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RACE IN ORDINARY COURSE: UTILIZING THE RACIAL BACKGROUND IN ANTITRUST AND CORPORATE LAW COURSES

ALFRED DENNIS MATHEWSON*

This article is about the discourse in law school classes in which non-white students are in classes with white students.¹ I recall the integration of race in one of my first year law classes. I was one of a handful of Black students in Professor Geoffrey Hazard's Civil Procedure class at Yale Law School. Professor Hazard had supplemented the casebook with materials that he had prepared for a case as an attorney. I do not recall the exact details, but I believe the case was *Swann v. Burkett*.² This case involved an African-American couple that sued a landlord under the Unruh Civil Rights Act³ for refusing to rent them an apartment because of their race. Professor Hazard had chosen the case because it was a personal triumph as he had successfully represented the plaintiffs. Although Professor Hazard used it to demonstrate procedural rules, he brought race out of the background. While race was not relevant to the Civil Procedure rules, it was germane to the substantive cause of action in the case.

My colleague, Margaret Montoya, published an account⁴ of her

* ©2007. Professor of Law, University of New Mexico. I presented the framework for this paper at the AALS Workshop on Racial Justice in a New Millennium: From Brown to Grutter—Methods to Achieve Nondiscrimination and Comparable Racial Equality in Portland, Oregon, June 2004. I wish to thank Taunya Banks, Norman Bay, Eric Gerding, and Antoinette Sedillo Lopez for their helpful comments.

¹ Race does not tend to create the same degree of controversy in classrooms with mixed nonwhite students.

² 26 Cal.Rptr. 286 (Ct. App. 1962).

³ CAL. CIV. CODE § 51 (Deering 2008).

⁴ Margaret E. Montoya, *Mascaras, Trenzas, Y Grednas: Un/Masking The Self While Un/Braiding Latina Stories And Legal Discourse*, 15 CHICAGO-LATINO L. REV. 1, 18 (1994).

encounter with Josefina Chavez, in the discussion of *People v. Chavez*,⁵ as a first year law student in Criminal Law class. She recounted that the case involved Ms. Chavez's conviction for manslaughter in the death of her newborn baby. The legal issue was whether the child had been born alive, and the class discussion had been limited to the facts relevant to that question. Professor Montoya recalled her surprise at the lack of examination of other facts such as "her youth, her poverty, her fear over the pregnancy, her delivery in silence".⁶ For two days, these other facts - as well as her race or ethnicity⁷ - had been confined to the factual background for whatever use individual students might make of them, until Professor Montoya, then a student, interjected with an inquiry. Such facts were deemed irrelevant to the legal doctrines and thus not emphasized in teaching students to notice only the relevant facts for legal analysis.

In first year classes designed to teach students traditional legal analysis or to think like a lawyer, like Criminal Law, the concept of relevancy is the primary device used to determine which images will be sharpened for the application of legal rules and which will remain out of focus in the background. This framework normally relegates race into the background abyss in law school courses except those addressing civil rights, employment discrimination, or racial justice. The relevancy paradigm is in fact taught in classes in all three years of law school.

In 1986, Derrick Bell assaulted this pedagogical paradigm when he taught a section of the Constitutional Law course at Stanford University. The reaction of students and the faculty to his approach emphasizing the role of race in the development of American Constitutional jurisprudence transformed his experience into one of the watershed events in the history of critical race legal theory.⁸ Unlike the other Stanford professors, he saw race as a highly relevant fact in the subject matter of the

⁵ 176 P.2d 92 (Cal. Ct. App. 1947).

⁶ Montoya, *supra* note 4, at 18.

⁷ The year was 1945 and Josefina Chavez is a Spanish name, but her race is not mentioned in the opinion. *See Chavez*, 176 P.2d at 92-93.

⁸ *See Tom Philip, Law Dean Apologizes to Black Prof*, SAN JOSE MERCURY NEWS, Nov. 21, 1987, at 1B (noting adverse student reaction to Professor Bell's constitutional law class).

course. Even though Professor Bell had not really deviated from the normative relevancy paradigm, Stanford Law School students then, like students in most law schools today, seemed to prefer the old pedagogical order in which the discussion or analysis of racial issues was segregated in courses explicitly pertaining to race, such as Race and the Law, Employment Discrimination, and Civil Rights Law.⁹ A traditional course simply was not the proper place. The Stanford Law School administration apparently agreed with the students as the Dean arranged for a series of lectures to supplement or enhance Professor Bell's course.¹⁰

Professor Bell did not call his course Race and Constitutional Law even though he had authored a casebook¹¹ on the subject used in a number of courses bearing that or some similar name in law schools and undergraduate programs. I do not believe that Professor Bell thought he was teaching such a course, nor do I believe that he intended to do so. He was teaching a course in Constitutional Law and approached it just like any other professor using a particular point of view. His emphasis of race was no different from some professor using Law and Economics to analyze judicial decisions and legal rules. In the ensuing decade, numerous law teachers of color sought to emulate Professor Bell in the classroom as well as in scholarship.¹² The result has been the development of Critical Race Theory as a

⁹ See *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 112 (7th Cir. 1990), *reh'g denied en banc*, 1990 U.S. App. LEXIS 14554 (7th Cir. 1990) (declining to recognize common law action for racial discrimination). See also Neil G. Williams, *Offer, Acceptance and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183, 222-24 (1993) (noting Judge Posner's refusal to recognize common law right to be free from racial discrimination); Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1048 (2003) (indicating conservative model of law and economics is embedded in legal community).

¹⁰ See Philip, *supra* note 8 (highlighting the Dean's decision to set up alternative lectures in response to student reaction to a visiting professor).

¹¹ DERRICK A. BELL, *RACE, RACISM AND AMERICAN LAW* (Little Brown & Co. 1981).

¹² These include Paul Butler, Roy Brooks, Dorothy Brown, Sumi Cho, Kimberle Crenshaw, Richard Delgado, Charles Lawrence, Mari Matsuda, and Margaret Montoya. For a bibliography of materials on the use of race in the classroom and sample syllabi on courses on race and the law, critical race theory, civil rights, and other courses incorporating race see University of Florida Levin College of Law, Center for the Study of Race and Race Relations: Race and Law Curriculum Workshop, Inaugural Conference [hereinafter Conference]: February 24-26, 2005, available at <http://www.law.ufl.edu/centers/csrrr/conference050224.shtml> (last visited Nov. 1, 2008).

mainstream field of study in legal education.¹³ It has overshadowed its forebear Critical Legal Studies and become as important to jurisprudential inquiry as Law and Economics.¹⁴ Its success, however, has obscured the discussion in legal discourse of virtually any aspect of the African-American experience other than discrimination or its remediation. If the legal issue does not explicitly concern discrimination, neither the identity of persons involved as African Americans nor their experiences is relevant to the discussion.¹⁵

In Critical Race Theory, race drives the analysis of legal issues.¹⁶ Race is examined in the context of racial minorities in juxtaposition with a white majority.¹⁷ In fact, the subordination of racial minorities by a dominant white majority rather than race itself is central to the analyses. For example, Beverly Moran explores this thesis in her seminal work examining the structural discrimination of the tax code against Blacks.¹⁸ Her approach has been followed by numerous scholars and has most recently been

¹³ See DOROTHY A. BROWN, *CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS* (West Law School 2003) (discussing the method of examining cases through the analytical framework of Critical Race Theory, other books, and data on schools offering this method).

¹⁴ See GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 167-85* (NYU Press 1996) (describing the history and development of Critical Race Theory).

¹⁵ The classroom was not the beginning of Professor Bell's assault on the elimination of the African American experience in legal analysis through the concept of relevancy. He first addressed it with his incorporation of narratives in analyzing equal protection jurisprudence in a recent law review article. Derrick Bell, *The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985). Alex M. Johnson defends the use of narratives by writing that "[n]o longer are issues addressed from a neutral perspective in which facts, theories, heuristics, and paradigms are studied. Instead, insight on legal issues is explicated from experiences. Insight is gleaned through doing rather than through thinking." Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 851 (1994). However, Daniel Farber and Suzanne Sherry believe that there is no "reason to abandon the expectation that legal scholarship contain reason and analysis, as well as narrative. A legal story without analysis is much like a judicial opinion with 'Findings of Fact' but no 'Conclusions of Law.'" Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 854 (1993).

¹⁶ See Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 95 (1994) (describing Critical Race Theory's analysis as being grounded "on the real, everyday experiences of people of color").

¹⁷ See *id.* at 112 (stating "CRT challenges us to envision a more democratic system of civil litigation, in which the socially weaker party has a real opportunity to confront the socially powerful party.").

¹⁸ Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996). Professor Moran explores the impact of the policies underlying Internal Revenue Code preferential treatment of property relative to wages on the wealth differential between Blacks and Whites. *Id.*

applied to the corporate and securities law fields.¹⁹ Even Whiteness Studies pursue this approach.²⁰ Critical race theory approaches to traditional legal subject matters also emphasize this juxtaposition.²¹

In contrast, I incorporate race into my courses in antitrust and corporate law but I do not use critical race theory pedagogy. I use an ordinary course approach²² in which I treat race as a factual and pedagogical norm in legal discourse when it may enhance my teaching of the subject. I may use race even when it is not relevant to a specific legal rule because it may be relevant for background information or the explanation of inferences and reasoning. While I stake a position distinct from critical race theorists, I do not analyze critical race theory or the large body of scholarship pertaining thereto in this article. I limit my discussion to my use of race in teaching traditional law school subjects, specifically antitrust and corporate law. I present this article in two parts. In Part I, I describe the challenges of using critical race theory to introduce discussions of race in traditional law school subjects. Race is interjected as an outsider. In Part II, I present my race in ordinary course approach. I do not suggest that my approach is superior to Critical Race Theory; I offer it only as another avenue of discussing race. In my approach, the subject matter drives the analysis and race is visibly interwoven into conventional legal analysis.

