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Chapter 9

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Constitutional Memories

Sometime during my second year in law school, around 1976, I had a powerful encounter with the Fourteenth Amendment. It started in a class called Con Law II, in which I understood that we were to study primarily the Bill of Rights. Coming into the course, I already had a vague idea about what some of those rights might be—certainly I felt favorably disposed toward them. But my overall grasp was, to put it charitably, weak. I did recall that we had discussed at length something called "due process" in our civil procedure class the year before, in the context of learning about the constitutional rights of certain corporations to resist defending themselves in unfavorable jurisdictions. From those discussions I had at least come away with a strong though unanchored sensation that due process was a big deal—widely influential, and guaranteed by the U.S. Constitution. Still, my knowledge was spotty.

That second year, in Con Law II, however, I learned with more clarity—I believe as a brief foundation for our taking up the incorporation doctrine—that due process was specifically a feature of the Fourteenth Amendment. As the semester wore on, I could see that this amendment was indeed a powerful thing, even beyond due process. It had sweepingly restructured the reach of the Bill of Rights, and it seemed to crop up repeatedly in an amazing range of constitutional controversies.

Particularly remarkable to me was the fact—briefly noted in passing in our casebook and in class discussion—that the amendment had been proposed and ratified just after the Civil War as part of the Reconstruc-

tion struggle over the status of freed slaves. I am a white Southerner whose childhood was spent under segregation, and whose earliest imprinting lessons about the fact and meaning of social injustice had to do with race. So it was moving to me, a proud and pleasurable surprise, to learn that the Fourteenth Amendment, apparently a central feature of our Constitution, an amendment whose clauses had turned out to be a fountainhead of rights for all kinds of people, had been born out of the black freedom movement.

Characterizing the Fourteenth Amendment in this way is maybe controversial. Not all would agree that the Fourteenth Amendment is "central" to the Constitution,[1] or that a "black freedom" amendment has yet succeeded in creating or enforcing meaningful equality for black people or any other racial minority,[2] or even that legal "rights" or strategies based upon them are of much use in any case.[3] Despite these important questions, I think my instincts at the time were right. I am no doubt more sophisticated about the law and legal history at this juncture than I was in my second year of law school, and nowadays I believe that the valence of constitutional rights as a force for good or ill is more deeply contingent and contextual than I suspected back then. Nevertheless, I am *still* thrilled at the story of the Fourteenth Amendment. I am still proud that it and its scarred and imperfect sister amendments (the Thirteenth which abolished slavery, and the Fifteenth which prohibited racial restriction of the right to vote) are embedded where they are, in the heart of our most canonical of American legal texts.

At the time I was first encountering the impact of Reconstruction on the Constitution, I found myself worrying about the students who did not take Con Law II. Would they somehow, through some other route, learn this inspiring and thought-provoking fact about the amendment's genesis? It seemed important to me that they should. And so one day, as I was talking with my friend and fellow student, whom I will here call Ruby—an African American woman a little older than I, who had grown up in the rural South—I asked her brightly and with feeling if she knew that the Fourteenth Amendment had been framed and adopted during Reconstruction. Did she know that it sprang from the fight for emancipation and for the eradication of the ravages of slavery?

Ruby sucked her teeth and cocked an amused and incredulous eye in my direction. "Of course I know that, child. Who do you think I am?"

Who *did* I think she was? It didn't occur to me that Ruby might be significantly better off than I in terms of her access to constitutional literacy.

In those days I had little information about the complex history of African American schools in the South before the *Brown* decision, or who had made those schools and how.[4] For these and other reasons I had few clues about what Ruby was likely or unlikely to know about the U.S. Constitution.

On that day, Ruby began to explain. She told me a little about her education in the segregated grade schools of south Georgia. She related how her black teacher there had insisted that every child in her elementary school class *memorize* the words of the Thirteenth, Fourteenth, and Fifteenth Amendments. That achievement, she said, took the children weeks. Ruby and her classmates learned these texts by heart, and then stood and recited them before each other while the teacher presided from the back of the room. Ruby remembered walking to school in the mornings and saying the amendments over with her sister in anticipation of the public performance she would soon be called upon to give. By my calculation, these events would have taken place sometime in the early 1950s: a time, in other words, when *Plessy v. Ferguson*[5] was still "good" law.

I cannot tell you what an effect this story had on me. I pondered the image of Ruby and her sister as little girls, walking down that hot south Georgia road, reciting the Fourteenth Amendment from memory upon the open air.

The story gave me more than an arresting image, however. It surprised me with a new sense of the Constitution and its history. Ruby's story suggests that African Americans have a particular historical claim upon the Constitution, and can take a particular kind of historical credit for some of the best aspects of its evolution. It manifests in a particularly vivid way that African Americans have sustained—through untold adversity, often from the bottom up, and at least in important part with the tools of a decentralized oral tradition—an insurgent interpretation of that document's meaning.

As someone who now teaches in law school classrooms, I am struck by the fact that this important learning moment happened "off the books." It was extracanonical, if you will, at least in the context of my formal schooling. But it forever changed my own view of one of the central texts of the tradition into which I was being inducted.

As for the quality of the educational experiences I could claim up to that point, the civic efficacy of the official canon to which I had been exposed, it is worth noting that I owed this knowledge to Ruby, a product of

a scandalously underfunded Jim Crow Georgia school. Now she was here to tell her well-meaning but somewhat backward friend, with the bachelor's degree from Harvard and the year and a half in law school, a little something about the U.S. Constitution and one of its most important interpretive communities.

The story of Ruby and her teacher and their part in the intergenerational black stewardship of the post–Civil War amendments has continued to raise questions for me about race and the American legal canon as that canon is presently being taught and recreated in U.S. law schools.

This essay will argue that race is a central and generative feature of the American legal canon, but that its role and significance have too often been obscured or written out of the conventional wisdom transmitted through American legal education and scholarship.[6] It will urge that legal academics, in their roles as teachers, scholars, and public intellectuals, should challenge the grand racial narratives and "grand racial silences" of the official canon, that they should help to resurrect and construct counternarratives, in important part by attending to the experiences and words of those who can offer perspectives from the bottom and from the margins of the racial order as it is currently constituted. Such challenges will be crucial to the creation of a better canon: one that is more contentious and open-ended, perhaps, but truer to the nation's actual history and better suited to helping the peoples of the United States achieve a more just and peaceful future.

