

2015

# Of Word Grenades and Impermeable Walls: Imperial Scholarship Then and Now

Juan F. Perea

Follow this and additional works at: <http://scholarship.law.umn.edu/lawineq>

---

## Recommended Citation

Juan F. Perea, *Of Word Grenades and Impermeable Walls: Imperial Scholarship Then and Now*, 33 LAW & INEQ. 443 (2015).  
Available at: <http://scholarship.law.umn.edu/lawineq/vol33/iss2/6>

*Law & Inequality: A Journal of Theory and Practice* is published by the  
University of Minnesota Libraries Publishing.



## Of Word Grenades and Impermeable Walls: Imperial Scholarship Then and Now

Juan F. Perea†

### I. Finding Light

Richard Delgado has been a profound influence for many of us. Having taught law for some years now, I am proud to know Richard well as a friend, colleague, co-author and kindred spirit. But the first time I remember him inspiring me dates back to before I became a law professor. I would like to share that story here.

I recall as a law student attending a lecture on the First Amendment by a famous Harvard Law School professor. While he gave his lecture, I thought about the problem of hate speech and the injuries it causes. It seemed to me that the purpose of hate speech was and is to cause injury. If that is so, then I wondered why it could not be regulated in the same way we regulate other injurious acts, like throwing a stone that injures someone. I was puzzled about why we don't regulate hate speech, so after the lecture I approached the professor and asked him my question: "Why, if the intent underlying hate speech is merely to injure someone, can't it be regulated in the same way that we might regulate an incident of stone-throwing that causes injury?" The professor looked at me with something like contempt and answered, with consummate arrogance, "What is the political content in throwing a stone?" He then walked away abruptly, dismissively, leaving me slightly dazed and wondering why I had asked such a stupid question. It took me a long time to understand that it was not a stupid question.

Fast forward a few years and I am now an associate at Ropes & Gray in Boston. I decide to take a brief lunch break. I'd like to see if I can find something interesting in the firm's law library. I spot the bound volumes containing the *Harvard Civil Rights-Civil Liberties Law Review*, which I had never heard of until that

---

†. Professor of Law, Loyola University Chicago School of Law. I'd like to thank Bethany Hurd and Evan Gelles for excellent work in organizing this symposium and for excellent editorial assistance.

moment. I begin leafing through one of the volumes, and I find Richard's article *Words that Wound*.<sup>1</sup> I am astonished. Here, at last, is the answer to the question I had asked years before. Here is a fully-wrought, clear case for regulating hate speech, just as I thought should be possible. Here are words of hope and encouragement that help me understand that my question had never been stupid. I learned so much from that article. Lying beside the often mundane books in the library, there were other books, containing words of hope, liberation, and justice. There were voices like Richard's, engaging issues that I recognized, in some way, and cared about. It was possible to make a life writing about race and justice and to try to make the world a little bit better. The small flame within me that wanted that life now burned more brightly. For that inspiration, and others to come, I am grateful to Richard.

## II. On Authors, Ideology, and Epistemology

The content and sources of knowledge are contested terrain across all levels of education. Ideology and politics are major influences in decisions about what shall be taught and who shall teach it. Battles over the proper content of any curriculum raise interesting questions of epistemology.<sup>2</sup>

Recent news stories show the continuing, recurrent political battles over knowledge and legitimacy in public education. In Colorado, the Jefferson County School Board, overseeing a district which includes Denver, wants to restrict history education to subject matter that "promote[s] citizenship, patriotism, essentials and benefits of the free-market system, respect for authority and respect for individual rights."<sup>3</sup> Under these restrictions, students would only be taught lessons depicting the United States' heritage in a positive light.<sup>4</sup> Even the Republican National Committee weighed in on the Jefferson County controversy, calling the

---

1. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

2. Epistemology is the study of "the nature and grounds of knowledge especially with reference to its limits and validity." *Epistemology*, MERRIAM-WEBSTER ENGLISH DICTIONARY, <http://www.merriam-webster.com/dictionary/epistemology> (last visited Mar. 18, 2015).