I. CRITICAL RACE THEORY IN THE CLASSROOM

Teachers utilizing the critical race approach often find that students struggle with making a choice of focusing on the study of race or on the traditional subject matter. The reactions of the

¹⁹ See *infra* note 20 and accompanying text.

²⁰ See Darryl Fears, *Hue and Cry on 'Whiteness Studies'; An Academic Field's Take on Race Stirs Interest and Anger*, THE WASH. POST, June 20, 2003, at A01. "Historically, it has been common to see whites as a people who don't have a race, to see racial identity as something others have . . . [i]t's a great advance to start looking at whiteness as a group." *Id.*

²¹ See Conference, *supra* note 12.

²² The approach is derived from the "ordinary course of business" concept in the Uniform Commercial Code. See e.g., U.C.C. §§ 1-201(b)(9), 7-205, 9-320 (buyer in ordinary course); §9-321 (licensee in ordinary course) (2008). BLACK'S LAW DICTIONARY (8th ed. 2004) equates the term to "course of business" and defines it as "the normal routine in managing a trade or business." The normal routine as opposed to an uncommon event is the essence of my race in ordinary course approach.

Stanford students demonstrate the difficulty of using the critical race approach.²³ At least three legal symposiums have addressed the incorporation of issues of race into law school courses. In 2004, the American Association of Law Schools presented its Workshop on Racial Justice at its midyear meeting.²⁴ In 2005, St. John's University School of Law presented a symposium on the incorporation of racial issues in corporate law subjects.²⁵ In the spring of 2006, the Center for the Study of Race and Race Relations at the University of Florida Levin College of Law held a Race and Law Curriculum Workshop.²⁶ Each of these symposiums included discussions of pedagogical approaches of law professors and the challenges presented by those approaches. Nearly all of the professors who deliberately incorporate race into subjects not directly related to racial justice report the similar reactions to those that greeted Professor Bell.²⁷

The greatest challenge is that discussions of race tend to distract students from straight-forward analyses of legal subject matter, and the magnitude of the distraction is difficult to control. In fact, the degree of distraction appears to be inversely related to the perceived degree of relevance to the subject matter. This distraction phenomenon occurs for several reasons. First, many hypotheticals involve settings in which the default race is white and, while noticed by all, it need not be spoken.²⁸ Colors other than white must be tagged or marked in the discussion in order for them to be visible. When they are, unless the subordination/dominance axis is directly in issue, race tends to

²³ See generally Benjamin Blaisdell, *Seeing Every Student as a 10: Using Critical Race Theory to Engage White Teachers' Colorblindness*, INT'L J. EDUC. POL'Y, RES. & PRAC., Mar. 22, 2005, available at http://www.accessmylibrary.com/coms2/summary_0286-9713608_ITM.

²⁴ See, e.g., Leonard M. Baynes, *Racial Justice in the New Millennium; From Brown to Grutter: Methods to Achieve Non-Discrimination and Comparable Racial Equality*, 80 NOTRE DAME L. REV. 243 (2004); see also Symposium, *Racial and Legal Education*, 54 J. LEGAL EDUC. 313 (2004). An earlier version of this article was presented at that symposium.

²⁵ See Symposium, *The Intersection of Race, Corporate Law, and Economic Development*, 77 ST. JOHN'S L. REV. 701 (2003).

²⁶ See Conference, *supra* note 12.

²⁷ See Angela Mae Kupenda, *Moving from Fear to Courage, and Replacing Preaching with Reaching*, Feb. 25, 2005, <http://www.law.ufl.edu/centers/csrrr/pdf/racelawconf/kupenda.pdf>; see also Cynthia Lee, *Integrating Race into the Curriculum: Learning from Failure*, Feb. 25, 2005, <http://www.law.ufl.edu/centers/csrrr/pdf/racelawconf/lee.PDF>.

²⁸ Race is usually in the background even when it is obvious and not white. One writer noted that race is always present. See Kupenda, *supra* note 27, at 2-5.

take on significance in the discussion that is disproportionate to its actual importance. It comes with a presumption that the subordination/dominance axis is in play. It invites intense emotional reactions that overwhelm dispassionate rational analyses. Thus, the raising of race in a traditional doctrinal course will frequently appear as an oddity to the majority of students. The powerful allure of the subordination/dominance axis overwhelms the analytical relevance of race to the subject matter.²⁹ The initial and perhaps final inference that students draw about its presence is that the professor is raising the subordination/dominance axis. The search for some other relevancy is not undertaken, and the student is closed to any attempt to show such relevance. This problem is particularly acute in business law courses where students may see race as wholly irrelevant. Many students simply do not envision race in the picture of commercial transactions in part because they do not readily contemplate the subordination/dominance theme in transactions routinely described in the *Wall Street Journal* or the business section of local newspapers. Since race is not germane to the substantive issues, the forced discussion of the subordination/dominance axis serves no meaningful purpose other than to teach students political correctness.

Second, students may be uncomfortable with a discussion focusing on race because the dynamics of extemporaneous classroom discussion will inevitably lead to a script in which any discussion of race - no matter how well intentioned - will result in a student making a remark that is racially insensitive or viewed as racially insensitive. The conversation is a delicate one as heightened sensibilities scrutinize language for overt and coded racism. That student will then be subjected to class or school wide reprobation as a racist, and students serving up the reprobation will be greeted with derision as overly sensitive or politically correct. The ensuing conversation will disrupt the classroom discussion with one concentrated on racism rather than the substantive legal principles of the course. Reasoned analysis appears to exit the discourse.³⁰

²⁹ A similar idea is contained in FED. R. EVID. 403, which provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury”

³⁰ I say “appears to exit” because students presume that other students are speaking

The controversy over Andrew Young's remarks in the Los Angeles Sentinel during the summer of 2006 is a case in point.³¹ Reverend Young had been consulting with Wal-Mart on its overseas labor practices and had been a strong defender of the company. His basic position is that large corporations have a positive role to play in eliminating world wide poverty.³² Reverend Young resigned over the following remarks printed in the Los Angeles Sentinel in defense of Wal-Mart:

"Well, I think they should; they ran the 'mom and pop' stores out of my neighborhood," the paper quoted Young as saying. "But you see, those are the people who have been overcharging us selling us stale bread and bad meat and wilted vegetables. And they sold out and moved to Florida. I think they've ripped off our communities enough. First it was Jews, then it was Koreans and now it's Arabs; very few black people own these stores."³³

Although he has apologized for his statement and resigned as a consultant of Wal-Mart, he still continues to defend his answer:

"Things that are matter-of-fact in Atlanta, in the New York and Los Angeles environment, tend to be a lot more volatile . . ."³⁴

He intended his comments to be in ordinary course.³⁵ He resigned

from predisposed positions.

³¹ See *Wal-Mart Imagemaker Quits Amid PR Flap*, CBS NEWS, Aug. 18, 2006, <http://www.cbsnews.com/stories/2006/08/18/business/main1909213.shtml> (discussing Andrew Young's decision to step down from his position as head of an outside support group hired by Wal-Mart to improve its image after making statements that were seen as racist and offensive).

³² See *Andrew Young Resigns from Wal-Mart Group*, ASSOCIATED PRESS, Aug. 18, 2006, <http://www.msnbc.msn.com/id/14406528> (noting Young's opinion that not enough attention has been paid to the positive effects large business and corporations can have on the international community in helping to solve the problems of the poor).

³³ *Id.* In apologizing for his remarks, Young went on to say "[t]hings that are matter-of-fact in Atlanta, in the New York and Los Angeles environment, tend to be a lot more volatile." *Id.* His comments, thus, were in ordinary course.

³⁴ *Id.*

³⁵ In fact, in his March 2, 2006 interview on NPR, where Young defends his acceptance of the position with Wal-Mart, he spoke of the overcharging by Mom and Pop businesses in black communities that were not owned by Blacks. See *Andrew Young, In Defense of Wal-Mart* (NPR radio broadcast, Mar. 2, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5241430>. He did not say more about the race or ethnicities of the business owners. *Id.* See also John Hope Bryant, *Ambassador Andrew Young and the Los Angeles Sentinel Interview: A Perspective from Someone in the Room*, OURWEEKLY.COM, Aug. 25, 2006, http://www.johnhopebryant.com/john_hope_bryant_/2006/08/ambassador_andr_2.html. Mr. Bryant explains that he was present during Andrew Young's interview with the Los Angeles Sentinel where the allegedly racist

because the ensuing reaction not only distracted from his campaign to promote good corporate citizenship with Wal-Mart, but completely disrupted it.³⁶ It would be impossible for him to discuss Wal-Mart without also having to deal with the reprobation that he receives from the remarks.³⁷

Students of color may be uncomfortable invoking race because they fear that the mere mentioning of race will obscure the substantive point they are making. Moreover, they may not wish to assume responsibility in the classroom for espousing the viewpoint of their racial group or be listened to only when they do.

II. RACE IN ORDINARY COURSE

Notwithstanding the minefield encountered by critical race theorists in traditional subjects, I regularly elevate the role of race in courses I teach, including Antitrust Law and Business Associations. Specifically, I call attention to the presence of non-whites in the factual background. While I am more likely to bring African Americans into focus, I look for settings that involve Native Americans, Latinos and other racial minorities. If the setting is a racially integrated one, I draw that out as well. In elevating race, I have sought to follow Professor Bell's original approach but, in contrast to critical race theorists who attempt to raise issues of racial oppression and subordination in traditional courses, I direct attention to race in the ordinary course of class discussion. In my view, race is a material factor in the legal issues regardless of whether it is directly relevant in the application of substantive legal rules. Nevertheless, I continually illuminate its connection to the class subject matter.