Race and the American Legal Canon

Canonicity can mean many things. Certainly by any standard the legal canon would encompass the cases and materials that law professors assign to law students.[7] More embedded aspects of the taught canon are also an important part of the message conveyed. Such aspects include the pedagogical methods that law teachers use in their classrooms, who those teachers are, the general argument categories they encourage their students to learn how to make, the overall outline and sequence of the curriculum, and not least, the bar examination and the picture transmitted to students about the existing market for legal services and how they can or should fit themselves into it.[8] Beyond the preparation of students, legal scholars continually recreate and constitute another sort of legal canon through doctrinal and theoretical conversations carried on in a set of

perhaps increasingly divergent academic and professional discourse communities. Further, beyond both the academy and the profession, there is a "popular canon" of American law. The Constitution, for instance, is an object of near-religious veneration for many members of the American public.[9]

In this essay, I will approach the legal canon in a way that cuts across various kinds of materials and audiences, focusing on its role as a source of cultural literacy, a collection of core narratives (or "stock stories")[10] that Americans tell themselves about the nation's history and its system of law. In doing so, I take as a given, and will not try to convince readers here, that the nation's history is strongly marked by racial oppression backed in many instances by the full authority of law, and that racist ideas, arrangements, and practices powerfully persist in the United States today. I believe it follows that stories about racially oppressive relations, about attempts to overcome them, and about ways that law has been involved in both, should not be muffled or repressed, but should be a prominent part of the canon transmitted in and through the law schools, addressed and debated in the scholarly community, and shared with the populace at large.[11] Subordinate narratives and perspectives about race should be sought from the bottom and from the margins, while presently dominant stories about race should be subjected to searching analysis, just as they have been in other disciplines.

Challenging the Canon: Two Visions

Adding

I have argued that legal educators should treat race as a canonical feature of the American legal tradition, should recognize the signs of race that mark our most important texts and defining moments, and should find ways of highlighting those signs for their students and their colleagues. However, the task may not be as simple as it sounds. As a first approach to better understanding where some of the difficulties lie, I will contrast two different visions of what a racially progressive change in the canon might entail. Both of these visions are at work in current writing and theorizing about "the Western canon" generally, and both are relevant for thinking about the American legal canon as well. The first I will call here the "additive vision" of canon transformation. It parallels some

of the more primitive discussions in higher education about affirmative action in admissions or faculty hiring, and it focuses primarily on a need to be more "inclusive." In the context of race, the additive approach to canon change in liberal arts has often meant expanding course reading lists to include works by or explicitly about people of color, or expanding the list of course offerings to include courses explicitly about, for instance, "black" history, or the art and culture of non-European nations or ethnic groups.

Texts by and/or about people of color, so the argument runs, should be placed in the core, not only texts or courses by and/or about (dead? European? male?) white people. Similarly, "diversity" courses—that is, courses about "other" or "different" cultures, or courses focusing explicitly on people of color—should be included more generously in the elective curriculum, or perhaps more radically, should be required for completion of relevant academic degrees.[12]

The additive vision has a lot to recommend it. We do need inclusion and diversity.[13] In an earlier essay, I used the additive vision as a starting point for arguing that legal education might be able to make faster strides than other university disciplines in facing up to the centrality of race for our field and its traditions.[14] I hypothesized that legal education, though it had largely ignored the canon debates up until that point, might paradoxically be more advanced than the rest of the university in "desegregating" its canon. After all, I then argued, in legal education we didn't need to fight for the addition of a race-relevant text to our canon. Surely, at the pinnacle of American legal canonicity, as defined by anybody's standard and plain as day for all to see, sits the U.S. Constitution. And the Constitution is saturated with racial meaning and racial conflict—as even I had dimly seen in my second year of law school, and as Ruby had so strikingly illuminated for me in her reminiscences and gentle jibes.

Further, since Ruby's original tutorial, I had studied with other teachers as well, and had learned how to decode the places in the founders' Constitution where slavery had been accommodated while remaining unnamed. Those provisions included the three-fifths clause that allowed slave states to increase their political power by including enslaved persons (albeit fractionally) in their population counts for purposes of congressional representation; the slave trade clause that insulated the transatlantic slave trade from legislative prohibition by Congress for twenty years; and the fugitive slave clause that committed even free states to the

recognition and enforcement of property rights in slaves who had escaped from bondage.

Given these marks left by slavery on the face of the Constitution, the centrality of race and racism to the American legal canon should be, at least relatively speaking, noncontroversial, and legal educators should face significantly lower barriers to teaching a racially integrated canon than scholars in many other disciplines.

Further experience, however, has cast doubt on my original thesis. In the first place, if race is in fact so self-evidently central to the Constitution, then why don't we teach it that way? Why is the Constitution of 1787 so seldom presented to our students in any depth?[15] Why do they so seldom read *Prigg v. Pennsylvania*?[16] How, even in my second year, could I have been left to wonder whether other students would be aware of the origins of the Fourteenth Amendment? Why, a few years ago, when I asked a third-year law student in my trusts and estates class where the Fourteenth Amendment came from, did he pause, think quizzically for a moment, and then venture hesitantly, "1964?"?

And the problem is not confined to our students. Most legal scholars would, of course, do better on dating and situating the Fourteenth Amendment than the unfortunate guy I called on that day. But no small number of my colleagues in law teaching have confessed to me that they were unacquainted with the slavery compromises in the founders' Constitution before I pointed them out.

Beyond constitutional law, a similar pattern of silence on matters of race characterizes other foundational areas of the law school's curriculum. American criminal law, property law, and legal ethics, for instance, are as marked by race as the Constitution. Yet they too are often taught with little or no overt or rigorous examination of the ways that racism and resistance to it have figured in their doctrinal development and social impact.[17]

In other words, experiential data from my own time in law school, both as a student and as a teacher, do not support my wishful hypothesis that we in legal education could reach an easy consensus on the centrality of race to our mission. Race, in many colors, may have been in our legal canon all along, but seeing and interpreting it will require a struggle.