3. Colleen Slevin & P. Solomon Banda, *Denver Area Students Walk out of School in Protest*, HUFFINGTON POST (Sept. 23, 2014, 10:02 PM), [http://www.huffingtonpost.com/2014/09/23/denver-students-walk-out\\_n\\_5871224.html](http://www.huffingtonpost.com/2014/09/23/denver-students-walk-out_n_5871224.html).

4. *Id.*

Advanced Placement United States History standards “radically revisionist.”<sup>5</sup>

The controversy in Colorado seems to be part of a nationwide trend. In 2010, for example, Arizona sought to eliminate Mexican American studies programs in public high schools by banning educational programs that are “designed primarily for pupils of a particular ethnic group,” that “advocate ethnic solidarity instead of the treatment of pupils as individuals,” that promote “overthrow of the U.S. government,” or that promote “resentment towards a race or class of people.”<sup>6</sup> Implementing this law, Tucson authorities went so far as to ban a list of disfavored books, including Richard Delgado and Jean Stefancic’s *Critical Race Theory* reader.<sup>7</sup> Having successfully eliminated traces of Mexican Americans from the curriculum, and lest there be any identifiable Mexican American presence on the rostrum, the Arizona Department of Education also proposed banning instructors whose English was “heavily accented or ungrammatical.”<sup>8</sup>

Other states would also prefer that their young students not learn about certain matters. In South Carolina, conservatives asked the College Board to exclude material with ideological bias.<sup>9</sup> As their primary example of ideological bias, they suggested excluding lessons about evolution.<sup>10</sup> Of course, the attempt to exclude evidence-based, scientifically well-accepted knowledge such as evolution is a stance entirely free of ideology. The disdain for science also exists in Texas, where some schools are attempting to adopt textbooks that distort climate science.<sup>11</sup>

5. Nicky Woolf, *US ‘Little Rebels’ Protest Against Changes to History Curriculum*, GUARDIAN (Sept. 26, 2014, 8:49 AM), <http://www.theguardian.com/world/2014/sep/26/sp-colorado-ap-history-curriculum-protest-patriotism-schools-students>.

6. ARIZ. REV. STAT. ANN. §15-112 (West 2015); see also H.B. 2281, 49th Leg., 2nd Reg. Sess. (Ariz. 2010).

7. Roque Planas, *7 Mexican American Studies Books Banned from Tucson, Arizona Classrooms (SLIDESHOW)*, HUFFINGTON POST (Oct. 24, 2012, 12:01 PM), [http://www.huffingtonpost.com/2012/10/05/books-banned-arizona\\_n\\_1941253.html](http://www.huffingtonpost.com/2012/10/05/books-banned-arizona_n_1941253.html); see also Richard Delgado, *Precious Knowledge: State Bans on Ethnic Studies, Book Traffickers, (Librotraficantes), and a New Type of Race Trial*, 91 N.C. L. REV. 1513 (2013).

8. Miriam Jordan, *Arizona Grades Teachers on Fluency*, WALL ST. J. (Apr. 30, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703572504575213883276427528>.

9. Judd Legum, *Oklahoma Lawmakers Vote Overwhelmingly to Ban Advanced Placement U.S. History*, THINK PROGRESS (Feb. 18, 2015, 9:02 AM), <http://thinkprogress.org/education/2015/02/17/3623683/oklahoma-lawmakers-vote-overwhelmingly-ban-advanced-placement-history-class/>.

10. *Id.*

11. Mariah Blake, *Texas’ New Public School Textbooks Promote Climate*

Controversies over what shall be taught and who shall teach it are not limited to high schools. Commanding far less media attention, but hitting closer to home, are serious questions about what shall be taught, and who shall write, about race and racial history in law schools. In 1984, Richard wrote an important, controversial article titled *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*.<sup>12</sup> In subsequent articles in the series, Richard updated and expanded on this first article.<sup>13</sup> In this Essay, I want to develop some themes from his *Imperial Scholar* articles and to show some of the continuing epistemic limitations of imperial scholarship. These articles should be read by anyone interested in knowledge production within the legal academy. Not only are they remarkably insightful, they are also models of excellent scholarly writing within our tradition. The articles are short, but not too short, direct, substantively important, and written in crisp, lively and vivid prose. We would all do well to follow his example.

