

2016

## Inclusion and Exclusion in American Legal History

Mark E. Steiner

Follow this and additional works at: <http://scholarship.law.berkeley.edu/aalj>

---

### Recommended Citation

Mark E. Steiner, *Inclusion and Exclusion in American Legal History*, 23 *ASIAN AM. L.J.* (2016).  
Available at: <http://scholarship.law.berkeley.edu/aalj/vol23/iss1/4>

### Link to publisher version (DOI)

<http://dx.doi.org/10.15779/Z38QC43>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Asian American Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact [jcera@law.berkeley.edu](mailto:jcera@law.berkeley.edu).

# Inclusion and Exclusion in American Legal History

Mark E. Steiner†

I. INTRODUCTION .....	69
II. AMERICAN LEGAL HISTORY CASEBOOKS.....	72
III. SURVEY TEXTS .....	78
IV. INTRODUCTORY TEXTS.....	86
V. MARGINS AND MAINSTREAMS.....	91
VI. CONCLUSION.....	98

## I. INTRODUCTION

Scholarship on Asian American history has increased dramatically over the last twenty-five years.<sup>1</sup> Asian Americans are no longer at the margins of American historiography.<sup>2</sup> The history of Asian Americans illuminates both the history of immigration and the “history of how race works in the United States.”<sup>3</sup> Historian Erika Lee has suggested, “You

---

DOI: <http://dx.doi.org/10.15779/Z38QC43>

Copyright © 2016 Regents of the University of California.

† Godwin PC Research Professor and Professor of Law, South Texas College of Law. Thanks to Al Brophy for his comments, to Emma L. Steiner for her research assistance, and to Lindsey Quock, Jon Tanaka, and Jonathan Ma of the Asian American Law Journal for all their hard work in making this Article better.

1. See generally SUCHENG CHAN, *Chinese American Historiography: What Difference Has the Asian American Movement Made?*, in CHINESE AMERICANS AND THE POLITICS OF RACE AND CULTURE 1 (Sucheng Chan & Madeline Y. Hsu eds., 2008); Sucheng Chan, *The Changing Contours of Asian-American Historiography*, 11 RETHINKING HIST. 125 (2007); Roger Daniels, *No Lamps Were Lit for Them: Angel Island and the Historiography of Asian American Immigration*, 17 J. AM. ETHNIC HIST. 3 (Summer 1997); GARY Y. OKIHIRO, THE COLUMBIA GUIDE TO ASIAN AMERICAN HISTORY (2001); Mae M. Ngai, *Asian American History—Reflections on the De-centering of the Field*, 25 J. AM. ETHNIC HIST. 97 (Summer 2006); CATHY J. SCHLUND-VIALS ET AL., KEYWORDS FOR ASIAN AMERICAN STUDIES (2015).

2. See Gail M. Nomura, *Significant Lives: Asia and Asian Americans in the History of the U.S. West*, 25 W. HIST. Q. 69 (1994); GARY Y. OKIHIRO, MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE (1994). A gap persists between this scholarship and its incorporation into American history survey courses on both the high school and college level. There is a “continuing invisibility of Asian Americans in American history and life.” ERIKA LEE, THE MAKING OF ASIAN AMERICA: A HISTORY 415 (2015); see also ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE 48–49 (1999) (discussing ignorance of violence and discrimination against Asian Americans because of textbooks that don’t include history of Asian Americans).

3. LEE, *supra* note 2, at 4–5.

can't teach American History without Asian Americans.”<sup>4</sup>

Both Asian American historiography and jurisprudence include a lot of legal history. Asian immigrants have been targeted by a legal regime designed to uphold white supremacy. These laws have excluded and marginalized Asians and Asian Americans.<sup>5</sup> Consequently, scholarship on Asian American *legal* history also has dramatically increased in the last twenty-five years.<sup>6</sup> Neil Gotanda has identified three Asian American “historical narratives” that are part of “Asian American Jurisprudence”: immigration, citizenship, and race.<sup>7</sup> Gotanda presents these narratives as part of Asian American Jurisprudence’s “interrogations” or reinterpretations of cases, statutes, and legal histories.<sup>8</sup> The immigration narrative is “the legal history of Asian immigration to the United States” and is “closely linked to the citizenship narrative.”<sup>9</sup> Gotanda explains that “the citizenship narrative begins where the immigration narrative leaves

---

4. Erika Lee, “You Can’t Teach American History without Asian Americans,” From Immigrants to Citizens: Asian Pacific Americans in the Northwest, 2014 National Endowment for the Humanities Landmarks of American History and Culture Workshop (Seattle, WA, July, 2014); *see also* Ralph Ellison, *What America Would be Like Without Blacks*, TIME (Apr. 6, 1970); SUSAN SLEEPER-SMITH ET AL., WHY YOU CAN’T TEACH UNITED STATES HISTORY WITHOUT AMERICAN INDIANS (2015). Thanks to Professor Lee for sharing her PowerPoint presentation from her 2014 NEH talk.

5. *See generally* Sucheng Chan, *Asian American Struggles for Civil, Political, Economic, and Social Rights*, in CHINESE AMERICA: HISTORY & PERSPECTIVES (2002); Neil Gotanda, *Exclusion and Inclusion: Immigration and American Orientalism*, in ACROSS THE PACIFIC: ASIAN AMERICANS AND GLOBALIZATION 129 (Evelyn Hu-DeHart ed., 1999); Neil Gotanda, *New Directions in Asian American Jurisprudence*, 17 ASIAN AM. L.J. 5 (2010); Neil Gotanda, “Other Non-Whites” in *American Legal History*, 85 COLUM. L. REV. 1186 (1985); Charles J. McClain & Laurene Wu McClain, *The Chinese Contribution to the Development of American Law*, in ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882–1943, at 3 (Sucheng Chan ed., 1991); Charles J. McClain, *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 ASIAN L.J. 33 (1995); Mae M. Ngai, *History as Law and Life: Tape v. Hurley and the Origins of the Chinese American Middle Class*, in CHINESE AMERICANS AND THE POLITICS OF RACE AND CULTURE 1 (Sucheng Chan & Madeline Y. Hsu eds., 2008).

6. *See, e.g.*, ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE (1997); JOHN S. W. PARK, ELUSIVE CITIZENSHIP: IMMIGRATION, ASIAN AMERICANS, AND THE PARADOX OF CIVIL RIGHTS (2004). On the legal historiography, *see generally* Richard P. Cole & Gabriel J. Chin, *Emerging from the Margins of Historical Consciousness: Chinese Immigrants and the History of American Law*, 17 LAW & HIST. REV. 325 (1999); Roger Daniels, *Ah Sin and His Lawyers*, 23 REVS. AM. HIST. 172 (1995); Erika Lee, *Immigrants and Immigration Law: A State of the Field Assessment*, 18 J. AM. ETHNIC HIST. 85 (Summer 1999); Allison Brownell Tirres, *Who Belongs? Immigrants and the Law in American History*, in A COMPANION TO AMERICAN LEGAL HISTORY 228 (Sally E. Hadden & Alfred L. Brophy eds., 2013); *see also* Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 527–35 (2000) (mainstream immigration law scholars ignore the influence of race). In 1994, Garland Publishing published a 4-volume series on Asian Americans and the Law edited by Charles McClain. The series included: *Chinese Immigrants and American Law*; *Japanese Immigrants and American Law: The Alien Land Laws and Other Issues*; *The Mass Internment of Japanese Americans and the Quest for Legal Redress*; and *Asian Indians, Filipinos, Other Asian Communities and the Law*.

7. Neil Gotanda, *New Directions in Asian American Jurisprudence*, 17 ASIAN AM. L.J. 5, 11 (2010).

8. *Id.* at 8.

