

## Introduction

“Is it possible to be both a judge and a feminist?” So opens *Feminist Judgments*, a collection of key decisions in English law rewritten by feminist legal scholars.<sup>1</sup> It is a provocative question, and one that prompted us, a group of Critical Race Theorists, to open this book, *Critical Race Judgments*, with a similar question: “Is it possible to be both a judge and a Critical Race Theorist?” On one view, the answer is a resounding “no.” To put the point the way two critics of the genre once did, Critical Race Theory, which simply aims to expose and eliminate ongoing forms of racial inequality, is “beyond all reason.”<sup>2</sup>

That perception of Critical Race Theory – that it is “beyond all reason” – is now part of a broader ideological project to undermine and discredit the theory. Indeed, it’s no exaggeration to say that, as this book goes to press, conservatives are waging a full-scale attack on Critical Race Theory, arguing that the theory is divisive and un-American.<sup>3</sup> Against the backdrop of that attack, and the distortions and misrepresentations that underwrite it,<sup>4</sup> at least some people may wonder whether Critical Race Theorists have anything meaningful to say about law.

On another view, and the one that informs this project, Critical Race Theory has profoundly important things to say about law. Indeed, as this book will make clear, Critical Race Theory has the potential to help the United States realize the principles of democracy to which it aspires. After all, the very project of Critical Race Theory, or CRT, is to articulate a vision of law that lives up to our democractic and

<sup>1</sup> FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE v (Rosemary Hunter, Clare McGlynn, & Erika Rackley eds., 2010).

<sup>2</sup> DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997).

<sup>3</sup> See, e.g., Aziz Huq, *The Conservative Case Against Banning Critical Race Theory*, TIMES, July 13, 2021, <https://time.com/6079716/conservative-case-against-banning-critical-race-theory/>; Adam Harris, *The GOP’s ‘Critical Race Theory’ Obsession*, THE ATLANTIC, May 7, 2021, <https://www.theatlantic.com/politics/archive/2021/05/gops-critical-race-theory-fixation-explained/618828/>.

<sup>4</sup> Kimberlé Crenshaw, *The Panic Over Critical Race Theory is an Attempt to Whitewash U.S. History*, THE WASHINGTON POST, July 2, 2021; Cheryl Harris, *What is Critical Race Theory and Why is Trump Afraid of it*, THE NATION, September 17, 2020.

constitutional commitments to liberty, justice, and equality for all, and to educate people on the ways in which law can be (and has been) deployed to undermine or limit our collective capacity to realize those commitments.<sup>5</sup> From that vantage point, the reason some people might find the notion of a judge who is also a Critical Race Theorist unfathomable is not because Critical Race Theorists have nothing to say about legal doctrine. Instead, it is because they oppose the voice of racial justice with which Critical Race Theory speaks.

For more than three decades, Critical Race Theorists have had to contend with a constitutional framework that makes *any* reference to race doctrinally suspect. As the law currently stands, *any* governmental reliance on race, even for benign or remedial purposes, is not merely problematic, but also presumptively unconstitutional and therefore warrants the application of the highest level of judicial review – strict scrutiny.<sup>6</sup> Under this constitutional arrangement, efforts on the part of public schools and colleges and universities to integrate or diversify their student bodies would be subject to the same judicial skepticism as efforts on the part of those institutions to segregate their students. From the Court’s perspective, because both integration initiatives and segregation initiatives necessarily rely on race, both should be treated as suspect and therefore be subject to what the Court repeatedly refers to as the most “exacting” and “rigorous” form of judicial review.<sup>7</sup> That kind of formalism (that all uses of race should receive the same constitutional treatment) continues to shape constitutional law in ways that essentially ensure that Black lives, and the lives of other racially marginalized groups, will not matter.

Importantly, to critique the Court’s formalism in the foregoing regard is not necessarily to take sides in, for example, debates over affirmative action. Even if one thinks that affirmative action is bad social policy, one might still reasonably ask: Is it fair to say that taking race into account in the affirmative action context is like taking race into account in the Jim Crow context? Supreme Court doctrine reifies that fiction by applying the same constitutional standard to both forms of race consciousness. In case after case, the Supreme Court has said that because it cannot tell the difference between benign and invidious uses of race, all uses of race must be strictly scrutinized.<sup>8</sup> This race-per-se-is-bad approach to constitutional doctrine has made it virtually impossible to mobilize law to address existing forms of racial inequality.