Beyond Adding

The limitations of the additive approach have been targeted repeatedly in the scholarship and the polemics of the larger canon debates. Scholars

of color in anthropology, for instance, have refused to restrict their role to that of "native informant" or data gatherer about the lives or cultures of colored people. They have insisted as well upon critically examining the practices of white colonial and postcolonial anthropology. Race-conscious scholars of color in other parts of the academy too are likely to have turned their analytical gaze[18] on "whiteness" as well as "color," to have moved on to analyze closely the sacred texts and customary practices of the dominant racial group.[19] Toni Morrison has been pursuing this line in the context of literary criticism. One passage of Morrison's in particular has always struck me as powerfully suggestive for a full reading of the founders' Constitution, with that document's multiple accommodations to slavery, and yet its studied avoidance of any explicit invocation of the peculiar institution by name. Morrison calls for

> [an] examination and re-interpretation of the American canon, for the "unspeakable things unspoken"; for the ways in which the presence of Afro-Americans has shaped the choices, the language, the structure—the meaning of so much American literature. A search, in other words, for the ghost in the machine. . . .
>
> We can agree, I think, that invisible things are not necessarily "not there". . . . In addition, certain absences are so stressed, so ornate, so planned, they call attention to themselves; arrest us with intentionality and purpose, like neighborhoods that are defined by the population held away from them. Looking at the scope of American literature, I can't help thinking that the question should never have been, "Why am I, an Afro-American, absent from it?" It is not a particularly interesting query anyway. The spectacularly interesting question is, "What intellectual feats had to be performed by the author or his critic to erase me from a society seething with my presence, and what effect has that performance had on the work?"[20]

This sort of canon work moves beyond addition and opens for reexamination and reevaluation (by old-timers and newcomers alike) the entire received tradition.

A Race-Conscious Canon for American Law

Thanks to decades of heightened effort to move beyond the kind of pale "de jure desegregation" that has characterized too many post-*Brown* law schools, there are now unprecedented numbers of teachers and scholars

of color in the previously all-white legal academy. This achievement, as incomplete and as vulnerable as it is,[21] nonetheless has opened a new and exciting era of interpretive contestation on matters of race in the American legal canon.[22] It requires no essentialist illusions to see that new scholars of color in the legal academy have played a powerful role in unsettling old assumptions and infusing new themes into the canonical conversation.[23] Building on pioneering work by their scholarly and activist predecessors, and working across various sorts of racial and ethnic lines, they have introduced a wider legal audience to previously neglected racial texts and events that should clearly be part of the established canon; they have dramatized real and allegorical stories about race and law in America; they have helped white people in the legal academy to better understand the whiteness of so much of what we do; they have put forward new interpretive claims about the existing canon.[24]

This good work, coupled with that of others inside and outside the legal academy, puts us in a position to more fully and productively recognize and respond to race in the American legal canon. It allows us to identify racial problems that should be a recurring subject of study and racial narratives that should be among the stock stories of our culture. The work has also discovered and created materials with which we as legal academics can help construct and tell the "legal side" of those core stories about race.[25]

It is worth noting that some such narratives will be inspiring and others will be shameful. That is as it should be. *Dred Scott*, like *Lochner*, is a canonical case for American law, not because it is admirable, but because it is indispensable to understanding how we arrived at the present, because it stands as a (contested and variously interpreted) cautionary tale.

What follows are my own nominations for some grand problems of race and law in America that I believe should be part of the canon as taught in American law schools. I am not suggesting that all members of the legal community or of the nation will reach harmonious accord on the meaning or significance of these problems or of the racial stories that accompany them. But all of us should at least know that these problems exist, and all of us should be familiar with the major texts and events connected to them. We should be aware of the major contending interpretations of their meaning (including especially on questions of race the interpretations and perspectives of people and communities of color). This essay will not suggest a blueprint for how and where these themes can or should be fit into the curriculum or a course. Precisely the challenge I in-

tend to pose is that we should be "teaching race across the curriculum," and all law teachers should be asking themselves how and where they can best do so. I choose the following problems involving race and law because each has had a strong imprint on American history, and each continues to be relevant for important decisions facing the nation today.

1. Slavery. One would think this nomination is so self-evident as to be unnecessary, but as I have complained above, experience suggests that is not the case. At the risk of belaboring the obvious, I note that the imprint of slavery on U.S. history is unmistakable: among other things, the institution helped to amass the nation's wealth, led to the costliest war in U.S. history, and was the source of revolutionary amendments to the Constitution. Further, slavery left behind a caste system that is even now only half dismantled, whose continued existence is still one of the most striking social facts about American society, and which today confronts policymakers and communities with some of the most difficult questions they face. Slavery's institutionalization, formal abolition, and informal afterlife are largely creatures of law, and the materials available for tracing and telling this story through a legal lens are abundant and ready to hand. Since I have written elsewhere about these materials and some of my pedagogical adventures in attempting to teach them, I will not repeat those stories here,[26] but will simply state that slavery is at the heart of American experience and is memorialized at the heart of our legal canon. It should be taught and debated accordingly.

When I first heard Ruby's story, I took from it that because of slavery and the nature of its overthrow, African Americans have a special claim upon the American legal tradition in general and upon the Constitution in particular. It seemed to me then and seems to me now that the rest of us owe our African American neighbors for much, including our reconstructed Constitution, and that we should study and acknowledge the nature of that debt.

In more recent years, as the economy of the nation and the world have undergone dramatic changes, as "globalization" has raised unprecedented questions about the meaning and future of national sovereignty, as millions of impoverished migrants have set forth to find work around the globe, and as disparities in wealth and life experience between those at the top and bottom of the world's economy widen to almost unimaginable proportions, I have begun to recognize other stories of race and law in America's past that I believe could also help the nation understand the

challenges confronting us. The global economy forces us to think anew about the nature of territorial boundaries, for instance, and raises hard questions about the U.S. role in the new world order.

A more global perspective on the national racial canon also reminds us to revisit the story of American slavery itself in the context of its birth in the days of European empire and the Atlantic Triangle. The slave trade's involuntariness distinguishes it crucially from other sorts of immigration, but there are important common themes at work as well, such as the worldwide search for cheap labor, and the multiple ways that race and geography can be deployed in the construction of segmented labor markets.

Such a perspective on the U.S. place in the world also suggests the value of attending to some of our "other" racial minorities. Native American Indian tribes, Asians, and Latinos have stories that are particularly helpful in casting light on some of these pressing problems.[27] In this context, I want to propose two additional problems of race and law that should be treated as part of the American legal canon at century's end.

2. Conquest. If slavery is at the "heart" of the story of American law, what defines that law's outer perimeter? In more instances than not, the edge of our polity has moved through space by force of arms, in acts of conquest. The story of the European and then American conquest on this continent should be canonical in the study of American law.

The Constitution is strikingly silent about the extent of its own reach, never clearly addressing how the nation purported to exercise sovereignty over the lands of the original colonies, much less how the Constitution and the other laws of the union should or should not apply to territories and peoples not present at the founding in 1787.[28] This omission is as noticeable as the document's silence on slavery, since expansion was plainly an issue on the nation's agenda from the first. Since the acquisition of new territories and the admission of new states into the union continued apace well into the present century, the question could not continue to go unaddressed. Accordingly, we have the benefit today of various explanatory and declaratory sources that can help us understand the ways that the American legal system came to be imposed upon (or withheld from) various territories and populations.

