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RACE AND THE DEVELOPMENT OF LAW IN AMERICA:
INTRODUCTION TO THE SYMPOSIUM

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The theme of this Symposium is the influence of race on the development of American law. In American law we directly deal with issues of race in terms of constitutional and statutory prohibitions against racial discrimination. But our racial history and its consequences have influenced the development of law in America in many other ways, and it is that influence that is the theme of this Symposium.

In the constitutional and legal history of the United States, race cannot be separated from slavery. Our Nation was founded on the institution of racial slavery, and racial slavery was specifically protected in the Constitution and American law.¹ In order to somehow try to

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1. Six of the thirteen original states—Maryland, Delaware, Virginia, North Carolina, South Carolina, and Georgia—were slave states. At the time of the Constitutional Convention, the existence of slavery in these states was a political "given" and recognition of their interests as "slave states" was a part of the calculus of interests that shaped the Constitution. As a result, at least three provisions of the Constitution specifically recognized and protected slavery: Article I, Section 2, which provided that slaves constituted three-fifths of a person for purposes of representation in the United States House of Representatives; Article I, Section 9, which prohibited Congress from abolishing the slave trade before 1808; and Article 4, Section 2, which required the return of fugitive slaves to their owners. As Supreme Court Justice Thurgood Marshall said at the time of the Bicentennial of the Constitution:

No doubt it will be said, when the unpleasant truth of the history of slavery in America is mentioned during this bicentennial year, that the Constitution was a product of its times, and embodied a compromise which, under other circumstances, would not have been made. But the effects of the framers' compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes.

Justice Thurgood Marshall, Commentary: Reflections on the Bicentennial of the United States

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justified this inhumane institution, it was necessary to brand the African slaves as morally inferior human beings who legitimately could be enslaved by the morally superior whites. It was in this way that the concept of white supremacy and black inferiority found its way into American law. Horrific as Taney's language in Dred Scott may sound to us today, it was an accurate description of American law in 1858: “[Negroes] had for more than a century before [the Constitution] been regarded as beings of an inferior order . . . and so far inferior that they had no rights which the white man was bound to respect.”

The concept of white supremacy and black inferiority continued after the abolition of slavery and the adoption of the Fourteenth Amendment. It was reflected in Plessy v. Ferguson, which legitimated state-imposed racial segregation and bans on interracial marriage in the southern states. The state laws prohibiting interracial marriage provide

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Constitution, Address Before the Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987), in 101 HARV. L. REV. 1, 3-4 (1987). Legal doctrine with respect to slave ownership existed in all of the “slave states,” and in cases presenting issues relating to slavery, the legitimacy of slavery was assumed. See, e.g., The Antelope, 23 U.S. (10 Wheat.) 66 (1825) (noting that while Americans could be prosecuted for violating federal laws against slave trading, foreigners had the right to engage in the slave trade if the laws of their home nation permitted them to do so); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (holding that Congress had the power to enact the federal Fugitive Slave Act of 1793, which established procedures for the capture and return of fugitive slaves, and this law preempted and invalidated a Pennsylvania law creating impediments to the recapture of fugitive slaves).

3. 163 U.S. 537 (1896).
4. Id. These laws, referred to as “Jim Crow” laws, were not widespread prior to Plessy, but were adopted throughout the southern and border states following the Supreme Court’s holding in Plessy that such laws were constitutional. See the discussions of this point in C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 98-100 (1955); Jennifer Roback, The Political Economy of Segregation: The Case of Segregated Streetcars, 46 J. ECON. HIST. 893 (1986). For further discussion of the historical context of Plessy, see Michael J. Klarman, The Plessy Era, 1998 SUP. CT. REV. 303; Paul Oberst, The Strange Career of Plessy v. Ferguson, 15 ARIZ. L. REV. 389 (1973). Professor Safranek notes that following the Supreme Court’s decision in Berea College v. Kentucky, 211 U.S. 45 (1908), holding that the state could require segregation at completely private institutions, “states and cities passed a number of laws that prohibited the association of Blacks and Whites in a wide variety of public facilities, such as restaurants, hotels, restrooms, and barber shops.” Stephen J. Safranek, Race and the Law, or How the Courts and the Law Have Been Warped by Racial Injustice, 48 WAYNE L. REV. 1025, 1047 (2002).
an early example of how racial considerations can influence the development of other areas of American law. It has long been settled in the United States that a state generally will recognize a marriage of its domiciliaries entered into in another state if the marriage is valid under the law of the state where it is performed even though the marriage would not be valid under its own laws. The reasons for the rule are obvious. The question of the validity of the marriage may not arise until many years later, and the parties, considering themselves to be married, will have acted as married persons, including producing children, so that undesirable social consequences could result if the marriage were declared invalid. The exception to the rule of recognition is where a marriage would be “contrary to the overriding public policy of the domicile” or “in violation of its positive law.”