I do not necessarily make race visible in these courses to invite discussions of subordination/dominance axis. In my view, race is

remarks arose, and he believes that they were taken out of context and did not reflect Andrew Young's actual beliefs. *Id.*

³⁶ See *Andrew Young Steps Down From Wal-Mart After Comments Deemed Offensive*, Associated PRESS, Aug. 18, 2006, available at <http://www.foxnews.com/story/0,2933,209144,00.html> (noting that Young's comments sparked controversy over the purpose of his outside support group aimed at helping Wal-Mart's public interest as it appeared to attack Wal-Mart's critics).

³⁷ See *Wal-Mart Iimagemaker Quits Amid PR Flap*, *supra* note 31. "I [Young] think I was on the verge of becoming part of the controversy, and I didn't want to become a distraction from the main issues, so I thought I ought to step down." *Id.*

an ordinary part of life and society and therefore is appropriate for discussion as economic implications. Although invoking race normally means concentrating on the stories of historical racial minorities,³⁸ using race in the ordinary course of business law courses means examining cases or problems in which race is a factor that may be relevant to the analysis of the subject matter and therefore may be examined like any other in the factual context in which those legal issues arise.

I embrace race for several reasons. First, it is visible in many of the contexts in which I envision the operation of substantive rules. I am familiar with the setting and use it in ways similar to the use of metaphors.³⁹ Second, I heighten the visibility of race because I want to change the script for discourse when the subject of race comes up in classrooms and other settings. I want a conversation to take place with the same breadth and depth of jazz; one that includes the fundamental criticism of critical race theory as well as Smooth Jazz.⁴⁰ Third, I seek to eradicate the assumption that someone who speaks about race necessarily takes a position of preconditioned passion and emotion rather than reason.⁴¹ Thus, it is necessary to use a framework that is vastly rich in experience, but not chained to the blues of the subordination/dominance axis.⁴² By invoking race, I may make

³⁸ See David Dante Troutt, Professor, Rutgers University School of Law-Newark, Speech at the Race and Law Curriculum Workshop, University of Florida Levin College of Law (Feb. 2005) (transcript available at <http://www.law.ufl.edu/centers/csrrr/pdf/racelawconf/troutt.pdf>) (noting that a professor uses hypothetical questions involving ongoing problems of a black-owned business in Business Torts & Intellectual Property classes); see also Kupenda, *supra* note 27, at 3 (arguing that discussion of the protection of minority shareholders naturally invites a comparison of the political treatment of racial minorities).

³⁹ See James R. Elkins, *Lawyer Ethics: A Pedagogical Mosaic*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 117, 133-35 (2000) (describing the use of metaphors to explain rules in legal analysis).

⁴⁰ "Smooth Jazz" is "generally described as a genre of music that utilizes instruments (and, at times, improvisation) traditionally associated with jazz and stylistic influences drawn from mostly R&B, but also funk and pop." Wikipedia.com, Smooth Jazz, http://en.wikipedia.org/wiki/Smooth_jazz#Description (last modified Nov. 6, 2008).

⁴¹ Cf. Rachel F. Moran, *Symposium on Law in the Twentieth Century: Diversity and its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2334-35 (2000) (stating "[e]ven when faculty attempt to use philosophical abstractions to contain heated discussions about race and gender, emotions break through and influence the discussion . . . [this] may have reinforced professors' anxieties that these discussions inevitably will 'cross the borders of legitimate, respectful, professional discourse' and 'lead to tension, hard feelings, and censorship'").

⁴² Professor Calmore uses the metaphor of white acceptance of jazz to explain critical race theory in the classroom. See generally John O. Calmore, *Article: Critical Race Theory, Archie Shepp, And Fire Music: Securing An Authentic Intellectual Life In A Multicultural*

some white students uncomfortable and perhaps some non-white students. I do not avoid the subordination/dominance axis or use race in some other way, however, to address student comfort levels. I use race in a way that I hope facilitates a discourse that recognizes the presence of reason.

Finally, I have a grander purpose for enhancing the presence of race in the classroom. There is a presumption underlying Anglo-American jurisprudence that traditional legal rules are race-neutral and have universal application to the relevant facts.⁴³ I introduce race to test this proposition in a couple of ways. First, to see whether ostensibly neutral legal rules lead to results consistent with the underlying policies and objectives when applied to different racial contexts. Secondly, to see whether there would be "Hurricane Katrina" type effects where the application of race neutral storm evacuation polices failed with disastrous consequences.⁴⁴ This approach will be further explained in describing my race in the ordinary course approach to the classroom.

There is a by-product in which I am also interested. I want students to see and discuss issues involving African Americans in situations other than as criminals or victims in the subordination/dominance axis.⁴⁵ By having more discussions

World, 65 S. CAL. L. REV. 2129, 2147 (1992) (asserting "[a]rt is a direct cultural manifestation that synthesizes and refines a life-style and world view. Critical race theory's scholarship . . . creates an art style that represents a fulfillment of culture. Not content to imitate white or dominant scholarship's canons, methods, and analyses, people of color are adding our own distinctly stylized dimensions to legal scholarship.").

⁴³ See generally Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991); see also Reginald Leamon Robinson, *Lead Article: Race, Myth and Narrative in the Social Construction of the Black Self*, 40 HOW. L.J. 1 (1996).

⁴⁴ The policymakers did not appreciate the circumstances confronting the residents of the Ninth Ward or how those residents would assess those circumstances. The policy makers but for the understand the information flows or the assessment of available information within the Ninth Ward.

⁴⁵ See George H. White, *Defense of the Negro Race—Charges Answered*, Jan. 29, 1901, available at <http://docsouth.unc.edu/nc/whitegh/whitegh.html>. Representative White speaks of the proclivity to define African Americans by the worst rather than our best:

I want to enter a plea for the colored man, the colored woman, the colored boy, and the colored girl of this country. I would not thus digress from the question at issue and detain the House in a discussion of the interests of this particular people at this time but for the constant and the persistent efforts of certain gentlemen upon this floor to mold and rivet public sentiment against us as a people and to lose no opportunity to hold up the unfortunate few who commit crimes and depredations and lead lives of infamy and shame, as other races do, as fair specimens of representatives of the entire colored race.

Id. at 4.

about African Americans in transactional contexts, I hope to create scripts for conversations about race across and within diverse racial groups that include positive images of African Americans.

There are three basic circumstances in which I heighten the visibility of race: when the presence of nonwhites is a notable element of the transactional context, when a dispute occurs in a community that may be characterized by its color, and when an issue along the racial subordination/dominance axis occurs in a business setting thus lending itself to a doctrinal analysis under business associations law. The first two of these ways may, but need not, concern an issue of racial subordination.

A. Race as a Notable Element of the Factual Context

The example of race as a notable element occurs when a person of color is or may be involved in the dispute in some capacity, such as a party, lawyer, judge or witness. In Business Associations, for example, Marcus Garvey's conviction for securities fraud provides an opportunity to examine issues in the mechanics of corporate formation as well as provide a setting examining securities fraud.⁴⁶ Garvey is identifiable as an African American.

The Black Star Line and other entities involve African Americans and communities that are identifiable as such. The history lesson on the subordination/dominance axis and economic empowerment serves as the hook to engage students in the analysis of the securities framework while simultaneously demonstrating corporate and commercial transactions occurring within African-American communities.

While some students may desire to discuss the racial politics, it is unlikely that they are aware of the substantive legal issues. As a result, many students find the opportunity to examine them fascinating. Garvey appealed his conviction for mail fraud in

⁴⁶ See Jeffery M. Brown, Article, *Black Internationalism: Embracing an Economic Paradigm*, 23 MICH. J. INT'L L. 807 (2002). "Garvey remains perhaps best known for advocating a radical but largely ill-conceived plan to create a Pan-African commercial trade and manufacturing network that would empower people of color . . . [T]he BSL [Black Star Line shipping company] sold shares of common stock to its investors, idealistic African-Americans who believed and invested in Garvey's vision . . ." *Id.* at 843. However, this plan came under attack by the New York District Attorney who "accused Garvey and his BSL of engaging in fraudulent investment practices." *Id.* at 843-44.

connection with the sale of stock in the Black Star Line, Inc., one of several organizations - most of which were nonprofits - that he founded.⁴⁷ Garvey raised millions of dollars between 1919 and 1921, but the money was not managed well and very little of the money could be accounted for.⁴⁸ Prominent leaders in the African-American community including members of the National Association for the Advancement of Colored People, publicly denounced Garvey and urged the Department of Justice to prosecute him presumably for preying on the hopes and dreams of numerous uneducated poor and working class folks.⁴⁹ Garvey was charged with mail fraud for sending a circular or letter to Benny Dancy offering shares of stock in Black Star Line, Inc., a Delaware corporation formed specifically for the purpose of operating a steamship line to transport blacks to Africa.⁵⁰ Garvey's defense was rooted in the subordination/dominance axis. He acknowledged the mailings from several organizations,⁵¹ but maintained that those who paid money were not purchasing stock but were "more intent on the ultimate uplifting and salvation . . . promised to the negro race of America than to the paltry profits that might be realized from the stock

⁴⁷ See *Garvey v. U.S.*, 4 F.2d 974 (2d Cir. 1925). Garvey allegedly took part in "exhortations to buy worthless stock, accompanied by deceptively false statements as to the worth thereof, he was guilty of a scheme or artifice to defraud . . . if such scheme . . . was accompanied by the use of the mails defined by the statute, he was guilty of an offense." *Id.* at 975.