That the application of strict scrutiny to any use of race would limit the remedial possibilities of law is not at all surprising. Think about the matter this way: How can

<sup>5</sup> CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw et al. eds., 1996).

<sup>6</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>7</sup> See *Regents of U.C. v. Bakke*, 438 U.S. 265, 291 (1978) (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (Kennedy, J., concurring in part and concurring in judgment) (expressing that “any racial preference must face the most rigorous scrutiny by the courts”).

<sup>8</sup> One of the classic articulations of this view is Justice Powell’s concurrence in *Bakke*. See *Bakke*, 438 U.S.

one meaningfully address racial inequality without (a) explicitly invoking race and (b) directly targeting racial inequality? Imagine trying to diagnose and medically treat cancer by taking a “cancer-blind” approach. How would that even work? We think it highly unlikely that anyone would support a rule that prohibited doctors or researchers from either talking about cancer or directly targeting the disease for eradication.

Consider now the environment. Imagine trying to address environmental degradation under circumstances in which you were forced to be “environmentally blind.” Assume that this “environmental blindness” discouraged, for example, explicit references to and direct targeting of air pollution on the view that such activity would constitute “environmentally-motivated” and “environmentally consciousness” conduct. If your environmental policy interventions were constrained in the preceding ways, you would be significantly limited in what you could do to advance environmental justice.

Finally, imagine trying to end animal cruelty without being explicitly “animal-conscious” in the sense of expressly invoking and paying attention to all the ways in which animals are vulnerable to abuse and violence. Again, combating animal cruelty via this “animal blind” frame wouldn’t make any sense. More to the point, such an approach would tie your remedial hands in ways that would circumscribe the reach of your animal justice advocacy.

Yet, in the context of race, the Supreme Court has insisted on colorblindness – and as a matter of law! Motivating that insistence is the view that race should be, and in fact is, irrelevant.<sup>9</sup> But the hard truth of the matter is that race remains a salient feature in U.S. society, a feature that neither the Supreme Court nor any other body can simply wish away. This moment of “racial reckoning” in which we find ourselves ought to make that abundantly clear. Race still matters. Race matters with respect to who is incarcerated or not, who is subject to police violence or not, who has access to healthcare and education or not, who lives in environmentally degraded and impoverished communities or not, who occupies positions of power and privilege or not, and who is subject to debilitating stereotypes that inform decision making on the ground or not. Race pervades every dimension of social life – from the conditions under which we are born to the circumstances under which we die. All of which raises the question: Why in the name of “equal protection” would the Supreme Court adopt an approach to race that limits our ability to ensure that everyone, regardless of race, is equally protected? Asked another way, why would the Court uncritically embrace colorblindness?

The use of the term “uncritically” in the preceding sentence is intentional. For it is not the case that proponents of CRT are opposed to colorblindness all the way down, so to speak. As one of us has argued elsewhere, “the CRT critique of colorblindness is not a critique of colorblindness per se. It is a critique of the

<sup>9</sup> *Id.*

radicalization of colorblindness to both elide existing forms of racial inequality and limit our capacity to eliminate them.”<sup>10</sup> To articulate the point the way that Ian Haney-López has, the CRT critique of colorblindness is a critique of the Court’s “intentional blindness”<sup>11</sup> with respect to the ongoing realities of race. Precisely because CRT has pushed back against the radicalization of colorblindness – a radicalization that has been normalized in constitutional law – CRT occupies a “dissenting” position in case law, legal analysis, and scholarly literatures.

The limited space Critical Race Theory occupies in case law makes *Critical Race Judgments* all the more important. Which is to say, against the absence of CRT perspectives in U.S. law, a clear articulation of what a Critical Race Theory presence might look like in legal doctrine becomes particularly crucial. Thus, this book.

At the heart of *Critical Race Judgments* is a “what if?” question. How might seminal Supreme Court opinions – and a few lower court cases – have come out (or been reasoned) differently had a Justice open to CRT been on the bench and been able to garner a majority of the vote? In answering this question, *Critical Race Judgments* does not merely demonstrate the relevance of CRT to some of the most controversial and complicated issues that the Supreme Court and lower courts have had to engage. It demonstrates the difference Critical Race Theory could have made – and can still make, a difference with the potential to make the United States a more perfect union.

