Introduction

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The Story of Law and American Racial Consciousness—Building a Canon One Case at a Time

In Defense of a Race Law Canon

Do we need a race law canon? The answer is not obviously "yes." Some would say that the cases *Race Law Stories* engages do not constitute a distinct area of law because those cases are subsumed within the broader fields of civil rights and constitutional law. Inasmuch as Foundation Press has already published both a *Constitutional Law Stories* and a *Civil Rights Stories*, there is no need for *Race Law Stories*.[1] Others would agree that race law is an independent field of study, but they would disagree about how to understand the relationship between race and law.

Because of these disagreements, there is no race law canon as such. Few law schools offer courses that focus specifically on race except as occasional seminars. In fact, of the more than 190 accredited law schools in the United States, as of the publication of this volume, only UCLA School of Law offers a Critical Race Studies Program, which includes a formally organized race law curriculum.[2] These curricular realities mean that *Race Law Stories* can not simply be a collection of the stories behind leading cases on race law; this anthology must offer a vision of what a race law canon might look like. Although it is our hope that the vision *Race Law Stories* presents will push the discussion about race and law school curricula further along, we do not present *Race Law Stories* as a

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[1] *Constitutional Law Stories* (Michael C. Dorf, ed. 2004); *Civil Rights Stories* (Risa Goluboff & Myriam E. Gilles, eds. 2007).

[2] American Bar Association, *Section of Legal Education & Admissions to the Bar*, *at* http://www.abanet.org/legaled/approvedlawschools/approved.html (last visited Jan. 14, 2008); Overview of the Critical Race Studies Program, UCLA Law, *at* http://www.law.ucla.edu/home/index.asp?page=2599 (last visited Jan. 14, 2008).

definitive, once-and-for-all representation of a race law canon. We view this anthology as a starting point.

Happily, we are not beginning with a blank slate. We have inherited a number of Critical Race Theory readers and a handful of casebooks on race and the law and civil rights.[3] But for these prior works, *Race Law Stories* would not have been possible. At the same time, when reviewing these readers and casebooks, we discovered that there is no consensus (with a few exceptions like *Brown v. Board of Education* and similarly iconic decisions) about which cases count as the canon of race law. In this sense, the absence of a stable race law canon has been reflected not only in the marginalization of race in law school curricula, but also in the very texts designed, at least in part, to instantiate a canon on race and the law.

The failure to consolidate a race law canon undoubtedly reflects a general ambivalence about the significance of race. In our national rhetoric, racial injustice often is treated as an aberration or an accident in an otherwise democratic system. Race is a scar on the body politic, a superficial wound that has healed or soon will. Race is something that happened, not something that is happening; it resides in the past and should not exist in the future. To the extent that race is recognized as a contemporary social dynamic—as something that is happening now—it is equated with skin color, a biological irrelevancy that has no bearing on our innermost selves, economic and political realities, educational opportunities, and overall social experience. These ideological commitments are not merely reflected in the law; they are constituted by law.

Consider, for example, how Justice Sandra Day O'Connor thinks about race in the context of voting rights. In determining the constitutionality of a redistricting plan in *Shaw v. Reno*,[4] a case Daniel P. Tokaji discusses in his contribution to this volume, O'Connor notes that part of what is worrisome about reapportionment plans is that they put in ''one district individuals who belong to the same race, but who are otherwise widely separated by geographic and political boundaries, and who may

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[3] *See. e.g.*, Charles F. Abernathy, *Civil Rights and Constitutional Litigation: Cases and Materials* (2006); Roy L. Brooks, et al., *Civil Rights Litigation: Cases and Perspectives* (2005); Dorothy A. Brown, *Critical Race Theory: Cases, Materials, Problems* (2d ed. 2007); Kimberlé Crenshaw, et al., *Critical Race Theory: The Key Writings That Formed the Movement* (paperback ed. 1996); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* (2001); F. Michael Higginbotham, *Race Law: Cases, Commentary, and Questions* (2005); John C. Jeffries, Jr., et al., *Civil Rights Actions: Enforcing the Constitution* (2007); George Martinez, et al., *A Reader on Race, Civil Rights, and American Law: A Multiracial Approach* (2001); Juan Perea et al., *Race and Races* (2d ed. 2007); Adrienne Katherine Wing, *Critical Race Feminism: A Reader* (paperback ed. 2003).

[4] 509 U.S. 630 (1993).

have little in common with one another but the color of their skin.''[5] For O'Connor, because race is reducible to skin color, race consciousness is not only suspect, it is potentially if not presumptively dangerous. It reproduces the racism of the past and undermines our commitment to colorblindness. This conception of race impedes our ability to imagine a race law canon. After all, what place is there for such a field if race is nothing more than skin color; if contemporary racism does not exist; if our Constitution is colorblind? Isn't civil rights law necessary only because past racial injustices must be rectified? And why expend efforts on building a race law canon when those injuries are largely behind us and the promise of a colorblind society lies ahead? Doesn't the focus on establishing a race law canon entrench and rigidify the very thing we aim to destabilize and eliminate: race?

Race Law Stories rejects these ideological assumptions. It demonstrates that American race law cases have never been colorblind. Indeed, if there is a single principle that unites race law cases across disparate doctrines and historical periods, it is that they are all race-conscious—which is to say, they all take race into account. This is not to suggest that they do so in precisely the same way and to precisely the same end. They do not. As Ian Haney López and Michael A. Olivas's contribution to *Race Law Stories* attests, the racial consciousness of *Brown v. Board of Education* is very different from that in *Hernandez v. Texas*, notwithstanding that both cases adjudicate the meaning of the Equal Protection Clause and that the Supreme Court decided them within two weeks of each other. Among other differences, *Brown* focuses on African Americans, while *Hernandez* addresses discrimination against Mexican Americans. Moreover, while *Brown's* antidiscrimination intervention is predicated upon the recognition of African Americans as a distinct non-white racial group, *Hernandez* does not stake out that position with respect to Mexican Americans. These significant differences should not obscure that both *Brown* and *Hernandez* are unequivocally race-conscious. Both draw upon and articulate ideas about racial categorization, racial meaning, and racial inequality. Both rely on and help to entrench the cognizability of race as an identity and a social practice. And both are unintelligible without reference to race.

These general observations about and features of race consciousness obtain across the cases in *Race Law Stories*. In this respect, one can understand the chapters that constitute this volume as a collective narrative about law and American racial consciousness, a collective narrative that *Race Law Stories* unfolds one case at a time. As will become clear, this collective narrative is decidedly multiracial, plays itself out across a number of doctrinal contexts, and reflects moments of both

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[5] *Id.* at 647.

inequality and equality. Moreover, it is a narrative that is inextricably linked to the establishment of the United States as an independent nation-state and to the expression of American democracy in political and everyday life. As Robin Lenhardt's chapter reveals, sometimes this story is about love, as it was with Andrea Pérez (a Mexican–American woman) and Sylvester Davis, Jr. (an African–American man); in 1947, this interracial couple attempted to marry across the color line. Sometimes the story is quite literally about hair, as when Renee Rodgers sued American Airlines for promulgating a grooming policy that prohibited its public-contact employees from wearing fully braided hairstyles. As Paulette Caldwell notes in her chapter on the case, in ruling that the policy did not discriminate against black women, the court invoked the hairstyle that Bo Derek sported in the movie *10*. The court reasoned that because the no-braids policy would have affected Bo Derek (a white woman), it was not discriminatory against Renee Rodgers (a black woman).

Paradoxically, sometimes the story is that a race law case purports not to be about race at all, as in *Morton v. Mancari*, explored in Carole Goldberg's chapter. That decision sought to suppress race consciousness by describing Native American identity as political, not racial. Ironically, this approach was used to uphold an affirmative action program in the Bureau of Indian Affairs. And sometimes the racial story is about the very notion of American belonging, as illustrated by Erika Lee's chapter on birthright citizenship, a principle that the Supreme Court affirmed in *United States v. Wong Kim Ark*, and by Ronald Sullivan's chapter on *Prigg v. Pennsylvania,* a case in which the Court upheld the Fugitive Slave Act of 1793, thereby allowing the removal of free blacks from non-slaveholding states to slaveholding states.

As already should be apparent, the story of law and American racial consciousness is inscribed not only in the language in which the United States Supreme Court and lower courts speak—that is to say, case law. It is inscribed as well in the lives of real people in real historical moments pushing back against real racial injustices. This is the complexity we attempt to capture in *Race Law Stories*: an account of law and American racial consciousness that reflects the specific ways in which people from different racial groups have struggled to become—formally and substantively—a part of ''We, the People.'' Our methodology for doing so includes storytelling, not the fictional variety but the sort of richly textured, highly contextual accounts that can be used to interrogate formal legal principles.[6]

[6] Critical Race Theory (''CRT'') has been roundly criticized for employing storytelling as a method of legal analysis. *See* Daniel A. Farber & Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (1997); Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 Stan. L. Rev. 807

***Telling Stories Out of Law: The Structure and Organization of* Race Law Stories**

Central to our conception of *Race Law Stories* is an understanding of legal cases as narratives. Reggie Oh and Thomas Ross's chapter on *City of Richmond v. J.A. Croson* explicitly develops this theme. The thinking, in part, is this: Embedded within every legal case is a story—about winners and losers, about justice and injustice, and about heroes and villains. How this story is told is a function of who is doing the telling. One narrator's triumphal account is another's story of devastating defeat. The villain in one narrative is the hero in another. The line between justice and injustice unavoidably turns on perspective. All of this is to say, legal cases are never ''just there.'' Like other narratives, they are always already the product of representational choices.[7]

Certainly, this is true of the narratives that constitute *Race Law Stories*. Some of the stories focus on the litigants; others on political figures; still others on lawyers; and others still on judges. Some of the narratives are celebratory; others are condemnatory. Some highlight the intricacies of race and gender; others reveal the intersection of race and immigration. Some focus on specific legal doctrines; others foreground broader structural dynamics, such as conquest and colonialism. Given these complexities, part of our challenge was to organize the chapters in an intelligible way. To meet this challenge, we divided the book into the following four sections: ''Birth of a Nation: Formal Citizenship and Sovereignty''; ''Separate and Unequal: Classification and Caste''; ''Our Constitution is Colorblind: The Doctrine of Race Neutrality''; and ''With All Deliberate Speed: Race–Conscious Remedies.''