⁴⁸ See Alfred Dennis Mathewson, *Commercial and Corporate Lawyers 'N the Hood*, 21 U. ARK. LITTLE ROCK L. REV. 769, 778 n.7 (1999) (explaining that Black Star Line actually existed, but was poorly managed and even sold stock at Garvey's speaking engagements by sending around offering plates in which people placed their money in order to purchase shares).

⁴⁹ See *Wants Garvey Tried Soon*, N.Y. TIMES, Aug. 28, 1922, at 10 (reporting that Chandler Owen, African-American newspaper editor, announced during Friends of Negro Freedom meeting that group would urge Department of Justice to prosecute Garvey); see also *2000 Negroes Hear Garvey Denounced*, N.Y. TIMES, Aug. 21, 1922, at 7 (quoting Dr. Robert W. Bagnall, organizer for National Association for the Advancement of Colored People, from speech given at another Friends of Negro Freedom meeting saying that Garvey, "has misled poor, ignorant negroes . . . promising them a competence for life from their investments in this enterprises"); '*Garvey Must Go, Negroes Declare*, N.Y. TIMES, Sept. 11, 1922, at 19 ("'Marcus Garvey Must Go' was the slogan at three meetings of negroes held in Harlem yesterday by men and women who expressed dissatisfaction with Garvey's handling of the affairs of the Universal Negro Improvement Association.").

⁵⁰ See *Garvey*, 4 F.2d at 975. The prosecutor told the jury at the trial that thirty to forty thousands blacks had purchased approximate \$1,000,000 of Black Star Line stock. *Marcus Garvey on Trial*, N.Y. TIMES, May 19, 1923, at 16.

⁵¹ Other non-profit organizations which Garvey claimed were included in the Black Star Line, Inc. enterprise included the Universal Negro Improvement Association, the Liberian Construction Loan, the African Legion, the Black Cross Nurses, and the Negro Factories Corporation. See Mathewson, *supra* note 48, at 773.

investment.”⁵²

In Business Associations, class discussions about the *Garvey* case may revolve around the distinction between nonprofit and for-profit enterprises, the issuance of shares of stock, or record ownership. In Securities Regulations, the discussion may center on the technical requirements of the mail fraud statute in comparison with the Federal Securities Act of 1933⁵³ and Section 10b-5 of the Federal Securities and Exchange Act of 1934.⁵⁴ A deeper conversation involves underlying policies for protecting unsecured investors as the primary contributors to Garvey's enterprises who were for working poor with relatively little education, an issue that may come up from time to time in the course.

Garvey is also interesting for another reason. It is difficult to believe that the Black Star Line was a significant blip on the radar screen of the Justice Department.⁵⁵ Garvey was raising substantial amounts of money through a variety of methods, but the Justice Department was only concerned about the sales of capital stock.⁵⁶ The concentration on the mail fraud statutes to attack the stock sales reflects the Katrina Effect suggested above.⁵⁷ Examination of it leads to a second line of inquiry regarding the impact of the regulatory scheme on capital formation within African American and other communities of color. Does the regulatory scheme facilitate the flow of capital out of those communities? Students are asked about the transactions costs associated with compliance, access of Garvey

⁵² *Garvey*, 4 F.2d at 975.

⁵³ 15 U.S.C. § 77a (1933).

⁵⁴ 15 U.S.C. § 78(a) (1934).

⁵⁵ The court noted that racial uplift appears to have been at the core of Garvey's activities and the sales of stock were only a part, and perhaps, of lesser significance in the overall scheme.

It may be true that Garvey fancied himself a Moses, if not a Messiah; that he deemed himself a man with a message to deliver, and believed that he needed ships for the deliverance of his people; but with this assumed, it remains true that if his gospel consisted in part of exhortations to buy worthless stock, accompanied by deceptively false statements as to the worth thereof, he was guilty of a scheme or artifice to defraud.

Garvey, 4 F.2d at 975.

⁵⁶ *Id.*

⁵⁷ The indictment charged Garvey and associates with a scheme “to persuade negroes for the most part to buy shares of stock in the Black Star Line at \$5 per share, when the defendants well knew, notwithstanding florid representations to the contrary, that said shares were not and in all human probability never could be worth \$5 each or any other sum of money.” *Id.* at 974.

to securities professionals. Students are free to continue the discourse along the more traditional subordination/discrimination axis but some of that conversation will now include fine points of securities law.

I use the discussion specifically to question whether the regulatory scheme ostensibly designed to protect unsophisticated investors has an unintended Katrina effect in communities of color. Garvey raised money from stock sales and charitable contributions;⁵⁸ yet he was prosecuted for only the stock sales.⁵⁹ The securities laws do not regulate the raising of money for charities or churches.⁶⁰ Thus, the regulatory scheme imposes substantial transaction costs on raising commercial capital in African-American communities.⁶¹ The rise of Prosperity Theology⁶² is in part due to the absence of similar transactional costs in charitable fundraising and religious fundraising. I also examine other collateral implications of this asymmetrical regulatory scheme. It suggests that the protection of unsophisticated investors is for the protection of the securities markets more so than the investors. Unsophisticated investors

⁵⁸ See Ben F. Rogers, *William E. B. DuBois, Marcus Garvey, and Pan-Africa*, 40 J. NEGRO HIST. 154, 161 (1955).

Of course, it would cost a great deal of money to finance any Back-to-Africa movement, but this was the least of Garvey's difficulties, for he was a fund raiser without peer. . . . He sold tickets to most of his speeches, pictures of himself for 50 [cents] apiece, and Christmas cards bearing his likeness for 50 [cents] a dozen. The greatest of all his fund-raising drives, however, was the promotion of the Black Star Line, a steamship company whose boats would be owned and manned by Negroes and would eventually be the means of transporting American Negroes to Africa at the time of the great migration.

Id.

⁵⁹ See *Garvey*, 4 F.2d at 975–76 (detailing Garvey's fraud scheme).

⁶⁰ See Fed. Securities Act of 1933, § 3(a)(4), which provides an exemption for certain non-profit organizations as follows:

Any security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual; or any security of a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940.

Id.

⁶¹ See *Garvey*, 4 F.2d at 975 (discussing incidental costs of running this type of scheme).

⁶² See John Blake, *Was Jesus Rich? Swanky Messiah Not Far-Fetched in Prosperity Gospel*, ATLANTA J.-CONST., Oct. 22, 2006, at 1 (stating "the basic tenet is God rewards the faithful with wealth, spiritual power and debt-free living."); see also John Blake, *Cashing In On the Faithful; Some Pastors Adopt Strong-Arm Tactics to Shame Parishioners Into Shelling Out*, ATLANTA J.-CONST., Apr. 27, 2002, at 1B (declaring that "[g]iving becomes a means to prosperity . . . [i]t's giving to get.").

are unpredictable and consequently may render the market unstable.⁶³ It seems that they are free to lose their wealth in charitable donations as long as they do not disrupt the capital markets. The result is that the residents of disadvantaged communities or members of disadvantaged racial groups are limited in the ways they can invest in their own communities.

There is a tendency in corporate and commercial law classes to assume that the cases and transactions studied involve white principals in largely white community settings. Consider the agency case *Cargill*⁶⁴ that I teach in Business Associations. The setting is Iowa farm country. Cargill financed the owners of the local grain elevator in Warren, Minnesota.⁶⁵ This is another agency law case and the question is whether Cargill exercised so much control over the owner that he was its agent.⁶⁶ I suspect that the owners of the elevator, the farmers who sold them grain, and the executives at Cargill were white, but I have never wondered whether their color may be relevant to the discussion of agency law. Because *Garvey* is a securities law case involving an African-American principal in an African-American community setting, it is used in Business Associations.

Garvey is an example where the racial identity of a party is conspicuous and his race is a material factor in the doctrinal analysis. *Billops v. Magness Construction*,⁶⁷ - a case that previously was included in editions of KLEIN, RAMSEYER AND BAINBRIDGE'S Business Association case book⁶⁸ - involves a case where race is less obvious, is not alluded to in the opinion but perhaps explains the results. In that case, a group organized a fashion show at a Hilton Hotel in Delaware.⁶⁹ The event included an art exhibit and dance.⁷⁰ The group noisily objected to the hotel's insistence that they pay for everything in advance on the

⁶³ See, e.g., *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 515 (7th Cir. 1989).

⁶⁴ *A. Gay Jensen Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285 (Minn. 1981).

⁶⁵ *Id.* at 288 (detailing Cargill's agreement).

⁶⁶ *Id.* at 290 (stating the "major issue" in the case).

⁶⁷ 391 A.2d 196 (Del. 1978).

⁶⁸ The case was deleted from WILLIAM A. KLEIN, J. MARK RAMSEYER & STEPHEN M. BAINBRIDGE, *BUSINESS ASSOCIATIONS, CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, AND CORPORATIONS* (6th ed. 2006) and replaced with *Miller v. McDonald's Corp.*, 945 P.2d 1107 (1997). KLEIN, RAMSEYER & BAINBRIDGE at 58. The authors explain that Miller "offers better facts and a clearer explanation of the law." *Id.* at xii.

⁶⁹ *Billops*, 391 A.2d. at 197 (describing the events that lead to the lawsuit).

