Book Review

Teaching Race Through Law: "Resources for a Diverse America"

RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA.
Edited By Juan F. Perea, Richard Delgado, Angela P. Harris, and Stephanie M. Wildman.

Reviewed by Eric K. Yamamoto

INTRODUCTION

"I couldn’t talk about it for over forty years. Not to my children. Not to friends. Not a word." The sixty-year old woman, born and raised an American citizen, was speaking of the Japanese American internment: the U.S. government’s World War II incarceration of 120,000 Americans of Japanese ancestry in desolate concentration camps without charges, trial or, as ultimately shown, evidence of group-based disloyalty or military necessity. The woman lost her home, family business, relatives and, most important of all, her dignity and freedom. Racial vilification followed her...
release from years of imprisonment. Yet the Supreme Court upheld the constitutionality of the “exclusion” (as it was euphemistically called).³

This Nisei (second-generation Japanese American) woman spoke to me after a large public forum on the successful reopening of the infamous World War II internment cases. Mid-1980s coram nobis⁴ proceedings in Korematsu⁵ and Hirabayashi⁶ drew upon newly discovered government wartime documents and revealed three extraordinary facts. First, before the internment, government intelligence services unequivocally informed officials at the highest levels of the military and the War and Justice Departments that Japanese Americans living on the West Coast posed no serious danger to the war effort and that there existed no need for mass exclusion or internment.⁷ Second, the West Coast military commander based his internment decisions on invidious racial stereotypes about the inscrutability and inherent disloyalty of Japanese Americans.⁸ Third, the War and Justice Departments concealed and destroyed key evidence and deliberately misled the Supreme Court about the purported “military necessity” basis for the internment when the Court was deciding the original Korematsu and Hirabayshi cases.⁹

After the forum on the coram nobis cases, the Nisei woman waited and spoke quietly. "I knew we didn’t do anything wrong, but the President, Congress, and the courts said the internment was right. I came to seriously doubt myself.” But then, years later, “our children and many [non-Japanese American] friends fought to clear our name. They opened our eyes to why this all happened to us, and also to why others in America have been so badly treated, like the Blacks. Maybe we’ll get reparations.” She concluded, “Now I can talk about it. This has freed my soul.”¹⁰

Race and Races: Cases and Resources for a Diverse America, by Juan Perea, Richard Delgado, Angela Harris, and Stephanie Wildman, is

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3. Korematsu v. United States, 323 U.S. 214 (1944) (declaring constitutional under the Fifth Amendment Due Process clause the federal government’s World War II exclusion of persons of Japanese ancestry (primarily United States citizens) from West Coast areas, leading to their indefinite incarceration without charges or trial); see also Hirabayashi v. United States, 320 U.S. 81 (1943) (declaring constitutional the federal government’s World War II curfew imposed only upon persons of Japanese ancestry, including United States citizens).

4. A writ of coram nobis is an extraordinary court-issued writ that operates to rectify “manifest injustice” in the judicial process by correcting fundamental errors in criminal proceedings. The writ is rarely issued. It is used to “clear the name” of a wrongfully convicted defendant after conviction, appeal and imprisonment. (By contrast, the related habeas corpus writ is used to free a criminal defendant wrongfully held in custody.) See United States v. Morgan, 346 U.S. 502 (1954).


6. Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987).


10. See supra note 1.
the first multiracial, multidisciplinary casebook for courses on Race and American Law. It succeeds spectacularly as both pedagogy and scholarship. As a law teacher I feel, at last, that I have a casebook for class that really helps us “talk about it.” And while it may not free our souls, the casebook will inspire students and significantly elevate the teaching of Race and American Law and related courses to new levels of breadth and sophistication.

Before Race and Races, I and many other teachers compiled our own course readers, a hodgepodge of constantly changing materials drawn from a variety of sources, without introductions, transitions, or notes and questions. These ad hoc readers worked well enough because of the thought behind them, the wealth of materials available, and the support of Derrick Bell’s magnificent treatise, Race, Racism and American Law. What was missing, however, was a multiracial and multidisciplinary text that looked like a casebook, with its cases, statutes, and notes, but that also brought a critical edge to traditional constitutional law and civil rights casebooks’ handling of racial justice issues. What we needed was a casebook that would enable us to systematically explore race and law in all its often oppressive but occasionally liberating dimensions. Overall, Race and Races does this in exemplary fashion. Race and Races will serve as a standard bearer for critical-theory-informed casebooks generally and for more specialized race and law casebooks to follow. Race and Races gives us what we need to “talk about it.”

To complement these broad observations, I will first highlight some of the specific salutary dimensions of the casebook. I will then follow with a critique of two areas in which the book can be strengthened for its next incarnation.

I

STRENGTHS OF Race and Races

The list of highlights is long. To start, the editors are highly respected scholars. While their writings range across the spectrum of subjects, their critical race theory scholarship places them at the cutting edge of debates on racial justice. This is significant because their theoretical choices

12. For another standard bearer, in the area of contracts and commercial law, see Amy Hiltsman Kastely et al., Contracting Law (2d ed. 2000).
about how questions of race and racism should be presented to students also illuminate the larger intellectual enterprise of rethinking race, rights, and justice in the new century.