While each part of *Race Law Stories* has a certain thematic coherence, the authors within each section speak from different doctrinal, historical, and racial positions. We have studiously avoided compartmentalizing *Race Law Stories* into sections that focus on specific racial groups.[8] Instead, we adopt a multiracial and racially integrative approach

(1993). Many CRT scholars continue to defend the storytelling methodology. *See* Richard Delgado, *On Telling Stories in School: A Response to Farber & Sherry*, 46 Vand. L. Rev. 665 (1993); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411 (1988); Daria Roithmayr, *Guerillas in Our Midst: The Assault on Radicals in American Law*, 96 Mich. L. Rev. 1658, 1670–73 (1998). While we do not believe that storytelling is a necessary or the most crucial part of CRT, this approach has played an important role in establishing the genre.

[7] Reginald Oh, *Re-mapping Equal Protection Jurisprudence: A Legal Geography of Race and Affirmative Action*, 53 Am. U. L. Rev. 1305, 1314 (2004) (citing Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* 4–5 (1987)).

[8] *See* Devon W. Carbado, Race, Law and Citizenship: Black Civil Rights Responses to Japanese American Internment (manuscript on file with author) (exploring the problem of ''racial compartmentalism'').

throughout. All too often, race law scholars fail to realize that Jim Crow was not just an issue for blacks and whites. It directly affected and targeted other racial groups as well. A similar point can be made about immigration—specifically, that there is a tendency to think of immigration as a Latino/a or an Asian–American issue. In fact, immigration law and policy reach across racial groups.[9] And so does each section of *Race Law Stories*.

Birth of a Nation: Formal Citizenship and Sovereignty

Race has played an integral part in defining America's national identity. After the heady rhetoric of the Declaration of Independence sparked a successful revolution, the fledgling United States of America embarked on the hard work of nation-building. The drafters of the Constitution took a sober second look at the rhetoric of radical egalitarianism in the Declaration, and they blinked. The adoption of the Constitution in 1787 and its ratification one year later depended on a compromise, one that integrated slavery into the very fabric of American democracy. Nor was this the end of the role race would play in forging our country's identity. In short order, in 1790, Congress further entrenched slavery and adopted an immigration law that restricted naturalization to whites. In 1793, Congress passed the Fugitive Slave Act, which allowed slaveholders to turn to federal courts for assistance in recapturing runaways who had fled to free states. Eventually, Congress moved to adopt whites-only voting rules in every territory except Illinois.[10] These actions demonstrated that race was far from a superficial wound on the body politic; in fact, race played a constitutive role in defining that body politic.

For many, the United States Supreme Court's 1857 decision in *Dred Scott v. Sandford*[11] is the paradigmatic anti-canonical case that illustrates the courts at their worst in dealing with questions of race, citizenship, and sovereignty.[12] There, the Court nullified the Missouri Compromise of 1820, a federal law that struck a fragile balance between

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[9] *See* Kevin R. Johnson, *Immigration, Civil Rights, and Coalitions for Social Justice*, 1 Hastings Race & Poverty L.J. 181 (2003); Devon W. Carbado, *Racial Naturalization*, 57 Am. Q. 633 (2005); Lolita Buckner Innis, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DePaul L. Rev. 301 (1999).

[10] Philip A. Klinkner with Rogers Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America* 28–29 (paperback ed. 1999).

[11] 60 U.S. (19 How.) 393 (1857).

[12] Christopher L. Eisgruber, *The Story of* Dred Scott*: Originalism's Forgotten Past*, *in Constitutional Law Stories*, *supra* note 1, at 151–52 (Michael C. Dorf ed. 2004). For another account of the *Dred Scott* case, see Xi Wang, *The* Dred Scott *Case* (1857), *in Race on Trial: Law and Justice in American History* 26 (Annette Gordon–Reed ed., 2002). *See generally* Mark Graber, Dred Scott *and the Problem of Constitutional Evil* (2006).

slave and free states. The Compromise permitted slavery to persist but prohibited its expansion to territories newly acquired through the Louisiana Purchase. The Court, in a splintered decision that spawned nine separate opinions, found that the Compromise violated a constitutional right to own slaves.[13]

In the process, the Court rejected Dred Scott's claim that though once a slave, he had become free by residing in territories where slavery was prohibited. The Justices found that Dred Scott, as "a Negro, whose ancestors were imported into this country, and sold as slaves . . . could not become a member of the political community formed and brought into existence by the Constitution of the United States."[14] As a result, he was not entitled to the rights, privileges, and immunities that it guaranteed. As a black man, whether slave or free, Dred Scott existed beyond the boundaries of formal federal citizenship.

The Court's opinion made clear that the Constitution aspired to build a white nation. In reaching this conclusion, the Court hoped to end the relentless political struggle between pro- and anti-slavery factions as the nation expanded westward. Yet, instead of protecting the nation-building project by according constitutional protection to slaveholder rights, the *Dred Scott* decision pushed the country toward a profound political rupture, one that would ultimately lead to a bloody Civil War.[15]

The drama of *Dred Scott* has rightly earned a place in the anti-canon of race law, but the decision should not blind us to the manifold ways in which race has influenced the nation-building project. Indeed, almost ten years before Chief Justice Roger Taney decided *Dred Scott*, America ended its war with Mexico. Mexico had long been on America's expansionist agenda. As early as 1787, "Benjamin Franklin had identified Mexico . . . as [a] target[] for further expansion."[16] It was not until the 1840s, however, that America's expansionist agenda, or Manifest Destiny, took hold. As Laura Gomez notes, "[f]or many, Manifest Destiny conjures up a moment of national triumph before the dark years of conflict over slavery that culminated in the Civil War."[17] Gomez rightly argues that this conception of Manifest Destiny obscures that it was "a cluster of ideas that relied on racism to justify a war of aggression against Mexico."[18]

[13] Eisgruber, *supra* note 12, at 157.

[14] 60 U.S. (19 How.) at 403 (opinion of Taney, C. J.).

[15] Eisgruber, *supra* note 12, at 174–78; Wang, *supra* note 12, at 42–43.

[16] Perea et al, *supra* note 3, at 258.

[17] Laura E. Gomez, *Manifest Destinies: The Making of the Mexican American Race* 3 (2007).

[18] *Id.*

President James Polk played a significant role in effectuating this war. In 1845, Polk succeeded in annexing Texas.[19] While the 1836 Treaty of Velasco had secured Texas's independence from Mexico, it was not yet part of the United States.[20] That incorporation would have to wait until March 1, 1845, when President-elect Polk succeeded in inspiring Congress to admit Texas to the Union.[21] Polk's post-inaugural efforts to purchase California from Mexico were not so successful.[22] He came to realize that the only other way he could possess this vast region was by war—and, more particularly, a war in which Mexico was the perceived aggressor.[23] Thus, in 1845, America's investment in and commitment to waging a war against Mexico was firmly in place. War itself would come the following year. In March of 1846, President Polk moved American troops into the disputed territory between the Nueces River and the Rio Grande, thus precipitating a conflict with Mexican troops.[24] ''Mexico has . . . shed American blood upon American soil,'' Polk told the Congress on May 11, 1846.[25] This affront, he suggested, demanded a decisive response. He asked Congress for a declaration of war, which he shortly got.[26]

As historian Rodolfo Acuña has observed, ''The poorly equipped and led Mexican army had little chance against the expansion-minded Anglos.''[27] Within two years the war was over. The Treaty of Guadalupe Hidalgo, which remains under-studied in American law schools despite its crucial role in understanding the Mexican–American experience, made California and other parts of the Southwest part of the United States. At best, the treaty conferred formal citizenship on the Mexicans who remained in the newly acquired American territory after the war. These Mexicans found themselves on the other side of a border they did

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19 Polk had not yet been inaugurated on the first of March when Congress passed the Joint Resolution reflecting this commitment. Joint Resolution for Annexing Texas to the United States, H.R.J. Res. 8, 28th Cong. (1845). However, his position on the matter and his political efforts are reflected in his Presidential inaugural address, which he delivered four days later. *See* James K. Polk, Inaugural Address, Mar. 4, 1845.

20 Treaties of Velasco, Rep. of Tex.-Mexico, May 14, 1836.

21 *See* Joint Resolution for Annexing Texas to the United States, *supra* note 19.

22 Gene M. Brack, *Mexican Opinion, American Racism, and the War of 1846*, 1 West. Hist. Q. 161, 161 (1970); The White House, *James K. Polk–Biography*, *at* http://www.whitehouse.gov/history/presidents/jp11.html.

23 The White House, *supra* note 22.

24 James K. Polk, Message on War with Mexico, May 11, 1846.

25 *Id.*

26 *Id.*; The White House, *supra* note 22.

27 Rodolfo Acuña, *Occupied America: A History of Chicanos* 13 (1988).

not cross. While conquest and expansionism had brought them into the United States, white supremacy kept them trapped inside the box of formal citizenship. Deemed racially inferior, they were considered unfit for the exercise of any real rights.

But even the extension of formal citizenship—or what one might think of as a kind of colonial naturalization—was highly contestable. Polk wanted the property (Mexico) without the people (Mexicans). Formal citizenship was the racial price he had to pay for his territorial ambitions. This political compromise meant that Mexicans themselves would have the citizenship rights that Chief Justice Taney could not imagine extending to blacks. At the same time, because Mexicans were not perceived to be of pure ''Anglo–Saxon'' racial stock but instead viewed as an impure and racially mixed group, they experienced the Jim Crow color line of separate and unequal before it was formally articulated as such in the South. As Laura Gomez observes, Mexican Americans became white by law but non-white by social practice.[28] This liminal status was a direct result of the ideology and practice of Manifest Destiny.

Nor were Mexicans the only non-white group whose ''American'' identity was forged at the interstices of conquest and expansionism. At the outset, the United States had to grapple with the problem of treaties that accorded Native American tribes semi-sovereign status.[29] The tribes were something of an anomaly in a nation that equated whiteness with fitness for citizenship and self-governance. The heavy hand of the law might require that the treaties be honored, but the heavier hand of the politics of nation-building relegated tribes to a position of inferiority as non-whites. The ''peculiar'' position that Native Americans found themselves in did not escape Chief Justice Taney in *Dred Scott*.[30] Indeed, he drew upon it to distinguish Native Americans from people of African descent. Taney reasoned that ''although they [Native Americans] were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws.''[31] According to Taney, America treated Native Americans as foreign governments, ''as much so as if an ocean had separated the red man from the white.''[32] This was not so, he maintained, with respect to Africans. In effect,

[28] Gomez, *supra* note 17, at 4.