In the initial *Imperial Scholar* article, Richard examined the citation practices of an elite group of civil rights scholars.<sup>14</sup> In studying those citation practices, Richard discovered a scholarly tradition consisting of “[W]hite scholars’ systematic occupation of, and exclusion of minority scholars from, the central areas of civil rights scholarship. The mainstream writers tend to acknowledge only each other’s work.”<sup>15</sup> Analogizing to the reasons underlying doctrines of standing to bring a case, Richard identified a series of problems stemming from the work of imperial scholars, White male writers writing about the rights of persons of color.<sup>16</sup> These problems include lack of real knowledge and experience regarding their subject and commitments that differ significantly from the interests of the people whose rights they are writing about.<sup>17</sup>

---

*Change Denial and Downplay Segregation*, MOTHER JONES (Sept. 17, 2014, 10:48 AM), <http://www.motherjones.com/politics/2014/09/texas-textbooks-promote-climate-change-denial-downplay-segregation>.

12. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) [hereinafter *Imperial Scholar*]. On the impact of Delgado’s *Imperial Scholar*, see Robert S. Chang, *Richard Delgado and the Politics of Citation*, 11 BERKELEY J. AFR.-AM. L. & POL’Y 28 (2009).

13. See Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992) [hereinafter *Imperial Scholar Revisited*].

14. *Imperial Scholar*, *supra* note 12 (commenting on the work of scholars including Paul Brest, Laurence Tribe, Owen Fiss, and Frank Michelman).

15. *Id.* at 566.

16. *Id.* at 567–73.

17. *Id.* at 567–68.

Finally, imperial scholars “were unaware of basic facts about the situation in which minority persons live or ways in which they see the world.”<sup>18</sup> Richard concluded that “this exclusion of minority scholars’ writings about key issues of race law [has] caused the literature dealing with race, racism, and American law to be blunted, skewed, and riddled with omissions.”<sup>19</sup> The article was characterized by Derrick Bell as “an intellectual hand grenade, tossed over the wall of the establishment as a form of academic protest.”<sup>20</sup>

Richard’s follow-up article, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*,<sup>21</sup> identified a series of coping strategies employed by former and new imperial scholars. His pithy names for various categories of imperial scholars describe their strategies well: “Abandonment of the Field;” “The Unconverted;” and “The Latter-Day Imperialists,” among others.<sup>22</sup> Richard found that “mainstream figures who control the terms of discourse marginalize outsider writing as long as possible.”<sup>23</sup> Richard’s seemingly wistful conclusion was that:

Almost a decade later many of the actors have changed, but the situation is not greatly different. With a few notable exceptions both the original group and the newcomers rely on a panoply of devices, ranging from the dismissive Afterthought to the wishful Translation, to muffle and tame the new voices.<sup>24</sup>

Thirty years after he wrote his first *Imperial Scholar* article, the situation is pretty much unchanged since Richard wrote the *Imperial Scholar Revisited*.<sup>25</sup> There are certainly more scholars of color in academia today, publishing and adding to our wealth of knowledge. Yet, in the main, writings on race remain marginalized. The knowledge we have produced has neither been integrated into the canon, nor has it had its proper influence in the realms of today’s imperial scholars.

18. *Id.*

19. *Imperial Scholar Revisited*, *supra* note 13, at 1349 n.5 (describing the conclusion he reached in the first *Imperial Scholar* article).

20. Jon Wiener, *Law Profs Fight the Power*, *NATION*, Sept. 1989, at 246 (quoting Derrick Bell).

21. *Imperial Scholar Revisited*, *supra* note 13.

22. *Id.* at 1353–62.

23. *Id.* at 1351.

24. *Id.* at 1372.

25. See Chang, *supra* note 12, at 33; see also Richard Delgado & Jean Stefancic, *Living History Interview*, 19 *TRANSNAT’L L. & CONTEMP. PROBS.* 221, 229–30 (2010) (“That same old boy citation network still operates . . . . These patterns have been slow to change.”).