In some ways, part of what CRT seeks to do is realize the unfulfilled racial justice aspirations of the “the First and Second Reconstructions”<sup>12</sup> by staging a “Third.”<sup>13</sup> The need for a Third Reconstruction is particularly salient given the political and social landscape in which we find ourselves. The differences in the number of cases and deaths from COVID-19, as well as hospital stays and treatments according to race during the pandemic, have made clear to many people the longstanding racial inequities of which people of color have long been aware. The killing of George Floyd by former officer Derek Chauvin, and his two partners, in Minneapolis, Minnesota on May 25, 2020, ignited nationwide protests, followed by protests across the globe, often formed around CRT tenets. Moreover, the specific demands for

<sup>10</sup> Devon W. Carbado, *Strictly Scrutinizing the Black Body: The “Compelling State Interest” and “Narrow Tailoring” Regulation of Blackness* (forthcoming UCLA L. REV.) (2022).

<sup>11</sup> Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012).

<sup>12</sup> Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 765 (1994) (identifying CRT as, in many ways, being engaged in a project of reconstruction and finishing “the unfinished revolutions of the First and Second Reconstructions”). Other CRT scholars and fellow travelers have similarly called for a Third Reconstruction.

<sup>13</sup> See, e.g., Paul Butler, *The System is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1474–78 (joining other scholars and activists in calling for a Third Reconstruction to address institutional racism and inequality); Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 501 (2003) (positing that a Third Reconstruction could forge “a world in which the theory of race ha[s] been debunked once and for all, and universal humanity and brotherly love would reign as the supreme values undergirding our Constitution, our communities, and our lives”).

change that people continue to make draw on core CRT ideas, ideas that have become part of the everyday language of the first two generations to have lived in a world where CRT has always existed.

Still, our investment in a “Third Reconstruction” is not without controversy, and not just from the ideological right, but also from the ideological left, particularly if one frames law as a “master’s tool.” Recall Audre Lorde’s admonition that “the master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.”<sup>14</sup> But in advancing that point, Lorde was not urging that we avoid legal contestations or the juridical terrain. She was asking us to jettison the dominant ways of thinking and doing that “keep the oppressed occupied with the master’s concerns.”<sup>15</sup> That project of eschewing the “master’s concerns” is precisely what the rewritten opinions endeavor to do. Whether they are successful in that respect, we leave to the reader to decide. The point is that each opinion evidences a commitment to foreground, rather than ignore, particular expressions of racial inequality and take seriously the experiences and perspective of people on “the bottom”<sup>16</sup> of social hierarchies and not just those on “the top.”<sup>17</sup> That epistemological stance alone stands in stark contrast to the Supreme Court’s general tendency to marginalize the experiences and perspectives of racially subordinated groups.

Given the Court’s demographic makeup over time, perhaps the Court’s historical marginalization of race should not surprise us. While the Supreme Court was established in 1789, the Court did not have its first Black justice until 1967, when Lyndon B. Johnson appointed Justice Thurgood Marshall. Since that appointment, there has been just one other African American on the Supreme Court, Justice Clarence Thomas, a conservative jurist whom President George H. W. Bush appointed in 1991 to replace Justice Marshall. President Ronald Reagan appointed the first female justice, a white woman, Sandra Day O’Connor, in 1981, and President Bill Clinton appointed another white woman to the Court, Justice Ruth Bader Ginsburg, in 1993. In 2009, President Obama appointed Justice Sonia Sotomayor, the first Latinx person and woman of color to the Court, and the following year appointed another woman, Justice Elena Kagan. In 2020, the Court welcomed another woman into its fold, Amy Coney Barrett, who was appointed by President Donald Trump.

<sup>14</sup> AUDRE LORDE, *THE MASTER’S TOOLS WILL NEVER DISMANTLE THE MASTER’S HOUSE*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110, 112 (2007).

<sup>15</sup> *Id.* at 113. See, e.g., Angela Onwuachi-Willig, *Using the Master’s “Tool” to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 *ARIZ. L. REV.* 113 (2005) (highlighting Justice Thomas’ life and career as evidence for why affirmative action should continue).

<sup>16</sup> Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323 (1987).

<sup>17</sup> Devon W. Carbado, *Race to the Bottom*, 49 *UCLA L. REV.* 1283 (2002).

There has yet to be an Asian American or a Native American justice on the Court or an openly LGBTQ person of any race. To put all of this in raw numbers, there have been a total of 115 justices since the United States established the Supreme Court, including the three most recent appointees, Justices Kavanaugh, Gorsuch, and Barrett. To date, only three justices in the history of the United States have been non-white, and only five have been women.<sup>18</sup>

In painting the foregoing demographic picture, we are not saying that one's identity fully determines the scope of one's normative views. Of course, it does not – and we want to say that loudly and clearly. We are saying that one's experiences in and visions for the social world are mediated by our various identities. It matters, then, the historical demographic makeup of the Court. It tells a story about white male overrepresentation (and the underrepresentation of every other group) that implicates the Supreme Court in the very exclusionary practices it has had to resolve. Moreover, the persistence of that overrepresentation has likely shaped the trajectory of Supreme Court doctrine in immeasurable ways.