[29] Judith Resnik, *Dependent Sovereigns: Tribes, States and the Federal Courts*, 56 U. Chi. L. Rev. 671 (1989).

[30] *Cf.* Kenneth Stampp, *The Peculiar Institution: Slavery in the Ante–Bellum South* (Vintage Books ed., 1989).

[31] *Dred Scott*, 60 U.S. (19 How.) at 403.

[32] *Id.* at 404.

"Taney extraterritorialize[d] Indians (people who were actually here) and intraterritorialize[d] blacks (people who had in fact been separated from white inhabitants by an ocean)."[33] He did this to suggest that whereas Native Americans were naturalizable, blacks were not. "While it has been found necessary, for their own sake as well as our own, to regard them as in a state of pupilage,"[34] Taney maintained, Native Americans as subjects of foreign governments could, unlike blacks, become American citizens.

The notion of Native Americans as at once sovereign, uncivilized, and "in a state of pupilage" permeates the case law on Native Americans, as Rennard Strickland's story of the *Cherokee Cases*[35] reveals. The Cherokee Nation was primarily concentrated in Georgia, a state that was becoming aggressively hostile to the Cherokee when the federal government did not completely remove all Native Americans from the state under the Georgia Compact of 1802. Georgia, a state in which slavery and hence presumptions of racial inferiority were deeply entrenched, increasingly extended its laws into Cherokee lands. The Cherokee Nation soon realized that the only way its members could regain their rights under treaties with the United States was through the United States Supreme Court. Strickland demonstrates how the status of Native Americans as both sovereign and inferior influenced the Court's resolution of the conflict. As his account shows, the racialization of the Cherokee people left them vulnerable to marginalization and exile. The tribe was eventually forcibly removed from its homeland, decimated, and divided by internal feuding.

Though often treated as an egregious departure from American law and values, *Dred Scott* in fact built on the tragic consequences of earlier decisions that denied blacks due process protections in the name of federal power. As Professor Ronald S. Sullivan Jr. explains in the story of *Prigg v. Pennsylvania*,[36] Justice Joseph Story upheld the Fugitive Slave Act in 1842, despite his personal reservations about slavery. *Prigg* was, in 1842, the first pronouncement on slavery by the Supreme Court. Margaret Morgan, the subject of the case, was a black woman whose parents, although never formally emancipated, lived in freedom on their owner's estate in Maryland, a slave-holding state. Morgan married an emancipated black man from Pennsylvania, with whom she raised six children. The couple initially lived in Maryland but eventually moved to

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[33] Carbado, *supra* note 9, at 644.

[34] 60 U.S. (19 How.) at 403–404.

[35] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[36] 41 U.S. (16 Pet.) 539 (1842).

Pennsylvania, where they lived happily until Morgan and her children were seized, enslaved, and forcibly taken back to Maryland by the son-in-law of her parents' deceased owner. Justice Story believed that respect for federal power and the preservation of comity among slave and free states were essential to the nation-building project. As a result, he read the federal Fugitive Slave Act to provide that the federal government had the sole power to regulate the recapture of runaway slaves. The price for this display of unity was borne by blacks, who even when free could not fully protect themselves from being kidnapped and enslaved by a master who claimed them as his property. As Sullivan argues, this price was palatable because of pervasive beliefs in the racial inferiority of blacks, beliefs that Story undoubtedly shared, whatever his views on slavery.

While the notion of black inferiority lived on after the Civil War and the end of slavery, this ideology had to contend with the Reconstruction Amendments, which, among other things, conferred formal citizenship on blacks.[37] In particular, the Fourteenth Amendment expressly repudiated the logic of *Dred Scott* and earlier cases such as *Prigg*. But formal citizenship for blacks did not necessarily mean formal citizenship for other non-whites—even those who were born on American soil. Notwithstanding the Fourteenth Amendment's language that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States,"[38] there was a very real question about whether this language applied to the Chinese, who by the end of the nineteenth century were already perceived to be irreducibly foreign and thus incapable of being folded into the nation-state. As Erika Lee notes in the story of *United States v. Wong Kim Ark*,[39] the presumptively permanent foreign status of Chinese people was inscribed in a federal statute: the 1790 naturalization law that restricted naturalization to whites. Wong Kim Ark did not dispute his status as a non-white person ineligible to naturalize. The question was whether the Fourteenth Amendment naturalized him (in the same way that it had naturalized the recently emancipated slaves) as a function of his birth in the United States.

Understood in this way, Wong Kim Ark's case forced a contestation between a federal statute and a constitutional provision. The naturalization law equated an ascribed characteristic, race, with presumptive unfitness for citizenship. The Constitution equated another ascribed trait, place of birth, with presumptive fitness. As a person of Chinese descent born in the United States, Wong Kim Ark brought these conflict-

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[37] U.S. Const., amends. XII, XIV, XV.

[38] U.S. Const., amend. XIV, § 1.

[39] 169 U.S. 649 (1898).

ing claims into sharp relief. Was he fit by birth or unfit by race? Ultimately, the Court held in 1898 that Wong was an American citizen, yet his race continued to make his citizenship suspect—a subject of speculation by immigration officers who required extensive documentation whenever he sought to reenter the United States after traveling abroad. While home might have been where Wong's heart was, home was never a place for his race. To put the point slightly differently, and to borrow from Gloria Anzaldua, after acquiring formal citizenship, Wong Kim Ark was ''at home, a stranger.''[40] He became ''not quite, not American,''[41] ''foreign in a domestic sense.''

The phrase ''foreign in a domestic sense'' comes from *Downes v. Bidwell*,[42] the case Pedro A. Malavet discusses in his contribution to this volume. As the United States became a colonial empire at the very historical moment in which it was constituting itself as a post-slavery nation-state, race played a critical role in determining how newly acquired territory would be incorporated. This question of incorporation was never just about places; it was also always about people. Before the Civil War, Congress and the states had battled over the future of slavery on the assumption that all territories were on the path to statehood. Later, however, a model emerged in which some areas could remain perpetually dependent possessions with only limited sovereignty.[43] In the story of *Downes v. Bidwell*, Malavet shows how a 1901 case that was superficially about trade in fact turned on the perceived unfitness of the Puerto Rican people for self-governance. A shipment of oranges spawned a racially inflected meditation that helped to relegate the newly-acquired territory of Puerto Rico to the status of an insular possession—''foreign in a domestic sense''—rather than a site of self-determination. This structural arrangement rendered the residents of unincorporated territories like Puerto Rico second-class citizens, both inside and outside the borders of America's national identity. Meanwhile, on the mainland, a similar dynamic was at play. It, too, was producing second-class citizens—but through a formal system of racial classification and caste.

Separate and Unequal: Classification and Caste

Given how centrally race has figured in the construction of national identity, no one should be surprised that race also plays a central role in defining personal identity. Far from being a superficial matter of skin

[40] Carbado, *supra* note 9, at 639 (drawing on Gloria Anzaldua to advance a theory of racial naturalization).

[41] *Id.* at 639.

[42] 182 U.S. 244 (1901).

[43] Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 Rev. Jur. U.P.R. 225, 236–39 (1996).

color, race has often determined individuals' life chances. Even after the Civil War and the Reconstruction Amendments, Jim Crow segregation left blacks separate and unequal by law.[44] Two Supreme Court cases in particular facilitated the government's use of racial classifications to both police the color line and create a deeply subordinating caste system: *Pace v. Alabama*[45] and *Plessy v. Ferguson*.[46]

In *Pace*, the Court confronted a challenge to an antimiscegenation law that banned marriage between blacks and whites. The state of Alabama argued that the law did not violate the equality guarantees in the Fourteenth Amendment because members of each race faced equivalent penalties for crossing the color line. The Justices agreed, noting that the regulation of marriage was primarily a state concern and that the punishment was directed at the offense rather than a particular race.[47] The decision led to a proliferation of bans on intermarriage, and fourteen years later, the Court extended its "separate but equal" analysis to uphold segregation in public places in *Plessy*.[48]

In *Plessy*, a man who was "of mixed Caucasian and African descent in the proportion of seven-eighths Caucasian and one-eighth African blood"[49] unsuccessfully challenged his expulsion from a whites-only train car as a violation of the constitutional rights secured to blacks under the Reconstruction Amendments. Part of the Court's analysis employed the same racial logic as *Pace*. According to Justice Henry Billings Brown's majority opinion, Plessy failed to demonstrate an equal protection violation because the Louisiana law in question separated blacks from whites and whites from blacks. In other words, as a formal matter, the law treated blacks and whites the same, so there was no constitutional problem.

Plessy's counsel advanced a second argument for overturning the law: The lawyers questioned the propriety of a statute that delegated to

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[44] *See generally* C. Vann Woodward, *The Strange Career of Jim Crow* (commemorative ed. 2002).

[45] 106 U.S. 583 (1882).

[46] 163 U.S. 537 (1896). For accounts of the *Plessy* case, see Cheryl I. Harris, *The Story of* Plessy v. Ferguson*: The Death and Resurrection of Racial Formalism*, *in Constitutional Law Stories*, *supra* note 1, at 181; Thomas J. Davis, *Race, Identity, and the Law:* Plessy v. Ferguson (1896), *in Race on Trial: Law and Justice in American History*, *supra* note 12, at 61.

[47] 106 U.S. at 585.

[48] Rachel F. Moran, *Interracial Intimacy: The Regulation of Race and Romance* 80–81 (2001).

[49] Petition for Writs of Prohibition and Certiorari at 1, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 15,248).

private railway companies the power to determine who was black and who was white. In arguing the case before the United States Supreme Court, attorney Albion Tourgée, a noted advocate for racial equality, argued that whiteness was a valuable form of property and that railway employees were able to deprive individuals of that property without due process of law.[50] He noted that extensive race-mixture meant that it was often difficult, if not impossible, to determine racial identity. In any event, he concluded: ''Why not count everyone as white in whom is visible any trace of white blood? There is but one reason to wit, the domination of the white race.''[51]

In part, the Court neatly sidestepped this novel question by concluding that the issue of racial identity was a question of state law and that at any rate Plessy had not formally challenged his classification in the earlier proceedings.[52] But the Court also partially engaged Plessy's whiteness as property argument, observing that ''we are unable to see how this statute deprives him of, or in any way affects his right to'' a property interest in whiteness.[53] The Court reasoned that ''[i]f he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of this so called 'property.' Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property.''[54] The Court was inviting Plessy to litigate his racial identity.