Powerful racial critiques have recently been made in other disciplines. For example, Eduardo Bonilla-Silva and Tukufu Zuberi, in *White Logic, White Methods*,<sup>26</sup> make a powerful critique of the methodology of sociology, which they argue confirms White misbeliefs about race. The flawed methodology results from White control over knowledge production: “[t]he production of knowledge about race (and gender and class) is controlled by a small, mostly male, mostly White elite who perpetuate their power by designating, among other things, good and bad scholarship.”<sup>27</sup> Philosophy Professor Charles Mills has also written powerfully of the necessity for, and relative absence of, a racial critique of philosophy.<sup>28</sup> Political philosopher Charles Lebron has noted and addressed the disengagement of philosophy from the realities of racial injustice.<sup>29</sup>

It seems that many, perhaps most, other disciplines have their imperial scholars. Richard was well ahead of his time in making his critique of civil rights scholarship. Yet his critique remains timely and on point.

### III. Imperial Scholarship and the Failure to Recognize the Proslavery Constitution

#### A. *Feel-Good History and the Feel-Good Constitution*

The battles over AP history and other curricular matters that I began with are battles over ideological control over the content and dissemination of knowledge. Public officials in Colorado want to promote “citizenship, patriotism,” “respect for authority,” and to depict American heritage in a positive light, among other goals.<sup>30</sup> In Arizona, the legislature banned programs “designed primarily for pupils of a particular ethnic group,” or that promote “resentment toward a race or class of people,” among other concerns.<sup>31</sup> In both instances, the goal seems to be to present an idealized and sanitized version of American history in which the American nation arose out of the grand vision of the founding fathers with little or no violent conflict, little or no oppression of

---

26. See EDUARDO BONILLA-SILVA & TUKUFU ZUBERI, *WHITE LOGIC, WHITE METHODS* 52 (2008).

27. *Id.* at 52.

28. See Charles W. Mills, *White Ignorance*, in *RACE AND EPISTEMOLOGIES OF IGNORANCE* 11 (Shannon Sullivan & Nancy Tuana eds., 2007).

29. See CHRIS LEBRON, *THE COLOUR OF OUR SHAME* (2013).

30. Woolf, *supra* note 5.

31. H.B. 2281, 49th Leg., 2nd Reg. Sess. (Ariz. 2010).

Black and Brown people, and no thefts of land and resources from native peoples, Blacks, and Mexican Americans. This is a world view meant to comfort White Americans and to attempt to assert the basic soundness of the American nation and its origins. Ironically, such a curriculum violates Arizona's injunction banning programs "designed primarily for pupils of a particular ethnic group."<sup>32</sup> This is a program designed by Whites for the benefit and comfort of Whites.

The sanitized, feel-good version of American history is accepted by many as an ideologically neutral presentation of the facts. However, ideology drives the decisions about which stories to tell and which to ignore; which evidence to cite and which to withhold. There is no ideologically neutral position.<sup>33</sup> History books and curricula that present Whites as unfailingly positive and well-meaning, depicting "American heritage in a positive light," seek to cultivate that positive light.<sup>34</sup> To do so they must ignore mountains of contrary evidence. High school history texts have been soundly criticized for presenting such a distorted and unrealistic view of American history.<sup>35</sup> Historical materials featuring Blacks, Indians, and Latinos, though frequently characterized disparagingly as "revisionist" and "ethnic" or "racial," provide balance and perspective to the sanitized, allegedly patriotic curriculum.<sup>36</sup> There is nothing unpatriotic about presenting historical evidence of injustice. This evidence simply permits a different interpretation of American history and nationality based on more complete historical evidence.

With these points in mind, it is interesting to turn our attention to our own discipline. The same forceful critiques of high school history texts for leaving out conflict, violence, and racism, can be made of constitutional law casebooks. The authors of these casebooks are overwhelmingly White and male.<sup>37</sup> In constitutional law, imperial scholars, mostly White and male,

---

32. *Id.*

33. KEITH JENKINS, *RETHINKING HISTORY* 69–70 (1991).

34. Legum, *supra* note 9.

35. FRANCES FITZGERALD, *AMERICA REVISED* (1979); JAMES W. LOEWEN, *LIES MY TEACHER TOLD ME* (1995).

36. Woolf, *supra* note 5.

37. See Bryan K. Fair, *A Constitutional Law Casebook for the 21st Century: A Critical Essay on Cohen and Varat*, 21 SEATTLE U. L. REV. 859, 881–83 (1998) (noting a "longstanding criticism of casebook and law review authors is that too often they cite the work of a narrow group, namely [W]hite men citing other [W]hite men").



largely control the content of knowledge of the entire field.<sup>38</sup> And while different books are more-or-less mildly conservative or liberal in leaning, by and large the fundamental canon and doctrines of constitutional law remain what they have been for many years.