9. *Id.*

off.”<sup>10</sup> This narrative isn’t just about Asian immigrants coming to America but rather “facing discrimination and exclusion in America.”<sup>11</sup> The third narrative is the racial narrative. Chinese immigrants faced racist opposition, but these attacks were different “from existing racial subordinations.”<sup>12</sup> Chinese in America “were characterized as a permanently foreign race that was incapable of becoming American.”<sup>13</sup> Moreover, this scholarship has become “more integrated into the broader field of U.S. history as well as subfields like intellectual, cultural, and legal history.”<sup>14</sup>

Allison Brownell Tirres has pointed out that while Asian migration was numerically much smaller than European migration, “the issue of Asian migration contributed to the development of law in a manner that far surpasses its numerical importance.”<sup>15</sup> Tirres concludes, “Modern immigration jurisprudence is built upon cases that arose from attempts to restrict Asian migration.”<sup>16</sup> She notes there are “at least four important legal developments [that] arose from challenges to restrictive law against Asian migrants: the establishment of the plenary power doctrine; the build-up of the administrative apparatus of immigration enforcement; constitutional support for the rights of aliens within U.S. borders (outside of the immigration context); and the litigation of ‘whiteness,’ stemming from racial aspects of naturalization laws.”<sup>17</sup>

Over fifteen years ago, Richard P. Cole and Gabriel Chin suggested that the legal history of Chinese immigrants was “now firmly within the mainstream of scholarly study” and no longer in the “margins of historical consciousness.”<sup>18</sup> The purpose of this Article is to examine whether Asian American legal history has entered the mainstream of American legal history. This Article does so by looking at American legal history casebooks, surveys, and short introductory texts. Can you write about American legal history without Asian Americans?

Part II discusses the coverage of Asian American legal history casebooks. Whether Asian Americans are included in any particular casebook depends upon how traditional that casebook’s approach to American legal history is. Books designed for “History of Anglo-American

---

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 9; see also Neil Gotanda, *Law*, in *KEYWORDS FOR ASIAN AMERICAN STUDIES* 144–48 (Cathy J. Schlund-Vials et al. eds., 2015); Neil Gotanda, *Exclusion and Inclusion: Immigration and American Orientalism*, in *ACROSS THE PACIFIC: ASIAN AMERICANS AND GLOBALIZATION* 129 (Evelyn Hu-DeHart ed., 1999).

14. Mae M. Ngai, *Asian American History—Reflections on the De-centering of the Field*, 25 *J. AM. ETHNIC HIST.* 99 (Summer 2006).

15. Tirres, *supra* note 6, at 235.

16. *Id.*

17. *Id.*

18. Richard P. Cole & Gabriel J. Chin, *Emerging from the Margins of Historical Consciousness: Chinese Immigrants and the History of American Law*, 17 *LAW & HIST. REV.* 325, 325 (1999).

Law” courses will not include any Asian American legal history. The two casebooks that reflect the “new legal history” movement are split—one covers Asian American legal history and one does not.

Part III looks at the two main survey texts of American legal history: Lawrence M. Friedman’s *A History of American Law* and Kermit L. Hall’s *The Magic Mirror: Law in American History*. Both books take a “law and society” approach to legal history. As “law and society” scholarship uses a broader, more critical approach to law, both books include aspects of Asian American legal history.

Part IV examines three short introductory texts of American legal history. Because of their space limitations, these books announce what topics are important enough in American legal history to make the cut. The coverage of Asian American legal history varies significantly as each author made very different editorial judgments about what to include and what to exclude.

Part V attempts to analyze how much Asian American legal scholarship has pervaded these mainstream texts. All these texts are attempts to synthesize broad themes in American legal history. An author’s political orientation undoubtedly will influence what topics that author chooses to cover. Both conservatives, who want to believe that race is irrelevant, and liberals, who tend to see race in a black-white binary, may be averse to Asian American legal history. This Article also examines what scholarship is cited in these legal history texts. The most surprising finding is that citations to Asian American scholars are exceedingly rare.

## II. AMERICAN LEGAL HISTORY CASEBOOKS

Asian American jurisprudence is largely absent from casebooks used in law school legal history courses. The overwhelming majority of American law schools offer at least one course in legal history.<sup>19</sup> The lack of Asian American legal history in these courses is hardly surprising: American legal history has long had a “conservative tradition,” as Morton J. Horwitz established over forty years ago.<sup>20</sup> This conservative tradition manifests itself in the general approach toward legal history and the selection of topics deemed worthy of study. American legal history largely consisted of biographies of the so-called Great Judges and expositions of common-law development.<sup>21</sup> Horwitz argued that this tradition masked “fundamentally conservative political preferences.”<sup>22</sup> Legal history had perverted “the real function of history by reducing it to the pathetic role of

---

19. Joan Sidney Howland, *A History of Legal History Courses Offered in American Law Schools*, 53 AM. J. LEGAL HIST. 363, 363 (2013).

20. Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275 (1973).

21. *See id.* at 276–77.

22. *Id.* at 276.

justifying the world as it is.”<sup>23</sup>

There are different approaches to the study of American legal history, and texts for legal history courses reflect those differences. The more traditional approaches are inclined to examine the autonomous development of either the judicial system or common-law doctrine. The modern approach (for lack of a better term) takes a broader look at the development of American law and how law reflects society. These different approaches are interested in answering different questions about American legal history. Consequently, the casebooks used in the traditional approaches do not contain any Asian American legal history. In comparison, although the modern approach does not guarantee coverage of Asian American legal history, some casebooks using the modern approach contain Asian American legal history.

Two traditionally inclined legal history courses that focus on the Anglo-American development of either common law or legal institutions (like courts, the legal profession, and legal education) remain popular.<sup>24</sup> The “development of common law” approach is essentially doctrinal history. As Lawrence M. Friedman has noted, it stresses “the history of legal doctrines—their beginning, their development, their growth.”<sup>25</sup> Consequently, it’s not surprising that a book entitled *The Anglo-American Legal Heritage: Introductory Materials* doesn’t include anything on Asian Americans.<sup>26</sup>

The other traditional approach is to look at the development of Anglo-American legal institutions. One casebook intended for such a class, *History of the Common Law: The Development of Anglo-American Legal Institutions*, devotes only “skeletal coverage” to “constitutional and political history, and many of the social and economic dimensions.”<sup>27</sup> It primarily covers the emergence and transformation of the jury system and the law-equity division but also addresses the development of trial procedure and the histories of legal education and the legal profession.<sup>28</sup> This book never mentions Asian Americans, although such topics as racial restrictions on testimony, Asian immigrants’ exclusion from the practice of law as “aliens ineligible to citizenship,” or the recent history of Asian Americans gaining access to the profession could easily fit within its

---

23. *Id.* at 281.

24. For examples of courses using these approaches, see ROBERT L. JARVIS, TEACHING LEGAL HISTORY: COMPARATIVE PERSPECTIVES 71, 100–101, 225 (2014).

25. Lawrence M. Friedman, *American Legal History: Past and Present*, 34 J. LEGAL EDUC. 563, 563 (1984).

26. DANIEL R. COQUILLETTE, THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS (2d ed. 2004).

27. JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS xxvi (2009).

28. *See id.*

institutional purviews.<sup>29</sup>

Two major casebooks on American legal history reflect the “new legal history” that had developed in the 1970s and 1980s.<sup>30</sup> According to its practitioners, the “new legal history” differed from traditional legal history in both substance and method. It was heavily influenced by the historical profession’s turn toward social history in the 1960s and 1970s. The new legal history examined the “social bases of legal development.”<sup>31</sup> Hall explained that it “de-emphasized doctrinal developments in favor of explaining the distributive economic and social consequences of the law.”<sup>32</sup> Stephen B. Presser and Jamil S. Zainaldin have published eight editions of their casebook *Law and Jurisprudence in American History: Cases and Materials* since 1980.<sup>33</sup> Kermit L. Hall and various coauthors have published four editions of their book *American Legal History: Cases and Materials* since 1991.<sup>34</sup> Both books reflect the “new legal history” by

29. See Gabriel J. Chin, “A Chinaman’s Chance” in *Court: Asian Pacific Americans and Racial Rules of Evidence*, 3 UC IRVINE L. REV. 965 (2013); *In re Hong Yen Chang*, 24 P. 156 (Cal. 1890), abrogated by *In re Hong Yen Chang*, 344 P.3d 288 (Cal. 2015) (posthumous admission as attorney granted to Hong Yen Chang); *In re Takuji Yamashita*, 70 P. 482 (Wash. 1902); *People v. Hall*, 4 Cal. 399 (1854).

