unanimous: "the record does not permit the conclusion that military necessity warranted the exclusion of ethnic Japanese from the West Coast."

Later, President Ronald Reagan signed the Civil Liberties Act of 1988, creating the Office of Redress Administration to administrate the reparations programs, which gave Japanese Americans a formal apology and reparations in the amount of $20,000 for each surviving internee who was a U.S citizen or legal resident alien at the time of the internment.

Race, Rights and Reparation focuses on this redress

ties while detaining the disloyal. Endo, 323 U.S. at 291.

110. Endo, 323 U.S. at 294-302. Douglas was not persuaded by the government's characterization of the planned evacuation as a device to protect the safety of the evacuees. Id.


113. PERSONAL JUSTICE DENIED, supra note 111, at 8.


115. Its full name is the Office of Redress Administration of the Civil Rights Division of the Department of Justice ("ORA"). 28 C.F.R. § 74.2(h) (2004).

movement of the 1980s in chapters Five and Six. The primary focus is on the *coram nobis* litigation of the mid-1980s that reopened *Korematsu, Hirabayashi* and *Yasui* and ultimately revealed that during World War II the Departments of Justice and War suppressed, doctored and altered exculpatory evidence indicating that the military evacuation and internment of Japanese Americans on the West Coast was unnecessary. Through their *coram nobis* petitions, Fred Korematsu, Gordon Hirabayashi, and Min Yasui sought to vacate their wartime convictions on grounds of government prosecutorial misconduct and lack of military necessity. Eventually, Korematsu, Hirabayashi, and Yasui succeeded in the litigation of their *coram nobis* petitions. However, because the cases cannot be used to correct legal errors, the Supreme Court's decisions during World War II remain good law.

V. MODERN APPLICATION: THE 2003 TERM

Recent Supreme Court decisions (after the attacks of September 11) involving enemy combatants used the same segmented analysis as the internment cases discussed above in avoiding a core constitutional issue: whether President George W. Bush had the authority to detain unlawful combatants. The Court in *Hamdi v. Rumsfeld* inferred the lessons of *Hirabayashi* and *Korematsu*, noting that in both cases the majority emphasized the importance of striking a proper balance between the grave harms done to an individual's civil liberties and the dangers to the nation's security. One hopes that neither the present nor future Courts will arbitrarily defer to military necessity so easily and comfortably.

117. YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at 277-443.
118. A *writ of coram nobis* is "[a] procedural tool whose purpose is to correct errors of fact only, and its function is to bring before the court rendering the judgment matters of fact which, if known at the time judgment was rendered, would have prevented its rendition." BLACK'S LAW DICTIONARY 337 (6th ed. 1990).
119. YAMAMOTO, CHON, IZUMI, KANG, & WU, supra note 3, at 294-309.
120. See id. at 280-81. The litigation brought allegations that the government relied upon false evidence and suppressed military reports that indicated there was no real danger of Japanese espionage. See id. at 281. The genesis of this litigation was the discovery of evidence by attorney and scholar Peter Irons during research for his book, *Justice at War: The Story of the Japanese Internment Cases*. Id. at 280-86.
121. 124 S. Ct. 2633 (2004).
122. Id. at 2649-50.
If the recent detainee decisions are to serve as a bellwether, there is hope.123

In 2004, the Supreme Court ruled on three cases involving enemy combatants. Each case argued that the enemy combatant had the right to file a writ of habeas corpus allowing them to contest their detentions in court.

First, in Hamdi, Yasser Esam Hamdi, an American citizen, maintained that he had been mislabeled as a Taliban fighter, and was denied due process.124 Hamdi was born in Louisiana in 1980.125 As a child, he and his family moved to Saudi Arabia.126 He resided in Afghanistan when he was seized by the Northern Alliance and turned over to the U.S. military.127 After an initial interrogation, Hamdi was removed from Afghanistan to the U.S. Naval Base in Guantanamo Bay in January 2002.128 The majority held that Hamdi must be afforded due process and given a meaningful opportunity to contest his detention.129 The Court emphasized the importance of the basic constitutional due process guarantee that prisoners can argue their innocence before a court,130 and found that Hamdi must be granted the same right, and allowed to contest the government’s basis for his designation as an enemy combatant.131 The Court explicitly rejected the administration’s position that enemy combatants are not entitled to traditional legal rights.132 After the Court’s decision, the Justice Department agreed to release Hamdi after more than two years of detention during which time no charges were filed and lawyers were withheld.133 Hamdi was released and returned to Saudi Arabia on the conditions that