*Race and Races’* Introduction and opening chapter set the theoretical stage. They are not to be missed in a rush to the cases. The Introduction provides a list and brief explanation of tools of critical inquiry (p. 3), which gives students an immediate handle on the book’s approach. I ask students to refer back to these rough queries as they read throughout the course: “Make the Implicit Explicit,” “Look for the Hidden Norm,” “Avoid We/They Thinking,” “Remember Context,” “Seek Justice,” “Consider the Harm,” “Trust Your Intuition,” and “Ask, Who Benefits?” They serve as a kind of primer for critical inquiry. Significantly, these queries are framed less as commands and more as questions. The book’s critically informed approach is imparted with a light hand.

The first chapter does a masterful job of handling the difficult problem of defining race and racism. Its approach is to use tightly edited articles, drawn from both legal and social science scholarship, followed by insightful notes and questions. The carefully framed excerpts from Omi and Winant on racial dictatorship (pp. 12-13), Young on theories of oppression (pp. 14-15), Blauner on internal colonialism (pp. 16-20), Williams on Memmi’s discursive strategies of racism (pp. 26-28) (my students find Memmi particularly incisive), Krieger on the cognitive psychology of discrimination (pp. 33-36), Lawrence on cultural meaning and the equal protection intent requirement (pp. 37-41), Foster on environmental justice (pp. 46-48), Feagin and Feagin on “scientific” conceptions of race (pp. 56-58), Gotanda on critical conceptions of race (pp. 61-63), and Hernandez (pp. 69-77) on census racial categories, produce an extraordinary quilt of basic legal and sociological concepts. Working through each of these essays and linking them to one another creates an intellectual framework for the course, and is, in my experience with the book, an exceedingly valuable investment of teaching time and effort.

After this theoretical introduction, the book moves through group legal histories and then to substantive themes. This organizational structure works well. I find teaching group identity history first provides a necessary foundation for students in a course on race, since many of them lack historical grounding. The sequential coverage of African Americans, American Indians (to which I add Native Hawaiians), Latinos/as, Asian Americans and Whites enables me to teach legal history as a complex story about race in America, a story that, with variations, repeats over and over. It also enables me to introduce themes that we will explore later in greater depth, such as Reva Siegel’s “preservation-through-transformation” thesis about equal protection jurisprudence and its tendency to transform itself in response to pressures for change while preserving status inequalities in new
forms. The African American chapter (pp. 91-172), for instance, does this superbly. With a critical eye, and using multidisciplinary materials (the Lavinia Bell interview (pp. 112-14) alone transforms students' grasp of slavery), the chapter takes us from the Constitution's framers through slavery, Reconstruction, Jim Crow, the NAACP, the Civil Rights Movement and contemporary racism.

The book then moves to themes, or issues. By the second half of the course students are hungry for in-depth conceptual study, and the thematic chapters deliver. The themes range widely, developing notions of equality, voting, segregation in housing and education, freedom of expression, sexuality and the family, popular culture, crime, and responses to racism. This range allows teacher to pick and choose from a cornucopia of topics. No one can teach it all. All of these thematic chapters are thoughtfully prepared and deep, some of them are striking and innovative. For instance, the carefully integrated chapter on “Race, Sexuality, and the Family” (pp. 866-958) and the compelling chapter on “Racism and Popular Culture” (pp. 959-1016) can be found in no other teaching materials, and certainly not in any casebook.

What Race and Races does far better than any traditional casebook is introduce, without imposing, tools of critical inquiry and provide the multidisciplinary “resources” (as the book's subtitle says) for contextualized and particularized analyses. It is an approach invaluable not only for teachers and students, but also for scholars interested in a broad grounding in race and law.

II

CRITIQUE

Race and Races, though excellent overall, has some shortcomings in specific areas that should be addressed in subsequent editions. I will discuss improvements I would like to see in the two areas with which I am most familiar: Asian Americans and Reparations for Historical Injustice.

A. Asian Americans

“Asian Americans” (pp. 367-428) is the casebook’s one weak chapter. It is the book’s shortest chapter, half the length of the strong “Latinos/as” chapter (pp. 246-366). Page length itself is not especially important. What is important, however, is the Asian American chapter’s overly narrow focus and omission of key study areas. The picture presented by the chapter is skewed.

The chapter focuses on only two Asian American ethnic groups: the Chinese and Japanese. This leaves out of the Asian American picture the dramatic impact of the 1965 Immigration Act reform\(^{16}\) on the immigration of Filipinos, Vietnamese, Koreans, Laotians, Cambodians, and Hmong. These "other" ethnic Asian Americans collectively far outnumber Chinese and Japanese Americans\(^{17}\) and have dramatically changed how we grapple with Asian Americans in U.S. law and culture. For example, it was the immigration of these Asian groups along with Latinos/as that became the target of California's anti-immigrant Proposition 187\(^{18}\) in 1994, which, in turn, spurred anti-immigrant legislation across the country.\(^{19}\) The omission of these Asian ethnic groups from the chapter, save for brief references in two of the articles, will feel inadvertently exclusionary to many Asian American students and teachers. More importantly, the chapter creates a distorted vision of Asian America and its connections to contemporary American law.

One half of the chapter is devoted to the law's treatment of Chinese Americans in the nineteenth century. While this was an early formative period in Asian American legal history, it does not warrant five of the nine subsections of the chapter, especially because the notes and questions following each section are sketchy and do not provide enough substance to connect meaningfully with other Asian American and law issues, historical or current. Unlike the other chapters' notes and questions, these have the feel of limited preparation.