30. For an overview of the “new legal history,” see Kermit L. Hall, *The Magic Mirror: American Constitutional and Legal History*, 1 INT’L J. SOCIAL EDUC. 22 (1986); Harry N. Scheiber, *American Constitutional History and the New Legal History: Complementary Themes in Two Modes*, 68 J. AM. HIST. 337 (1981). On casebooks used in American Legal History courses, see Scott Douglas Gerber, *Teaching the Legal History You Write About*, 53 AM. J. LEGAL HIST. 410, 411 (2013) (“I teach constitutional law too, and there are many fine casebooks from which to choose for that course. The same cannot be said for American legal history. As far as I can tell, there are only two: Presser and Zainaldin’s *Law and Jurisprudence in American History* and Hall, Finkelman, and Ely’s *American Legal History*”); Geoffrey R. Watson, *The Fun of Teaching American Legal History*, 53 AM. J. LEGAL HIST. 426, 426 (2013) (noting that the selection of a casebook for an American legal history course was a choice between Presser & Zainaldin, *Law and Jurisprudence in American History* and Hall, Finkelman, & Ely’s *American Legal History*).

31. Hall, *The Magic Mirror: American Constitutional and Legal History*, 1 INT’L J. SOCIAL EDUC. at 31–32.

32. *Id.*

33. STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND AMERICAN HISTORY: CASES AND MATERIALS* (1980); STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* (2d ed. 1989); STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* (3d ed. 1995); STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* (4th ed. 2000); STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* (5th ed. 2003); STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* (6th ed. 2006); STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* (7th ed. 2009); STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* (8th ed. 2013). Presser has characterized Zainaldin as the “junior author.” Stephen B. Presser, *Confessions of a Rogue Legal Historian: Killing the Fathers and Finding the Future of the Law’s Past*, 4 BENCHMARK 217, 218 (1990).

34. KERMIT L. HALL, WILLIAM M. WIECEK, & PAUL FINKELMAN, *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* (1st ed. 1991); KERMIT L. HALL, WILLIAM M. WIECEK, & PAUL FINKELMAN, *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* (2d ed. 1996); KERMIT L. HALL, PAUL FINKELMAN & JAMES W. ELY, JR., *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* (3d ed. 2005);

including material on slavery, women and the law, and family law, topics conspicuously absent from more traditional legal history texts.<sup>35</sup>

The Presser and Zainaldin casebook is published by West. As a West casebook, its essential attribute is already known by any law student: it's huge (the current edition has over 1400 pages of text).<sup>36</sup> One legal historian has noted, "If you intend to give students an idea of how law schools approach the study of legal subjects, then Presser and [Zainaldin] is the only casebook available."<sup>37</sup>

Despite the size and breadth of the casebook, Presser and Zainaldin have not included any materials relating to Asian American legal history in any of the eight editions of their book. There is nothing on citizenship or immigration law. There is nothing on the internment of Japanese Americans during World War II.<sup>38</sup> The book includes a long section on slavery and the Civil War, which also includes a note on *Plessy v. Ferguson*, and includes *Brown v. Board of Education*, but that is the extent of its coverage of racism and law. The book also includes a 200-page chapter called "The Battle for the Soul of the Legal Academy." That chapter includes material on Critical Legal Studies; however, it doesn't have anything on Critical Race Theory.<sup>39</sup>

A couple reasons might explain the complete absence of Asian

KERMIT L. HALL, PAUL FINKELMAN & JAMES W. ELY, JR., *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* (4th ed. 2011).

35. See, e.g., HALL, FINKELMAN & ELY, *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* (4th ed.) at 243–303; STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* 451–494, 682–768 (8th ed. 2013).

36. STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* (8th ed. 2013).

37. Michael Les Benedict, *Thoughts on Class Materials for American Legal History Courses*, H-LAW (Mar. 30, 1995), [http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=h-law&month=9503&week=e&msg=0Nm17w4HU3nmbRIgO%2bLnsA&user=&pw=\[https://perma.cc/6G9C-2FZG\]](http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=h-law&month=9503&week=e&msg=0Nm17w4HU3nmbRIgO%2bLnsA&user=&pw=[https://perma.cc/6G9C-2FZG]). Benedict characterizes the Hall book as a "sourcebook" rather than a casebook. *Id.*

38. To be fair, their casebook isn't the only American Legal History casebook that ignores either Asian Americans or naturalization and immigration law. See HERBERT A. JOHNSON, *AMERICAN LEGAL AND CONSTITUTIONAL HISTORY: CASES AND MATERIALS* (1994).

39. On Critical Race Theory, see Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241 (1993); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: THE CUTTING EDGE* (3d ed. 2013); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2d ed. 2012); Harvey Gee, *Beyond Black and White: Selected Writings by Asian Americans within the Critical Race Theory Movement*, 30 ST. MARY'S L.J. 759 (1999); Neil Gotanda, *Critical Legal Studies, Critical Race Theory and Asian American Studies*, 21 AMERASIA J. 127 (1995); Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as Foreigners, and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347 (1997). Critical Race Theory, according to Keith Aoki, "while not totally opposed to the loose agenda of [Critical Legal Studies], was clearly critical of the elitist and imperialistic aspects of rich, white lefty male law professors drawing up blueprints for revolution and ironic rabble-rousing." Keith Aoki, *Critical Legal Studies, Asian Americans in U.S. Law & Culture, Neil Gotanda, and Me*, 4 ASIAN L.J. 19 (1997); see generally, Symposium, *Minority Critique of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. REV. 297 (1987).



Americans from this book. First, the authors may not be aware of the relevant scholarship.<sup>40</sup> Second, the book has a didactic purpose that seems both celebratory and conservative in orientation. Shortly after the first edition appeared in 1980, Presser announced the purpose of legal history is to stress the “core values” of American law. He identified four such core values. The “most basic core value” is “the rule of law” or “restraints on arbitrary power.”<sup>41</sup> The second core value is “popular sovereignty”: “the idea that the best way to prevent the exercise of arbitrary power is to disperse political power as widely as possible and to lodge ultimate sovereignty in the citizenry.”<sup>42</sup> The third core value is “the maintenance of maximum economic opportunity and social opportunity.”<sup>43</sup> The fourth core value is “the maximum protection and promotion of private interests and initiatives.”<sup>44</sup> For Presser, these core values have remained unchanged; he reiterated them in 2013.<sup>45</sup> Presser’s “core values” leave little room for Asian Americans in the *Law and Jurisprudence in American History* casebook. Presser’s core values manage to avoid a theme that would necessarily include the legal history of Asian Americans: equality before the law. By leaving out this “core value,” Presser largely avoids the darker side of American legal history. He also avoids the story of Asia America and the search for equality.<sup>46</sup> However, Asian America legal history isn’t necessarily excluded by the book’s commitment to “core values” either. Certainly, the “rule of law” is a theme that runs through Asian American legal history.<sup>47</sup>

*American Legal History: Cases and Materials* has had three coauthors for each of its four editions, but there have been two sets of coauthors. Kermit L. Hall, William M. Wiecek, and Paul Finkelman wrote the first two editions; Kermit L. Hall, Paul Finkelman, and James W. Ely, Jr wrote the third and fourth editions.<sup>48</sup> The book has been praised as “arguably the best survey text” and “excellent in presenting key themes about national legal history.”<sup>49</sup>

40. See *infra* text accompanying notes 195–209.

41. Stephen B. Presser, “Legal History” or the History of Law: A Primer on Bringing the Law’s Past into the Present, 35 VAND. L. REV. 849, 853–854 (1982).

42. *Id.* at 854–55.

43. *Id.* at 855.

44. *Id.* at 856.

45. Stephen B. Presser, *What I Do When I Teach Legal History*, 53 AM. J. LEGAL HIST. 393 (2013); STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY v (8th ed. 2013).

46. See, e.g., CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA (1996).

47. See, e.g., Lucy Salyer, *Captives of Law: Judicial Enforcement of the Chinese Exclusion Laws, 1891–1905*, 76 J. AM. HIST. 91 (1989).