The expansion of the United States, with the many incremental impositions of sequentially new boundaries upon newly acquired territory, was always importantly about race. Key American thinkers and leaders, including many with roles in the legal system, were gripped by the ideol-

ogy of Manifest Destiny, the expansionist idea that the white race—or the United States as an instrument of the white race—had a calling and a responsibility to dominate (and thereby to save or uplift) the rest of the world. Accordingly, expansion of U.S. territory has in almost every instance been accompanied by racial narratives about the legitimacy of expansion, the likely benefits to be visited upon the darker people whose territory has been acquired, and the ways such people and their rights should or should not be recognized by American law.

For instance, the first Justice Marshall was once asked to resolve a dispute between two white property owners, one claiming title through purchase from an Indian tribe, and one claiming title through a grant from the federal government. He chose the path of candor, offering the following Genesis-like pronouncements about the nature of the European presence in America:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. . . .
>
> The British government, which was then our government, and whose rights have passed to the United States, asserted title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. . . .[29]

Whatever undertones a reader may detect as to the justice's personal reservations about the proffered ideology, he did not shrink from enforcing it. In other instances, images of the racial inferiority of nonwhite peoples were used by American lawmakers in the context of conquest, not so

much to justify taking over the land of such peoples as to avoid incorporating them into the larger body politic after their territory had been secured to the United States. In an 1848 speech against the Mexican-American War, Senator John Calhoun made the following argument:

> [W]e have never dreamt of incorporating into our Union any but the Caucasian race—the free white race. To incorporate Mexico, would be the very first instance of incorporating an Indian race; for more than half of all the Mexicans are Indians, the other is composed chiefly of mixed tribes. I protest against such a union as that! Ours, sir, is the Government of a white race. The greatest misfortunes of Spanish America are to be traced to the fatal error of placing these colored races on an equality with the white race. That error destroyed the social arrangement which formed the basis of society. . . . And yet it is professed and talked about to erect these Mexicans into a Territorial Government and place them on an equality with the people of the United States.[30]

Although Calhoun failed to dissuade the Congress from acquiring the land taken in the war, and although Calhoun's views were certainly more openly racist that those of the Congress generally, the fears he expressed were widespread. After the Mexican-American War was concluded by the Treaty of Guadalupe Hidalgo in 1848,[31] and the United States took over a vast territory that included present-day California, Arizona, Nevada, New Mexico, and parts of Colorado and Utah, New Mexican petitions for statehood were rejected for over sixty years, the longest wait imposed on a territory in U.S. history. In 1912 the white population of New Mexico for the first time became a majority, and New Mexico was at last admitted to the union.

Meanwhile, the conquered Mexican residents of areas acquired by the United States in the treaty were promised without racial reservation that their civil rights and property rights would be honored by the United States, but the promises were diluted from the beginning. For instance, dark-skinned ex-Mexicans often found themselves disenfranchised by racially exclusionary state voting laws that made no exceptions for treaty rights such as those the Mexicans were claiming.[32] Further, in the ensuing decades the vast majority of Mexican landholdings held by Mexicans at the time of the treaty were lost to Anglo hands through a confusing array of legal mechanisms and extralegal grabs, made all the more ironic as time wore on, and Mexican and Mexican American landless laborers formed the ill-paid backbone of so much of U.S. agriculture.[33]

After the Spanish-American war, a new conquest raised racial issues once more. At the close of hostilities in 1898, the United States signed a treaty with Spain through which it gained possession of the Philippines, Guam, Cuba, and Puerto Rico.[34] Although natives of Spain living in the territories retained the right to preserve their Spanish citizenship, the status of "the native inhabitants of the territories hereby ceded to the United States" was to be "determined by the Congress."[35] After the treaty, the Supreme Court was asked to rule on the legality of a tariff imposed on Puerto Rican oranges, in light of the fact that the island had become part of the United States. The Court ruled that the tariff was legal, but it felt constrained to address as well the question of the status of the inhabitants of the island:

> [T]he Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct. . . .
>
> We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the "American empire." There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. . . . In all its treaties hitherto . . . there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto [quoting language from treaties related to the Louisiana Purchase, the acquisition of lands from Mexico, Alaska, and the instant case].
>
> Grave apprehensions of danger are felt by many eminent men,—a fear lest an unrestrained possession of power on the part of Congress may lead to unjust and oppressive legislation. . . . These fears, however, find no justification in the action of Congress in the past century. . . . There are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests. . . .
>
> It is obvious that in the annexation of outlying and distant possessions, grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production,

> which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.
>
> A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire.[36]

It is clear that policymakers in America have justified our expanding circumference by reference to race, and have also viewed that perimeter as having an important continuing racial function.

The Conquest deserves a place in a racially transformed canon because it had an important impact on the shape of U.S. history, coming close to fully accounting for our present national borders. Further, mythic tales of a sort of "citizen's conquest" along the advancing west-tending frontier, as white settlers displaced Indians and turned the land to productive use, come close to being synonymous with our official autobiography.

The themes and stories of conquest also have present-day significance. Numerous current issues could be better understood and resolved if informed by a better knowledge of the racial subtext to our nation's conquering past. Domestically, such issues include the stubborn persistence of an independence movement in Puerto Rico and the still-anomalous status of that island and its people within the larger structure of the U.S. polity;[37] the newly arisen and quite active sovereignty movement among native people in the state of Hawai'i;[38] the attitudes and demands of Mexican American communities whose diverse constituents include many residents descended from Mexican settlers who "came" to the United States only because the U.S. Army conquered the territory in which they were living and the earlier U.S.–Mexico border moved south;[39] not to mention the continuing struggle of Indian tribes to establish and defend a meaningful system of tribal sovereignty within the severe constraints imposed upon them by federal law and policy.[40]

Internationally, the history of conquest is also relevant for contemporary disputes. Since the time of the founding, the temper of the global geopolitical consensus has changed significantly. Today, ideologies of racial egalitarianism and of self-determination have, at least in a formal sense, prevailed, and human rights norms have taken frail but persistent root. A more thorough and thoughtful understanding of the law and practice of U.S. conquest might help us reconcile the continuing legacies of imperial past practice with the announced ethic of the postcolonial world in which we find ourselves today.