The chapter does a somewhat better job of handling Japanese Americans. It nevertheless falls far short in key areas. The very brief discussion of anti-Japanese initiatives before World War II (pp. 397-406), crucial to a contextual understanding of the internment, is barely adequate. The selected materials on the Alien Land Law (pp. 398-404), which prohibited Japanese ownership of land as a way of blocking their ability to compete as farmers, are quite good. But the brief questions after the statute and the


\(^{18}\) Proposition 187, approved Nov. 8, 1994 (Initiative Statute: Illegal Aliens: Public Services, Verification, and Reporting) (codified at CAL. PENAL CODE §§ 113, 114, 834(b) (West 1999)) (establishing a state screening system to prevent undocumented immigrants from obtaining state benefits, including public education for children).

case give short shrift to the significance of these laws and do not foster student discussion about the legal setting for the internment.

A more important issue is what I consider to be the chapter's faulty handling of the Japanese American internment cases. The internment was a defining moment for Japanese Americans and for many other earlier Asian American immigrants. It signaled the law's ostensibly neutral but—in-reality—political treatment of Asian Americans and, by extension, all "outsiders" in America, at least in times of national stress. The Korematsu case, and its challenge to the legality of the internment, are still taught in many constitutional law courses and in almost all race and law courses. It is a case significant to scholar's understanding of constitutional law. And my story of the Nisei woman at the opening of this review offered a glimpse of the human depths of the underside to this racial story, and the importance of giving it voice.

Yet the chapter's Japanese American section (pp. 397-412) barely touches upon the internment issue, only five pages in all. An excerpt by Takaki (pp. 407-11) does provide a picture of the assembly processing centers and internment camps. But the internment cases receive next to no attention, one and a half pages. There is no analysis of the government's assertion that "military necessity," that is, Japanese Americans' perceived cultural propensity toward disloyalty and acts of espionage and sabotage, justified the internment. There is no discussion of the "extraordinary facts," recited at the beginning of the Review, which showed that key government officials knew that no military necessity basis for the internment existed, that the internment decisions were based on racial stereotypes, and that the government deliberately destroyed, suppressed, and altered all evidence of these facts in its presentation to the Supreme Court. After a short set-up, the chapter briefly quotes the Hirabayashi Supreme Court opinion. Neither equal protection analysis nor political commentary follows. No notes and questions examine the Court's rationale. No reference is made to the Hirabayashi coram nobis Ninth Circuit opinion in 1987 vacating Hirabayashi's conviction because of "manifest injustice" in the government's prosecution of the original case.

Most disconcerting, the section dismisses the Korematsu case in three perfunctory lines and a citation, without any hint of its legal or social significance then or now, without any mention of the egregious governmental misconduct in prosecuting the case in concealing and fabricating evidence on "military necessity," without any linkage of the revelation of that government misconduct in the Korematsu case to the subsequent congressional authorization of reparations for former internees (reparations are mentioned

20. See supra notes 7-9 and accompanying text.
21. Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987).
in a note at the section’s end). Although the Korematsu case is reproduced in a later chapter on equality, the casebook’s dismissive treatment in the Japanese American section of the Asian American chapter, along with the overall superficial treatment of the internment and the silence about the coram nobis litigation, leaves a huge gap in this chapter of the casebook.

The chapter’s section on contemporary issues, with selected excerpts from Chang on the “model minority” (pp. 412-18), Saito on Asian American “foreignness” (pp. 419-422), and Kang on hate violence (pp. 423-28), is much stronger. The articles raise current and often vexing issues for Asian Americans. The notes and questions for this section, however, are sparse and, generally, superficial. Many teachers not versed in Asian American legal issues may be tempted to skip the material.

The chapter could be significantly strengthened by addressing the aforementioned critiques. This could be done without adding many pages, particularly if the Chinese American section is shortened. The chapter could also be enhanced by the incorporation of cases raising contemporary Asian American legal issues, such as hate and economic violence, current immigration dynamics, labor rights, interminority conflict, and civil rights. My suggested additions would include Vietnamese Fishermen’s Association v. Knights of the Ku Klux Klan (White fisherman enlisting the KKK to terrorize legal immigrant Vietnamese fisherman in Texas), Ho v. San Francisco Unified School District (Chinese Americans successfully challenging a thirteen-year old public school desegregation consent decree achieved by the NAACP as an equal protection violation), Proposition 187 (Asian American and Latino/a groups succeeding in having the anti-immigrant initiative invalidated), Fragante v. City and County of Honolulu (Filipino immigrant with top job qualifications denied city position because of accent), Vincent Chin sentencing (probation sentence for angry unemployed White auto workers who, mistaking Chin for a Japanese person, beat his brains out of his head with a baseball bat), and Thai Garment Workers (immigrant Thai women enslaved for years in an El Monte,

25. See supra note 18.
26. 888 F.2d 591 (9th Cir. 1989).
27. United States v. Ebens, 800 F.2d 1422 (6th Cir. 1986).
California garment factory, suing clothing retailers who commissioned the garments).

**B. Reparations**

The second area for enhancement is reparations. Reparations have come to the fore as part of American, and indeed worldwide, racial justice law. In the United States in 1999, the federal government settled a multimillion dollar reparations claim by African American farmers that were deliberately excluded from the Department of Agriculture's loan programs. Tulsa is in the process of conferring reparations for the mayhem inflicted by White residents on African Americans in the 1920s, much like the reparations for the African American survivors of Rosewood in Florida. Aetna Insurance Company apologized and paid reparations for its past discriminatory insurance practices. African Americans have announced the filing of class action reparations claims against businesses that profited from slavery and Jim Crow segregation, and Congressperson John Conyers has proposed an African American Reparations Study Commission bill. Native American tribes and Native Hawaiians have reparations claims pending for treaty and sovereignty violations, as well as for breaches of land trusts. Japanese Latin Americans are demanding reparations for their kidnapping and internment by the United States during the Second World War.