48. See *supra* note 36.

49. ROBERT L. JARVIS, TEACHING LEGAL HISTORY: COMPARATIVE PERSPECTIVES 120, 125 (2014).

Unlike *Law and Jurisprudence in American History*, *American Legal History* does not ignore Asian American legal history. This difference may be due to the different background and approaches of the authors. All four coauthors have doctorates in history; Ely and Wiecek also have law degrees. All four coauthors are, or were (Hall died in 2006),<sup>50</sup> prolific scholars.<sup>51</sup> Finkelman, in fact, has written on anti-Japanese sentiment before World War II.<sup>52</sup> Hall's survey text, *The Magic Mirror*, also may have helped broaden the scope of the casebook, which appeared two years after the survey text's publication.<sup>53</sup> The two books cover roughly the same ground. *American Legal History* reflects the themes Hall developed in *The Magic Mirror*.

The first edition of *American Legal History* contained two extended discussions on Asian Americans. The first treatment appeared in the chapter "Nineteenth-Century Law and Society, 1800-1900." The section captioned "Race" included subsections on blacks, Native Americans, and Chinese. The material under the Chinese subsection included an excerpt from *Yick Wo v. Hopkins* and a note on "The Chinese and Jim Crow."<sup>54</sup> The chapter "Total War, Civil Liberties, and Civil Rights" contained a ten-page section on "The Japanese Internment." Two cases—*Hirabayashi v. United States* and *Korematsu v. United States*—were included as well as notes on Executive Order 9066 and *Ex parte Endo*.<sup>55</sup> The second edition also contained these two sections.<sup>56</sup>

The third edition expanded its coverage of Asian Americans. In the chapter on 19th century law and society, the section, whose caption was changed from "Chinese" to "Asians," now included portions of *United*

50. Paul Finkelman, *Kermit L. Hall: A Life in Legal History and Scholarship*, 57 SYRACUSE L. REV. 357 (2007).

51. See, e.g., AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH (Kermit L. Hall & James W. Ely, Jr. eds., 1989); JAMES W. ELY JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER 1888–1910 (2012); JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW (2001); PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (3d ed. 2014); KERMIT L. HALL, THE POLITICS OF JUSTICE: LOWER FEDERAL JUDICIAL SELECTION AND THE SECOND AMERICAN PARTY SYSTEM 1829–1861 (1980); THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (Kermit L. Hall ed., 2d ed. 2005); WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA 1886–1937 (2001); WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760–1848 (1977).

52. Paul Finkelman, *Coping with a New "Yellow Peril": Japanese Immigration, the Gentlemen's Agreement, and the Coming of World War II*, 117 W. VA. L. REV. 1409 (2015); Paul Finkelman, *Race, Federalism, and Diplomacy: The Gentlemen's Agreement A Century Later*, OSAKA U. L. REV. No. 56, 1 (2009).

53. KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY (1989).

54. KERMIT HALL, WILLIAM M. WIECEK & PAUL FINKELMAN, AMERICAN LEGAL HISTORY 260–64 (1st ed. 1991). On *Yick Wo*, see Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About Yick Wo*, 2008 U. ILL. L. REV. 1359 (2008).

55. HALL, WIECEK & FINKELMAN, *supra* note 54, at 427–37.

56. KERMIT HALL, WILLIAM M. WIECEK, & PAUL FINKELMAN, AMERICAN LEGAL HISTORY 260–64, 427–37 (2d ed. 1996).

*States v. Wong Kim Ark* and *Oregon v. Charley Lee Quong* and additional notes on the Chinese Exclusion Act and the “Gentlemen’s Agreement.”<sup>57</sup> The section on internment added a note on “The Internment Cases a Generation Later.”<sup>58</sup> The fourth edition retained these additions.<sup>59</sup>

Since there is no consensus on what topics should be covered in an American legal history course, what is covered in a casebook will depend on the predilections of its authors. Only one of the casebooks under review included any Asian American legal history. The *American Legal History* casebook seems to have adequate coverage of Asian American legal history.

### III. SURVEY TEXTS

There are two main surveys of American legal history: Lawrence M. Friedman’s *A History of American Law* and Kermit Hall’s *The Magic Mirror: Law in American History*. Friedman first published *A History of American Law* in 1973. There have been two subsequent editions.<sup>60</sup> It has become one of the most cited law books.<sup>61</sup> Friedman later admitted that “despite its promising title” the book “essentially peters out in 1900.”<sup>62</sup> In 2002, he published what is essentially its second volume, *American Law in the 20th Century*.<sup>63</sup> Hall first published *The Magic Mirror: Law in*

57. KERMIT HALL, PAUL FINKELMAN & JAMES W. ELY, *AMERICAN LEGAL HISTORY* 293–307 (3d ed. 2005). On *Wong Kim Ark*, see Erika Lee, *Birthright Citizenship, Immigration, and the U.S. Constitution: The Story of United States v. Wong Kim Ark*, in *RACE LAW STORIES* 89 (Rachel Moran & Devon Carbado eds., 2008); Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 *FORDHAM L. REV.* 2521 (2007); Lucy E. Salyer, *Wong Kim Ark: The Contest Over Birthright Citizenship*, in *IMMIGRATION STORIES* 64 (David A. Martin & Peter H. Schuck eds., 2005). In 2015, *Wong Kim Ark* became newsworthy because of the repeated calls by Republican presidential candidates to end birthright citizenship. See, e.g., Fred Barbash, *Morning Mix: Donald Trump Meet Wong Kim Ark, the Chinese American Cook Who Is the Father of ‘Birthright Citizenship’*, *WASH. POST*, Aug. 31, 2015, <http://www.washingtonpost.com/news/morning-mix/wp/2015/08/31/donald-trump-meet-wong-kim-ark-the-chinese-american-cook-who-is-the-father-of-birthright-citizenship/>; Chris Fuchs, *Jeb Bush Draws Fire for Blaming Asians in ‘Anchor Baby’ Debate*, *NBC NEWS*, Aug. 25, 2015, <http://www.nbcnews.com/news/asian-america/jeb-bush-draws-fire-blaming-asians-anchor-baby-debate-n415421>; Erika Lee, *A History Lesson for Donald Trump and His Supporters: In 1898, the Supreme Court Ruled in Favor of Wong Kim Ark and Safeguarded Birthright Citizenship for Millions*, *N.Y. DAILY NEWS*, Aug. 18, 2015, <http://www.nydailynews.com/opinion/erika-lee-immigration-history-lesson-donald-trump-article-1.2329495>.

58. HALL, FINKELMAN & ELY, *supra* note 57, at 434.

59. KERMIT HALL, PAUL FINKELMAN & JAMES W. ELY, *AMERICAN LEGAL HISTORY* 297–310, 437–446 (4th ed. 2011).

60. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1st ed. 1973); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (3d ed. 2005).

61. Fred R. Shapiro, *The Most-Cited Legal Books Published Since 1978*, 29 *J. LEGAL STUD.* 397, 402 (2000). Shapiro ranked *A History of American Law* the 28th most-cited legal book; however, he only included the second edition of the book. If both editions were included, Friedman’s book undoubtedly would have ranked even higher.

62. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 681 (2002).

63. *Id.*

*American History* in 1989. After Hall's death in 2006, a second edition was published posthumously in 2009 with a new coauthor, historian Peter Karsten.<sup>64</sup> Both books take a "law and society" approach to legal history. Because law and society scholarship tends to be more inclusive in its choice of topics, it is not surprising that both books cover Asian American legal history.

Lawrence M. Friedman is the Marion Rice Kirkwood Professor of Law at Stanford Law School. He is an extremely productive and influential author.<sup>65</sup> Legal historian Mary L. Dudziak was not kidding when she suggested that "Friedman has written more books and articles than some people read in a lifetime."<sup>66</sup> Before joining the Stanford Law faculty in 1968, Friedman taught at the University of Wisconsin Law School, where he was a colleague of Willard Hurst. Hurst was a pioneer of the "law and society" movement, and Friedman is his most famous disciple.<sup>67</sup> Friedman said of Hurst, "Once he showed us a new way to look at the law, the old way was finished for us."<sup>68</sup> Hurst took a "functionalist" approach to legal history; he stressed economic development and how the law served the needs of the emerging capitalist order. Hurst avoided constitutional and doctrinal history; he wrote about the "law in action."<sup>69</sup> While Hurst dramatically expanded the scope of American legal history, a lot of ground was left untrod. Historian William Novak has noted how more recent scholarship has emphasized "aspects of American legal history that Hurst ignored or left out."<sup>70</sup> Part of this post-Hurst legal historiography includes "social histories of American law that focused on race, class, and gender relations" and growing attention to "new fields like slave law, [N]ative American law, family law, and immigration law."<sup>71</sup> Not only has Friedman been mindful of these approaches by incorporating new scholarship in his survey texts, he also has contributed to them by writing histories of family

---

64. KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* (1st ed. 1989); KERMIT L. HALL & PETER KARSTEN, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* (2d ed. 2009).