To put the preceding points into sharper relief, imagine a Court on which a “wise Latina,” Chief Justice Sotomayor,<sup>19</sup> is joined by a “wise” Native American, “wise” African Americans, and a couple of “wise” Asian Americans.<sup>20</sup> We reference “wise” in this thought experiment because, as you might recall, during Sotomayor's confirmation hearing, several senators raised doubts about Sotomayor's competence to serve on the Court because she indicated that her experiences as a “wise Latina” had shaped her jurisprudence.<sup>21</sup> On the one hand, we were perplexed that Justice

<sup>18</sup> For a more general discussion of race and judicial diversity, see Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000); Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, 90 MINN. L. REV. 1252 (2006); Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789–2016*, 26 BERKELEY LA RAZA L.J. 92 (2016).

<sup>19</sup> Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002) (Responding to a quote attributed to Justice Sandra Day O'Connor that “a wise old man and wise old woman will reach the same conclusion in deciding cases,” Sotomayor noted that she was “not so sure that I agree with the statement,” explaining that “First, as Professor Martha Minnow has noted, there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hadn't lived that life.”). Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005) (examining how race shapes Justice Thomas' analysis of cases).

<sup>20</sup> For one example of this thought experiment, see Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1 (2019).

<sup>21</sup> See Charlie Savage, *A Judge's View of Judging is on the Record*, N.Y. TIMES, May 15, 2009, at A21; Peter Baker & Neil A. Lewis, *Republicans Press Judge About Bias and Activism*, N.Y. TIMES, July 15, 2009, at A1. See also Kevin R. Johnson, *An Essay on the Nomination and the Confirmation of the First Latina Justice on the U.S. Supreme Court: The Assimilation Demand at Work*, 30 CHICANA/O-LATINA/O L. REV. 97 (2011) (detailing the differences between the scrutiny faced by Justices Thurgood Marshall and Sonia Sotomayor as compared to their white peers on the bench, noting that Sotomayor, with 17 years' experience on the bench, had more judicial experience than any other nominee in decades; and explaining how the “wise Latina” comment was employed against Justice Sotomayor during her confirmation hearing despite her excellent credentials as a lawyer and jurist).

Sotomayor’s “wise Latina” comment engendered such controversy. On the other hand, we are mindful that judges of color have long been vulnerable to arguments that their race biases their decisionmaking.<sup>22</sup> That racial assumption obscures that white people are not racially tabula rasa but have racial experiences that color their perspectives and values. To paraphrase Judge Constance Baker Motley, all judges have a race, and for every judge their racial experiences consciously or unconsciously informs how they decide cases.<sup>23</sup> To our way of thinking, that reality is a potential plus, not an inevitable negative, particularly if the judge is cognizant of the impact and acknowledges it, which is the only way that a judge can limit any negative effects from such influence.

But realizing how one’s racial experiences shapes perspective and understanding, regardless of whether one is raced white, Black, Asian, Indigenous, or Latinx, requires a robust commitment to inclusion and equity, one we aspired to practice in our “judicial appointments” process for this book. Which is to say, in constructing our court, we sought out justices who are diverse along many dimensions of social identity, including race, gender, religion, socioeconomic class,<sup>24</sup> and sexual orientation.

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Our approach to engaging potential contributors was relatively straightforward. We invited both prominent and emerging CRT scholars to either imagine themselves on the Court or to channel actual Justices tasked with authoring key decisions bearing on race. We instructed them that, in writing their respective opinions, they should consider themselves subject to the same constraints that bind Supreme Court justices and lower court judges. These constraints include basic principles of law, the anticipated consequences of the decision for the parties and society as a whole, judicial ethics, and a judge’s professional and personal experiences. We stressed that each rewritten opinion would be bound by the precedent in existence at the time of the decision to the same extent that the original opinion