Internationally, former Korean sex slaves are seeking reparations from the Japanese government, and former worker slaves, abducted by the Japanese government during World War II, are claiming compensation from the private industries that benefited from their slave labor. Similarly, worker slaves for Germany are receiving litigation-induced reparations.

31. Lori S. Robinson, *Growing Movement Seeks Reparations for U.S. Blacks*, ARIZ. REPUBLIC, June 22, 1997, at H1. (awarding $150,000 to each of the nine survivors of the 1923 massacre where a White mob killed six Blacks and burned down the Black community of Rosewood, in addition to awarding between $375 and $22,535 to 143 descendants for lost property).
from private businesses. The South Africa Truth and Reconciliation Commission, its formal work completed, still oversees the halting reparations program it recommended to help heal the wounds of apartheid.

Roy Brooks says we are midst an "Age of Apology." I would modify that phrase and, borrowing from Elizabeth Spellman, say we are in the "Age of Reparation." Repair, rather than compensation, is the root word of reparation. Indeed, we have entered an era in which communities, governments, and nations are attempting, through the varying forms of reparations, monetary and nonmonetary, to repair the enduring personal and societal damage of injustice.

The concept of reparation thus deserves an extended treatment in Race and Races. Reparations, in the form of monetary awards, are mentioned in various places in the book (for example, in a brief note following the discussion of the Japanese American internment (pp. 411-12)). In addition, the excellent chapter on "Responses to Racism" (pp. 1091-1154) includes one article that discusses reparations in a more general sense (pp. 1123-28). That chapter, however, covers a lot of other important ground, including coalition-building, resisting White supremacy, and racial healing, and would become unwieldy if it was expanded to incorporate a fully realized reparations section.

What would enhance the casebook most is a separate chapter that engages rapidly developing reparations theory in the context of past and pending worldwide and national reparations movements. Such a section would distinguish between legal (that is, court-asserted) claims for reparation and those focused on legislative, or even private, action. It would also explore the social psychological impact of the various forms of reparations and examine the dynamics of the reparations process, both its salutary potential and its underside. It would enable its readers to assess bona fide

41. Roy L. Brooks, The Age of Apology, in When Sorry Isn't Enough, supra note 35, at 3 (analyzing significant reparatory efforts in the United States and worldwide); See also Martha Minow, Beyond Vengeance and Forgiveness (1998) (providing concepts, ranging from vengeance to forgiveness, for assessing government and social group responses to historic injustice).
42. See Elizabeth Spellman, Fruits of Sorrow: Framing Our Attention to Suffering (1998) (revealing the multiple dimensions of the concept of "repair").
44. See Yamamoto et al., Race, Rights and Reparation, supra note 13; Brooks, supra note 41; Minow, supra note 41; Spellman, supra note 42, Yamamoto, Interracial Justice, supra note 43.
reparation efforts and identify those that aim simply for "cheap grace." The interest in such a chapter, I suspect, would be considerable. Recall the sixty-year-old Japanese American woman who said that only now, after the revisiting of the internment cases, did she also see how badly African Americans had been treated in the United States. Only now could she hope for reparation.

In sum, Race and Races: Cases and Resources for a Diverse America, is a remarkable pedagogical and scholarly achievement. It defines a burgeoning field. It inspires. It works, for teachers and students. We now have a Race and Law casebook that enables us to "talk about it."

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Book Review

Thinking About Race and Races: Reflections and Responses


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 .... 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?” What are the strategies of escape from knowledge? Of willful oblivion?

Toni Morrison

I

REFLECTIONS ON RACE AND RACES

The presence of people of color haunts the United States. Race and racism are central to the history, the mythology, and the basic institutions of American life, including American legal institutions. Yet American public discourse has seldom been forthright about the existence and implications of American racism. Thus, for example, prior to the Thirteenth Amendment in 1865, the Constitution never mentioned the word “slavery.” The drafters of the Constitution were scrupulously careful not to include the word anywhere in the document, even as they crafted compromises that protected and recognized the peculiar institution.2


The framers maintained this constitutional silence, it seems, to preserve the ideological integrity of the document. More recent silences about race in legal discourse seem intended to protect the public from being confronted with the enormity of racial injustice. For example, in decisions like Shaw v. Reno, Adarand Constructors, Inc. v. Peña, and Rice v. Cayetano, the Supreme Court has found governmental racial classifications unconstitutional under the Fourteenth and Fifteenth Amendments even when their purpose has been to ameliorate racial inequality and strengthen the political power of racialized and historically subordinated communities. In McCleskey v. Kemp, the Court refused to recognize a claim of systemic racial discrimination in the administration of the death penalty for fear of undermining the criminal justice system itself, a fear dissenting justice William Brennan described as "a fear of too much justice." In these and other decisions, the Court has treated government recognition of race as inherently divisive and antidemocratic. Yet these decisions, imposing public silence on the issue of race, have had the practical effect of maintaining historical and continuing racialized inequalities of political and economic power.