The insights of minority scholars writing on race have not made the difference that they should have in the ethereal worlds of imperial constitutional law scholarship. For example, the far-reaching implications of Derrick Bell's interest convergence theory could promote better understanding of the complex reasons why *Brown v. Board of Education* was decided as it was and when it was, and why the Civil Rights Act of 1964 was enacted.<sup>39</sup> Bell's interest convergence theory states essentially that civil rights gains for Blacks occur only when such gains are in the interests of majority Whites.<sup>40</sup> Bell postulated, and Mary Dudziak demonstrated, that the Cold War, in addition to other factors, exerted important influence on United States policymakers to enact internationally visible civil rights reforms.<sup>41</sup> These views provide an important corrective to the traditional liberal notion that, by the time of *Brown* and after, White institutions had finally decided to do the just thing of their own accord. Bell's and Dudziak's work encourages us to be less sanguine about the will of a majority of Americans for real racial equality. Even important achievements in the direction of equality can be understood as self-interested gestures by Whites to shape the appearance of a will for equality.

### B. *Recognizing the Proslavery Constitution*

As another example, I will discuss the reluctance of contemporary constitutional law scholars to name and discuss the proslavery Constitution. I call the document proslavery because the Constitution's text created incentives for slave ownership and importation, and protected the slave trade and the ability of slave masters to recapture escaped slaves.<sup>42</sup> In addition, James Madison

---

38. See *id.*; see also *Imperial Scholar*, *supra* note 12, at 563 (describing the tendency of White male legal scholars to cite other "inner-circle" White males).

39. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1980); Richard Delgado, *White Interests and Civil Rights Realism: Rodrigo's Bittersweet Epiphany*, 101 MICH. L. REV. 1201, 1208-09 (2003).

40. Bell, *supra* note 39, at 523.

41. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 14-15 (2000).

42. See *infra* pp. 450-54; see also Juan F. Perea, *Race and Constitutional Law*

and others argued that the Constitution's protections for slavery warranted its ratification by the slaveholding Southern states.<sup>43</sup> Proslavery is a fair name for a document that creates incentives and protections for increased slave ownership. Two years ago, I published a critique of four leading constitutional law casebooks for their failure to provide evidence of the proslavery Constitution.<sup>44</sup> In addition, these leading books fail entirely to consider the contemporary ramifications of a proslavery Constitution.

A majority of contemporary historians who study the issue conclude that the Constitution was proslavery.<sup>45</sup> This evidence-based conclusion by experts in the field should, standing alone, be sufficient reason for constitutional law casebooks to give central attention to this understanding and to explore its ramifications. Instead, we get little or nothing.

A simple review of a few constitutional provisions will demonstrate how the Constitution is proslavery. First, the Apportionment Clause states that representation in the House of Representatives will be based on the "whole number of free persons" plus "three fifths of all other persons."<sup>46</sup> "All other persons" is the first of many euphemisms for slaves.<sup>47</sup> This provision increases the number of representatives of slave states in the House by adding three fifths of the number of slaves to the census on which representation is based.<sup>48</sup> The provision provides additional political power to slave states to protect their slave property and other interests, therefore providing an incentive to increase the number of slaves held in slave states in order to boost representation.<sup>49</sup>

---

*Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1126–30 (2012) (reviewing GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS' UNION: SLAVERY, POLITICS AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC* (2010)).

43. James Madison, Speech at the Virginia Ratifying Convention (June 17, 1788), *reprinted in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 453, 453–54 (Jonathan Elliot ed., 2d ed. 1836); *see also* James Oakes, "The Compromising Expedient": *Justifying a Proslavery Constitution*, 17 CARDOZO L. REV. 2023, 2050 (1996).

44. Perea, *supra* note 42.

45. *See* PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS* (2d ed. 2001); GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS' UNION: SLAVERY, POLITICS AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC* 270 (2010); Oakes, *supra* note 43, at 2023.