Finally, as the excerpts quoted above suggest, conquest implicates law. There is a body of legal texts and legal documents pertaining to conquest. These sources can help elucidate the ways law has accompanied conquest, has legitimated wars and structured their aftermath, has defined (or denied) the rights of the conquered, has constructed a series of second-class citizenships for those conquered persons (such as Indian tribes in the early republic, or New Mexico when it was still too brown, or Puerto Rico in the twentieth century) who have not been viewed as belonging to a white enough community to be fully integrated into the American body politic.

3. Immigration. Immigration is my third nominee for canonical status in the American racial story. It is often but not always related to the theme of conquest, and in any event has its own characteristic dilemmas and issues.

Disagreements over immigration policy often turn out to be disagreements about race. For much of its history U.S. immigration law has included explicitly racial criteria for admission to the territory of the United States, and then for the privilege of acquiring U.S. citizenship. For instance, following an upsurge of anti-Chinese agitation in California, Congress passed the Chinese Exclusion Act in 1882, suspending all immigration of "Chinese laborers" for the next ten years. This statute was followed by a stronger ban in 1888 which made it impossible for a departed laborer to return to the United States after a visit home, even if he had obtained a then officially sanctioned certificate for re entry before his departure.[41] The Supreme Court upheld Congress's power to set and change the rules in this way in 1889 in the *Chae Chan Ping* case, where Justice Field felt free to take judicial notice of the following:

> [The passage of this statute was occasioned by] a well-founded apprehension—from the experience of years—that a limitation of immigration of certain classes from China was essential to the peace of the community on the Pacific coast, and possibly to the preservation of our civilization there. A few words on this point may not be deemed inappropriate here, they being confined to matters of public notoriety, which have frequently been brought to the attention of congress.
>
> This discovery of gold in California in 1848, as is well known, was followed by a large immigration thither from all parts of the world. . . . The news . . . penetrated China, and laborers came from there in great numbers, a few with their own means, but by far the greater number under contract with employers, for whose benefit they worked. These laborers readily secured

employment, and, as domestic servants, and in various kinds of outdoor work, proved to be exceedingly useful.

For some years little opposition was made to them, except when they sought to work in the mines, but, as their numbers increased, they began to engage in various mechanical pursuits and trades, and thus came in competition with our artisans and mechanics, as well as our laborers in the field. The competition steadily increased as the laborers came in crowds on each steamer that arrived from China. . . . They were generally industrious and frugal. Not being accompanied by families, except in rare instances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace.

The differences of race added greatly to the difficulties of the situation. . . . [T]hey remained strangers in the land residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living.

As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration. . . .

[Then the constitutional convention in California petitioned Congress] that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization; . . . that they retained the habits and customs of their own country, and in fact constituted a Chinese settlement within the state, without any interest in our country or its institutions. . . .

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation. . . . It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. . . . If, therefore, the government . . . considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities. . . .[42]

Following this case, which settled the unilateral congressional power to exclude aliens regardless of treaty provisions to the contrary, Congress passed the Geary Act which created a pass system applicable only to Chinese laborers, an internal identification regime based on race.[43] This statute was also upheld by the Supreme Court in *Fong Yue Ting v. United States*, another of the train of constitutional challenges mounted by Chinese activists to this and other anti-Chinese legislation.[44] Both *Chae Chan Ping* and *Fong Yue Ting* were important milestones in establishing Congress's plenary power over immigration and inaugurating what was to be a lasting attitude of deference by the Court toward federal immigration legislation.

Between 1921 and 1965 various national quota systems were adopted whereby immigration from each nation of the world was allowed only in accordance with quotas that were pegged by various formulas to past U.S. populations. These quotas operated in a specifically racial way. Their effect was to limit immigration from areas of Europe and of the world where disfavored racial and ethnic groups originated, and to preserve a "whiter" cast to immigration flows by tying them to the demographics of a whiter time. In addition, an "Asiatic Barred Zone" was in effect for a number of years. It prohibited all immigration from countries within specified latitudes and longitudes in Asia. Although the quotas were facially tied not to race but to nation, the intent of the legislation was evident from the context. Provisions such as the following reveal even more clearly Congress's underlying preoccupation with race:

> [An] immigrant born outside the Asia-Pacific triangle . . . who is attributable by as much as one-half of his ancestry to a people or peoples indigenous to not more than one separate quota area, situate wholly within the Asia-Pacific Triangle, shall be chargeable to the quota of that area.[45]

In addition to the immigration quota system for admission of persons desiring to become permanent residents or eventually naturalized citizens, the United States after World War II began a series of experiments with "guest worker" programs. When employers could show that there was a "shortage" of native-born or resident U.S. workers in a particular sector, they could import foreign workers—almost exclusively people of color from Mexico and the Caribbean—on a temporary basis to perform the specified job under supervision by the Department of Labor. The original "bracero" program with Mexico was ended in the 1960s, but today other guest worker programs are in existence, and the agricultural lobby is now pressing for an enlarged and liberalized regime.

Aside from the race-linked rules about immigration and temporary work authorizations, the law of citizenship was also racial in character during much of this time. For years, the chance to become a naturalized citizen was restricted to whites and people of African descent, a restriction that had an impact in its own right, but also could trigger other disabilities for those affected. (In California and a number of other states, for instance, no one ineligible for citizenship could own or lease agricultural land. Likewise the Immigration Act of 1924 excluded anyone from immigrating who was not eligible for naturalization, thereby in essence ending all legal immigration from Asia.) All of these measures were upheld in the face of court challenges.[46]

One by-product of the racial limits on naturalization was the creation of a forum for the repeated adjudication of whiteness, as people of various races and ethnicities attempted to establish that they were sufficiently "white" to be naturalized.[47] In one case, for instance, the Supreme Court was called upon to decide whether an Asian Indian man "of high-caste Hindu stock . . . and classified by certain scientific authorities as of the Caucasian or Aryan race" was eligible for naturalization as a "white person." Justice Sutherland, in holding that he was not, explained:

> What we now hold is that the words "free white persons" are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word "Caucasian" only as that word is popularly understood. . . . [W]hatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of person in this country commonly recognized as white. The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.[48]

Not until 1965, the year after the passage of the Civil Rights Act of 1964, did Lyndon Johnson sign a bill abolishing the race-linked national origins quota.[49] Latinos and Asians of all nationalities are still branded with

an "alienness" that is perceived as somehow "natural" by many Americans, but is in fact rooted in this long law-aided construction of highly stratified, racialized, and multinational labor markets.[50]