The repercussions of this silence about the racialized injustice that so pervades American society are perhaps most haunting in areas that public discourse treats as race-free. In its recent decision in United States v. Morrison, for example, the Court held that Congress lacked authority under either the Commerce Clause or Section 5 of the Fourteenth Amendment to create a federal civil remedy for victims of gender-motivated violence, thus invalidating a portion of the Violence Against

3. In debating the wording of Article I, Section 9, which prohibited Congress from using its new commerce powers to restrict the importation of slaves, Speaker of the House Dayton was unambiguous about the reason for omitting the word "slave" from the constitutional text:

   [In the discussion of its merits, no question arose, or was agitated respecting the admission of foreigners, but, on the contrary, that it was confined simply to slaves, and was first voted upon and carried with that word expressed in it, which was afterwards upon reconsideration changed for "such persons," as it now stands .... The sole reason assigned for changing it was that it would be better not to stain the Constitutional code with such a term, since it could be avoided by the introduction of other equally intelligible words, as had been done in the former part of the same instrument, where the same sense was conveyed by the circuitous expression of "three fifths of all other persons]."


4. 509 U.S. 630 (1993) (redistricting legislation that is "unexplainable on grounds other than race" demands strict scrutiny).

5. 515 U.S. 200 (1995) (strict scrutiny is appropriate for all government racial classifications, whether created by federal or state governments).


8. 481 U.S. at 339 (Brennan, J., dissenting).

Women Act (VAWA).10 Reviewing the scope of congressional power under Section 5, the Court held that because the Fourteenth Amendment applies only to state action, Congress had no power to create a civil remedy against private persons who engage in gender-motivated violence. This understanding of the Fourteenth Amendment is not compelled by the constitutional text itself, however, but is based on two cases decided shortly after the adoption of the amendment, *United States v. Harris*11 and the *Civil Rights Cases*.12 According to the *Morrison* Court:

The force of the doctrine of stare decisis behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.13

What the Court does not say is that when these cases were decided, the Supreme Court was engaged in a war with Congress over race and racism: a war in which the Court moved time and time again to thwart the project of making African Americans equal citizens. Akhil Amar points out, for example, that the intent behind section 1 of the Fourteenth Amendment reflected, in part, congressional desire to overrule the Court's infamous decision in *Dred Scott*14 that Blacks in America had no rights that White persons were bound to respect.15 Amar asks why the Rehnquist Court should choose to look for meaning in the interpretations of a hostile Supreme Court and not in the statements of the drafters of the Fourteenth Amendment.16

The Court's silence about our racial past has not only skewed its approach to statutory interpretation. Robert Post and Reva Siegel argue that

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10. In deciding the Commerce Clause issue, the Court relied on its analysis in *United States v. Lopez*, 514 U.S. 549 (1995). The Court held that, while the line between the economic and noneconomic is not always crystal clear, "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S at 613.
12. 109 U.S. 3 (1883).
16. As Amar argues:
   Many of the Congressmen supporting these laws had been leading architects of the Fourteenth Amendment itself. Why doesn't Chief Justice Rehnquist accord these men any epistemic respect? Founders such as James Madison and Thomas Jefferson, who lived and died as slaveholders, are treated with reverence by the Court (even though Jefferson was not even in America at the Founding). Why are Reconstructors like John Bingham and Charles Sumner, crusaders for racial justice, treated with so much less respect? *Id.* at 105-06.
the substantive scope of congressional power under Section 5, and the meaning of Section 1's guarantees, can be understood only by understanding our nation's long political and legal struggle over racial injustice. In passing over this history in silence, they argue, the Court's recent decisions concerning congressional power to pass antidiscrimination legislation threaten to construct a jurisprudence that is not only "mechanical" but may diminish the authority both of the Court and of the Constitution itself.

The silences, omissions, and strained reasoning in these cases are not, in our view, the result simply of faulty reasoning or a misunderstanding of precedent. Rather, the cracks in Morrison's analysis, and in the Court's jurisprudence of congressional power under the Fourteenth Amendment more generally, betray the effort required to ignore a central truth of American jurisprudence: that the constitutional principles of federalism and separation of powers on which Morrison and like cases turn are inextricably intertwined with the history of race and racism.

As the majority in Morrison acknowledged, "the principle that the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States is deeply ingrained in our constitutional history." But this principle, in turn, is seething with the presence of slavery, conquest, racial terror, and apartheid. These are the unquiet ghosts in the machine of federalism jurisprudence. Race and Races...
is our attempt to give form and substance to the unquiet ghosts whose sto­
ries lie deep in American legal and constitutional history.

As one of us has recently noted, the story of “race law” is ordinarily
taken to be the story of equality law.20 In this equality story, despite many
setbacks, “We, the People” gradually enlarges to embrace everyone.
African Americans are the central characters in this story. Their inspiring
journey from slavery to freedom, from apartheid to the American main­
stream, is taken as a metonym for the optimistic story of American racial
struggle generally, a story that ends with Martin Luther King, Jr.’s “I Have
a Dream” speech.21

While the African American struggle against slavery and for equality
retains central importance in United States history and in our book, Race
and Races attempts to tell a more comprehensive story of race in the
United States. It is an alternative to the fragmented, separated treatment
that racial topics typically receive, if treated at all, in the law school cur­
riculum (p. 2). As Professor Robert Williams, Jr., notes, we have attempted
to produce a book which presents “multiple race perspectives on American
law,” to teach “how the rule of law has been applied to a much broader set
of racial minority groups in this country, and the strategies those groups
have adopted to survive and create a diverse America.”22

We hope to teach students that race has always mattered in the
United States, and that it continues to matter in many ways that they may or may
not have understood before. Some of the most profoundly important events
in the early history of the colonies and the country were racial events. The
conquest, displacement, and removal of Indians yielded land for the expan­
sion of the colonies, and later the United States (pp. 173-216). The en­
slavement of Black Africans supplied labor for Southern agriculture (pp.
91-129). We still confront the powerful repercussions of these events today
in Indian claims for self-determination (pp. 220-28) and in African Ameri­
can claims for reparations (p.412).23