46. U.S. CONST. art. I, § 2.

47. FINKELMAN, *supra* note 45, at 3.

48. *Id.* at 8, 16.

49. Oakes, *supra* note 43, at 2040–41.

Coupled with the Apportionment Clause, the slave-import limitation guaranteed that Congress could not pass legislation restricting the slave trade until 1808.<sup>50</sup> The Constitution states that “[t]he migration or importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year [1808].”<sup>51</sup> “Such persons” is another euphemism for slaves.<sup>52</sup> So the Apportionment Clause provided more political power for the slave states based on the size of the slave population, and the slave-import limitation guaranteed that the slave states would be able to import as many slaves as they wanted without federal limitation.

As an added measure of protection for slave importation, Article V adds that “no Amendment which may be made prior to the Year [1808] shall in any Manner affect the first . . . Clause[] in the Ninth Section of the first Article.”<sup>53</sup> Article I, Section 9, Clause 1 of the Constitution is the slave import-limitation.<sup>54</sup> This is one of very few limitations on the amendment power. So not only is Congress prohibited from ending the slave trade until 1808, but the nation is forbidden to amend that provision of the Constitution that protects the slave trade. These are important protections for the slave trade from federal interference.

Finally, the Constitution contains the Fugitive Slave Clause, which provides that “No person held to Service or Labour in one State . . . escaping into another, shall . . . be discharged from such Service or Labour, but shall be delivered up on claim of the party to whom such service or labour may be due.”<sup>55</sup> A “person held to Service or Labour in one State” is yet another euphemism for slaves, and possibly indentured servants.<sup>56</sup> This provision created a new, national right of recapture for slave owners, an additional protection for their ownership of slave property. The provision figured positively in ratification debates over the Constitution in the slave states. There are more protections for slavery in the Constitution, but these few suffice to make the point.<sup>57</sup>

50. U.S. CONST. art. I, § 9, cl. 1.

51. *Id.*

52. FINKELMAN, *supra* note 45, at 3.

53. U.S. CONST. art. V.

54. U.S. CONST. art. I, § 9, cl. 1.

55. U.S. CONST. art. IV, § 2, cl. 3.

56. The euphemisms were, apparently, an attempt to avoid losing support for the constitution in the anti-slavery North. FINKELMAN, *supra* note 45, at 3. However, discerning readers of the document figured it out.

57. *See id.* at 3–7 (discussing other constitutional protections of slavery).

James Madison's own words support the proslavery interpretation of the Constitution. During the Constitutional Convention, Madison recognized that the most significant difference to be negotiated between the states was over the status of slavery:

But [Madison] contended that the States were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from the effects of their having or not having slaves. These two causes concurred in forming the great division of interests in the U. States. It did not lie between the large & small States: It lay between the Northern & Southern, and if any defensive power were necessary, it ought to be mutually given to these two interests. He was so strongly impressed with this important truth that he had been casting about in his mind for some expedient that would answer the purpose.<sup>58</sup>

If James Madison recognized that the status of slavery was the most important division of interests in the new nation, one would expect that sense of importance to have made it into constitutional law textbooks.

Later, Madison defended the inclusion of property in slaves as a basis for apportionment in Federalist No. 54:

The true state of the case is, that [slaves] partake of both these qualities; being considered by our laws, in some respects, as persons, and in other respects, as property . . . . The Federal Constitution therefore, decides with great propriety on the case of our slaves, when it views them in the mixed character of persons and of property. This is in fact their true character. It is the character bestowed on them by the laws under which they live; and it will not be denied that these are the proper criterion . . . . Let the compromising expedient of the Constitution be mutually adopted, which regards them as inhabitants, but as debased by servitude below the equal level of free inhabitants, which regards the *slave* as divested of two fifth of the *man*.<sup>59</sup>

During debates on ratification of the Constitution in Virginia, Madison defended two of the Constitution's protections for slavery, the slave-import limitation and the fugitive slave clause:

I should conceive this clause [the slave import limitation] to be

---

58. NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 224–25 (Adrienne Koch, ed. 1966) [hereinafter NOTES OF DEBATES]; see 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 486 (Max Farrand ed., rev. ed. 1966); see also FINKELMAN, *supra* note 45, at 14 (discussing same quotation).