⁷⁰ *Id.* at 197 (expounding on details of the events that resulted in the suit).

evening of the event.⁷¹ The state police were called.⁷² The plaintiffs sued the hotel and the Hilton chain. The issue in the case is one of agency law, whether Hilton Corporation authorized the actions of the hotel.⁷³ There was no question that the hotel's actions were outrageous. Although there is no mention of the race of any of the parties, I wonder if the group was black. The image that comes to mind is the Ebony Fashion Fair and the group sounds like a local black fraternity or sorority that commonly sponsors these events. Occasionally, I share this image with the class.⁷⁴

The image is not essential to the discussion of actual or apparent authority in the case. The race of the parties would not have been relevant to a determination of actual authority. If the hotel managers were white, why would their race make it more likely than not that Hilton Hotels authorized their actions? If the plaintiffs were black, why would their race make it more likely than not that they were reasonable in their belief that Hilton Hotels authorized their actions? The race of the parties is not relevant to the extent that the race of the defendant influenced the reasonableness of the plaintiffs' belief that Hilton Hotels had authorized their conduct.

However, race may have been exceedingly relevant to the wrongfulness of the manager's conduct.⁷⁵ I sometimes ask the class to think about the underlying circumstances and whether the event sounds familiar, whether they consider it normal for a hotel to call the State Police to deal with a banquet. Why would the manager have insisted on an additional rental? What made the manager request the rental and why did he go to such extraordinary lengths to exact it? Does race provide a rational explanation to all of the above? If race is the explanation why is this case brought as a tort case for extortion and false

⁷¹ *Id.* at 197 (reciting the actions taken by the defendants).

⁷² *Id.* at 197 (memorializing that "the director [of the hotel] and other Hilton personnel . . . summon[ed] the state police, and threaten[ed] to have plaintiffs arrested.").

⁷³ *Id.* at 197 (summarizing procedural posture and resulting relevant legal issue).

⁷⁴ I contacted Thomas J. Neuberger, the plaintiff's lawyer, but he did not remember the case.

⁷⁵ See *Runyon v. McCrary*, 427 U.S. 160, 174-75 (1976) (holding that actions were maintainable under 42 U.S.C. § 1981 for refusals to contract based on race); see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 171-73 (1989) (limiting decision from *Runyon* by holding that § 1981 did not apply to post formation conduct of the contracting parties).

imprisonment rather than a racial discrimination claim? Are principals liable for the racial discrimination of their agents that involve wrongful conduct that is actionable without regard to race?⁷⁶ When I ask these questions, I do so because the potential presence of race in the transaction occurs to me and I believe that I have something to teach students. A part of what I have to teach is the benefit of my insights.

The 6th Edition of KLEIN, RAMSEYER AND BAINBRIDGE continues to include *Arguello v. Conoco, Inc.*,⁷⁷ a case that explicitly involves race. It presents agency questions in the context of the subordination/dominance axis. Hispanic and African-American customers had been subjected to racially motivated refusals to sell them gasoline and harassment at Conoco-owned and independent Conoco dealers in Texas; therefore such customers sued for violations of federal civil rights laws.⁷⁸ At issue was whether Conoco could be held vicariously liable for acts of racial discrimination committed by its own employees and those of its franchisees.⁷⁹ The Court determined that Conoco could be held liable for the actions of employees at the Conoco-owned stations but not the actions of employees of the independent stores.⁸⁰ While it is possible to discuss the agency liability of a franchisor corporation for the tortuous acts of its franchisees in *Billops* without ever mentioning race, it is not possible in *Arguello*.⁸¹ In order to recover, the plaintiffs needed to establish that the franchisees were agents of Conoco - the key legal issue related to the degree of Conoco's control.⁸² The plaintiffs argued that Conoco, Inc. had sufficient control over the franchisees because the franchise agreements required the franchisees to maintain their businesses according to the

⁷⁶ See *infra*, notes 77-87 and accompanying text.

⁷⁷ KLEIN, RAMSEYER & BAINBRIDGE, *supra* note 68 at 70 (discussing *Arguello v. Conoco, Inc.*, 207 F.3d 803 (5th Cir. 2000)).

⁷⁸ See *id.* at 805; see also 42 U.S.C. § 1981 (2007); 42 U.S.C. § 2000a (2007).

⁷⁹ *Arguello*, 207 F.3d at 806.

⁸⁰ *Id.* at 808 (stating "[t]herefore, we find that there is no agency relationship between Conoco, Inc. and the branded stores in question, and that Conoco, Inc. as a matter of law cannot be held liable for the unfortunate incidents which happened to Ivory, Pickett, Ross, and the Escobedos at the Conoco branded stores."). *But see generally* U.S. v. Kemble, 198 F.2d 889 (3d Cir. 1952) (applying standards for imposing criminal liability on corporate principal instead of union for statutory violations by union officials).

⁸¹ See *Arguello*, 207 F.3d at 807 (discussing standard for establishment of agency relationship):

⁸² *Id.*

Conoco's standards governing customer service and that Conoco, Inc. had the power to terminate franchisees that did not adhere to those standards.⁸³ With respect to the Conoco-owned stores, the issue was whether the discrimination was within the scope of employment of the discriminating employees for the purpose of holding Conoco vicariously liable under the doctrine of respondeat superior.⁸⁴

The class can engage in a general discussion of the role of large corporations in regulating acts of racial discrimination in its activities or the discussion may be limited to intersection of agency law and antidiscrimination statutes. Students are less comfortable with the more open-ended general discussion, but students tend to be more comfortable discussing those issues in examining the policies underlying a normative discussion of rules that should govern the imposition of liability on a large corporation for acts of discrimination in the bowels of its activities. The different lines of analyses and results in the distinction between independent contractors and employees provide ample meat for the discussion. Perhaps, the general discussion requires students to state their personal values and preferences whereas the rule and policy discussion requires students to speculate about the policy preferences of others. That is not to say that students are entirely comfortable, but there may be a sense that they reveal less of themselves.

KLEIN, RAMSEYER AND BAINBRIDGE also includes *Ramos v. Estrada*,⁸⁵ a case that involves Latino and Latina business people,⁸⁶ which serves larger Hispanic communities. Interestingly, I do not take extra efforts to elevate race other than to use the story of the case. The authors make no mention of the nature of the business in the Teacher's Manual.⁸⁷ I tend to follow suit and stay focused on the legal issues concerning the

⁸³ *Id.*

⁸⁴ *Id.* at 810-13. The statute in question was the Civil Rights Act of 1866 codified at 42 U.S.C. § 1981.

⁸⁵ See KLEIN, RAMSEYER AND BAINBRIDGE, *supra* note 68, at 623; see also *Ramos v. Estrada*, 10 Cal. Rptr. 2d 833 (Ct. App. 1992).

⁸⁶ See *Ramos*, 10 Cal. Rptr. at 834. The appearance is derived from the Hispanic surnames and the nature of the business as a Spanish language television in California.

⁸⁷ See WILLIAM A. KLEIN, J. MARK RAMSEYER & STEPHEN M. BAINBRIDGE, BUSINESS ASSOCIATIONS AGENCY, PARTNERSHIPS, AND CORPORATIONS 396 (6th ed. Teacher's Manual 2006).

enforceability of vote pooling agreements. I could also use it as an example of race in the community context that is the subject of the section below.

B. Race in the Community Context

The most common examples of race in the context of community that I use are those involving minority business enterprises.⁸⁸ They are a convenient construct for examining the nature of the legal persona of business enterprises. Until the advent of minority business enterprise programs, business enterprises neither factually nor legally possessed a color or race.⁸⁹ The statutes or regulations establishing minority businesses set aside programs necessarily ascribing a race to them based on the racial identity of the owners of the business entity.⁹⁰ Because of the substantial potential for front companies,⁹¹ most programs add control and active participation

⁸⁸ A minority business enterprise is customarily defined as a business organization in which one or members of a minority group own and control at least fifty-one percent of the enterprise. 13 C.F.R. § 124.1002 (2008). For a history of minority business enterprise programs, see Robert E. Suggs, *Symposium: Economic Justice in America's Cities: Visions and Revisions of a Movement: Bringing Small Business Development to Urban Neighborhoods*, 30 HARV. C.R.-C.L. L. REV. 487 (1995), and see also Robert E. Suggs, *Rethinking Minority Business Strategies*, 25 HARV. C.R.-C.L. L. REV. 101 (1990). The terminology has changed to small disadvantaged business enterprise. 13 C.F.R. § 124.1002 (2008). A business firm qualifies as a disadvantaged enterprise if it "is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals..." 13 C.F.R. § 124.101 (2007). Individuals are socially disadvantaged if they are among those "who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities." 13 C.F.R. §124.103 (2008). The regulations designate several racial groups that are presumed to suffer from social disadvantage.

⁸⁹ When I first introduced the minority business enterprise in my business associations' class, I could comfortably state that prior to the establishment of minority business enterprises, corporations or business entities did not lawfully possess a race or color. Consequently, the drafters of minority business programs found it necessary to create one and succeeded at ascribing or imputing to the entity the race or color of a majority of its owners. See Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023 (2006) (arguing that courts in recent cases have been willing to hold that business entities possess racial identities and citing *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1059 (9th Cir. 2004); *Bains LLC v. Arco Prod. Co.*, 405 F.3d 764, 770 (9th Cir. 2005); *Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395, 404, *aff'd in part, rev'd in part, cert. denied*, 541 U.S. 1064 (2004)).

⁹⁰ *But see Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006) (holding that an African-American sole shareholder lacked standing to sue under 42 U.S.C. § 1981 for discriminatory refusal to contract with his corporation).