One striking way to understand the relevance of race to legal educa­
tion is to consider the enormous amount of law, assumed to be independent
and unrelated, that nonetheless emerges as closely related when race and
racism are used as organizing principles. For example, law school curricula

20. Angela P. Harris, Equality Trouble: Sameness and Difference in Twentieth-Century Race
21. See A Testament of Hope: The Essential Writings and Speeches of Martin Luther
Paradigm of Race: The “Normal Science” of American Racial Thought, 85 CALIF. L. REV. 1213
(1997); Richard Delgado, Rodrigo’s Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship,
and the Black-White Binary, 75 TEX. L. REV. 1181 (1997) (noting that equality law, and civil rights
generally, are commonly equated with the African American experience).
22. Robert Williams, Jr., Do You Believe in the Rule of Law?, 89 CALIF. L. REV 1633, 1637
may typically include separate courses on Indian Law, Immigration Law or History, Civil Rights, and Equal Protection. These are all treated as separate and discrete disciplines. This curricular separation tends to obscure the independent significance of race and racism. As Professor Margalynne Armstrong points out, when students are not exposed to the racial dynamics lurking in these other courses, issues of race and racism that should be raised are instead ignored.24

When race and racism are used as lenses through which to view the law in these traditionally separate subject areas, a unified story of race in the United States emerges. For example, consider how Europeans sought to justify the conquest of Indians and the usurpation of Indian lands by presuming the inferiority of Indian peoples. As Chief Justice Marshall wrote in Johnson v. McIntosh, "the character and religion of [the Indians] afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy" (pp. 175-76). Europeans justified Black slavery in similar terms. Indeed, abolitionism and the struggle against Jim Crow included, as central components, challenges to the presumed inferiority of Blacks (pp. 141-56). From 1790 to 1952, immigration law was a remarkable forum for the development and definition of Whiteness and the exclusion of many non-Whites. In 1790, the first condition for naturalized citizenship was that one be a "free white person," presumed to be fit, temperamentally, intellectually, and morally, to participate in the affairs of government (p. 583). Of course, in Dred Scott v. Sandford (pp. 123-25), the Supreme Court decided that Africans and African Americans, whether slave or free, were never intended to be considered citizens under the federal constitution. During the latter half of the nineteenth century, the federal courts decided who qualified as a "white person" for naturalization (pp. 429-33). The courts, including the Supreme Court, decided that immigrants from China, Japan, India, and other nations were not "white" and therefore not entitled to citizenship (pp. 429-40).25 Astonishingly, the racial qualification for naturalization remained in place until 1952.26

Thus, traditional civil rights law and equal protection, Indian law, and immigration law all form important parts of the history and construction of racial identities in the United States. Remarkably, even integrating all of these ostensibly disparate areas of law, one would learn nearly nothing about Latinos/as.27 Much of the story of Latinos/as in the United States lies in the race-based conquest of Mexico and later Puerto Rico, and in the

25. See also IAN HANEY LOPEZ, WHITE BY LAW (1996).
26. Id. at 49.
extraordinary legal process through which one-half of Mexico became the Southwestern United States (pp. 246-97). After the military conquest, this legal process began with the Treaty of Guadalupe Hidalgo in 1848 (pp. 260-66), and continued with land grant adjudications decided by the Taney Court and later Courts in the mid-to-late nineteenth century (275-98). Litigation continues even today over the validity of dispositions of Mexican land grants.  

While White racism has influenced powerfully the destinies of all people of color in this country, it is important to understand that the forms that racism takes are not the same with respect to each of the groups affected by it. Including multiple race perspectives in our book provides historical background for understanding the varied ways that racism affected and affects different communities of color. By giving prominent attention to the particular histories of the major racial groups in the United States, including Whites (pp. 429-99), we hope to facilitate important comparisons, linkages, and distinctions regarding the conditions faced by the different groups. For example, consider the period 1880-1900. In 1882, anti-Chinese agitation in California culminated in congressional enactment of the federal Chinese Exclusion Act, which prohibited the immigration of Chinese laborers into the United States (pp. 382-84). Subsequently, the Supreme Court upheld the exclusion acts in 1889 in Chae Chan Ping (p. 384-88). In 1887, Congress passed the General Allotment Act, also known as the Dawes Act, which destroyed Indian tribal sovereignty by breaking up lands held jointly by the tribes and allotting these lands in separate parcels to individual tribal members (pp. 215-16). This Act led to reductions in the land base controlled by Indian tribes. And in 1896, the Supreme Court decided Plessy v. Ferguson (pp. 142-47), upholding and encouraging racial segregation. In 1898, during the Spanish-American War, the United States conquered Puerto Rico, Cuba, and the Philippines and invaded Hawaii (326-28).

Thus, during this twenty-year period, aggressive United States colonialism combined with severe internal repression of racial minorities. Only by comparing the histories of the different racial groups can one identify and explain this phenomenon. Indeed, Race and Races illustrates how United States racial history follows a zigzag path, sometimes forwards,

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29. See also Critical White Studies: Looking Behind the Mirror (Richard Delgado & Jean Stefancic eds., 1997).
30. 163 U.S. 537 (1896).
often backwards. Readers will also discover how this is not at all accidental. Society often arranges it so that one racial group is in favor while another is intensely repressed. Seeing the checkerboard of racial progress and the way groups are often played off against each other helps the reader understand the behavior of higher courts today.