59. THE FEDERALIST NO. 54 JAMES MADISON, *reprinted in* THE AMERICAN CONSTITUTION 240–41 (J.R. Pole ed., 1987) (emphasis in original).

impolitic, if it were one of those things which could be excluded without encountering greater evils. The Southern States would not have entered into the Union of America without the temporary permission of that trade; and if they were excluded from the Union, the consequences might be dreadful to them and to us. We are not in a worse situation than before . . . . From the mode of representation and taxation, Congress cannot lay such a tax on slaves as will amount to manumission. Another clause secures us that property which we now possess. At present, if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws; for the laws of the states are uncharitable to one another in this respect. But in this Constitution, 'no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor shall be due.' This clause was expressly inserted, to enable owners of slaves to reclaim them.

This is a better security than any that now exists. No power is given to the general government to interpose with respect to the property in slaves now held by the states. . . . Great as the evil is, a dismemberment of the Union would be worse. If those states should disunite from the other states for not indulging them in the temporary continuance of this traffic, they might solicit and obtain aid from foreign powers.<sup>60</sup>

Both the text of the Constitution and Madison's defense of its protections for slavery are strong evidence supporting the proslavery interpretation of the Constitution. This evidence, taken together with the conclusion of a majority of historians that the Constitution was proslavery, fairly establishes its character as proslavery. These materials also establish the centrality of slavery and slavery-protection at the Constitutional Convention. Given all of this, why is this evidence neglected in constitutional law casebooks, and why do constitutional law professors not teach routinely that the constitution was proslavery?<sup>61</sup>

---

60. James Madison, Speech at the Virginia Ratifying Convention (June 17, 1788), reprinted in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 453, 453-54 (Jonathan Elliot ed., 2d ed. 1836).

61. Just for the record, in my constitutional law classes I teach exactly this material. When we begin to cover Race and the Constitution, I assign the students my article on Race and Constitutional Law casebooks, so they can examine and discuss that evidence. Derrick Bell engaged with the proslavery constitution and its ramifications at the outset of his constitutional law course. When he taught his course as a visitor at Stanford, he was subject to student complaints and discontent which resulted in a series of lectures apparently designed to serve as corrective to

#### IV. Imperial Scholarship and Constitutional Law

Delgado's critique of imperial scholars is grounded in epistemological limitations that they bring to their writing. As Richard wrote, the "exclusion of minority scholars' writings about key issues of race law [has] caused the literature dealing with race, racism, and American law to be blunted, skewed, and riddled with omissions."<sup>62</sup> While one cannot overgeneralize with respect to race, since some White scholars recognize and engage meaningfully with the proslavery Constitution,<sup>63</sup> it is striking that the work of imperial scholars in constitutional law essentially ignores evidence of the proslavery Constitution.<sup>64</sup> While this may principally be true with respect to constitutional law casebooks, it appears that part of the unstated ideology of imperial scholars is to ignore the Constitution's endorsement of slavery and the implications of that endorsement.<sup>65</sup> They seem disinclined to present the Constitution as a racist document, which it surely was.<sup>66</sup> Why, if the evidence supports the conclusion that the Constitution supported slavery and was profoundly racist, do we not discuss or teach the Constitution in this way?

It seems to me that ignoring the evidence of the proslavery Constitution marginalizes the importance of race and racism before and at the founding of the nation. The fact of slavery is impossible to ignore entirely. But by minimizing the role of slavery in the Constitution's drafting,<sup>67</sup> one can go a long way towards making slavery and White American racism into a side issue, rather than an issue of central importance.<sup>68</sup> And making racism of peripheral, rather than central, concern in the study of

---

Bell's teaching. See Richard Delgado, *An Unasked Question* (Oct. 23, 2011), <http://professorderrickbell.com/tributes/richard-delgado/>. The resistance of White students and colleagues can be a significant obstacle faced by anyone who teaches this material. It seems entirely unacceptable, however, to pander to ignorance and resistance rather than to help students face unmistakable historical evidence and to consider its contemporary ramifications.

62. *Imperial Scholar Revisited*, *supra* note 13, at 1349.

63. See FINKELMAN, *supra* note 45; MARK GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

64. See, e.g., *Imperial Scholar*, *supra* note 12, at 562 n.3 (listing prominent legal scholars including those whose constitutional scholarship ignores the document's racist deficiencies).