In legal education and in American communities, we should teach about the boundaries of American citizenship, should probe the meanings and the mechanisms behind this "nation of immigrants," and we should do so with the history of immigration law, the national quota system, and the long line of Mexican guest worker programs in plain view. Given the impact of immigration and immigration law on our society and economy, and given the difficult immigration questions confronting us today, this is an issue that should be prominently in the canon. Immigration even has its own national monument surrounded by controversy, surely a sign that it has canonical status in the American imagination.[51]

Conclusion

We Americans inherit our national canon from its "original" authors, from their predecessors, and from intervening generations of official and unofficial readers, listeners, and responders, both winners and losers. We also create it continually anew, choosing which themes and values we will affirm, which national events we will remember and how, which past speakers, actors, and writers will command our attentive respect, which clauses and cases we will analyze, and which present-day problems we will treat as most pressing. Always and unavoidably, we carry out this canon-building and canon-destroying contestation in the light of contemporary concerns.

No contemporary concern is more important than that of race or has more resonance with our long national narrative. Structures and mandates of white supremacy, as well as diverse projects of resistance to it, have been central to the history of our country from before its founding to the present. Today, racial inequity and racial tension are epidemic in the national culture, and deep pessimism about the possibility of just or peaceful resolutions of racial differences and racial inequities is pervasive. Law has played a major role in both constructing and attempting to deconstruct the myriad institutions of white supremacy, and throughout our national history people of color, despite their racial subordination and their designation as unassimilable or inadmissible outsiders, have

been active agents in making and changing that law. In the high and low texts of the American legal canon, signs of racial hierarchy and racial struggle are much in evidence, revealed both by what is included and expressed in those texts and by what is repressed and excluded from them.

Nevertheless, the teaching of these signs, the telling of these struggles, and the carrying on of vigorous and candid debate about their meaning within the context of the U.S. legal system are for the most part muted and peripheral within American legal education. The racial messages in the law school curriculum are ubiquitous but often inchoate, almost subliminal, and thus apparently invisible to many of us in the enterprise. We law teachers should find ways of speaking about these issues and breaking these silences, in our classrooms, in our writing and speaking, and in our work in the community. We should particularly seek out and generously use sources that examine three grand racial problems of American history that this essay has nominated for canonical status: slavery, conquest, and immigration.

A canon will always to some degree represent the victor's story, the version of national events and ideas most flattering to the powerful and most stabilizing for the status quo. But repressed narratives and "dangerous opposites" always remain in the canon as well, and they can provide alternative sources of inspiration and understanding. Since we are a society that claims a commitment to democracy, we should adopt a democratic canonical method, one that values and preserves bottom-up skepticism, a reiterative drive to revision, a restless and continuing search for the suppressed narratives of subordinated people, a suspicion of official wisdom, an acknowledgment that canons (and the challenges to them) are always in some sense provisional.

I will end this essay now as I began it, with a story about an African American child and the U.S. Constitution. Several years ago I delivered an earlier version of this essay to an audience of law professors. In that talk I told the story of Ruby and her Georgia teacher and told what I had learned from my friend about the transmission of the post war amendments to a new generation of black children in the Deep South in the early 1950s. I voiced my conviction that African Americans have particular claims on the Constitution and can take particular kinds of credit for some of its most admirable features. Not long after, I received a letter from an African American friend and colleague who had attended the talk. She told a constitutional story of her own, and I share it with you now:

> My son was about five or six when he first learned about the enslavement of his ancestors in this country. He became very frightened that those days might return. I reassured him as best I could, but the only thing that seemed to provide him any comfort at all was to sit on the floor with him and read the words of the Thirteenth Amendment to the Constitution. I also explained to him several times how difficult it would be to amend the Constitution to allow the return of slavery. I read to him from one of those small pamphlet versions of the Constitution that law publishing houses put out. And do you know, that child wouldn't go to sleep without a copy of the Constitution under his bed that night, and for many months afterwards.[52]

NOTES

To thank all those I owe on this topic would be impossible, but I want to mention a few people whose various contributions were indispensable: Derrick Bell, Bob Chang, Joe Cook, Juan Perea (who in an exemplary spirit of collegiality freely shared the results of his research with a novice), Jim Sessions, John Sobieski, Kathy Stillman, and Dick Wirtz. I am grateful as well for the support of the University of Tennessee Professional Development Awards Program and of the Faculty Development Fund of the University of Tennessee College of Law.

1. For instance, *compare* Christopher Eisgruber, *The Fourteenth Amendment's Constitution,* 69 S. Cal. L. Rev. 47, 48 (1995) ("[t]he Amendment . . . transformed the Constitution at its core, altering both the Constitution's political function and the principles that should govern its application") *with* Michael McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 Loy. L.A. L. Rev. 1159, 1160 (1992) (the amendment was simply "the logical culmination of the theory of the original Constitution").

2. *See* Donald Lively, *Equal Protection and Moral Circumstance: Accounting for Constitutional Basics*, 59 Fordham L. Rev. 485, 487–88 (1991) ("[T]he fourteenth amendment's meaning for minorities is primarily a function of evolving majority tolerance . . . [T]he history of Fourteenth amendment review reveals a pattern of judicial subservience to dominant social interests)." For people interested in full rights of citizenship for women of all colors, the Fourteenth and Fifteenth Amendments contained a bitter pill at their passage. Stringent efforts to win inclusion of women in their terms had gone down to failure. *See, e.g.,* Nora Basch, *Reconstitutions: History, Gender and the Fourteenth Amendment*, *in* The Constitutional Bases of Political and Social Change in the United States (Schlomo Slonim ed. 1990).

3. *See*, *e.g.,* Mark Tushnet, *The Critique of Rights*, 47 S.M.U. L. Rev. 23 (1993);

Alan Freeman, *Racism, Rights, and the Quest for Equality of Opportunity*, 23 HARV. C.R.-C.L. L. REV. 295 (1988); Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

4. *See generally* W. E. B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA, 1860–1880; JACQUELINE JONES: SOLDIERS OF LIGHT AND LOVE: NORTHERN TEACHERS AND GEORGIA BLACKS, 1865–1873 (1980); Eric Bates, *Remembering the Good: Vanessa Siddle Walker Uncovers the Forgotten History of Segregated Black Schools,* SOUTHERN EXPOSURE, Summer 1994, p. 24.

5. 163 U.S. 537 (1896) (announcing that a Louisiana law mandating "separate but equal" public accommodations was not a violation of the equal protection clause).