Professor Abrams suggests that a chronological sequence might have been preferable for facilitating such comparisons. We respectfully disagree. Part of the aim of providing separate chapters for the major racial groups was to demonstrate the nature, degree, and particularity of the racism experienced by each and to emphasize the trends and advances just described. Not all racism is the same, nor has it played out in the same way for each group. These dynamics and particularities likely would have been obscured had we taken a purely chronological approach.

II

RESPONSES TO REVIEWS OF Race and Races

As Professors Abrams and Yamamoto correctly note, the authors of a casebook are in a luckier position than most: we have the opportunity to correct our mistakes in subsequent editions. We embrace several goals for the next edition that the contributors to this colloquy have identified. Professor Yamamoto suggests a richer chapter on Asian Americans and an extended treatment of reparations. Professor Abrams suggests a sustained examination of the relationship between race, class, and poverty. We also take to heart Abrams’ suggestion that we pay more attention to lawyering strategies beyond the strictly conventional and the purely interpersonal. Beyond these, some of our reviewers raised issues requiring more extensive responses.

A. Professor Abrams

Abrams’ suggestion that the book could use “more emphasis on the affirmative meanings assigned to race” is an interesting one. If all Abrams means by her suggestion is that we could have added material on the unintended benefits of racial segregation, that is certainly right. Perhaps

32. Id. at 290-93.
33. Id. at 291.
34. See Kathryn Abrams, Race and Races: Constructing a New Legal Actor, 89 CALIF. L. Rev. 1589, 1601 (2001).
37. See Abrams, supra note 34, at 1599.
we should have also made more references to the racial pride and kinship that most people of color feel deeply. But Abrams’ comment raises a deeper question that many have struggled with: are there, in fact, “affirmative meanings assigned to race”? Certainly as an accidental by-product, racism has given rise to political solidarity, family feeling among strangers, a vivid sense of historical connection to those who came before; vibrant cultural traditions; and deep commitments to justice. But are these “affirmative meanings assigned to race”? Or are they inherently reactive in nature? If racism were somehow vanquished, what would be left of race?

Noel Ignatiev, calling for the abolition of the White race, argues that Whiteness is nothing but the label for unjust privilege (pp. 489-93). Does “race” itself have content, once it is disentangled from cultural, historical, and political identity? We think we have done right by not answering these questions. Indeed, given that racism is unlikely to be eliminated any time soon, it is not clear that these questions are pressing ones. Instead, since the central meaning of “race” seems to turn on historically contingent value judgments, beliefs and faiths that support relationships of differential power and subordination, our approach has been to examine the nature of the historical development and expression of these beliefs.

One lesson our book teaches is that the dominant society in practically every era has assigned positive images to itself and to Whiteness. One chapter of Race and Races (pp. 429-99), for example, details how color imagery and invisible privileges provide an “affirmative meaning assigned to (the white) race” (pp. 464-78). By the same token, popular culture (pp. 959-1016) almost invariably assigns negative meanings and images to groups of color, except for the rare periods in which it assigns ridiculously romanticized ones to them such as the noble savage.

Professor Abrams also encourages us in the next edition to address interminority tensions and conflicts. This is a sore point in communities of color right now. Consider a situation like the controversy over admissions quotas at Lowell High School challenged in Ho v. S.F. Unified School District (p.745), where tension persists between Asian Americans and African Americans. We decided the proper role for us as casebook authors was to discuss the Ho case as an example of the need for negotiation and coalition, and to show that intergroup social dynamics may sometimes be fraught with the same struggles over self-interest as those between a minority group and the majority. We doubt that it would be wise for us to do more than this. In particular, we think it would be unwarranted for us to take a stand on who is right and who is wrong in that controversy. While intergroup complaints between communities of color might theoretically rise to such an egregious level that progressive scholars such as ourselves could not avoid taking a stand, we found no such cases in our research.

38. Id. at 1601.
Professor Abrams also chides us, somewhat surprisingly, for remaining mired in a Black-White paradigm. This casebook, of course, is the first expressly to expand beyond that paradigm and consider the racial fortunes, issues, problems, and histories of all the major groups of color in the United States, and include the construction of Whiteness (pp. 304-09, 471-77). Thus, practically every chapter on a substantive topic, such as hate speech or popular culture, devotes attention to all the major groups. However, one of the lessons of the differential racialization thesis is that each of the groups has been racialized in different, but overlapping, ways (pp. 1-2, 14-15). Thus, for example, immigration and language rights play little role in Black history. Mexican Americans suffered conquest, but were not enslaved in a literal sense. Accordingly, any organizational scheme that sets out to march determinedly through a four-part matrix under every single topic heading would distort history. Thus, we have tried to devote attention to the rich tapestry of race, realizing that not every strand attaches to every other.

Professor Abrams also complains that our book is missing a praxis. Robert Williams provides part of the answer to that complaint: Indian history (like that of most of the groups we consider) teaches legal skepticism. We believe that a book that highlights how frail a reed the law has proven to be for oppressed peoples provides a valuable dose of skepticism and realism for would-be lawyers. The young lawyer wins cases she knows she should have lost, loses cases she knows she should have won. Judges can be biased. Jurors can kowtow to a domineering foreperson. One’s clients can lose their nerve or lie. We suspect that law students who take the time to develop their own radical critique of social institutions, including the law, will enter practice with a type of psychic armoring that will enable them to persevere in the face of resistance and disappointment. Perhaps this is the most valuable praxis lesson of all, and one we very much hope readers will take from our book.