65. ROBERT W. GORDON & MORTON J. HORWITZ, EDs., *LAW, SOCIETY, AND HISTORY: THEMES IN THE LEGAL SOCIOLOGY AND LEGAL HISTORY OF LAWRENCE M. FRIEDMAN* (2011); Lawrence M. Friedman, *Legal Scholarship Symposium: The Scholarship of Lawrence M. Friedman*, 40 *TULSA L. REV.* 561 (2005).

66. Mary L. Dudziak, *Law, Modernization and the Question of Agency in American Legal History*, 40 *TULSA L. REV.* 591, 591 (2005).

67. On the influence of Hurst and the "Wisconsin School" on Friedman, see G. Edward White, *Book Review*, 59 *VA. L. REV.* 1130, 1132–33 (1973); Michael Grossberg, *Legal History and Social Science: Friedman's History of American Law, the Second Time Around*, 13 *LAW & SOC. INQUIRY* 359, 365–68 (1988).

68. Lawrence Friedman, *Willard Hurst: Teacher*, 1980 *WISC. L. REV.* 1121, 1122.

69. See Stephen Diamond, *Legal Realism and Historical Method: J. Willard Hurst and American Legal History*, 77 *MICH. L. REV.* 784 (1979).

70. William J. Novak, *Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst*, 18 *LAW & HIST. REV.* 97, 140 (2000).

71. *Id.*

law.<sup>72</sup>

When Friedman's survey of American legal history appeared in 1973, it was the first of its kind. It has become the "standard text in most undergraduate, graduate, and law school legal history courses."<sup>73</sup> Friedman took an explicit "law and society" approach in his survey. He declared that the first edition of *A History of American Law* was intended as a "social history of American law"; he assumed that American law was a "mirror of society."<sup>74</sup>

*A History of American Law* is important as the first survey of its kind. In 1970, Friedman himself had detailed the "serious detriment" that the lack of a general survey of American legal history presented.<sup>75</sup> Friedman explained that meant: "there is no tradition, no received learning, no conventional wisdom to define what is important and what is not for students, researchers, and historians in other areas."<sup>76</sup> At the very least, Friedman established that the tradition and received learning for American legal history would include Asian Americans. Asian American legal historiography was almost nonexistent in 1973; there were only a handful of relevant books and articles.<sup>77</sup> Friedman's prescience set the terms for subsequent synoptic histories.

Remarkably for 1973, Friedman included two sustained discussions of Asian American legal history. He mentioned the California Constitutional Convention of 1875 where "agitation over Chinese labor and immigration was one special feature."<sup>78</sup> The debates, Friedman noted, "were rabidly racist in tone."<sup>79</sup> One delegate said the Chinese were "unfit for assimilation with people of our race."<sup>80</sup> Friedman described how Denis Kearney was the leader of a "large and voluble bloc of radicals."<sup>81</sup> He seemingly rationalized the racist attack on Chinese immigrants by stating that behind the racist oratory "was [a real fear] of the Chinese impact on wage scales." Friedman did not explain the actual impact of the convention in terms of the eventual

---

72. LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW* (2005); JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* (2011).

73. Michael E. Parrish, *Book Review: Friedman's Law*, 112 *YALE L.J.* 925, 933 (2003).

74. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 10 (1st ed. 1973).

75. Lawrence M. Friedman, *Some Problems and Possibilities of American Legal History*, in *THE STATE OF AMERICAN HISTORY* 3, 4 (Herbert Bass ed., 1970).

76. *Id.*

77. See GUNTHER BARTH, *BITTER STRENGTH: A HISTORY OF THE CHINESE IN THE UNITED STATES, 1850-1870* (1964); ROGER DANIELS, *CONCENTRATION CAMPS, USA: JAPANESE AMERICANS AND WORLD WAR II* (1971); ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* (1962); Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 *CALIF. L. REV.* 7 (1947).

78. FRIEDMAN, *supra* note 74, at 306.

79. *Id.*

80. *Id.*

81. *Id.*

constitution.<sup>82</sup>

Friedman again discussed Asian Americans in a section on “the Races.”<sup>83</sup> For a book published in 1973, Friedman was ahead of his time on race because he went beyond the then typical black-white discussion.<sup>84</sup> Friedman explained how blacks were not the only race that felt “the lash of white hatred.”<sup>85</sup> He described the 1882 Exclusion Act and anti-Chinese violence in the West. He noted the “countless ordinances and laws” that reflected a “virulent hatred against Orientals.”<sup>86</sup> (He also again mentioned “the fear of the competition of Chinese labor.”) He discussed one case, *Yick*

---

82. *Id.* at 306–07. The Convention proposed a new Article for the revised California Constitution entitled “Chinese.” The revised constitution was approved by the voters in 1879. The “Chinese” article read as follows:

SECTION 1. The Legislature shall prescribe all necessary regulations for the protection of the State, and the counties, cities, and towns thereof, from the burdens and evils arising from the presence of aliens who are or may become vagrants, paupers, mendicants, criminals, or invalids afflicted with contagious or infectious diseases, and from aliens otherwise dangerous or detrimental to the well-being or peace of the State, and to impose conditions upon which persons may reside in the State, and to provide the means and mode of their removals from the State, upon failure or refusal to comply with such conditions; provided, that nothing contained in this section shall be construed to impair or limit the power of the legislature to pass such police laws or other regulations as it may deem necessary.

SEC. 2. No corporation now existing or hereafter formed under the laws of this State, shall, after the adoption of this Constitution, employ directly or indirectly, in any capacity, any Chinese or Mongolian. The Legislature shall pass such laws as may be necessary to enforce this provision.

SEC. 3. No Chinese shall be employed on any State, county, municipal, or other public work, except in punishment for crime.

SEC. 4. The presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the well-being of the State, and the Legislature shall discourage their immigration by all the means within its power. Asiatic coolieism is a form of human slavery, and is forever prohibited in this State, and all contracts for coolie labor shall be void. All companies or corporations, whether formed in this country or any foreign country, for the importation of such labor, shall be subject to such penalties as the Legislature may prescribe. The Legislature shall delegate all necessary power to the incorporated cities and towns of this State for the removal of Chinese without the limits of such cities and towns, or for their location within prescribed portions of those limits, and it shall also provide the necessary legislation to prohibit the introduction into this State of Chinese after the adoption of this Constitution. This section shall be enforced by appropriate legislation.

CAL. CONST. art. XIX (1879), <http://archives.cdn.sos.ca.gov/collections/1879/archive/1879-constitution.pdf>. The legislature proceeded to pass “the necessary legislation” in the next session of the General Assembly. Act of Feb. 13, 1880, Chap. X, 1880 CAL STAT. 6 (prohibiting employment of “any Chinese or Mongolian” by corporation); Act of April 3, 1880, Chap. LXVI, 1880 CAL STAT. 114 (cities and towns granted power to pass any laws necessary “to cause the removal without the limits of such cities and towns . . . of any Chinese”); Act of April 5, 1880, Chap. LXXIV, 1880 CAL STAT. 121 (prohibiting “the marriage of a white person with a negro, mulatto, or Mongolian”); Act of April 7, 1880, Chap. LXXX, 1880 CAL STAT. 130, 149 (“Mongolian children” not to be included in the “apportionate” of funds to counties for public schools); Act of April 23, 1880, Chap. X, 1880 CAL STAT. 389, 391, 397 (drainage district projects prohibited from employing “any Chinese or Mongolian”); see also McCLAIN, *supra* note 46, at 79–97.