6. Not all would agree with my characterization of legal education, of course. Richard Epstein, for instance, believes that "[t]he modern preoccupation with diversity has led to an excessive concern about matters of race and sex. Certainly within the legal community, the question of diversity has moved from being one consideration among many to a place of unquestioned dominance in university and law school life." Richard A. Epstein, *Legal Education and the Politics of Exclusion*, 45 STAN. L. REV. 1607, 1624 (1993). Whether universities in general and law schools in particular are primarily suppressing or primarily obsessing about matters of race (or engaging in some strange hybrid of both) is, of course, a matter of hot debate.

7. In their introduction to this volume, Balkin and Levinson mention cases and materials in relation to the "pedagogical canon." Cass Sunstein proposed this list of canonical elements in legal education: (1) authoritative texts, (2) the courses law professors teach, and (3) the choice of materials assigned in each. The occasion was a speech at the plenary gathering of the 1992 annual meeting of the Association of American Law Schools. Cass Sunstein, *In Defense of Liberal Education*, 43 J. LEGAL EDUC. 22 (1993).

8. On pedagogy, *see, e.g.*, Margaret Montoya, *Mascaras, Trenzas, y Greñas: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L. J. 185, 201–09 (1994), and in 15 CHICANO-LATINO L. REV. 1 (1994); Judy Scales-Trent, *Sameness and Difference in a Law School Classroom: Working at the Crossroads*, 4 YALE J. L. & FEMINISM 415 (1992); Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992); Kimberle Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1989), *reprinted in* 4 S. CAL. REV. L. & WOMEN'S STUD. 33 (1994); Stephanie Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147 (1988).

On who teaches and why it might matter, *see, e.g.,* Deborah Jones Merritt, *Who Teaches Constitutional Law?*, 11 CONST. COMMENTARY 145 (1994); Jerome

Culp, *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 Va. L. Rev. 539 (1991); and Richard Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. Pa. L. Rev. 537 (1988).

On the curriculum, *see* Duncan Kennedy, *The Political Significance of the Structure of the Law School Curriculum,* 14 Seton Hall L. Rev. 1 (1983); *see also* Gerald Torres, *Teaching and Writing: Curricular Reform as an Exercise in Critical Education*, 10 Nova L.J. 867 (1986).

On educational impacts of the job market, *see, e.g.*, Laurence Hellman, *Effects of Law Office Work on Value Formation*, 4 Geo. J. Legal Ethics 537 (1991) (examining law firm clerkships, one channel through which the market can be seen to "leak into" legal education); Robert V. Stover, Making It and Breaking It: The Fate of Public Interest Commitment During Law School (1989).

9. For some provocative thoughts on Constitution worship, *see, e.g.,* Duncan Kennedy, *American Constitutionalism as Civic Religion: Notes of an Atheist*, 19 Nova L. Rev. 909 (1995); and Sanford Levinson, *Pledging Faith in the Civil Religion: or, Would You Sign the Constitution?* 29 Wm. & Mary L. Rev. 113 (1987).

10. J. M. Balkin and Sanford Levinson, *The Canons of Constitutional Law,* 111 Harv. L. Rev. 963, 987 (1998).

11. Law professors can and should participate in making the popular legal canon. We have the freedom to function not only as teachers of law students, but also as public intellectuals or as community educators. We can help to develop more accessible materials and events. For an example of a text that aims to popularize a race-conscious version of the American legal canon, *see* Nancy Schiff, Race, the Constitution, and the Supreme Court: Unit One of a Four Unit Series for Teens on Law (The Center for Community Legal Education, University of San Francisco School of Law,1996). For an exemplary project by serious historians that aims to bring their findings to a wide audience, *see* Eric Foner & Olivia Mahoney, America's Reconstruction: People and Politics After the Civil War (1995).

12. *Requiring* things is likely to lead to confrontations with the flip side of adding, that is, with subtracting. If the zero-sum view is often exaggerated or paranoid or a diversion, there are nevertheless realities of time, place, and credit hours that can and sometimes do force hard choices. Opting *not* to add or subtract anything is, of course, a choice.

13. For an article that includes a forcible argument for adding a particular case to the American legal desegregation canon, *see* Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 10 La Raza L.J. 127 (1998), 85 Calif. L. Rev. 1213 (1997).

14. Frances Lee Ansley, *Race and the Core Curriculum in Legal Education,* 79 Calif. L. Rev. 1511 (1991).

15. Consider the views of the original Constitution presented in *Prigg v.*

Pennsylvania, 41 U.S. 536 (1842), which characterized the fugitive slave clause as foundational for the republic, in the context of a challenge to a Pennsylvania law that made the return of fugitive slaves to slaveholding states more difficult. Or *Dred Scott v. Sandford,* 60 U.S. 393 (1856), which justified the Court's mobility to exercise jurisdiction over an African American man's challenge to his enslaved status, on the ground that the founders had intended to exclude all persons of African descent from citizenship in the nation.

16. 41 U.S. 536 (1842).

17. I should note that this is less true than it was a decade ago. In property, for instance, there are now at least two casebooks that have begun to treat race as constitutive of property relations in the United States, not as an interesting afterthought on "policy." CURTIS BERGER & JOAN WILLIAMS, PROPERTY (1997); JOSEPH SINGER, PROPERTY (2d ed. 1997).

18. The metaphor of the "gaze" is a rich one, not my own. *See* Laura Mulvey, *Visual Pleasure and Narrative Cinema*, 16 SCREEN 6 (1975) (discussing the "male gaze" of many films and its power to construct the female as an object to be observed, a power that is all the greater for being implicit rather than overtly announced or coerced). Said's observation in a related context is:

> [T]hese [colonial] accounts spirited away, occluded, and elided the real power of the observer, who for reasons guaranteed only by power and by its alliance with the spirit of World History, could pronounce on the reality of native peoples as from an invisible point of super-objective perspective, using the protocols and jargon of new sciences to displace "the natives'" point of view.

EDWARD SAID, CULTURE AND IMPERIALISM 168 (1994). In a similar vein, Toni Morrison once observed that whites in early American letters were able to write about people of color from a position where "there was never the danger of their 'writing back.'" Toni Morrison, *Unspeakable Things Unspoken: The Afro-American Presence in American Literature,* 28 MICH. Q. REV. 1, 13 (1989). For deployments of a related usage, *see* BILL ASHCROFT, GARETH GRIFFITHS, & HELEN TIFLIN, THE EMPIRE WRITES BACK: THEORY AND PRACTICE IN POST-COLONIAL LITERATURE (1989); and Henry Louis Gates, *The Empire Writes Back: Worlds Collide in Salman Rushdie's New Collection,* NEW YORKER, Jan 23, 1995, at 91.