B. Professor Alfieri

Toward the end of his critique, Professor Alfieri poses a curious challenge. “To render prescriptive counsel properly,” he writes, Race and Races’ editors “must confront the tension dividing modern and postmodern modes of analysis.” He notes that we appear to both “condemn and exploit the hegemonic logic of law.” We also simultaneously “ridicule and embrace formalism and process values...[and both] celebrate

39. Id. at 1600.
40. Id. at 1601-02.
41. Williams, supra note 22, at 1634-36.
43. Id.
multiracial identity and assail"44 those methods of advocacy that appear to
him incompatible with that identity. He suggests that we are ambivalent
about rights.45 To be sure, Alfieri professes a gracious understanding of our
predicament, for we "labor in the ambiguity of this long moment of
transition."46 He concludes by declaring "We should be grateful for their
leadership. We should hope they do not grow weary."47

We are not weary. However, if we were to set ourselves the task of
reconciling modernism and postmodernism, formalism and its opposite,
multiracialism and conventional Anglocentric advocacy, we might well
grow so. But these are not our tasks. As we imply in the sections devoted
to strategies and methods of reform, we are prepared to embrace an un-
apologetic eclecticism (pp. 3, 1091-1154). Just as race and racism take dif-
ferent forms at different periods and in relation to different minority
groups, the tools of resistance must likewise vary. In one setting, litigation
may be a perfectly sensible means of confronting a particular evil. In an-
other, litigation may be fruitless; mass demonstration or storytelling48 or
enlistment of race traitors49 may be needed. Some racial roadblocks may
yield to discourse analysis; others may be better addressed by efforts to
change material conditions.50 In some situations, such as the army or or-
ganized sports, formality may guarantee at least a degree of fairness.51 In
others, free-flowing coalition politics and interpersonal friendships may be
what the situation requires.

In short, the traditional either/or categories Alfieri lists are not well
tailored to addressing the vast panoply of race. This is both a disadvantage
and a blessing. Students and fellow travelers cannot tie themselves to a
single theory of race, any more than they can rely on a unitary method of
resistance.

CONCLUSION

The complexity of "race," of "races," and their development and de-
ployment through United States history cannot be confined by simple cate-
gories and facile resolutions. Some of the questions raised by our reviewers

44. Id.
45. See id.
46. Id.
47. Id.
48. See Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87
49. On the concept of race traitor, see Race and Races (pp. 489, 493).
50. See Richard Delgado, Two Ways to Think About Race: Reflections on the Id, the Ego, and
other Reformist Theories of Equal Protection, 89 Geo. L.J. 2279 (2001); Delgado, The
Latino/A Condition, supra note 27, at 303-45 (describing role of rebellious lawyering and street politics in
effecting reform).
51. See Richard Delgado et al., Fairness and Formality: Minimizing the Risk of Prejudice in
allow no easy solutions. Accordingly, the multidisciplinary, historical approach we have taken in the book is pragmatic and eclectic.\textsuperscript{52} We have sought to give voice to stunning silences and omissions of race, to provide history and resources that we hope will enable us, in Professor Yamamoto's words, "to 'talk about it.'"\textsuperscript{53}

The perceptive insights of these distinguished reviewers give us much to think about. We are grateful to them for their knowledge, their insights, and their criticisms, all of which we find helpful in understanding what our book means to others and how we can make it better.

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\textsuperscript{52} Cf. Catharine Pierce Wells, \textit{Why Pragmatism Works for Me}, 74 S. Cal. L. Rev. 347, 353 (2000) ("Good lawyers do not obsessively adhere to a single theory. Instead they try to keep their minds free so that they are receptive to various ways of formulating the issues."); Margaret Jane Radin, \textit{The Pragmatist and the Feminist}, 63 S. Cal. L. Rev. 1699, 1700 (1990) ("We must look carefully at the nonideal circumstances in each case and decide which horn of the dilemma is better (or less bad), and we must keep re-deciding as time goes on.").

\textsuperscript{53} Yamamoto, \textit{supra} note 35, at 1651. Even as we write, the conservative American Civil Rights Coalition, an arm of Ward Connerly's American Civil Rights Institute, has unveiled a new proposed initiative for the March 2002 California ballot. The measure, titled the "Racial Privacy Initiative," would prevent the state from "classify[ing] any individual by race, ethnicity, color or national origin in the operation of public education, public contracting or public employment." Under the measure, the state would be prohibited from collecting data about an individual's race on government forms for the purpose of detecting racial discrimination. Letter from Kevin Nguyen, Executive Director, and M. Royce Van Tassell, Director of Research, American Civil Rights Coalition, to Tricia Knight, Initiative Coordinator, Office of the Attorney General of California, 2-3 (Feb. 20, 2001) (on file with authors). However, police uses of race, including the controversial practice of "racial profiling," would be specifically exempted from the ban. Letter from Elizabeth B. Guillen, Legislative Counsel, Mexican American Legal Defense and Education Fund, to Joe Shinstock, California Department of Finance 7-8 (Mar. 14, 2001) (on file with authors) (arguing that law enforcement will, in practice, have a difficult time distinguishing uses of race authorized by the statute and those not authorized). \textit{But see} Libertarian Party, Reviewer's Guide to the "California Racial Privacy Initiative" (Jan. 12, 2001), at http://www.peoplesveto.org/ip/text_files/010112%20Initiative.txt (claiming that "[s]ince racial profiling is already illegal, this exemption does not make it legal"). Yet another attempt to make matters of race unspeakable seemingly awaits in the wings.