This invitation was not necessarily disingenuous. In fact, and as Angela Onwuachi–Willig's account of *Hudgins v. Wright*[55] demonstrates, the practice of litigating racial identity has a long pedigree in American law, dating back to slavery. How courts resolved these cases could mean the difference between freedom and bondage. While a court's determination that a litigant was black or African always resulted in bondage, whiteness was not the only identity upon which one could ground a claim to freedom. Indeed, in *Hudgins*, the possibility of freedom was predicated upon Native American, not white identity. Decided by the Supreme Court of Appeals of Virginia in 1806, *Hudgins* involved the legal battle of three women to prove that they were free citizens, not slaves. This determination rested on whether they were proved to have

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50 Cheryl I. Harris develops this claim in her article *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993).

51 Brief for Plaintiff in Error at 11, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 15, 248).

52 *Plessy*, 163 U.S. at 549.

53 *Id.*

54 *Id.*

55 11 Va. (1 Hen. & M.) 134 (1806).

descended from a free American Indian woman, as they claimed, or an enslaved black woman, as the alleged slaveholder claimed. At one time it had been legal to enslave American Indians, but when the government of Virginia began to find it lucrative to increase trade between whites and American Indians, their enslavement was prohibited. As enslavement of blacks was still perfectly legal, the ability to distinguish oneself as descending from American Indians was critical to many people's freedom.

Onwuachi–Willig's careful parsing of the court's opinion reveals the enormous role that hair and phenotype can play in determining an individual's race. Yet, the fact that the case was decided in the context of slavery raises a question about its relevance today. Do we read this case only for the historical exegesis it provides, or do we read it as well for its contemporary relevance? Asked more pointedly, do people continue to litigate their race? If so, how difficult are these cases to resolve—and what is at stake? To the extent that neither slavery nor Jim Crow legislation is a part of the contemporary legal landscape, one might think that the problems engendered by racial classification have disappeared. As Onwuachi–Willig shows, however, this is not the case; the dilemmas and difficulties of categorizing people racially persist today, bedeviling both antidiscrimination law and efforts on the part of the federal government to count individuals by race for purposes of the United States census. Were Homer Plessy alive today, there would be a real question not only about how to count him but about how he would count himself on the census.

Because of the centrality of *Plessy* as an anti-canonical case about African Americans, we sometimes ignore the significance of the case for other racial groups, particularly Asian Americans. Yet, *Plessy* profoundly affected the lives of people of Asian descent. Largely, it was with a simple citation to *Plessy* that the Supreme Court in *Gong Lum v. Rice* rejected Martha Gong Lum's claim that her exclusion from a whites-only high school violated equal protection.[56] Significantly, the relevant Mississippi constitutional provision did not specifically mention the ''yellow race''—one of the preferred terms, along with ''Oriental,'' for Asian Americans—but only ''white and colored races.'' Martha Gong Lum thus had to decide on which side of the color line she belonged. In effect, her answer was neither; more particularly, she refused to identify herself as either white or colored.[57]

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[56] 275 U.S. 78 (1927).

[57] Sora Han argues that Gong Lum's claim shifted the racial lens from a black/white paradigm to a black/non-black paradigm, further entrenching the notion of blackness as the identity categorization to avoid. See Sora Y. Han, *The Politics of Race in Asian American Jurisprudence*, 11 Asian Pac. Am. L.J. 1, 2–24 (2006).

Only a few years earlier Takao Ozawa had found himself in a similar racial predicament. This time, the legal regime was not a state constitutional provision but a federal statute. As noted earlier, in 1790, Congress had limited naturalization to free white persons. Congress amended this statute in the context of Reconstruction so that ''aliens of African nativity and ... persons of African descent'' also were eligible for naturalization.[58] Like Martha Gong Lum, Ozawa had to decide whether he could find a path to citizenship as a white person or one of African descent. How would Ozawa situate himself? In the story of *Ozawa v. United States*,[59] Devon W. Carbado answers that question: Ozawa argued that he was white. For the most part, he based his claim on his success in assimilating to an American way of life and on the lightness of his skin.

But as Carbado notes, Ozawa also advanced a more radical claim that reflected his skepticism about the utility of whiteness as a category. As Ozawa explained in his brief, ''there is not an absolutely white person existing on this earth.''[60] Like Plessy, Ozawa found that the Court was unreceptive to his efforts to complicate racial identity. His petition for naturalization was denied, and eventually, other Asian-origin groups would encounter similar barriers. Even when anthropologists considered some groups, like Asian Indians, to be Caucasian, the Justices relied on a widespread common belief that these groups were in fact non-white.[61] In doing so, the Court cemented their place on the wrong side of the color line.

Importantly, people of Asian descent were not the only group who asserted whiteness to acquire citizenship. ''Middle Easterners'' did so as well.[62] As John Tehranian notes, ''[t]he results of these cases were mixed.''[63] Courts sometimes considered Middle Easterners white, as in *Ex parte Mohriez*, where a federal district court invoked ''the sciences of algebra and medicine, the population and the architecture of Spain and of Sicily, the very words of the English language,'' to conclude that a

[58] 8 U.S.C. § 359 (1875), *amended by* 8 U.S.C. § 1422 (1952).

[59] 260 U.S. 178 (1922).

[60] Supreme Court Brief, *in Consulate General of Japan, Documentary History of Law Cases Affecting Japanese in the United States, 1916–1924*, at 15 (1978 reprint) (1925).

[61] United States v. Thind, 261 U.S. 204 (1923).

[62] We put this term in quotes here to signal our recognition that it is from a Western gaze that people became Middle Easterners. We deploy it nonetheless—and throughout the remainder of the introduction without quotes—because it continues to be a cognizable racial category both ascriptively and self-definitionally. *See generally* John Tehranian, *Compulsory Whiteness: Towards a Middle Eastern Legal Scholarship*, 82 Ind. L.J. 1, 11 (2007).

[63] *Id.*

man of Arab descent was white.[64] However, most often, courts reached the opposite conclusion, as in *In re Ahmed Hassan*.[65] In that case, the court focused on skin color, religion, and assimilability to conclude that Ahmed Hassan was unnaturalizable.

> Apart from the dark skin of the Arabs, it is well known that they are a part of the Mohammedan world and that a wide gulf separates their culture from that of the predominately Christian peoples of Europe. It cannot be expected that as a class they would readily intermarry with our population and be assimilated into our civilization.[66]

Like Ozawa, Hassan found himself on the non-white/non-black side of the color line, a racial position from which even formal citizenship was unattainable.

The question of situating individuals along the color line does not always involve racial categorization—whether, for example, a person is yellow or white. Sometimes the question is whether a person or group belongs on the color line at all. This is precisely the issue in the story of *Morton v. Mancari*,[67] Carole Goldberg's contribution to this volume. She describes yet another dilemma of federal classification: how to deal with the identity of Native Americans. Tribes have been the subject of special legislation based on a history of conquest and treaties that accorded them semi-sovereign status. At the same time, and as Rennard Strickland's chapter reveals, Native Americans have been racialized, and their racial inferiority often has been used as a justification to divest them of their land and their rights. Today, the tendency to treat tribes as either racial or political has significant consequences. The Court has become increasingly unreceptive to programs like affirmative action that weigh race in allocating jobs or government contracts. So, if Native American tribes have a purely racial identity, programs directed at their needs are suspect. If, however, the tribes are political entities, the programs are simply part of a complex and ongoing negotiation about the tribes' relationship as dependent sovereigns of the federal government.

Goldberg's story brings this formal legal question to life, showing how serendipity played a role in framing this key case in Native American law. Carla Mancari was a non-Indian employee at a Bureau of Indian Affairs school, who challenged affirmative action policies that were designed to encourage the hiring and promotion of Indians. During the litigation, a lawyer advocating on behalf of these policies, by happen-

[64] 54 F. Supp. 941, 942 (D. Mass. 1944).

[65] 48 F. Supp. 843 (D. Mass. 1942).

[66] *Id*. at 845.

[67] 417 U.S. 535 (1974).

stance, had a conversation that led him to appreciate the distinction between Indian identity as racial or political. The result was a victory in the Supreme Court that preserved the Bureau of Indian Affairs policies, even as the justices rejected other affirmative action programs.

Mexican Americans experienced a similar victory in 1954 in *Hernandez v. Texas*.[68] As in *Morton v. Mancari*, the Supreme Court did not employ an explicitly racial analysis. Decided shortly before *Brown v. Board of Education*,[69] *Hernandez* addressed the systematic exclusion of Mexican Americans from grand juries in Texas. As Ian Haney López and Michael A. Olivas's chapter on the case notes, there were important differences between *Brown* and *Hernandez*. *Brown* was a highly controversial case targeting Jim Crow segregation and was very much in the public eye, while *Hernandez*, which invoked the same principles but for a different group, was virtually unknown and unrepresented in the media. Moreover, while *Brown* was backed by many prominent groups with substantial funding and support, the lawyers for Hernandez had to scrape together the funds even to afford the Supreme Court filing fee and the trip to Washington, D.C. Finally, *Brown* treated African Americans as a distinct racial group; *Hernandez* did not do so with respect to Mexican Americans.

Notwithstanding the foregoing differences, the *Hernandez* Court, like the *Brown* Court, found wrongful discrimination. *Hernandez*'s ruling in this respect made the opinion ''the first civil rights decision of the Warren Court.'' In extending Fourteenth Amendment protection to Mexican Americans, the Court did not characterize them as a distinct, non-white group. Indeed, lawyers on both sides of the litigation argued that Mexican Americans were white. This agreement ''precluded a racial analysis for what was otherwise evidently a racial case.'' According to Haney López and Olivas, one positive aspect of the Court's refusal to treat Mexican Americans as a distinct and non-white race was that it forced the Court to adopt an anti-subordination approach, one that focused on hierarchy and social stratification, and not simply on formal racial classifications. In this sense, *Hernandez* helped to make clear that caste is often accomplished by, but does not require, formal classifications. This insight has largely disappeared into a contemporary normative claim that our Constitution is colorblind. Contrary to the lessons of history, today's Court treats race neutrality as a complete cure for discrimination, despite clear evidence of ongoing racial inequality.