⁹¹ A front company is one whose qualifying owners hold nominal interests as fronts for the real owners who are not members of disadvantaged minority groups. See Neal Devins, *Adarand Constructors, Inc. v. Pena and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 WM. & MARY L. REV. 673, 702 (1996).

requirements.⁹² When allocating control in small businesses these requirements serve as fodder for planning examples.⁹³ I can explore doctrinal issues in partnership and corporate law concerning the governance of the enterprise. For example, students may be asked whether an enterprise organized as a general partnership will qualify as a minority business enterprise where the minority partner owns a 51% interest or whether modifications to the partnership agreement are required.⁹⁴ Students may also examine the mechanisms that capital investors seek in governing documents to protect their investments and how the MBE requirements clash with those objectives. The question could just as easily be asked with other business organizations such as corporations and limited liability companies.

Some students may wish to discuss the constitutionality of the programs, but I defer that to another class. Prolonged discussions of constitutionality in a business law class would allow the class to veer away from the analysis of the substantive principle of the course's subject matter. Other students may inquire about the possibility of front companies and the process for challenging minority business enterprise status. I keep the discourse focused on the economic, business, planning, and technical issues of business associations law. I particularly like to examine the economic assumptions involved in the standard definition.⁹⁵ The original definition in the Small Business Administration (SBA) 8(a) program was based on the race of its owners and the racial composition of the community where its

⁹² See 13 C.F.R. § 124.1002 (2008) (imposing requirements of management and control by one or more socially or economically disadvantaged individuals in a small disadvantaged business (SDB)).

⁹³ For example, the Small Business Administration [hereinafter SBA] 8(a) Program requires that disadvantaged individuals not merely own a majority in interest, but must also have the right to control and actively exercise control over business policy and day-to-day operations. These requirements conflict with the normal protection devices that investors or lenders would negotiate and obtain. It is not unusual that obtaining such protection results in adverse consequences for the investor, as in the case of Cargill. in *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285 (Minn. 1981). A creditor may obtain the right to be consulted on major business decisions, the right to monitor business operations as well as the right to intervene in management upon the occurrence of some triggering event.

⁹⁴ I also use examples involving women-owned business enterprises.

⁹⁵ Since the definition precludes a non-minority capital contributor from obtaining investor protections in the form of control rights, I argue that the rules frequently attract non-minority who view their capital inputs as costs of doing business rather than investments.

facilities were located or it conducted business.⁹⁶ While the original definition sought to foster the direct transfer of capital to communities through individuals serving those communities the standard definition is designed to steer capital to disadvantaged individuals. My goal of encouraging students to see corporate law issues in communities of color and with persons of color engaged in wealth seeking has been served. I use the minority business enterprise materials primarily because I have a deep interest in the subject.

Furthermore, the SBA section 8(a) regulations also permit the examination of business development in Indian Country.⁹⁷ The regulations distinguish between businesses owned by Native American individuals and those owned by tribal governments.⁹⁸ Individuals may qualify for eligibility by establishing socio-economic disadvantage, but tribal governments are presumed to fall in that category. I prefer to cover doing business in Indian country in my Business Planning course rather than Business Associations.

In my Business Planning class, I present a problem based upon the settlement of the late John Sengstacke's estate. Mr. Sengstacke, an African American, owned Sengstacke Enterprises, Inc., a company founded by his family that operated a chain of newspapers serving African-American communities in the Midwest.⁹⁹ When he died owning more than 70% of the shares, he instructed the trustee to maximize the value of his estate for his heirs.¹⁰⁰ He also provided for the removal of the trustee by his heirs in order to keep the business in family hands. If it remained in family hands, it would continue to be owned by Blacks. His principal asset was his shares of the newspaper

⁹⁶ The initial SBA section 8(a) program did not use ownership exclusively to define those businesses which were eligible. It directed capital infusions in the form of public contracts to minority businesses which were located in areas with large numbers of unemployed or underemployed individuals. See Donald P. Young, *The "Greening" of the Small Business Set-Aside Program: The Past, the Present, and Some Thoughts for the Future*, 18 NEW ENG. L. REV. 883, 884 (1983).

⁹⁷ For a discussion of the meaning of Indian Country, see Paul W. Shagen, Comment, *Indian Country: The Dependent Indian Community Concept and Tribal/Tribal Member Immunity from State Taxation*, 27 N.M. L. REV. 421 (1997).

⁹⁸ See 13 C.F.R. §§ 109-11 (2008).

⁹⁹ See *Making an Impact in Real Time*, Leading Edge Alliance, Spring 2003, available at http://www.leadingedgealliance.com/issues_old/2003/spring/realtimes. Sengstacke Enterprises, Inc. owned four newspapers: Chicago Defender, Michigan Chronicle in Detroit, Tri-State Defender in Memphis, and the Pittsburgh Courier. *Id.*

¹⁰⁰ See *id.*

company. Several of the newspapers were profitable and sought by major newspaper companies. The communities served by the papers and some of the Sengstacke heirs believed that the chain should remain under Black ownership. The estate was facing a significant federal estate tax bill.¹⁰¹ I use the class as a law firm to represent the trustee for John Sengstacke's trust, his granddaughter and any of the other heirs. The class assignment is extraordinary because it forces students to grapple with the arcane principles of business and estate planning, exposes them to a sophisticated business transaction with African-American parties and the vagaries of the subordination/dominance axis. Students generate a list of questions and research them out of class and report back. These include the legality of an auction limited to African-American offerees, the federal estate tax liability, the fiduciary duties of Northern Illinois Trust, and the granddaughter if she ousts Northern Illinois as trustee. The class discussion includes the issue of black community ownership and the conflict with shareholder wealth maximization obligations of the granddaughter if she acquires control of the corporation.¹⁰²

C. Racial Subordination/Dominance Axis in Doctrinal Law

Some professors directly combine critical race theory and business law. By doing so, the subordination/dominance themes are invoked in the context of corporate and commercial transactions.¹⁰³ Use of the subordination/dominance axis in this manner is consistent with my race in ordinary course approach. The critical race approach is more blues in tone while my race in ordinary course is broader. The former approach is demonstrated in the Symposium on *The Intersection of Race, Corporate Law and Economic Development*: at St. John's University School of Law.¹⁰⁴ For example, in *A Trip Through the*

¹⁰¹ See *id.* "By the time we bought the company it was truly a money-losing operation. It has so many problems – with printers, trade creditors, the IRS – that it could have been in bankruptcy." *Id.*

¹⁰² After several years, the granddaughter finally found a buyer from within the family. See *id.*

¹⁰³ See generally EMMA COLEMAN JORDAN AND ANGELA P. HARRIS, *WHEN MARKETS FAIL: RACE AND ECONOMICS* (Foundation Press 2006).

¹⁰⁴ See Symposium, *The Intersection of Race, Corporate Law, and Economic Development*, 77 ST. JOHN'S L. REV. 697 (2003); see generally Cheryl L. Wade, *Attempting to Discuss Race in Business and Corporate Law Courses and Seminars*, 77 ST. JOHN'S L. REV. 901 (2003).

Maze of "Corporate Democracy": Shareholder Voice and Management Composition,¹⁰⁵ and *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*¹⁰⁶, Thomas Joo and Steven Ramirez respectively explore the lack of racial diversity in the boardrooms of large publicly held corporations. In *The Duty to Monitor: Emerging Obligations of Outside Lawyers and Auditors to Detect and Report Corporate Wrongdoing beyond the Federal Securities Laws*,¹⁰⁷ Larry Cata Baca explores the application of the Sarbanes Oxley Act to the monitoring and reporting of discrimination within a company.

In *Falling Through the Cracks: Race and Corporate Firms*,¹⁰⁸ Leonard Baynes shifts his analysis to doctrinal issues. He explores the application of partnership law rules to address racial discrimination between prospective partners.¹⁰⁹ He examines the use of partnership law rules as a source of a cause of action to tackle racial discriminatory employment and partnership decisions in law firms.¹¹⁰ Partnership law rules continue to be important, and racial discrimination merely provides a context for their analysis. In contrast to Judge Posner's position,¹¹¹ Professor Baynes examines the use of the agency and partnership doctrines of good faith and fiduciary duties to evaluate discriminatory refusals to promote associates who are racial minorities to partner.¹¹² The subordination/dominance theme must be discussed as the class must consider whether the partnership decision was racially discriminatory. That discussion invariably leads to *Mungin v.*

¹⁰⁵ See generally Thomas W. Joo, *A Trip Through the Maze of "Corporate Democracy": Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV. 735 (2003).

¹⁰⁶ See generally Steven A. Ramirez, *Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN'S L. REV. 837 (2003).

¹⁰⁷ 77 ST. JOHN'S L. REV. 919 (2003).

¹⁰⁸ 77 ST. JOHN'S L. REV. 785 (2003).

¹⁰⁹ See *id.*

¹¹⁰ See generally *Hishon v. King & Spalding*, 467 U.S. 69 (1984). The decision of a law firm to admit or not to admit an associate to partnership involves a term or condition of employment governed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (2008). After this case, some corporate law professors may have mentioned the application of antidiscrimination law statutes to decisions on the admission of a partner to a professional partnership.

¹¹¹ See *supra* note 9 and accompanying text.

¹¹² See Leonard M. Baynes, *Falling Through the Cracks: Race and Corporate Law Firms*, 77 ST. JOHN'S L. REV. 785, 830-31 (2003).