123. This opinion is largely based upon Justice Sandra Day O’Connor’s dicta in Hamdi, opining that the indefinite detention of American citizens without trial would violate due process unless the procedure and circumstances surrounding the detention were justified by reason of security or were necessary to free the military from serious burdens that might compromise its efficiency. Id. at 2646-48.
124. Id. at 2636.
125. Id. at 2635.
126. Id.
128. Id. at 2636.
129. Id. at 2648-52.
130. U.S. CONST. amend. XIV.
131. Hamdi, 124 S. Ct. at 2648-49.
132. Id.
he give up his U.S. citizenship, renounce terrorism, and agree not to sue the U.S. government.\textsuperscript{134}

In \textit{Rumsfeld v. Padilla},\textsuperscript{135} the narrow issue was whether the \textit{habeas} statute\textsuperscript{136} conferred a right to judicial review of the detention of aliens in a territory over which the United States exercised plenary and exclusive jurisdiction, but not “ultimate sovereignty.” The Court, in order to avoid “rampant forum shopping,” held strictly to the “general rule that for core \textit{habeas} petitions challenging present physical confinement, jurisdiction lies in only one district: the district of confinement.”\textsuperscript{137}

Finally, \textit{Rasul v. Bush}\textsuperscript{138} addressed whether the six-hundred detainees at the American naval base in Guantanamo Bay, Cuba, could challenge the legality of their detention in U.S. courts on the basis that none were enemy combatants or terrorists.\textsuperscript{139} Petitioners claimed: (1) no charges were filed against them; (2) they were not provided counsel; and (3) they were denied access to the court.\textsuperscript{140} In a six-to-three decision, the Court held that United States courts have federal jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities.\textsuperscript{141}

The recent Supreme Court decisions require the government to provide procedures guaranteeing citizen detainees due process of our laws. Unmistakably, the Bush administration’s antiterrorism policy experienced a setback.\textsuperscript{142} However, “[t]he government may well be able to satisfy the Court’s lenient procedural standards without actually altering its morally dubious detention policies.”\textsuperscript{143}

Interestingly, because \textit{Hamdi} was restricted to citizen de-

\begin{itemize}
\item \textsuperscript{134} \textit{Id}.
\item \textsuperscript{135} 124 S. Ct. 2711 (2004).
\item \textsuperscript{136} 28 U.S.C. § 2243 (2000).
\item \textsuperscript{137} \textit{Padilla}, 124 S. Ct. at 2722, 2724, 2727.
\item \textsuperscript{138} 124 S. Ct. 2686 (2004).
\item \textsuperscript{139} \textit{See id}.
\item \textsuperscript{140} \textit{Id} at 2691.
\item \textsuperscript{141} \textit{Id} at 2699.
\end{itemize}
tainees, and Padilla was dismissed, we must wait until other legal challenges involving unlawful arrests or detentions of individuals who have alleged ties to terrorist activities arise to fully reexamine issues addressed in the internment cases in this contemporary context. Until then, jurisprudence continues with the Supreme Court’s segmented analyses.

VI. CONCLUSION

Race, Rights and Reparation contributes substantially to the literature on Asian American legal scholarship and academic treatments on the internment. The casebook is hopefully the beginning of a more sophisticated, albeit difficult, discourse on the balancing of civil liberties and national security during a time of war. This casebook will encourage law students and legal scholars to critically examine their own views about the internment and the war on terrorism during this precarious time in American history. With this in mind, readers should remember the most overarching lesson of the internment of Japanese Americans: the government should not target an entire ethnic group in the name of national security alone. Even during a time of crisis, civil rights and liberties must always be protected.
TRIBUTE TO PROFESSOR HERMAN M. LEVY

1929 – 2004