The classic examples of marriages “contrary to the overriding public policy of the domicile” were polygamous marriages, certain incestuous marriages between close relatives and “marriage between persons of different races where such marriages are at the domicile regarded as odious.” It was not until 1967, it may be noted, that the Supreme Court held that laws prohibiting interracial marriages were unconstitutional.

Professor Safranek points out that in the early twentieth century, the Supreme Court came down with some decisions holding that particular forms of state-imposed discrimination against African Americans were unconstitutional. By the 1930s, apart from constitutional challenges to


6. This formulation is found in the American Law Institute’s RESTATEMENT OF CONFLICT OF LAWS § 132 (1934). Professor Albert A. Ehrenzweig, writing in 1962, noted that, “[T]he American Law Institute has seen fit to endow those states which continue to deny legal effect to ‘miscegenation’ marriages with a ‘paramount interest’ in such marriages of their domiciliaries that is said to entitle the laws of those states to enforcement everywhere.” A. A. EHRENZWEIG, CONFLICT OF LAWS 386-87 (1962). He also pointed out that as of 1958, some twenty-four states had “preserved their miscegenation statutes,” id. at 387 n.61, and correctly predicted that, “sooner or later the Supreme Court of the United States will find occasion to remove the problem by outlawing miscegenation statutes for both domestic and conflicts purposes.” Id. at 387.

7. Loving v. Virginia, 388 U.S. 1, 2 (1967). As of that late date, some sixteen states still prohibited interracial marriage. Id. at 6 & n.5. The Lovings had been married in the District of Columbia, where interracial marriages were permitted, and moved to Virginia. They were then prosecuted for a violation of the Virginia law prohibiting interracial marriage. Id. at 2-3.

8. See the discussion and review of cases in Safranek, supra note 4, at 1052-54.
racial discrimination itself, considerations of race and the racial context in which important constitutional questions were presented appeared to influence the development of American constitutional law in what we would now consider a more positive way.

For example, two landmark 1930s cases protecting the rights of persons accused of crime arose as they did only because of officially sanctioned discrimination against African Americans in the southern states. In *Powell v. Alabama*, decided in 1932, the Supreme Court held that the Sixth Amendment's guarantee of the right to counsel in criminal cases was binding on the states through the Fourteenth Amendment; that at least in capital cases, counsel had to be appointed for indigent accused; and that the assistance of counsel had to be effective. That case involved the "Scottsboro trial," where young and illiterate African Americans were tried, convicted, and sentenced to death without being represented by counsel after being accused of raping white women traveling on a freight train with them in Alabama.

In *Brown v. Mississippi*, decided in 1936, the Court held that the admission into evidence of a coerced confession violated due process. Three defendants, described by the Court as "all ignorant negroes," were taken into custody and whipped repeatedly by white men, including law enforcement officials, until they "confessed in every manner of detail as demanded by those present." One of them had been hanged from a tree twice, then taken down and whipped until he confessed. The jailers fully acknowledged the whippings, and in response to how severely he whipped one of the victims, one jailer said: "Not too much for a negro; not as much as I would have done if it were left to me." As the Court stated: "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the

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10. *Id.* at 67-68.
11. *Id.* at 71.
12. *Id.* at 49-52.
14. *Id.* at 286.
15. *Id.* at 281.
16. *Id.* at 282.
17. *Id.* at 281.
18. *Id.* at 284.
confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.\footnote{19}

A very important First Amendment case from this period, \textit{Herndon v. Lowery},\footnote{20} decided in 1937, also arose in a racial context. Herndon was an African American organizer for the Communist Party who went to Georgia to recruit members for the Party among African Americans living in Georgia's Black Belt.\footnote{21} He advocated among other things, "equal rights for the Negroes and self-determination for the Black Belt."\footnote{22} He was convicted of insurrection, a capital offense under Georgia law, and sentenced to a long prison term.\footnote{23} In very strong language, the Court held that the First Amendment fully protected the right to advocate fundamental social change, including the idea of violent revolution.\footnote{24} The Court also held that the First Amendment required that a law regulating expression must be narrowly drawn so that it would not be "a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others."\footnote{25}

Another example of race influencing the development of American law is the Supreme Court's "state action" decisions in cases from 1944 through 1964, involving claims that racial discrimination practiced against African Americans, ostensibly by private entities, amounted to unconstitutional state action. The racial discrimination involved in those cases would today be prohibited by the Voting Rights Act of 1965,\footnote{26} the Civil Rights Act of 1964,\footnote{27} and the Fair Housing Act of 1968.\footnote{28} In these cases the Court found unconstitutional state action in the exclusion of African Americans from a political party's primary and pre-primary,\footnote{29} in their exclusion from a park that had been transferred from public to