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[68] 347 U.S. 475 (1954).

[69] 347 U.S. 483 (1954).

Our Constitution is Colorblind: The Doctrine of Race Neutrality

No book on race law would be complete without a discussion of colorblindness, that is, the doctrine of race neutrality. Justice John Marshall Harlan's dissent in *Plessy* is most often cited for this principle. According to Harlan, "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[70] Although this was an important and radical position for Justice Harlan to stake out, it did not bespeak a commitment to social equality across the color line. Two passages in Justice Harlan's dissent made this clear. In one passage, Harlan observed that "[t]he white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage."[71] After reading this passage, one has to remind oneself that Justice Harlan was arguing against, not for, racial segregation. In short, "[w]hile in Harlan's view the law should be employed neither to separate the races nor to create a dominant race, he [was] comfortable with a society within which there [was] . . . racial dominance."[72]

Further along in his dissent, and again ostensibly in the spirit of anti-racism, Justice Harlan invoked the specter of the Chinese to question the constitutionality of the "separate but equal" doctrine. Again, he relied on images of racial inferiority even as he questioned segregation by law. As he wrote, "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question a Chinaman can ride in the same passenger coach with white citizens of the United States."[73] Here, Harlan's colorblind constitutionalism co-existed comfortably with the notion of the Chinese as being unfit for citizenship. In fact, Harlan's dissent traded on the unnaturalizability of the Chinese. Because Justice Harlan was arguing only against state-sanctioned racial segregation, these passages reinforcing images of racial inferiority remain obscure, and his vision of colorblindness has become politically and constitutionally ascendant.

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[70] *Plessy*, 163 U.S. at 537, 539 (Harlan, J., dissenting).

[71] *Id.*

[72] Carbado, *supra* note 9, at 647.

[73] Plessy, 163 U.S., at 561 (Harlan, J., dissenting). For an extended critique of Justice Harlan's dissent, see Carbado, *supra* note 9, and Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. Rev. 1283 (2002). Gabriel Chin was one of the first to note the racial problematics of Harlan's dissent. *See* Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 Iowa L. Rev. 151 (1996).

Indeed, *Brown v. Board of Education*[74] is often celebrated as the realization of Harlan's vision. In part, this is because *Brown* overruled *Plessy*, but it is also because of the manner in which *Brown* did so. In *Brown*, Chief Justice Earl Warren, writing for a unanimous Court, struck down laws mandating racial segregation in the public schools. The Court rejected *Plessy*'s "separate but equal" doctrine by finding that "[s]eparate educational facilities are inherently unequal."[75] Regardless of whether tangible resources like facilities, books, and teacher qualifications in black and white schools could be equalized, segregation by law inflicted irreparable, intangible harms on schoolchildren that would "affect their hearts and minds in a way unlikely ever to be undone."[76] Some scholars have read this language to suggest that racial classifications per se are unconstitutional, and that the Constitution requires race neutrality. *Brown* did not expressly articulate this race-neutral principle, but that is one of the most common ways in which the case is interpreted.

Significantly, in delegitimizing the racial classification at issue in *Brown*, Chief Justice Warren had more to draw on than Harlan's dissent. Only ten years earlier, the Court had decided another racial classification case, *Korematsu v. United States.*[77] In *Korematsu*, the Court confronted the internment of Japanese and Japanese–American residents who allegedly posed a threat to national security.[78] Much like in *Brown*, there was no dispute about whether there was a racial classification. The question was whether that racial classification was constitutional. In answering that question, *Korematsu* declared that "all legal restrictions which curtail the civil rights of a single racial group" are

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[74] 347 U.S. 483 (1954). The literature on *Brown* is vast. Among the many accounts are Richard Kluger, *Simple Justice* (1975); Charles Ogletree, *All Deliberate Speed: Reflections on the First Half–Century of* Brown v. Board of Education (2004); Leland Ware, *The Story of* Brown v. Board of Education*: The Long Road to Racial Equality*, *in Education Law Stories* 19 (Michael A. Olivas & Ronna Greff Schneider eds. 2008); Risa L. Goluboff, Brown v. Board of Education *and the Lost Promise of Civil Rights*, *in Civil Rights Stories*, *supra* note 1, at 25; Mark Tushnet, Brown v. Board of Education (1954), *in Race on Trial: Law and Justice in American History*, *supra* note 12, at 25.

[75] 347 U.S. at 484.

[76] *Id.* at 494.

[77] 323 U.S. 214 (1944). For accounts of the case, see Neil Gotanda, *The Story of Korematsu: The Japanese–American Cases*, *in Constitutional Law Stories*, *supra* note 1, at 249; Roger Daniels, Korematsu v. United States *Revisited*, *in Race on Trial: Law and Justice in American History*, *supra* note 12, at 139.

[78] This is not entirely accurate in the sense that the Court never actually addressed the internment of Japanese Americans as such. *See* Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. Rev. 933 (2004).

constitutionally suspect.[79] This heightened standard of review, or what we now refer to as strict scrutiny, did little to help people of Japanese descent. The Court upheld the internment practices, leaving open the question of how vigorous the Court would be in striking down invidious racial classifications.

Although many believe that *Korematsu* was the first case to apply strict scrutiny to a racial classification, *Hirabayashi v. United States*,[80] which was decided one year earlier, in fact deserves that distinction, as Jerry Kang's story of the case observes. Gordon Hirabayashi was born and raised in a small Christian farming cooperative south of Seattle, Washington. When, at age twenty-four, he was ordered to evacuate, he took a moral stand against the mandate, despite his mother's deep desire to keep the family together. Rather than comply, he turned himself in to the Federal Bureau of Investigation, ''armed with a four-page statement explaining the constitutional and moral grounds for his civil disobedience.'' Because Hirabayashi admitted to violating curfew and exclusion orders, his trial was short and his conviction assured. The judge granted his request to serve a ninety-day sentence for each offense, a longer sentence than initially given. The appeal was certified to the Supreme Court, bypassing Ninth Circuit review, and the American Civil Liberties Union took over Hirabayashi's defense.

In deciding the case, the Court avoided the issue of Japanese internment entirely by ''segmenting'' the case; it focused only on the conviction for a curfew violation and not violation of the exclusion order. The question presented became: ''During a time of national peril, was the military's adoption of a mere curfew lawful?'' Phrasing the issue this way allowed the Court to avoid the issue of the constitutionality of the entire internment machinery. As Kang notes, the Supreme Court reproduced this avoidance strategy in *Korematsu*, focusing on evacuation rather than detention. Kang goes on to describe the Japanese–American redress movement of the 1970s and 1980s, which turned on evidence that the United States government manipulated findings of fact to overstate the danger of sabotage and espionage in the internment cases. Ultimately, activists succeeded in getting an apology from the executive branch and modest reparations from Congress. In addition, attorneys got the federal courts to vacate the convictions of defendants like Hirabayashi. Despite these belated efforts to set the record straight, Kang suggests that the internment cases are cause for concern, not celebration. In his view, these are mainly stories of judges who dodged their responsibility, rather than of the power of law to work itself pure.

[79] 323 U.S. at 216.

[80] 320 U.S. 81 (1943).

If the internment cases were an abject lesson in the limits of law as an instrument of racial justice during wartime, then *Perez v. Sharp*[81] shows how the post-war promise of equality could transform legal doctrine. In *Perez*, a black man and a Mexican–American woman, who was classified as white, challenged California's ban on interracial marriage. At the time of their challenge, the United States Supreme Court had upheld an Alabama antimiscegenation statute in *Pace*, and the decision was still good law. Moreover, *Brown v. Board of Education* had yet to be decided. In the following decade, when *Brown* (and a series of cases issued shortly thereafter) dismantled the doctrine of "separate but equal" in public life, none of the opinions reached interracial intimacy. Indeed, based on the thinking that "one bombshell at a time is enough,"[82] the Justices refused to hear cases challenging bans on interracial marriage. By 1967, however, the Court felt confident enough to issue another decision striking down the legacy of segregation. In *Loving v. Virginia*,[83] Chief Justice Warren wrote for a unanimous Court in holding that antimiscegenation laws violated equal protection because they were designed to promote white supremacy. With one exception, the Justices also found that the statutes infringed on due process by burdening a fundamental freedom: the right to marry.[84]

But none of this would help Andrea Perez and Sylvester Davis. Indeed, as R.A. Lenhardt's story of *Perez* makes clear, at the time of the litigation, California was one of thirty states with antimiscegenation laws. When Perez and Davis took their case to the courts, they were represented by a lawyer who decided, in contrast to most such challengers, to "strike a blow . . . at the very heart of California's laws." He argued that the law violated the couple's freedom of religion, hoping that the California Supreme Court would exercise its original jurisdiction to hear the case without its ever going through the normal trial process. While the court was in fact persuaded to take the case, religion did not figure in the analysis. For Justice Roger Traynor, the case involved "the right to marry . . . the person of one's choice." According to Lenhardt, this characterization enabled Traynor to elucidate a colorblind understanding of race—that it is biologically irrelevant. With *Perez* as a part of its jurisprudence, the California Supreme Court became the first and

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81 198 P.2d 17 (Cal. 1948).

82 Walter F. Murphy, *Elements of Judicial Strategy* 193 (1964).

83 388 U.S. 1 (1967). For an account of the *Loving* case, see Peter Wallenstein, *Interracial Marriage on Trial:* Loving v. Virginia (1967), *in Race on Trial: Law and Justice in American History*, *supra* note 12, at 177; Robert A. Pratt, *The Case of Mr. and Mrs. Loving: Reflections on the Fortieth Anniversary of* Loving v. Virginia, *in Family Law Stories* 7 (Carol Sanger ed. 2007).