83. FRIEDMAN, *supra* note 74, at 443–45.

84. *Id.* at 440–45. Ronald T. Takaki’s trail-blazing work, *Iron Cages: Race and Culture in Nineteenth-Century America* wouldn’t appear for another six years. See RONALD T. TAKAKI, *IRON CAGES: RACE AND CULTURE IN NINETEENTH-CENTURY AMERICA* (1979).

85. FRIEDMAN, *supra* note 74, at 443.

86. *Id.* at 444.

*Wo v. Hopkins.*<sup>87</sup>

There have been two subsequent editions, both of which included more Asian American legal history. The second edition, published in 1985, kept the two discussions of anti-Chinese laws. Friedman added a brief comment about “a blizzard of laws and ordinances” in California that “testified to the hatred of Asians.”<sup>88</sup> He specifically mentioned an 1880 law that prohibited any corporation from employing “in any capacity any Chinese or Mongolian”.<sup>89</sup> However, he did not mention that the power to enact this law was granted by the 1879 California constitution.<sup>90</sup>

The only other addition to the second edition was a brief reference to the internment of Japanese Americans during World War II, a subject that had been strikingly absent in the first edition. Friedman castigated the Supreme Court for its decisions that refused to strike down the wartime internment. Those decisions, concluded Friedman, were “shot through with racism and hysteria.”<sup>91</sup>

In the third edition, published in 2005, Friedman continued to expand his treatment of Asian American legal history. Friedman retained the discussion of the “ruckus over Chinese labor and immigration” at the California Constitutional Convention of 1878–1879.<sup>92</sup> Friedman changed the tone of this discussion. In the earlier editions, he had maintained that behind the racist “oratory was fear of the Chinese impact on wage scales.” Friedman modified that sentence to read, “Fear of the Chinese impact on wage scales fueled the oratory.”<sup>93</sup> The second edition had stated, “Fear of the foreigner, distrust, xenophobia, sexual paranoia were thus added to the powerful, rotting sense of economic insecurity.” That sentence now read, “A powerful, rotting sense of economic insecurity joined hands here with xenophobia and sexual paranoia.”<sup>94</sup> Friedman did not address what discriminatory legislation resulted from this ruckus.<sup>95</sup>

In a chapter on the “underdogs,” Friedman now included a new section heading: “Asian Americans.” That section began, “In California (and in the West generally), the arrival of Chinese workers and immigrants touched off another epidemic of race hatred.”<sup>96</sup> That whites fueled the epidemic of race hatred is only implied. It is again implied in the next sentence, “The virulent feeling against Asians showed itself in a blizzard of

---

87. *Id.*

88. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 510 (2d. ed. 1985).

89. *Id.*

90. Friedman’s language changed in the second edition. The first edition referred to “Orientals.” FRIEDMAN, *supra* note 74. In the second edition, he refers to Asians or Chinese and Japanese.

91. FRIEDMAN, *supra* note 88, at 672.

92. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 263 (3d ed. 2005).

93. *Id.*; cf. FRIEDMAN, *supra* note 88, at 350.

94. FRIEDMAN, *supra* note 88, at 263.

95. Cf. WU-TANG CLAN, *Bring Da Ruckus, on ENTER THE WU-TANG: 36 CHAMBERS* (RCA 1993).

96. FRIEDMAN, *supra* note 88 at 387.

ordinances and laws.”<sup>97</sup> Like the two earlier editions, the section quoted labor economist John R. Common’s explanation that anti-Chinese hostility was “not primarily racial in character. It is the competitive struggle for standards of living.”<sup>98</sup> But, this time, Friedman interjected, “It was, however, racist to the core.”<sup>99</sup> The second edition began its concluding paragraph of this section with, “Whatever the original cause, race did become a part of the story.”<sup>100</sup> It now read, “Race thus was an essential part of the story—race, xenophobia, fear of the ‘yellow peril.’”<sup>101</sup>

Friedman also revised this chapter on underdogs by adding more detail on the development of federal laws restricting Chinese immigration and more detail on the prevalence of anti-Chinese violence in the late second half of the 19th century. The new details came from scholarship published after the second edition.<sup>102</sup>

Friedman also expanded his discussion of Asian American legal history in the 20th century in the section “The Constitution, Rights, and Civil Liberties in the Twentieth Century.”<sup>103</sup> The first half of the century was “a low point, in many ways, for race relations in the United States.”<sup>104</sup> Friedman asserted that “the house of white supremacy stood strong and fast” and then discussed the internment of Japanese Americans.<sup>105</sup> He described the Supreme Court as “supinely” upholding internment in *Korematsu v. United States*, an opinion that he called “a kind of low point.”<sup>106</sup>

Friedman also added a new section entitled “Asian Americans.” Asian American history “has many parallels to the history of other minority races.”<sup>107</sup> He recounted how Chinese immigration became “almost impossible” during the Exclusion era and how Chinese immigrants could not naturalize.<sup>108</sup> He mentioned alien land laws that prevented Asians from owning land on the West Coast. Friedman then described how the “racist immigration laws died in the 1960s.”<sup>109</sup> He concluded that since then, Chinese, Japanese, Vietnamese, and people from the Indian subcontinent

---

97. *Id.*

98. *Id.* at 388.

99. *Id.*

100. FRIEDMAN, *supra* note 88, at 510.

101. FRIEDMAN, *supra* note 92, at 389.

102. *Id.* at 388–89 (citing ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT (1998); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995); John R. Wunder, *Anti-Chinese Violence in the American West, 1850–1910*, in LAW FOR THE ELEPHANT, LAW FOR THE BEAVER: ESSAYS IN THE LEGAL HISTORY OF THE NORTH AMERICAN WEST 212 (John McLaren et al. eds., 1992)).

103. FRIEDMAN, *supra* note 92, at 523.

104. *Id.*

105. *Id.* at 526.

106. *Id.*

107. *Id.* at 532.

108. *Id.*

109. *Id.*



have been “upwardly mobile” and economic success stories.<sup>110</sup> Like Kermit Hall in *The Magic Mirror*, Friedman is “curiously complacent” in affirming the fairness of the American legal system.<sup>111</sup>

Like Friedman, Kermit Hall also took a “law and society approach” in *The Magic Mirror*, which first appeared in 1989. By the time Hall published his survey of American legal history, research and writing on American legal history had “exploded.”<sup>112</sup>

The book had two sustained discussions of Asian American legal history. The first appeared in the chapter “Race and the Nineteenth-Century Law of Personal Status.”<sup>113</sup> There, Hall discussed anti-Chinese legislation on the West Coast including the California Constitutional Convention, *Yick Wo v. Hopkins*, and the Chinese Exclusion laws. He also mentioned how Chinese litigants had some success in appellate courts but “their position before the law steadily eroded” during the Exclusion era.<sup>114</sup>

In the chapter “Cultural Pluralism, Total War, and the Formation of Modern Legal Culture: 1917-1945,” Hall included the section “Cultural Conflict and Social Control” that contained a discussion of federal restrictions on immigration in the early 20th century. He alluded to the Page Act of 1875 but didn’t mention how it targeted Chinese women.<sup>115</sup> He also again mentioned the 1882 Chinese Exclusion Act and stated that “in 1902 the ban on both Chinese immigration and citizenship became permanent.”<sup>116</sup>

Later in this chapter, Hall included a four-paragraph discussion of what he called “the relocation of Japanese-Americans.”<sup>117</sup> He wrote that the

110. *Id.*

111. See Maxwell Bloomfield, *Kermit Hall’s Survey of American Legal History: A Review Essay*, 4 BENCHMARK 293, 297 (1990). When reviewing *The Magic Mirror*, Maxwell Bloomfield wisely noted,

Like previous surveys, it also ends on a curiously complacent note. Hall certainly does not ignore the dark side of the record; time and again he points up the ways in which legal institutions have fostered racism and economic inequities throughout American history. But, on balance, he affirms the fairness of the system, which purportedly responds in incremental ways to the needs of all social classes. This neo-Progressive position has long characterized mainstream historiography, and it is worth considering why it should still seem axiomatic to most historians. One might think that a more pessimistic diagnosis would be in order these days.

112. KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* viii (1st ed. 1989).

113. The discussion begins somewhat awkwardly as Hall writes, “The Chinese were the most exotic of the wave of nineteenth-century immigrants.” *Id.* at 148. The same sentence remained in the second edition. KERMIT L. HALL & PETER KARSTEN, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 166 (2d ed. 2009).

114. HALL, *supra* note 112, at 148–49.

115. *Id.* at 248. On the Page Act, see Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005); Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, in *ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943* (Sucheng Chan ed., 1991); GEORGE ANTHONY PEFFER, *IF THEY DON’T BRING THEIR WOMEN HERE: CHINESE FEMALE IMMIGRATION BEFORE EXCLUSION* (1999).

116. HALL, *supra* note 112, at 248.

117. *Id.* at 252.

“forced removal” resulted from a “combination of racism, nativism, and wartime security concerns.”<sup>118</sup> Hall noted whites’ prejudice and resentment toward Japanese in California. He quoted constitutional scholar Edward S. Corwin’s observation that Japanese American internment was “the most drastic invasion of the rights of citizens of the United States by their own government” in American history.<sup>119</sup> Later in the chapter, he noted the United States Supreme Court’s decisions in *Hirabayashi* and *Korematsu*.<sup>120</sup>

The second edition of *The Magic Mirror* left these sections largely untouched. He removed a couple sentences from the first section, which discussed anti-Chinese legislation, and didn’t add anything. The section on internment remained the same as the first edition.<sup>121</sup> (Strangely, the index to the second edition removed the entry on citizenship.) Considering the amount of relevant scholarship that had been produced in the previous twenty years, this seems like a lost opportunity.

Both editions of *The Magic Mirror* contained a bibliographic essay. In the first edition, Hall noted that “the legal history of the Chinese in America is only now being written” and referenced two articles by historian John Wunder.<sup>122</sup> The second edition, published twenty years later, kept the same sentence and the citations to Wunder’s articles. The only new work added was Lucy Salyer’s book on the administration of the Chinese exclusion laws.<sup>123</sup> Although the text discussed Japanese American internment, the bibliography included no scholarship on internment.<sup>124</sup>

These two survey texts have both gone through multiple editions. The first edition of each text included some Asian American legal history. All authors of general texts have to make decisions about what more

118. *Id.*

119. *Id.* (quoting EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION 91 (1947)).

120. HALL, *supra* note 112, at 265.

121. KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 166–67, 273–75, 288 (2d ed. 2009).

122. HALL, *supra* note 112, at 371 (citing John R. Wunder, *Chinese in Trouble: Criminal Law and Race on the Trans-Mississippi West Frontier*, 17 W. HIST. Q. 25 (1986); John R. Wunder, *The Chinese and the Courts in the Pacific Northwest: Justice Denied?*, 52 PAC. HIST. REV. 191 (1983)).

123. HALL & KARSTEN, *supra* note 121, at 429 (citing LUCY SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995)).

124. The literature on internment is vast. See, e.g., ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II (1993; rev. ed. 2004); ROGER DANIELS, THE DECISION TO RELOCATE THE JAPANESE AMERICANS (1975); ROGER DANIELS, THE JAPANESE AMERICAN CASES: THE RULE OF LAW IN TIME OF WAR (2013); Neil Gotanda, *Other Non-Whites in American Legal History: A Review of “Justice at War”*, 13 J. GENDER, RACE & JUST. 333 (2010); PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES (1993); TETSUDEN KASHIMA, JUDGMENT WITHOUT TRIAL: JAPANESE AMERICAN IMPRISONMENT DURING WORLD WAR II (2003); ERIC MULLER, AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II (2007); WENDY NG, JAPANESE AMERICAN INTERNMENT DURING WORLD WAR II: A HISTORY AND REFERENCE GUIDE (2001); GREG ROBINSON, A TRAGEDY OF DEMOCRACY: JAPANESE CONFINEMENT IN NORTH AMERICA (2010); GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS (2003); ERIC K. YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001; 2d ed. 2013).

specialized areas are important enough to keep abreast in that field. The authors here made different decisions. Each of Friedman's subsequent editions added more material on Asian American legal history while Hall's second edition stood pat.

#### IV. INTRODUCTORY TEXTS

There are three short introductions to American legal history; all three have less than 200 pages of text.<sup>125</sup> Two were written by law professors and one by a professor of history. These books present a mixed bag. One book does a very good job incorporating Asian American legal history; the second does a perfunctory job, even within the space limitations; the third ignores Asian American legal history completely.

G. Edward White contributed the volume on American legal history to the Very Short Introductions series published by Oxford University Press. White is the David and Mary Harrison Distinguished Professor of Law at the University of Virginia School of Law. He holds both a law degree and a PhD in history. He is a prolific author, writing primarily about the judiciary and doctrinal history.<sup>126</sup>

White's book is the easiest to summarize: there is nothing about Asian American legal history. White writes in the introduction that reviewing the course of American legal history means confronting "defining issues in the development of American civilization."<sup>127</sup> Law, according to White, "permeates every facet of American life."<sup>128</sup> He gives as one example how "law determines the qualifications for American citizenship and who is eligible to enter the United States."<sup>129</sup> This is the only reference to either citizenship or immigration, which White subsequently does not address.<sup>130</sup>

White isn't unaware of Asian American legal history. In 2011, he published a short article on "the lost internment"—the evacuation and internment of Aleuts from the Aleutian Islands during World War II.<sup>131</sup> There, White referred to the Japanese American internment "as one of the notorious episodes in American legal history, one in which thousands of persons who posed no risk to the American war effort were subjected to curfews, forcibly removed from their homes, and detained in prison camps

---

125. LAWRENCE M. FRIEDMAN, *LAW IN AMERICA: A SHORT HISTORY* 37 (2002); PETER CHARLES HOFFER, *A NATION OF LAWS: AMERICA'S IMPERFECT PURSUIT OF JUSTICE* (2010); G. EDWARD WHITE, *AMERICAN LEGAL HISTORY: A VERY SHORT INTRODUCTION* (2013).

126. See, e.g., G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* (3d ed. 2007); G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835* (1988); G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (expanded ed. 2003).

127. G. EDWARD WHITE, *AMERICAN LEGAL HISTORY: A VERY SHORT INTRODUCTION* 1 (2014).

128. *Id.*

129. *Id.*

130. *Id.*

131. G. Edward White, *The Lost Internment*, 14 GREEN BAG 2d 283 (2011).

for the duration of the war and in some instances beyond.”<sup>132</sup> Moreover, in a new book, the second volume of a planned multivolume “Law in American History,” White includes a chapter entitled “The Transformation of Immigration Law and Policy.”<sup>133</sup>

The complete absence of Asian Americans may reflect either a lack of significance attributed to Asian American legal history or the perils of periodization. The book, after all, is a “very short introduction.” Decisions about what could or couldn’t be included had to be made. For White, no aspect of American legal history that involved Asian Americans made the cut. This may have been the result of White’s periodization. In the first two chapters, White addresses “two dominant themes of American history from the colonial years to the outbreak of the Civil War.”<sup>134</sup> These two themes, both involving the “subjugation of ethnic minorities,” are the “legal and social treatment of American Indians and African American slaves.”<sup>135</sup> Asian Americans, another ethnic minority subjected to discriminatory treatment, are overlooked, perhaps because the two chapters end with the Civil War.<sup>136</sup> Even so, discriminatory legislation and case law already had appeared in California before the Civil War.<sup>137</sup> When White discusses land acquisition, he covers colonial, revolutionary, and antebellum America, thereby missing the alien land laws of the late 19th and early 20th century.<sup>138</sup>

Lawrence Friedman in *Law in America: A Short History* provides a condensed version of his survey text. He again favors a “law and society” approach, stating that “the general idea behind this book is that American law is a reflection of what goes on in American society in general.”<sup>139</sup>

Friedman believes that the “skeleton in America’s closet” is “race

132. *Id.* at 283.

133. G. EDWARD WHITE, *LAW IN AMERICAN HISTORY, VOL. 2: FROM RECONSTRUCTION THROUGH THE 1920S*, ch. 4 (2016). White discusses the legal response to Chinese immigration, including the Page Act and the Chinese Exclusion Act, and Supreme Court cases such as *Chae Chan Ping*, *Chuy Lung*, *Ozawa*, *Thind*, and *Fong Yue Ting*. *Id.* at 103–05, 139–47, 152–63.