<sup>22</sup> See, e.g., *Pennsylvania v. Local Union 542, Int’l. Union of Operating Eng’r*, 388 F.Supp. 155, 165 (E.D. Pa. 1974), *aff’d*, 478 F.2d 1398 (3d Cir. 1974), *cert. denied*, 421 U.S. 999 (1975) (involving a request for recusal of Judge A. Leon Higginbotham in a racial discrimination case, on the basis that Higginbotham was Black, had spoken before a meeting of Black historians, and was a scholar in the field of race relations). In denying the motion, Judge Higginbotham responded in part, “To suggest that black judges should be so disqualified would be analogous to suggesting that the slave masters were right when, during tragic hours for this nation, they argued that only they, but not the slaves, could evaluate the harshness or justness of the system.” *Id.*

<sup>23</sup> *Blank v. Sullivan & Cromwell*, 418 F.Supp. 1, 4 (S.D.N.Y. 1975) (involving a request for recusal of Judge Constance Baker Motley in a gender discrimination case against a law firm and the judge’s response that “if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear the case, or many others, by virtue of the fact that all of them [are] attorneys, of a sex, often with distinguished law firm or public service backgrounds”).

<sup>24</sup> See Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What’s In a Definition?*, 88 DENV. UNIV. L. REV. 807, 809 (2011) (detailing why it is important to understand what is commonly referred to as “class” as involving only economic terms” but instead a combination of economic and social factors).

would have been. In other words, we emphasized the importance of *stare decisis*. Moreover, we made clear to the contributors that, while they were free to rely on additional authorities, they should limit themselves to authorities that were in existence at the time of the original decision. Our footnote here, an important one, was that they were nevertheless free to use any reasoning they wished, even reasoning informed by ideas, scholarship, cases or sources that arose after the original decision was issued. At bottom, we encouraged our contributors to be mindful of various forms of presentism, notwithstanding our understanding that a collection such as ours could not avoid (and indeed is predicated on) presentist thinking. Our commitment was to ensure that the rewritten opinions were contextually intelligible in the sense of reflecting the sensibilities, including the oppositional and dissenting voices, of the day.

The final instruction to our contributors pertained to how we advised them to engage with CRT. After considerable discussion, we decided to give the contributors leeway to use CRT as they saw fit. In other words, we did not direct the contributors to engage or emphasize particular themes or frames in their rewritten opinions. Yet, it is hard to read the opinions and not notice some central CRT ideas, including but not limited to: race is a social construction that intersects with and is shaped by other social categories; law produces and legitimizes racial power; the historical dimensions of *de jure* discrimination continue to shape contemporary patterns of racial inequality; formal equality is rarely if ever enough to achieve substantive equality; racial discrimination is not exhausted by conscious racial intentionality; and the juridical deployments of colorblindness have functioned largely to entrench rather than ameliorate extant racial disadvantages.<sup>25</sup> While all of these ideas ought to be subject to debate, the fact that some conservatives are seeking to “cancel” them should alarm anyone who takes racial justice and free speech seriously.

In advancing these and other CRT themes, most contributors adhered strictly to the guidelines we set out above. However, other contributors, like CRT itself, were a bit oppositional. They requested freer rein in drafting their opinions, and we readily acceded. Our sense was that insisting that every contributor write their chapter in the form of a conventional Supreme Court opinion would unnecessarily undermine the “big tent” ethic on which CRT is based.

Our commitment to that “big tent” ethic is also manifested in the different levels of criticality that the rewritten opinions reflect. Our surmise is that the reader will perceive some of the opinions to be more CRT-inflected than others. In addition to deriving from the range of historical and doctrinal constraints under which the contributors wrote, the differential engagement with CRT across the cases also reflects debates in the literature about the work Critical Race Theorists should mobilize CRT to perform. Understood in this way, the rewritten opinions are

<sup>25</sup> Richard Delgado & Jean Stefancic, *Introduction*, in RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: A READER* 7–10 (2014). See also Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2249–58 (2017) (specifying core tenets of CRT).



a productive reminder that the scholars who comprise the CRT community are not monolithic in their thinking about CRT and often have competing conceptions of the field, even as their scholarly contributions help to identify its contours.