84 Moran, *supra* note 48, at 98.

only state high court since Reconstruction to invalidate an antimiscegenation law.[85]

An important part of Lenhardt's story of *Perez* is her suggestion that the case offers important lessons that go well beyond those in *Loving*. For one thing, Justice Roger Traynor's majority opinion in *Perez* was far more skeptical of the legitimacy of racial categories than was Chief Justice Warren's opinion in *Loving*. Traynor's doubts reflected a heightened awareness of the dangers of an ideology of racial inferiority, the very philosophy that Americans had confronted in the war against Nazism. By contrast, in 1967, racial classifications had become necessary to implement desegregation decrees, and Warren was simply willing to take them for granted.[86] For another, *Perez* has become a centrally important precedent in the contemporary same-sex marriage movement, because Justice Traynor spent considerable time addressing the right to marry. By contrast, Chief Justice Warren relegated this issue to a couple of paragraphs at the end of the *Loving* opinion. To preserve a unified Court, Warren had to downplay this holding as a way to mollify colleagues who worried about recognizing rights not set forth explicitly in the Constitution. Traynor presumably had no hope of a unanimous decision in *Perez*, and so was free to develop an account of the unique role that intimate associations play in forming an individual's identity. Explicitly rejecting the ''separate but equal'' doctrine in the context of marriage, Traynor noted that ''the essence of the right to marry is freedom to join in marriage with the person of one's choice.''[87] The antimiscegenation law violated this right because a person's chosen partner could be ''irreplaceable,''[88] yet irretrievably unavailable by reason of race. Traynor's opinion drew together themes of equality and freedom in ways that are missing in both *Brown* and *Loving*.

Even as *Brown* and *Loving* assumed iconic status, the two decisions revealed some unresolved tensions in the Court's canon of colorblindness. After *Brown*, the Court had insisted on desegregation plans that used race to eliminate past discrimination ''root and branch''[89] in school districts. Busing became the most conspicuous and contentious example of judicial reliance on color-conscious remedies.[90] *Loving*, by contrast, at least in part, espoused a norm of colorblindness, but the Court did not

85 *Id.* at 84.

86 *Id.* at 98–99.

87 198 P.2d at 20–21.

88 *Id.* at 25.

89 Green v. County Sch. Bd., 391 U.S. 430, 437–38 (1968); Swann v. Charlotte–Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

90 Gary Orfield, *Must We Bus?: Segregated Schools and National Policy* (1978).

contemplate "a state-run interracial dating service."[91] On the contrary, the fundamental right to marry meant that government officials had to respect personal choices, even if high rates of same-race marriage persisted after *Loving*. As a result, *Loving* became "the first modern civil rights decision to treat colorblindness and segregation as compatible concepts."[92]

The juxtaposition of the two cases revealed a fundamental dilemma: How could the Court's formal commitment to colorblindness be reconciled with the ongoing need for race-conscious remedies? In the area of school desegregation, the Court eventually retreated from busing orders. As school desegregation litigation moved to the North and West, the Justices limited the scope of relief in urban school districts marked by segregation and poverty. The Court exempted nearby suburban districts, typically with affluent, white student bodies, from busing orders unless there was proof that these districts had intentionally promoted interdistrict segregation.[93] Such evidence was hard to come by, and so schools remained racially identifiable.[94] Even in the South, the federal courts increasingly found that school districts were unitary; that is, they had eliminated the vestiges of past discrimination.[95] When desegregation remedies drew to a close, schools often became resegregated.[96]

The Court's retreat was not limited to school desegregation. Affirmative action was highly controversial because color-conscious policies could be adopted in the absence of an official finding of past discrimination. These programs seemed to fly in the face of the principle of colorblindness because they were adopted voluntarily, rather than in response to sanctions for constitutional wrongdoing. In the story of *City of Richmond v. J.A. Croson Co.*,[97] Reginald Oh and Thomas Ross reveal a relatively early doctrinal moment in which the Court struggled to manage the conflict between colorblindness and affirmative action. The case began when J.A. Croson Company filed a lawsuit against the City of

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[91] Moran, *supra* note 48, at 8.

[92] Rachel F. Moran, *Loving and the Legacy of Unintended Consequences*, 2007 Wisc. L. Rev. 239, 262 (2007).

[93] Milliken v. Bradley, 418 U.S. 717 (1974).

[94] Gary Orfield, *Turning Back to Segregation*, *in Dismantling Desegregation: The Quiet Reversal of* Brown v. Board of Education 10–13 (Gary Orfield & Susan E. Eaton eds., 1996).

[95] Freeman v. Pitts, 503 U.S. 467 (1992) (Atlanta, Georgia); *see also* Board of Education v. Dowell, 498 U.S. 237 (1991) (Oklahoma City, Oklahoma).

[96] Orfield, *supra* note 90, at 14–22; Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education*, *in Dismantling Desegregation: The Quiet Reversal of* Brown v. Board of Education, *supra* note 94, at 53.

[97] 488 U.S. 469 (1989).

Richmond because Richmond denied Croson's bid for a plumbing contract. The city refused Croson's bid because it failed to comply with the Minority Business Utilization Plan (the "MBUP"), a city plan that required contractors to "subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises." Croson claimed that the MBUP violated the Fourteenth Amendment's Equal Protection Clause.

This case sparked bitter division among the Justices. As Oh and Ross explain, the conflicting opinions in *Croson* relied on distinct narratives that depicted affirmative action either as "simple racial politics"[98] or a modest concession to the ongoing realities of societal racism. The majority of the Justices considered the program a product of the black city council's pork-barrel politics and applied a rigorous strict scrutiny test to invalidate the set-aside plan. The dissenting Justices saw the initiative as a benign remedy to overcome the legacy of unequal access in the construction industry and would have applied a less stringent, intermediate standard of review to uphold the program. Oh and Ross argue that in this polarizing debate, none of the Justices fully appreciated the structural obstacles to full inclusion for non-whites in metropolitan areas. This was true, they argue, even with respect to Justice Thurgood Marshall, one of the most liberal Justices ever to sit on the Court and at that time the only African American. Marshall's opinion was deeply contextual, particularly when compared to the more abstract narratives of the other Justices, but nonetheless remained situated within the boundaries of the city of Richmond. According to Ross and Oh, by expanding the geographical scope to include the suburbs outside of the city, the Court's narrative would have become more about the "continuing political and socioeconomic powerlessness of African Americans" as white flight from the city both created the city's black majority and caused the city's economy to decline abruptly. The commitment to colorblindness, they argue, made this complex racial narrative difficult to tell.

The hold of colorblindness on American law transcends equal protection doctrine. As Kevin R. Johnson's account of *Whren v. United States*[99] demonstrates, colorblindness is a powerful force in the Fourth Amendment context as well. In *Whren*, police officers stopped a car, purportedly for a traffic violation, conducted a search, and found narcotics. The defendants contended that the stop was a pretext and that they had been victims of racial profiling. That profiling allegedly violated the Fourteenth Amendment, but what the defendants wanted was relief under the Fourth Amendment, which forbids unreasonable searches and sei-

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[98] *Id.* at 493–94, 510 (plurality opinion of O'Connor, J.).

[99] 517 U.S. 806 (1996).

zures. If the trial court concluded that the search or seizure was unreasonable, any evidence acquired as a result would be inadmissible. Whren argued that the narcotics seized during the search should not be allowed into evidence because the police officer's decision to perform the traffic stop was based on race. Without the incriminating drugs, Whren's conviction would be overturned.

As Johnson notes, consistent with the logic of colorblindness, the Supreme Court ignored the racial elements of the case, among them, the fact that at least one of the officers was white and that the defendant and his passenger were black. More profoundly, the Court, in a unanimous opinion, rejected the argument that a racial profiling claim of the sort Whren advanced could be the basis for invoking remedies under the Fourth Amendment. As a result, the most meaningful relief for illicit racial profiling was not available to defendants, even if they could surmount the evidentiary challenges of proving discrimination. Johnson persuasively argues that the Court's decision in *Whren* means that racial profiling must be addressed in the political rather than the judicial arena. In the meantime, officers have a license to make racial distinctions that are justified as part of the war on drugs. These distinctions, like other racialized aspects of the criminal justice process, seem not to run afoul of the notion that our Constitution is colorblind.[100] This reliance on racial distinctions, on the one hand, and the denial of race-conscious remedies, on the other, is a more general problem in American law.

With all Deliberate Speed: Race–Conscious Remedies

The roots of the dilemma over race-conscious remedies can be found in *Brown* itself. Despite the fact that the Court spoke with a single voice, the school desegregation mandate could not be implemented without the support of Congress and the executive branch. The following year, in *Brown II*, the Court found that school integration would proceed with "all deliberate speed."[101] As it turned out, there was far more deliberation than speed. For the next decade, the Court maintained a studied detachment in the face of Southern resistance. Only when Congress passed the Civil Rights Act of 1964, which endorsed a principle of nondiscrimination on the basis of race, did the Court begin vigorous efforts to enforce the integrationist ideal set forth in *Brown*. At the same time, state governments and the federal government began to take "affirma-

[100] *See* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 Mich. L. Rev. 946 (2002) (exploring the various ways in which Fourth Amendment jurisprudence is racialized); *See also* Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* (2007); Paul Butler, *Much Respect: Toward a Hip–Hop Theory of Punishment*, 56 Stan. L. Rev. 983 (2004).

[101] 349 U.S. 294 (1955).

tive'' steps to improve the educational and workplace opportunities of people of color. This is the context in which affirmative action was born, not in the courts but in the crucible of politics.

As the story of *Croson* demonstrates, the Supreme Court has had little difficulty in striking down affirmative action programs. Recall that in *Croson*, the Court applied strict scrutiny, the most stringent level of judicial review, to conclude that the city of Richmond's set-asides in government contracting were unconstitutional. While the case centered on the conduct of a city government, there was no doubt that the Court's approach applied to both state and municipal affirmative action programs. All would be subject to strict scrutiny. But what about affirmative action programs promulgated by the federal government? Should the same level of scrutiny apply to them? Later in *Adarand Constructors v. Pena*,[102] the Court answered that question in the affirmative, despite Congress's special role in implementing norms of equality under the Fourteenth Amendment. The Court insisted that colorblindness required that all race-based classifications, whether hostile or benign, at whatever level of government, be subject to strict scrutiny, a test that (at least after *Korematsu*) increasingly seemed to be ''strict in theory and fatal in fact.''[103]

Despite this commitment to colorblindness, the Justices upheld race-based admissions in *Regents of the University of California v. Bakke*.[104] There, Allan Bakke, an applicant to medical school, challenged the University of California at Davis's policy of setting aside seats in the entering class for underrepresented minority students. He alleged that this ''reverse discrimination''[105] violated the Equal Protection Clause as well as the non-discrimination principle set forth in Title VI of the Civil Rights Act. Four Justices agreed with Bakke, concluding that any use of race triggered strict scrutiny and that Davis had not offered a compelling justification for its program.[106] Four other Justices sided with Davis, finding that a lower level of judicial review should apply to affirmative

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102 515 U.S. 200 (1995).