\footnotesize{19. \textit{Id.} at 286.}
\footnotesize{20. 301 U.S. 242 (1937).}
\footnotesize{21. \textit{Id.} at 247-53.}
\footnotesize{22. \textit{Id.} at 250.}
\footnotesize{23. \textit{Id.} at 243-44.}
\footnotesize{24. \textit{Id.} at 259-61.}
\footnotesize{25. \textit{Id.} at 263-64.}
\footnotesize{28. 42 U.S.C. §§ 3601-3631 (2000).}
private ownership, in their exclusion from a privately-owned restaurant located in a government-owned facility, and in their exclusion from a privately-owned lunch counter when there was a local ordinance requiring racial segregation in restaurants. The Court also held in *Shelley v. Kramer*, that it was unconstitutional for the state to enforce a racially restrictive covenant in a suit by a private person. After the passage of modern civil rights laws, fewer state action cases have involved issues of racial discrimination. In those cases that did, however, the Court was more likely to find unconstitutional state action, while in the cases that did not, the claim of unconstitutional

32. Peterson v. Greenville, 373 U.S. 244, 248 (1963). In *Lombard v. Louisiana*, 373 U.S. 267 (1963), there was no ordinance, but the Court found that statements by city officials that “sit-ins” would not be permitted had the same coercive effect as an ordinance prohibiting them. *Id.* at 273-74.
33. 334 U.S. 1 (1948).
34. *Id.* at 23. It is interesting to note that three Justices did not participate in the decision. While, as usual, no reason was given for their recusal, it may be speculated that they recused themselves because they lived in homes that were covered by racially restrictive covenants. And it was not until 1950, after *Shelley* had been decided, that the Federal Housing Authority abandoned its official policy of issuing mortgages for homes that were subject to racially restrictive covenants. See the discussion in Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?,* 40 B.C. L. Rev. 429, 441 (1998).
36. See Georgia v. McCollum, 505 U.S. 42 (1992) (holding that the use of race-based peremptory challenges by a defendant in a criminal trial is unconstitutional); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (holding that use by a private litigant in a civil trial of peremptory challenge to exclude jurors on the basis of race is unconstitutional state action); Gilmore v. Montgomery, 417 U.S. 556 (1974) (holding that the city could not permit reserved use of public parks by private schools practicing racial segregation); Norwood v. Harrison, 413 U.S. 455 (1973) (holding that a state program that provides textbooks to all students in public and private schools cannot include private schools practicing racial segregation); Reitman v. Mulkey, 387 U.S. 369 (1967) (holding that initiative amendment to state constitution establishing absolute right of homeowner to refuse to sell home, which would have the effect of invalidating state civil rights laws prohibiting discrimination in housing, is unconstitutional state action). In *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), the Court found no unconstitutional state action where the holder of a state private club
state action usually failed.\textsuperscript{37} I realize that in theory every state action case presents a different issue, so it is possible, as I have done, to reconcile the Court's state action decisions in consistent doctrinal terms.\textsuperscript{38} Nonetheless, as regards race and the development of law in America, I find it noteworthy that the Court has been more likely to find unconstitutional state action in the cases where a claim of racial discrimination was involved than in the cases where it was not. Now that cases involving such claims are less likely to arise, the Court has been correspondingly less likely to find unconstitutional state action.

With this introduction, we now turn to our distinguished panel. Professor Gerald Torres of the University of Texas and Professor Steven Safranek of Ave Maria Law School will make presentations, and Professor Zanita Fenton of Wayne State Law School will comment on the presentations. We will then open the floor for your questions.

\textsuperscript{37} The thrust of the Court's current state action doctrine is that in order for the action of a private entity to be state action for constitutional purposes, there must be governmental involvement in the particular action alleged to be unconstitutional. For cases finding no governmental involvement in the challenged action despite heavy regulation of the private entity, see \textit{San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.}, 483 U.S. 522 (1987) (holding that a private organization supporting United States participation in Olympic activity to which Congress granted the right to prohibit certain uses of the word "Olympic" is not a state actor); \textit{Blum v. Yartsky}, 457 U.S. 991 (1982) (holding that a nursing home receiving state subsidy and state payments for more than 90\% of the patients is not a state actor); \textit{Rendell-Baker v. Kohn}, 457 U.S. 830 (1982) (holding that a private school receiving most of its operating funds from the state to provide education for problem students that have been referred to it by public high schools is not a state actor); \textit{Flagg Bros. Inc. v. Brooks}, 436 U.S. 149 (1978) (holding that warehouseman's sale of goods entrusted to it for storage goods as authorized by state law, but without assistance of public officials is not a state actor); \textit{Jackson v. Metropolitan Edison Co.}, 419 U.S. 345 (1974) (declaring that public utility holding governmental monopoly is not a state actor); \textit{Moose Lodge No. 107}, 407 U.S. 163.