Our final comment before we describe the structure and organization of the book is this: We will not in this introduction attempt to synthesize all of the various commitments of Critical Race Theory. Other scholars have performed that work and in the context of doing so revealed the breadth and depth of the field.<sup>26</sup>

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Very often, books considering legal decisions pertaining to race examine only the most obvious “race” cases; focus primarily, if not exclusively, on the experiences of African Americans; and adopt an organizational structure driven by doctrinal categories. To advance the instant project, we have taken a different path on each of these counts. To be sure, our rewritten opinions feature well-known precedents such as *Plessy v. Ferguson* and *Korematsu v. United States*, but they also include lesser-known cases, such as *Moore v. City of East Cleveland* and *Adoptive Couple v. Baby Girl*. While many of our opinions are what you might call salient race cases, for example, *Dred Scott v. Sanford* and *Gong Lum v. Rice*, others on their surface appear not to be about race at all, such as *Lawrence v. Texas* and *Roe v. Wade*. And though several of the cases center upon African American identity experiences, such as *Brown v. Board of Education* and *Virginia v. Black*, we also include opinions that foreground the identity and experiences of other people of color, such as *Rice v. Cayetano* and *San Antonio Independent School District v. Rodriguez*.

Turning now to the structure and thematic organization of the book, our approach does not track the formal doctrinal questions the cases present. Too often the traditional doctrinal way of organizing cases artificially compartmentalizes the nature of racial inequality and masks its intersecting dimensions of power.<sup>27</sup> To mitigate these pitfalls, we organized the book around five thematic clusters – Membership and Inclusion; Participation and Access; Property and Space; Intimate Choice and Autonomy; and Justice. Our employment of these themes means that, from a conventional doctrinal approach, some of the cases may appear to be “out of place.” That experience of disruption is one of our pedagogical goals – to encourage the reader to understand that *where* and *whether* a case is situated

<sup>26</sup> For works that describe the contours of CRT, see CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw et al. eds., 1995); CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY xxi (Francisco Valdes, Jerome McCristal Culp, & Angela P. Harris eds., 2002); RICHARD DELGADO & JEAN STEFANIC, CRITICAL RACE THEORY: AN INTRODUCTION (3rd ed. 2017); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefanic eds., 3rd ed. 2013); Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593 (2011).

<sup>27</sup> See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. CHI. LEGAL F. 139 (1989); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

within the broad architecture of “race and the law” is contingent on *how* racial inequality is imagined and *what* we view as appropriate remediation. In this respect, there is nothing per se right about the approach we have taken. Indeed, we encourage readers to come up with their own clusters, thematize the cases differently, and deploy them to tell other stories about the “strange career” of race and law in the United States.<sup>28</sup>

Our final prefatory comment concerns one of the most influential Critical Race Theorists, Derrick Bell. We begin *Critical Race Judgments* with Professor Bell’s imagined dissent in *Brown v. Board of Education*.<sup>29</sup> The choice to include that piece may surprise some readers. After all, *Brown* is perhaps the most celebrated constitutional law case. And unlike most of the other opinions in this book, Professor Bell’s opinion is a dissent, not a majority opinion. Nevertheless, for a number of reasons, we thought it crucial to include Bell’s text. To begin, although *Brown* is indeed a canonical opinion and deserves to be celebrated as a significant constitutional accomplishment, Professor Bell’s dissent makes clear that there were other more expansive terms on which the Supreme Court could have decided that case, terms that might have made it unnecessary, for example, to wait for more than a decade before antimiscegenation statutes were declared unconstitutional in *Loving v. Virginia*.<sup>30</sup>

Moreover, opening our book with Bell’s dissent sends a signal that *Critical Race Judgments* was undertaken with the robust antiracist spirit that motivated Derrick Bell’s entire career. Professor Bell, who died in 2011, was not only a brilliant civil rights lawyer, scholar, and teacher; he was also one of the “forepersons” of CRT.<sup>31</sup> In that respect, every CRT scholar, including the contributors to this book, owes a debt of gratitude to Professor Bell for the methods, themes, and normative analyses he developed and championed.

A final reason we lead with Professor Bell’s dissent in *Brown* bears an even more direct relationship to *Critical Race Judgments*. It occurred to us that the *dissenting* voice that motivated Bell’s engagement with *Brown* could be expressed as a *majority* voice that spoke truth to power across multiple sites of constitutional contestation. That truth-to-power/majority voice is by no means monolithic. As we indicated earlier, it takes a variety of “critical race” forms across the rewritten opinions that

<sup>28</sup> C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

<sup>29</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See also DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004); Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How Brown v. Board of Education Helped to Further White Supremacy*, 105 VA. L. REV. 343 (2019) (offering a different critique of *Brown*, specifically that the Court’s failure to grapple with the psychic harms of racial segregation for white people has helped to foster, rather than dismantle, white supremacy).

<sup>30</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>31</sup> Professor Bell authored several influential books and articles. What follows is just a sampling. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); DERRICK BELL, *AND WE ARE NOT SAVED* (1987); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).