Katten Muchin & Zavis,¹¹³ a case that is the subject of THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA,¹¹⁴ in which the appellate court reversed a jury finding of discrimination on the grounds that no reasonable jury could have found discrimination on the evidence presented.¹¹⁵ It also invites discussion of David Wilkins excellent analysis of partnership hiring decisions and racial discrimination.¹¹⁶ Ultimately, however, the class must return to the fiduciary duties of partners and the decision in *Meinhard v. Salmon*.¹¹⁷

The Baynes approach takes fundamental issue with Judge Posner's view that the subordination/dominance axis should be confined to antidiscrimination law.¹¹⁸ Many students may find the discussion of this important question uncomfortable, but that discomfort may be alleviated by the participation of students interested in or merely curious about law and economics. However, the issue is one that is highly appropriate for the corporate law doctrinal course. It would not be appropriate to segregate the discussion of this question in a class on employment discrimination. The discussion of whether standard corporate law doctrines may be used to address racial discrimination would not be complete without an actual examination of the application of those rules to the discrimination setting. Professor Baynes offers that analysis as delineated above.

David Brennen follows a similar approach in *Race-Conscious Affirmative Action by Tax-Exempt 501(c)(3) Corporations After Grutter and Gratz*.¹¹⁹ He examines whether programs and initiatives to address racial inequities in society by nonprofit

¹¹³ 941 F. Supp. 153 (D.D.C. 1996), *rev'd*, 116 F.3d 1549 (D.C. Cir. 1997).

¹¹⁴ PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (Dutton 1999).

¹¹⁵ *See id.* at 271 (holding in 2-1 vote that jury consisted of eight unreasonable people under reasonable person standard as not "even a scintillia of evidence" existed to prove bias).

¹¹⁶ Wilkins found that the structure of law firms' partnership admissions tended to place African-American attorneys at a disadvantage. *See generally* David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924 (1999) (reviewing BARRETT, *supra* note 114).

¹¹⁷ 164 N.E. 545 (N.Y. 1928).

¹¹⁸ *See* Baynes, *supra* note 112, at 786-87 (arguing that civil rights statutes are interpreted on the basis of perpetrator ideology and advocating for the use of contract law principles of good faith and fair dealing to regulate discrimination).

¹¹⁹ 77 ST. JOHN'S L. REV. 711 (2003).

entities will jeopardize their tax exempt status under section 501(c)(3) of the Internal Revenue Code.¹²⁰ The racial issue is a tax law issue that lawyers representing nonprofits may be expected to encounter after *Bob Jones University v. United States*.¹²¹ Both scholars consciously interject racial discrimination into corporate and tax law setting.¹²² Indeed the symposium invited scholars to do so.¹²³

In *Attempting to Discuss Race in Business and Corporate Law Courses and Seminars*,¹²⁴ Cheryl Wade writes of her attempt to examine issues of discrimination in the corporate context in teaching business law courses.¹²⁵ Race in this approach means racial discrimination; the corporate setting again merely provides a context in which it is examined. Her approach is to directly raise the subordination/dominance axis in teaching the federal regulation of proxy solicitations. She does so in her Corporations course as a part of teaching corporate social responsibility.¹²⁶ Professor Wade sees addressing racial inequities in society as a legitimate inquiry in examining corporate governance because corporations that fail to monitor discrimination face significant legal liability that adversely affects shareholder wealth.¹²⁷ She introduces the redress of racial discrimination by corporations gradually in corporate social responsibility issues before bringing it to the foreground in discussing the handling of discrimination class actions by the management of publicly held corporations and what information they disclose or are required to disclose in

¹²⁰ See *id.* at 712 (explaining the impact of the Supreme Court's decisions dealing with the use of race by public universities and the loss of tax-exempt status).

¹²¹ 461 U.S. 574 (1983); see David A. Brennan, *Race-Conscious Affirmative Action by Tax-Exempt 501(c)(3) Corporations After Grutter and Gratz*, 77 ST. JOHN'S L. REV. 711, 727 (2003) (stating that the Court in *Bob Jones University* concluded that discrimination against African Americans in public education is against public policy, and therefore the IRS may revoke Bob Jones University's § 501(c)(3) tax-exempt status).

¹²² See generally Baynes, *supra* note 112 (highlighting the inequalities of minority associates and partners in law firms); see also Brennan, *supra* note 121 (exploring whether or not race-conscious affirmative action is prohibited by public policy).

¹²³ See generally Baynes, *supra* note 112; see also Brennan, *supra* note 121.

¹²⁴ See Wade, *supra* note 104.

¹²⁵ See *id.* at 906-08 (advocating for the discussion of race in business and corporate law courses).

¹²⁶ See *id.* at 901-02. The legal obligations of directors to monitor racial discrimination is more fully clarified in Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389 (2002).

¹²⁷ See Wade, *supra* note 104 at 907 (arguing that race discrimination is a corporate governance issue).

proxy materials.¹²⁸ Her invocation of race is more pronounced in the context of corporate governance than in her general motivation to bring more discussion of social justice into the classroom discussion.¹²⁹

I have also used the subordination/dominance axis, but I do so through the injection of one or more cases like *Arguello*.¹³⁰ In Business Associations, I have occasionally used *Brown v. Ward*,¹³¹ a case concerning the interaction of Native Americans and Whites. It involves a proxy fight between Native American shareholders of a Cook Inlet Region, Inc., an Alaska corporation designated as a regional corporation under the Alaska Native American Claims Settlement Act,¹³² and explicitly raises the subordination/dominance axis in the context of a proxy fight.¹³³ A disgruntled shareholder solicited proxies to use in an annual election of directors.¹³⁴ When his first solicitation resulted in modest success, he sent a successful solicitation directly invoking the subordination/dominance axis.¹³⁵ Because the company

¹²⁸ See *id.* at 910-16 (pointing out that that the SEC does not require the disclosure of civil rights expenditures).

¹²⁹ See *id.* at 906-07.

¹³⁰ See *Arguello v. Conoco, Inc.*, 207 F.3d 803 (2000) (holding that because no agency relationship existed between corporation and franchisee, the corporation was not liable for minority consumers' claims of discriminatory behavior by franchisee).

¹³¹ 593 P.2d 247 (Alaska 1979).

¹³² 43 U.S.C. §§ 1601-1628 (2007).

¹³³ See *Brown*, 593 P.2d at 248 (discussing minority shareholder's proxy materials which contained racially charged statements against corporation).

¹³⁴ *Id.* at 250-51 (finding that defendant shareholder's second proxy solicitation contained materially misleading statements in violation of Alaskan law).

¹³⁵ The second proxy solicitation contained a satirical cartoon with the following message:

Hey! We want our money NOW.

We own Cook Inlet Region Inc. not the leaders and Lawyers.

If we each want a big chunk of Land then let's give it to ourselves "NOW" not 20 years from Now. We the stockholders own the Land not the leaders and Lawyers.

It has been estimated that just the coal reserves owned by us is worth over 2 Billion Dollars. I say "so what" how does that help us. If we were to go ahead and sell just the coal for its estimated value that would be over Three hundred thousand dollars "Look at this number \$300,000.00" for every man, woman, and child owner of Cook Inlet Region Inc.

Our leaders and Lawyers say invest, so what do we the owners of Cook Inlet Region Inc. have after 5 years. We have a piece of white man paper that says we have millions of dollars, yes Millions of dollars of warehouses, Lawyer fees, several old Hotels, "which you can't even sleep in without lots of money," more Lawyer fees, a great Big Multi-Million dollar white man office building where our leaders can spend our money in comfort AND who knows what else our money is spent on.

I say lets get out of white man business, sell All this stuff and invest the money

challenged the solicitation on narrower grounds alleging that the proxy materials were false or misleading based on representations about value and the availability of assets for distributions to shareholders, some professors may exclude the racial appeal as irrelevant. However, students reading the opinion clearly see it and have opinions.

Elevating the racial appeal is a delicate business because the solicitation characterizes whites in a bad light. It is possible to examine race without emphasizing the racial appeal. The shareholders are native Alaskans while management is comprised of lawyers and business executives, some of whom are not native Alaskans and may be white.¹³⁶ The case offers the opportunity to examine such corporations and to explore the discourse between management and shareholders in this setting. It is conspicuous that the court quotes the racial appeal in the proxy solicitation but otherwise ignores it in its discussion of the legal issues.¹³⁷ The racial appeal is irrelevant to the discussion of whether the proxy solicitation contained false and misleading statements about asset valuations and distributions.

The racial subordination/dominance axis can also arise in antitrust law. Group boycotts of local merchants were a staple in the arsenal of the Civil Rights Movement. The legendary Montgomery Bus Boycott¹³⁸ clearly used concerted refusals to deal with the Montgomery Bus Company that could have been the subject of a challenge under antitrust laws. In fact, *NAACP v. Claiborne Hardware Co.*¹³⁹ is usually mentioned in notes on group boycotts in Antitrust Law casebooks.¹⁴⁰ In that case, the NAACP organized a boycott of local department stores that did

with the people. This would mean THOUSANDS of dollars for each and every one of us NOW not 20 years from now.

We the stockholders own Cook Inlet Region Inc., and we own all the cash and all the minerals and all the land NOT THE LEADERS and Lawyers.

Id. at 248-49.

¹³⁶ *See id.*

¹³⁷ *Id.* at 249-251 (discussing whether or not statements made in the second proxy solicitation were materially misleading without referring to race).

¹³⁸ *See* Kermit L. Hall, "Lies, Lies, Lies": *The Origins Of New York Times Co. v. Sullivan*, 9 COMM. L. & POL'Y 391, 396-97 (2004).

¹³⁹ 458 U.S. 886 (1982).