103 Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972). *But see* Adam Winkler, *The Federal Government as a Constitutional Niche in Affirmative Action Cases*, 54 UCLA L. Rev. 1931 (2007) (suggesting that there is a meaningful survival rate for strict scrutiny cases).

104 438 U.S. 265 (1978).

105 *See* Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 Harv. BlackLetter L.J. 1 (1994) (challenging the notion of reverse discrimination).

106 438 U.S. at 418 (opinion of Stevens, J.)

action because it was designed to rectify inequality; under this intermediate test, the Davis plan passed muster.[107] With the Justices split four to four, Justice Lewis Powell cast the deciding vote. He concluded that affirmative action in higher education could be justified by a university's compelling interest in diversity. By diversity, he meant ''an atmosphere of speculation, experiment, and creation''[108] that was generated by bringing together students with different backgrounds and perspectives. Diversity included not just race but other characteristics that shaped a person's world view.[109] Powell therefore insisted on individualized review of applicants, with race treated as one factor among others. He cited the undergraduate admissions program at Harvard as one that could survive strict scrutiny. By contrast, Davis's set-aside program resembled a group-based quota, so Powell found it unconstitutional.[110]

For almost eighteen years, the question of affirmative action's constitutional status in college and university admissions seemed reasonably settled. In 1996, however, the Fifth Circuit Court of Appeals in *Hopwood v. Texas*[111] posed a direct challenge to the regime that *Bakke* had established. The court of appeals ruled that the Supreme Court had never held that diversity was a compelling state interest; only Justice Powell's lone opinion articulated that position. *Hopwood* turned the affirmative action world upside down. Colleges and universities had thoroughly internalized the *Bakke* holding in revamping their admissions processes. What were they to do now?

In 2003, the Supreme Court weighed in. When Barbara Grutter was waitlisted and denied admission, she brought suit alleging unconstitutional reverse discrimination at the University of Michigan's law school. When the Court granted *certiorari* in the case, no one knew whether the decision would place affirmative action on surer constitutional footing or whether, instead, it would delegitimize the policy altogether. Ultimately, the Court upheld affirmative action that relied on holistic review of applicants in *Grutter v. Bollinger*.[112] In rejecting Grutter's claim, Justice O'Connor not only reaffirmed Powell's diversity rationale but also linked it to core democratic values. Because elite institutions like Michigan's law school were pathways to leadership, O'Connor found that access was

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[107] *Id.* at 336–40 (opinion of Brennan, J).

[108] *Id.* at 312 (opinion of Powell, J.) (citing Sweezy v. N.H., 354 U.S. 234, 236 (1957)).

[109] For a conception of what we might mean by the expression ''racial diversity,'' see Devon W. Carbado & Mitu Gulati, *What Exactly is Racial Diversity?*, 91 Cal. L. Rev. 1149 (2003).

[110] *Bakke*, 438 U.S. at 315–24 (opinion of Powell, J.).

[111] 78 F. 3d 932 (5th Cir. 1996).

[112] 539 U.S. 306 (2003).

important to preserve a sense that groups from all walks of life have a fair chance to participate in shaping our nation's destiny.[113] Moreover, she concluded that the law school had treated applicants as individuals with race weighed as but one factor in admission. In seeking a critical mass of underrepresented students, Michigan pursued an aspiration, not a quota.[114]

Rachel F. Moran's story of the case makes clear that O'Connor's majority opinion, while an important victory, is part of a jurisprudence of fragmentation that has seriously weakened the Court's authority in matters of civil rights and affirmative action. The Court's ruling was anything but a resolution of the controversy surrounding race-conscious policies. Indeed, after *Grutter*, the electorate in Michigan passed a referendum that banned consideration of race in public decisionmaking.[115] As a result, the law school could no longer use the affirmative action program it had fought so hard to defend.

That the Court could not have hoped to resolve the contestation over affirmative action was evident from the very nature of the *Grutter* litigation itself. For one thing, and as Moran notes, a record number of organizations and institutions filed amicus briefs in this case, including Fortune 500 corporations and a group of retired generals, who argued that affirmative action was necessary to promote the national security of the United States. For another, there was intense controversy about the terms upon which the case should be argued. The student-intervenors unsuccessfully sought to redefine the litigation as an epic struggle over racial subordination, rather than a referendum on *Bakke*. Once the case was heard by the Supreme Court, the student-intervenors were not even allowed to participate in oral argument. According to Moran, these controversies, combined with the deep divisions among the Justices, suggest that the future of affirmative action remains up for grabs. Moreover, and as Ward Connerly's state-by-state anti-affirmative action ballot initiative project suggests, the Supreme Court will never be the final voice on the matter. As in California and Michigan, people will speak with their votes.

At the very least, this is worrisome. Historically, voting has been both a racialized opportunity and a racialized practice in the United States. As such, it is a context in which minorities are vulnerable to what Lani Guinier refers to as the tyranny of the majority.[116] As Daniel

[113] *Id.* at 332.

[114] *Id.* at 334–39.

[115] Proposal 2 (Nov. 7, 2006) (codified at Mich. Const. art. I, § 26).

[116] *See generally* Lani Guinier, *Tyranny of the Majority* (1994).

P. Tokaji's story of *Shaw v. Reno*[117] indicates, race-conscious redistricting was one response to this problem of systematic underrepresentation in the political process. Tokaji provides an in-depth account of one of the most important civil rights laws in our country's history, the Voting Rights Act.[118] First enacted to redress a history of exclusion, this legislation has clearly promoted access to the ballot box and helped to diversify representation on city councils, in state legislatures, and in Congress.

In *Shaw*, the plaintiffs challenged two majority-black districts in North Carolina, created to satisfy the Act's requirements, as products of racial gerrymandering. Tokaji makes clear that the case pitted the Justice Department's interpretation of voting rights law as color-conscious by congressional design against the Supreme Court's interpretation of the Equal Protection Clause as colorblind in cases like *Croson* and *Adarand*. Ultimately, the Court rejected bizarrely-shaped districts that highlighted race as the primary factor in how boundaries were drawn. However, the Justices did leave room for race to play a role, because race and political behavior were closely correlated in North Carolina. In short, the Court demanded that remedies under the Voting Rights Act be narrowly tailored, but the Justices refused to find that the Act's very invocation of race was unconstitutional. The Court recognized that the Act had become intricately entwined with notions of democratic legitimacy and fair play. As a result, the Justices were understandably reluctant to undermine a law that had so dramatically altered the concept of "We, the People." At the same time, the Court was clear that concerns about colorblindness do not disappear in the voting rights context. According to the Court, "[r]acial classifications of any sort pose the risk of lasting harm to our society."[119] Thus we should strive to make race irrelevant; we should strive to make it unnameable; we should strive not to see it.

Yet, as Eric K. Yamamoto and Catherine Corpus Betts's story of *Rice v. Cayetano*[120] reveals, sometimes the Court goes out of its way to see race—even when a strong argument can be made that race simply is not there. In *Rice*, a wealthy white rancher challenged the electoral process used to select board members for the Office of Hawaiian Affairs

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[117] 509 U.S. 630 (1993) (*Shaw I*), *on remand sub nom.* Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899 (1996) (*Shaw II*), *on remand*, No. 92–202–CIV–5–BR (E.D. N.C. Sept. 12, 1997) (approving plan and dismissing claim as moot). Later, a related case challenged the redistricting under the Voting Rights Act yet again. Cromartie v. Hunt, 1998 U.S. Dist. LEXIS 7767 (E.D.N.C. 1998), *rev'd*, 526 U.S. 541 (1999), *remanded*, 133 F. Supp. 2d 407 (E.D.N.C. 2000), *rev'd sub nom.* Easley v. Cromartie, 532 U.S. 234 (2001).

[118] Pub. L. No. 89–110, codified at 43 U.S.C. §§ 1973 et seq.

[119] 509 U.S. at 657.

[120] 528 U.S. 495 (2000).

(''OHA''). The OHA was designed to be a ''receptacle for reparations''[121] that would better the lives of indigenous Hawaiians. To facilitate self-determination, only individuals of Hawaiian ancestry were permitted to vote for board members. As a result, Rice's request for a ballot was denied and he filed suit, alleging that the voting restriction violated his civil rights.

Yamamoto and Betts contend that the Supreme Court wrongly rejected the OHA's electoral limit. In their view, the Justices failed to recognize the special history and claims of indigenous peoples. By ignoring the impact of colonization on native Hawaiians, the Court was able to use the rhetoric of colorblindness not to avoid race but to invoke it. Rather than viewing Native Hawaiians as an indigenous group and a once-sovereign nation whose government the United States illegally overthrew, the Court framed Native Hawaiians as a racial group. Thus, unlike both the district court and the Ninth Circuit Court of Appeals, the Supreme Court did not conceive of OHA as facilitating a relationship of trust between the Native Hawaiians and the United States. After explicitly inserting race into the case, the Court ruled that OHA's voting regime was reverse discrimination. Yamamoto and Betts close their chapter by suggesting that, in the end, *Rice* is a case both about collective memory and about the power to name and describe one's own reality. The Native Hawaiians became a race by law, not by self-definition.

The issue of race by self-definition is particularly salient for Middle Easterners, across religious identity. As noted earlier, in the context of seeking naturalization, people of Middle Eastern descent argued that they were white. Sometimes this argument carried the day; most often it did not. As a formal matter, inside and outside the domain of ''science,'' Middle Easterners today are classified as Caucasian or white. The question is whether, in terms of self-definition, they should embrace or reject that classification. How one answers this question has important race-conscious remedial implications. Only in 1987 did the Supreme Court make clear that though Middle Easterners are classified as white, they still can sue for racial discrimination.[122] Implicit in the Court's reasoning was the notion that Middle Easterners could be racially vulnerable. Our national response to the terrorist attack of September 11, 2001 has confirmed this assumption.

As Leti Volpp observes, ''September 11 facilitated the consolidation of a new category that groups together persons who appear 'Middle Eastern, Arab, or Muslim.' ''[123] While one can query whether this identi-

[121] Haw. Rev. Stat. § 10–3 (1993).

[122] *See* Saint Francis College v. Al–Khazraji, 481 U.S. 604 (1987).