65. See *id.*

66. E.g., Sidney Willhelm, *The Supreme Court: A Citadel for White Supremacy*, 79 MICH. L. REV. 847, 852 (1981) ("[T]he Constitution itself is a racist document.").

67. See, e.g., FINKELMAN, *supra* note 45, at ix ("[S]lavery was a central issue of the American Founding.").

68. See LOEWEN, *supra* note 35, at 261–95 (1995) (discussing how ideology informs the creation of particular accounts of history).

constitutional law leads to serious underestimation of how racist the nation was and perhaps continues to be.<sup>69</sup> This underestimation of White racism as a founding principle of nationhood then contributes to exaggeration of the Constitution's virtues and to blindness regarding the continuing legacies of foundational White racism.<sup>70</sup>

Historians recognize that the social system represented by slavery became a deeply embedded structural component of American culture.<sup>71</sup> As stated by historian George William Van Cleve:

American slavery was not just a brutal, oppressive labor system. As historians have shown, it was a multidimensional institution of social control. In the mainland colonies, it served as a means of enforcing racial separation and subordination, of limiting the cost of poor relief for the unemployed and disabled, and of controlling crime. These social-control functions of slavery embedded it deeply in American culture.<sup>72</sup>

Similarly, historian David Waldstreicher writes, "Slavery was also a form of government over people . . . . Like the Constitution, slavery was inherently a matter of fundamental law. It defined the places of people in their society."<sup>73</sup>

When the Constitution overtly embraced slavery protection, the social system of White supremacy and Black subordination was reified in the country's founding document.<sup>74</sup> Although the Reconstruction Amendments formally ended slavery and some forms of race discrimination, the basic structures of White domination have far outlived Reconstruction.<sup>75</sup> In a nation founded on White racism, can it really be a surprise that our system of criminal law and imprisonment constitutes a new Jim Crow, shackling disproportionate numbers of Black and Latino men and women and effectively removing them from full participation in society?<sup>76</sup> Law, in mutating forms, becomes a

69. See Willhelm, *supra* note 66, at 847 (discussing the Supreme Court's history of racist jurisprudence over a series of four book reviews).

70. See FINKELMAN, *supra* note 45, at x (discussing the need to confront the legacy of slavery).

71. VAN CLEVE, *supra* note 45, at 24.

72. *Id.*

73. David Waldstreicher, *The Mansfieldian Moment: Slavery, the Constitution, and American Political Traditions*, 43 RUTGERS L.J. 471, 477 (2013).

74. See, e.g., FINKELMAN, *supra* note 45, at 1-33 (discussing the influence of slavery on the Constitutional Convention).

75. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* (2011) (discussing the racist dynamics of contemporary incarceration).

76. See *id.*

vehicle for continuing race subordination of Blacks and Latinos by Whites.<sup>77</sup> These propositions would be easier to understand and accept if we learned, early on, that the Constitution reinforced and protected just such a system of racial subordination by law.<sup>78</sup>

## V. Conclusion

Thirty years ago, Richard Delgado recognized the omissions and distortions of knowledge produced by imperial scholars who marginalize the writing and insights of scholars of color.<sup>79</sup> He wrote with great courage, identifying the many problems posed by civil rights scholarship written by White imperial scholars. Thirty years later, we still witness much the same phenomenon. His thoughts on how to respond to imperial scholarship still stand.

What should be done? As a beginning, minority students and teachers should raise insistently and often the unsatisfactory quality of the scholarship being produced by the inner circle—its biases, omissions, and errors. Its presuppositions and world-views should be made explicit and challenged. That feedback will increase the likelihood that when a well-wishing White scholar writes about minority problems, he or she will give minority viewpoints and literature the full consideration due. That consideration may help the author avoid the types of substantive error catalogued earlier.<sup>80</sup> How many more years, how many more lifetimes will it take before the knowledge we develop helps inform serious consideration of how the Constitution, its politics and its law continue to shape the racism that still pervades our society?

---

77. *See id.*

78. *See* Willhelm, *supra* note 66, at 852.

79. *See Imperial Scholar*, *supra* note 12.

80. *Id.* at 577.