¹⁴⁰ *See* E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 413 (4th ed. 1999.); *see also* CHARLES J. GOETZ AND FRED S. MCCHESENEY, ANTITRUST LAW: INTERPRETATION AND IMPLEMENTATION 170 (3d ed. 2006).

not hire blacks and was sued by the white store owners.¹⁴¹ Similarly, the National Organization for Women was sued for its organization of the Missouri tourist industry when the state rejected ratification of the Equal Rights Amendment.¹⁴² Neither of those boycotts was found by courts to be actionable under the antitrust laws.¹⁴³

Those are cases in which those opposed to civil rights attempted to use the antitrust laws against the victims of discrimination.¹⁴⁴ Civil rights groups can also use the antitrust laws. I favor using traditional legal rules to tackle racial injustice¹⁴⁵ and I advance this theme in antitrust law. I use PITOFSKY, GOLDSCHMID & WOOD, CASES AND MATERIALS ON TRADE REGULATION in part because it contains a problem requiring the analysis of an antitrust claim to challenge the use of a uniform credit scoring system by local banks all of which denied a loan to a black business owner.¹⁴⁶ Problem 6 requires students to analyze several antitrust issues concerning group boycotts and refusals to deal, including the conspiracy theory oriented concept of conscious parallelism.¹⁴⁷ Students get to explore whether the conventional antitrust principles will provide a remedy for what appears to be a racially discriminatory refusal to deal. By the time students tackle the problem, they will have learned the rule of *Klor's, Inc. v. Broadway-Hale Stores, Inc.* in which the Supreme Court held a group boycott to be per se illegal where it was effectuated with the intent to injure the business of a competitor by depriving it of access to customers or suppliers essential for it to compete.¹⁴⁸ They will

¹⁴¹ *NAACP*, 458 U.S. at 889.

¹⁴² *Missouri v. Nat'l Org. for Women, Inc.*, 620 F.2d 1301, 1302 (8th Cir. 1980), cert. denied, 449 U.S. 842 (1980).

¹⁴³ See *NAACP*, 458 U.S. at 934 (stating that the claim was "constitutionally insufficient to support the judgment that all petitioners are liable for all losses resulting from the boycott."); see also *Nat'l Org. for Women, Inc.*, 620 F.2d at 1319 (holding that the "Sherman Act does not cover NOW's boycott activities on the basis of the legislative history of the Act and of the Supreme Court's consideration of the legislative history.")

¹⁴⁴ See *NAACP*, 458 U.S. at 892; see also *Nat'l Org. for Women, Inc.*, 620 F.2d at 1302.

¹⁴⁵ See generally *Mungin v. Katten Muchin and Zavis*, 941 F. Supp. 153 (D.D.C. 1996), rev'd, 116 F.3d 1549 (D.C. Cir. 1997).

¹⁴⁶ See PITOFSKY ET AL., CASES AND MATERIALS ON TRADE REGULATION 378 (5th ed. 2003); see also AREEDA ET AL., ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 279 (6th ed. 2004) (containing a few notes examining the collaboration of banks on extending loans and investigating creditworthiness but makes no reference at all to race).

¹⁴⁷ See PITOFSKY ET AL., *supra* note 146, at 348.

¹⁴⁸ 359 U.S. 207, 212 (1959).

also have covered *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.* in which the Supreme Court refused to invalidate the expulsion of a member from a cooperative.¹⁴⁹ Thus, students learn that a group boycott may be illegal if the boycotters act with some form of injurious intent.¹⁵⁰ The problem calls into question whether racial discrimination reflected in the redlining¹⁵¹ implemented through the credit reporting agency is the type of injurious intent required to maintain an action for a violation of Section 1 of the Sherman Act.¹⁵² The banks decidedly are not competitors of the tavern. The authors contemplate that the issue of racial discrimination will be discussed but within the standard antitrust analysis.¹⁵³

One of the more interesting aspects of Problem 6 is the existence of an agreement among banks to refuse to lend to black business owners in the redlined area. As the problem is written, the banks have formed an investigative agency to determine creditworthiness. When the black tavern owner applied for a loan, the agency determined that the loan was high risk because it was located in an area designated as high risk and recommended the denial of the loan. Its report was circulated to all member banks so that the business owner was rejected by all of the banks on that basis. The formation of the joint venture to conduct credit investigations was a lawful agreement. The problem raises the issue of whether the banks made independent decisions to reject the loan or conspired to boycott black owned businesses. That question opens the door to delve into conspiracy

¹⁴⁹ 472 U.S. 284, 298 (1985).

¹⁵⁰ See Jane W. Meisel, *Now or Never: Is There Antitrust Liability for Noncommercial Boycotts?*, 80 COLUM. L. REV. 1317 (1980).

¹⁵¹ See John Hugh Gilmore, *Insurance Redlining & The Fair Housing Act: The Lost Opportunity of Mackey v. Nationwide Ins. Companies*, 34 CATH. U. L. REV. 563, 563 n.1 (1985) (distinguishing between racial redlining in which lenders refuse to lend to borrowers based on the racial characteristics of the neighborhood in which they are located and economic redlining in which a lender refuses to lend to borrowers in areas that they deem to have high economic risk).

¹⁵² See *id.* at 567. Some scholars have acknowledged that *Klor's* demonstrates that non-economic goals may play a role in antitrust enforcement. See, e.g., STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 196 (Foundation Press 1992) (referring to Jeffersonian notions of equality of opportunity for small business owners).

¹⁵³ PITOFSKY, GOLDSCHMID & WOOD, TEACHER'S MANUAL FOR CASES AND MATERIALS ON TRADE REGULATION 48 (5th ed. 2003). In fact, the authors contemplate that a student may offer the Posnerian view that the antitrust laws should not address racial discrimination when other statutes have been enacted to expressly prohibit such acts. *Id.*

theory with the conscious parallelism doctrine.¹⁵⁴ The authors anticipate that the existence of an agreement among the banks in fact will be the first question to be addressed in the analysis of the question.¹⁵⁵

Cases involving free agency in professional sports could also be used because many involve African-American athletes.¹⁵⁶ TRADE REGULATION is interesting because it contains a separate note on group boycotts in professional sports but does not mention race.¹⁵⁷ The authors were perhaps comfortable using antitrust doctrine where its application to the subordination/dominance axis was readily apparent. While many of the group boycott cases in professional sports frequently have involved African-American plaintiffs,¹⁵⁸ labor law or baseball's exemption from the antitrust laws is usually the pivotal issue and the analysis of the merits of the antitrust claim is often unnecessary and given short shrift. For example, in *Flood v. Kuhn*,¹⁵⁹ Curt Flood objected to the reserve system because he likened it to slavery.¹⁶⁰ His 13th Amendment claim having been dismissed, he was left with challenging the reserve system as a group boycott under the antitrust laws; the courts never reached the merits because of baseball's exemption noted in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball*

¹⁵⁴ See Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 681-82 (1962). The issue of collective action arises frequently in determining the presence of racial discrimination. Under the doctrine of conscious parallelism, an agreement or conspiracy may be inferred under some circumstances in which competitors coincidentally engage in similar conduct.

¹⁵⁵ See TEACHER'S MANUAL, *supra* note 153, at 42.

¹⁵⁶ See, e.g., *Flood v. Kuhn*, 407 U.S. 258 (1972); see also *Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004); *Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995); *Powell v. Nat'l Football League*, 930 F.2d 1293 (8th Cir. 1989); *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976). It is easier to raise the racial subordination/dominance axis in Sports Law. For example, MATTHEW J. MITTEN ET. AL., *SPORTS LAW AND REGULATION CASES, MATERIALS AND PROBLEMS* (Aspen Publishers 2005) devotes a chapter to Race and Inequality. Two other leading sports law casebooks, PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS* (3rd ed. 2004) and RAYMOND L. YASSER ET AL., *SPORTS LAW CASES AND MATERIALS* (6th ed. 2007), devote chapters to gender inequality but not race.

¹⁵⁷ See PITOFSKY ET AL, *supra* note 146, at 346-48.

¹⁵⁸ See Alfred Dennis Mathewson, *Grooming Crossovers*, 4 J. GENDER RACE & JUST. 225, 239-47 (2001) (discussing various lawsuits involving African-American professional baseball, football, and basketball athletes).

¹⁵⁹ 407 U.S. 258 (1972).

¹⁶⁰ *Id.* at 289. Flood described the reserve system as making him "a piece of property to be bought and sold irrespective of my wishes". *Id.*

Clubs.¹⁶¹ Race may be examined in these cases without invoking the subordination/dominance axis, but I defer that discussion to my Sports Law class.

CONCLUSION

The essence of race in ordinary course means accepting the presence of race in the conventional analysis of legal principles in doctrinal subject areas in law school classrooms. Moreover, it means race is not limited to discussion of the subordination/dominance axis but should not be viewed as an alternative to critical race theory. I share with students what I see in the factual background of the settings in which the cases occur. Any faculty member, regardless of color or race, may follow a similar approach. A professor necessarily must handle the subject from a reference point with which the professor is familiar. Bringing race into the discussion in business law classes may provide students with tools to engage in higher-level intellectual discourse outside the classroom.

Professors who are not African American or members of another minority racial group may elevate race into the mainstream discussion of doctrinal subject matter.¹⁶² Any professor may adopt this approach provided he or she teaches from his or her own experience just, as Professor Hazard did and is sensitive to the potential for a difficult dialogue.

¹⁶¹ 259 U.S. 200 (1922).

¹⁶² In ordinary course, I would simply have referred to such faculty as White professors. See generally, Antoinette Sedillo Lopez, *Making and Breaking Habits: Teaching and Learning Cultural Context, Self-Awareness and Intercultural Communication Through Case Supervision in a Client Service Legal Clinic* (unpublished manuscript, on file with the author). The manuscript contains examples teaching cross-cultural literacy in a clinical program with a racially diverse faculty and student body.