[123] Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1575–76 (2002).

ty is new, its particular consolidation in the wake of September 11th has, as Muneer Ahmad notes, rendered people perceived to be Middle Eastern, Arab, or Muslim vulnerable to state and private violence.[124] How should Middle Easterners respond to this? Should they affirmatively assert a Middle Eastern racial identity? More than that, should they draw on the consolidation of this racial identity to seek race-conscious remedies such as affirmative action in the political and legal arenas? The answer is not obviously yes, and not only because of concerns of essentialism and the reification of identity categories, but also because people of Middle Eastern descent are differentially vulnerable to discrimination. Those who ''look white'' and work their identities[125] to obscure their Middle Eastern origins might experience ''short-run freedom from discrimination.''[126] Put another way, there is an incentive for Middle Easterners who have what John Tehranian refers to as ''assimilatory choices''[127] to exercise them. Hair can function as one such option. For example, to some Americans, facial hair on a Middle Eastern man signifies a terrorist. As a result of the potential for this signification, Tehranian ''do[es] not go to the airport without shaving first. It is covering, plain and simple, and a rational survival strategy. [He] prefer[s] the close shave to the close full-body-cavity search.''[128]

In a completely different context, Renee Rodgers confronted this very problem. That is, like Tehranian, she had to decide whether to allow her hair to make her vulnerable to discrimination. As Paulette M. Caldwell's story of *Rogers v. American Airlines*[129] discusses, Rodgers worked for American Airlines and was reprimanded for wearing a braided hairstyle on the job in violation of her employer's grooming code. For the most part, under federal employment discrimination law, female plaintiffs of color have had to choose between defining their injuries as either racial discrimination or gender discrimination. Yet, Caldwell argues, the prohibition on braids discriminated against Rodgers as an African–American woman, who was uniquely burdened in ways that did not affect her black male or white female colleagues. She faced what Kimberlé Crenshaw refers to as intersectional discrimination, that is,

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[124] Muneer Ahmad, *A Rage Shared By Law: Post–September 11 Racial Violence as Crimes of Passion*, 92 Cal. L. Rev. 1259 (2004).

[125] *See generally* Devon Carbado & Mitu Gulati, *Working Identity*, 85 Cornell L. Rev. 1259 (2000).

[126] Tehranian, *supra* note 62, at 18.

[127] *Id.* For a general discussion of different kinds of passing strategies, see Carbado & Gulati, *Working Identity*, *supra* note 125. See also Kenji Yoshiro, *Covering*, 111 Yale L.J. (2002) (employing the language of covering to describe the same phenomenon).

[128] Tehranian, *supra* note 62, at 20.

[129] 527 F. Supp. 229 (S.D.N.Y. 1981).

discrimination on the basis of more than one axis of difference.[130] To be fully protected by law, Rodgers did not want to be compartmentalized, fragmented into either a race or a gender identity. As Caldwell notes, the *Rogers* court enforced that fragmentation nonetheless, refusing to analyze the case in intersectional terms.

Although most intersectionality theorists have focused on employment discrimination claims like the one in *Rogers*, Caldwell shows that this approach is relevant to other areas of the law such as jury selection. Currently, the Constitution prevents prosecutors from striking jurors on the basis of race or gender.[131] Drawing on a controversial article in the *New Yorker*,[132] Caldwell argues that some prosecutors fear that African–American women will become irrational holdouts in criminal cases. To avoid a hung jury, these prosecutors strike black women in disproportionate numbers based on prejudice and stereotyping. Yet, their exclusion from juries will not be remedied so long as black men (who can stand in for race) and white women (who can stand in for gender) are selected as jurors. Caldwell contends that intersectionality should apply here as well to protect against the compound and complex interaction of race and gender bias. Thus far, to a considerable extent, courts continue to be intersectionally blind.

This is partially a reflection of concerns about the proverbial slippery slope. As one court put it, ''[t]he prospect of the creation of new classes of protected minorities [like black women], governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box.''[133] But there is a normative concern as well. Intersectionality forces courts to be mindful of more differences than those associated with ostensibly ''just race'' or ''just gender'' discrimination claims. The more courts focus on differences, the less race-neutral their jurisprudential approach. Understood in this way, intersectionality threatens the very possibility of colorblindness and exposes its inadequacy. This helps to explain why one court refers to it as a ''super remedy''[134] that is outside the legitimate boundaries of both gender- and race-conscious remedies.

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[130] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. L. F. 139 (1989). *See also* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990).

[131] Batson v. Kentucky, 476 U.S. 79 (1986) (race); J.E.B. v. Alabama, 511 U.S. 127 (1994) (gender).

[132] Jeffrey Rosen, *One Angry Woman: Why Are Hung Juries on the Rise?*, New Yorker, Feb. 24/Mar. 3, 1997, at 54.

[133] Degraffenreid v. General Motors, 413 F.Supp. 142, 145 (E.D. Mo. 1976).

[134] *Id.* at 143.

Intersectionality claims are even more problematic for courts when they involve sexual orientation. Under Title VII, sexual orientation as such is not a protected identity category. What this means concretely is that employers may legally discriminate on that basis—at least under federal law. One implication is that employers can invoke what one might call the ''sexual orientation defense'' to a plaintiff's claim of discrimination, whether intersectional or not. To understand how this might work, imagine that an employee is a black lesbian. Her employer knows this and terminates her, not because she violated a grooming policy but because she did not get along with other employees and was not collegial. To the extent that the fired employee brings a discrimination suit based on race or gender or both, her employer can respond that it did indeed discriminate but that discrimination was based on sexual orientation, not race or gender or a combination of the two. This sexual orientation defense is perfectly consistent with Title VII's antidiscrimination mandate.[135] In this sense, gays and lesbians of color are disadvantaged not only because they can not include their sexual orientation in an intersectional claim of discrimination but also because their sexual identity can function as a defense to discrimination claims based on aspects of their identities—like race and gender—that are protected under the law.

Renee Rodgers may or may not have known this, but her case is a useful window not only on the specific problem of intersectionality, but the more general problem of colorblindness. Colorblindness was designed to undo the formal classification schemes that arose to enforce a racial caste system. This explains the concept's constitutional genesis in Justice Harlan's *Plessy* dissent. Yet, the simple elimination of these categories alone will not address all the ways in which race can be institutionally entrenched. American Airlines did not prohibit black women from wearing braids; it prohibited all women from wearing braids. But as Caldwell notes, this seeming neutrality was deeply gendered and raced. Bo Derek notwithstanding, the intelligibility of white women is not linked to the all-braided hairstyle that the grooming policy prohibited. *Rogers* thus helps to illuminate a lesson the *Plessy* dissent teaches and that we as a society continue to ignore: that colorblindness and inequality can comfortably co-exist. Race-conscious remedies are therefore necessary at times.

More generally, *Rogers* along with the other stories in this volume reveal the extent to which race is deeply embedded in the American body politic and has created a tremendous social wound. Judges and policy-

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[135] *See, e.g.*, Anthony E. Varona & Jeffrey M. Monks, *En/gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 Wm. & Mary J. Women & L. 67 (2000). This intersectional problem also marginalizes gays and lesbians in antiracist and gay rights discourses. See Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L.Rev. 1467 (2000).

makers continue to articulate colorblindness as the cure. This makes little sense. Colorblindness emerged in response to the formal classification schemes that the federal and state governments promulgated to enforce a racial caste system. The simple elimination of these categories alone can not address the ways in which race has been entrenched in the very structure of our democracy. Racism is part of us. ''Our sense of ourselves as Americans, of others as Americans, and of the nation is itself, is inextricably linked to racism.''[136] Race-conscious remedies are modest means of both addressing this problem and promoting democratic legitimacy. This is one of the important lessons a race law canon can teach.

Conclusion

Our starting point for thinking about *Race Law Stories* was a set of themes around which we would organize the volume: sovereignty and formal citizenship; classification and caste; colorblindness and race neutrality; and race-conscious remedies. While these themes are not exhaustive of the ways in which one might map the race law terrain, our sense was that we could productively employ them to fashion a coherent, theoretically disciplined, and representative set of materials on race and the law.

Although we have separated the themes in the book, we recognize that they are deeply interconnected and cut across different time periods and doctrinal areas of law. *Morton v. Mancari*, for example, is at once a case about sovereignty and citizenship, classification and caste, colorblindness, and race-conscious remedies. Moreover, the theme of classification and caste is as relevant to the slave law jurisprudence of the eighteenth and nineteenth centuries as it is to the voting rights case law of the twentieth and twenty-first centuries. For this reason, we present our themes as heuristics or placeholders, not hard categorical boundaries.

Moreover, as discussed earlier, in elaborating these themes, we are careful to recognize the complexity created by America's multiracial population. We have chosen cases that include blacks, Latina/os, Asian Americans, Native Americans, and whites. Further, to demonstrate the extent to which race law reaches into every aspect of our lives, the stories cover a range of contexts, including, but not limited to, education, employment, housing, criminal law, voting rights, immigration, and family law. We also have chosen both ''top down'' cases—that is, cases brought by formal organizations (like the Japanese American Citizens League) or the government—and those that were ''bottom up''—that is, cases in which very ordinary people initiated or drove the litigation.

[136] Carbado, *Racial Naturalization*, *supra* note 9, at 651.

This comprehensive, comparative approach has helped us to offer a preliminary version of a race law canon. This canon differs substantially from civil rights and constitutional law and deserves its own place in the curriculum. Moreover, this canon must move beyond those cases that have achieved iconic or ignominious status. Some lawsuits involving race clearly stand a better chance of being canonized or demonized than others. Chief among those that achieve fame or notoriety are conflicts that reach the United States Supreme Court, which in turn establishes a precedent that endures long enough to be highly influential. Perhaps not surprisingly, then, most of the cases discussed in this book track that trajectory. But the volume also includes hidden gems: state and lower federal court cases that failed to reach the Supreme Court. These cases set precedents that were compartmentalized or contained, or were promptly overturned or ignored after they were decided. We consider them valuable discoveries because even though they have not become prominent, they are enormously instructive in demonstrating the multiple and complex ways in which race and law intersect. We hope that this book will draw attention to these cases, which deserve greater attention than race law scholars have so far afforded them.

The ultimate test of this volume's success lies with you, our reader. Our purpose will be served if you agree that these cases offer a unique opportunity to rethink the assumptions that shape the role of race in public and private conversations about equality, liberty, and national identity. If these stories help you to reflect critically on what race and the law mean in America, this book will do justice to the individuals, whether lionized or little-known, who brought these issues to life by daring to question the conventional wisdom about America's commitment to its most fundamental democratic values.