19. The whiteness project is multidisciplinary and multiracial. For a few examples beyond the legal academy, *see, e.g.,* DAVID R. ROEDIGER, TOWARDS THE ABOLITION OF WHITENESS (1994); THEODORE W. ALLEN, THE INVENTION OF THE WHITE RACE (1994); RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS (1993); TONY MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION (1993).

For examples of legal scholarship, *see, e.g.*, CRITICAL WHITE STUDIES (Richard Delgado & Jean Stefancic eds. 1997); IAN F. HANEY LOPEZ, WHITE BY LAW: THE

Legal Construction of Race (1996); Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

20. Morrison, *supra* at 5 and 11–13.

21. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied,* 116 S. Ct. 2582 (1996).

22. For an argument about the link between affirmative action in law school hiring and the improvement of legal scholarship, *see* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in legal Academia*, 1990 Duke L.J. 801; *but see* Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 Duke L.J. 1157.

23. Not everyone would agree about essentialist illusions or about the quality of the work. *See* Randall Kennedy, *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745 (1989); *but see Colloquy: Response to Randall Kennedy*, 103 Harv. L. Rev. 1855 (1990).

24. A full description of the growing literature is beyond the scope of this essay. For a start, *see* Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography,* 79 Va. L. Rev. 461 (1993). There are also a number of helpful anthologies of critical race literature, e.g., Critical Race Theory: The Key Writings that Formed the Movement (Kimberle Crenshaw et al. eds. 1995); and Critical Race Theory: The Cutting Edge (Richard Delgado, ed., 1995).

25. For reflections on how this new scholarship can support law school teaching, *see* Ansley, *supra* note 14.

26. For specifics, *see* Ansley, *supra* note 14, at 1539–54. Some particularly helpful sources out of many treasures are Peggy Cooper Davis, Neglected Stories: The Constitution and Family Values (1997); and Derrick Bell, *The Chronicle of the Constitutional Contradiction*, in And We Are Not Saved, The Elusive Quest for Racial Justice (1987).

27. A forthcoming textbook will include materials on African Americans as well as "other" racial and ethnic minorities. I anticipate that it will make a canonical contribution, though still only a beginning. Richard Delgado, Angela Harris, Juan Perea, and Stephanie Wildman will soon publish Race & Races: Cases and Resources for a Multiracial America (2000).

28. Justice Bradley observed at a later date, in the context of discussing congressional power to govern territories, that "[t]he power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right [*sic*] to acquire the territory itself. . . . The power to acquire territory . . . is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty and belong to all independent governments." Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1, 34 (1890).

29. Johnson and Graham's Lessee v. M'Intosh, 21 U.S. 543, 572–73, 588 (1823).

30. CONG. GLOBE, 30th Cong., 1st Sess. 96–98 (Jan. 4, 1848).

31. 5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 213 (Hunter Miller ed. 1937).

32. California's "Gold Rush" Constitution of 1849, for instance, provided that "every white male citizen of the United States, and every white male citizen of Mexico, who shall have elected to become a citizen of the United States, under the treaty [of Guadalupe Hidalgo], shall be entitled to vote. . . ." CAL. CONST. art. II, § 1 (1849).

33. *See, e.g.*, MALCOLM EBRIGHT, LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO (1994); and Guadalupe Luna, *Agricultural Underdogs and International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy*, 26 N.M. L. REV. 9 (1996).

34. Treaty of Paris (1898), *reprinted in* CHARLES I. BEVANS, 11 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776–1949, at 615–619 (1974).

35. *Id.*

36. Downes v. Bidwell, 182 U.S. 244, 279–280 (1901).

37. *See* Ediberto Roman, *Empire Forgotten: The United States' Colonization of Puerto Rico*, 42 VILL. L. REV. 1119 (1997).

38. *See, e.g.*, Eric Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post–Civil Rights America*, 95 MICH. L. REV. 821 (1997); and Noelle M. Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAWAII L. REV. 427 (1995).

39. *See, e.g.*, RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS (1988) and DAVID J. WEBER, FOREIGNERS IN THEIR NATIVE LAND (1973).

40. *See, e.g.,* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY (1994); VINE DELORIA, JR. AND CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE (1983).

41. Chinese Exclusion Act, 22 Stat. 58 (1882); Scott Act, 25 Stat. 504 (1888).

42. Chae Chan Ping v. U.S., 130 U.S. 581 (1889).

43. Geary Act, 27 Stat. 25 (1892).

44. 149 U.S. 698 (1893). Interestingly, Justice Field issued a strong dissent in *Fong Yue Ting*, on the ground that once a friendly alien in time of peace had been legally admitted to the country, he could not be expelled for failing to have a pass without some guarantee of procedural fairness. For background on the efforts by the Chinese community to resist the tide of anti-Chinese legislation, *see* CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA (1994).

45. 66 Stat. 177 (1952). *See also* Hitai v. INS, 343 F.2d 466 (2d Cir. 1965)

where the court used this provision to deny permanent residency status to a Brazilian man born to Brazilian parents, despite the fact that immigration from Brazil was not then subject to a quota, on the ground that the applicant's parents, both Brazilian citizens, were born in Japan.

46. Restrictions on naturalization were upheld in *Ozawa v. United States,* 260 U.S. 178 (1922); alien land laws were upheld in *Terrace v. Thompson*, 263 U.S. 197 (1923).

47. *See* Ian Haney-Lopez, White by Law: The Legal Construction of Race (1996).

48. United States v. Thind, 261 U.S. 204 (1922).

49. Accordingly, Professor Chin has suggested that the immigration act of that year should be seen as the third panel of a great civil rights triptych, together with the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

50. Robert Chang, *Toward an Asian-American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space,* 1 Asian L. J. 1, 81 Calif. L. Rev. 1243 (1993).

51. *See* Juan Perea, "The Statue of Liberty: Notes from Behind the Gilded Door," *in* Immigrants Out!: The New Nativism and the Anti-Immigrant Impulse in the United States (Juan Perea ed. 1997). *Compare* Peter Brimelow, Alien Nation: Common Sense about America's Immigration Disaster (1995) at 15.

52. Letter to Fran Ansley from Judy Scales-Trent, Jan. 14, 1993, on file with author, used with permission of Professor Scales-Trent and of her son, Jason Ellis.