134. WHITE, *supra* note 127, at 17.

135. *Id.*

136. *See id.*

137. *See* Act of March 30, 1853, ch. 44, 1853 Cal. Stat. 62 (captioned “An Act to provide for the Protection of Foreigners, and to define Their Liabilities and Privileges”); Act of April 28, 1855, ch. 153, 1855 Cal. Stat. 194 (captioned “An Act to Discourage the Immigration to this State of Persons who cannot become Citizens thereof”); Act of April 26, 1858, ch. 333, 1858 Cal. Stat. 295 (captioned “An Act to prevent the further immigration of Chinese or Mongolians to this State”); *People v. Hall*, 4 Cal. 399 (1854); *Speer v. See Yup Co.*, 13 Cal. 73 (1859).

138. WHITE, *supra* note 127, at 32–36. On alien land laws see Keith Aoki, *No Right to Own: The Early Twentieth-Century Alien Land Laws as a Prelude to Internment*, 19 B. C. THIRD WORLD L. J. 37 (1999); Jamie Bronstein, *Sowing Discontent: The 1921 Alien Land Act in New Mexico*, 82 PAC. HIST. REV. 362 (2013); Bruce A. Castleman, *California’s Alien Land Laws*, 7 W. LEGAL HIST. 24 (1994); Gabriel J. Chin, *Citizenship and Exclusion: Wyoming’s Anti-Japanese Alien Land Law in Context*, 1 WYO. L. REV. 497 (2001); Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979 (2010).

139. LAWRENCE M. FRIEDMAN, *LAW IN AMERICA: A SHORT HISTORY* 37 (2002).

relations in the nineteenth century.”<sup>140</sup> He briefly mentions the “scandalous treatment of the Chinese.”<sup>141</sup> In one paragraph, he mentions the Chinese exclusion laws; alien land laws that barred Asians from owning land in California and in other states; the “Gentlemen’s Agreement” that restricted Japanese immigration; and the laws that prohibited marriage between whites and “people with ‘Mongolian blood.’”<sup>142</sup> He alludes to, but does not name, the United States Supreme Court decision in *United States v. Thind*.<sup>143</sup> Friedman explains how the court in *Thind* held that Thind couldn’t become a citizen because of a “racial difference” that prevented assimilation. He never really explains the racial prerequisite for citizenship.<sup>144</sup> The next paragraph begins with this sentence: “for blacks, the ‘solution’ to the problem” was subjugation and a caste system; for Asians, “the solution was exclusion.” Friedman doesn’t say whose “solutions” these were. Elsewhere in the book, he is unwilling to apply the term “white supremacy” to any region but the South.<sup>145</sup>

Asian Americans reappear in Friedman’s discussion of “plural equality.”<sup>146</sup> The idea that “all men are created equal” had not referred to everybody. The notion of equality “meant, at best, freedom within a country that was in a way owned and run by and for a single dominant group: white Protestant males.”<sup>147</sup> A “new age” demanded the end to domination by a single race or gender. Friedman suggests that “race was the most shining example of plural equality in action.”<sup>148</sup> The historical record on race “had been dismal.” Friedman mentions slavery and segregation of African Americans and “rank discrimination against

---

140. *Id.* at 69.

141. *Id.* at 71.

142. *Id.* On anti-miscegenation laws see Gabriel J. Chin & Hrishikesh Karthikeyan, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910-1950*, 9 ASIAN L. J. 1 (2002); Martha Menchaca, *The Anti-Miscegenation History of the American Southwest, 1837 to 1970: Transforming Racial Ideology into Law*, 20 CULTURAL DYNAMICS 279 (2008); Deneesh Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities*, 41 LAW & SOC’Y REV. 587 (2007); Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795 (2000).

143. FRIEDMAN, *supra* note 139, at 71. Friedman misquotes the court when he says the case involved whether a “high-class Hindu” could become a citizen. The court referred to Thind as a “high caste Hindu.” The issue, according to the court, was whether “a high caste Hindu of full Indian blood, born at Amrit Sar, Punjab, India, a white person” for purposes of naturalization. *United States v. Thind*, 261 U.S. 204, 206 (1923). On *Thind* see IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 79–109 (1996).

144. FRIEDMAN, *supra* note 139, at 71. On the racial prerequisite cases, see Devon W. Carbado, *Yellow by Law*, 97 CALIF. L. REV. 633 (2009); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

145. FRIEDMAN, *supra* note 139, at 70. As noted earlier, Friedman in the third edition of *A History of American Law*, published three years later, associated internment with white supremacy.

146. *Id.* at 148.

147. *Id.*

148. *Id.*

Hispanics.”<sup>149</sup> He then mentions how “the Chinese were the object of intense hatred in California, and the first immigration restrictions were directed against the Chinese.”<sup>150</sup> Friedman posits that the post–World War II attack on racial discrimination has benefitted “all minority races.”<sup>151</sup>

That is about it for Friedman’s introductory text. He doesn’t mention internment. Topics covered in his more comprehensive survey text are ignored or glossed over in the shorter text. Racist immigration laws get a passing reference. The only court case involving an Asian litigant is given two sentences and the case name isn’t given in either the text or notes. Friedman included eight pages of suggestions for further reading. No books involving Asian Americans or citizenship or immigration laws are among the over ninety books listed.<sup>152</sup>

Peter Charles Hoffer, Distinguished Research Professor of History at the University of Georgia, does the best job of the three introductory texts including Asian American legal history in the story of American legal history. Unlike White and Friedman, he gives immigration law a prominent place in our legal history.<sup>153</sup> He published *A Nation of Laws: America’s Imperfect Pursuit of Justice* in 2010.<sup>154</sup> Like White and Friedman, he is a prolific author.<sup>155</sup>

Hoffer begins by introducing his main theme—the American ideal is that “we are a nation of laws,” but this is a contested ideal. American law has been both made and interpreted to suit partisan interests and ideologies. As a result, not all Americans have been equal under the law. In our past, some enjoyed all the benefits of citizenship while some were excluded from many of those benefits. And some were never even accorded the status of persons under the law.

Hoffer asserts that a “clear view of our legal history reveals ambiguities and contradictions, quarrels and confrontations.”<sup>156</sup> In a single chapter on “contested categories,” Hoffer spends over six pages on citizenship and immigration law under the heading “Inclusion and Exclusion.”<sup>157</sup> Hoffer returns to the “nation of law” ideal to ask: “In a nation of laws, who belongs and who does not?”<sup>158</sup> He wisely states,

---

149. *Id.*

150. *Id.* at 149.

151. *Id.*

152. *Id.* at 185–92.

153. See PETER CHARLES HOFFER, *A NATION OF LAWS: AMERICA’S IMPERFECT PURSUIT OF JUSTICE* 26–32 (2010).

154. *Id.*

155. See, e.g., PETER CHARLES HOFFER, *CRY LIBERTY: THE GREAT STONO RIVER SLAVE REBELLION OF 1739* (2011); PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* (1998); PETER CHARLES HOFFER, *THE BRAVE NEW WORLD: A HISTORY OF EARLY AMERICA* (2d ed. 2006).

156. HOFFER, *supra* note 153, at xi, xiii.

157. *Id.* at 26–32.

158. *Id.* at 26.

“Belonging is the core of immigration law” before recounting the story of Wong Kim Ark, whose case established birthright citizenship.<sup>159</sup>

Hoffer also explains that one can find “evidence of selective exclusion” in the “immigration story.”<sup>160</sup> Some immigrants have “belonged less than others.”<sup>161</sup> The determining factor has been race. In fact, the “hallmark of immigration law” would be the process whereby “law abetted or fomented distinctions of inclusion and exclusion based on the notion of race and racial characteristics.”<sup>162</sup>

Hoffer’s examples of immigration laws based on race and racial characteristics are the 1875 Page Act and the 1882 Chinese Exclusion Act.<sup>163</sup> He also includes a long passage from *Chae Chan Ping v. United States*, the case that established the plenary power doctrine in immigration law.<sup>164</sup> He summarizes the court’s holding as “the Chinese were too different, too foreign, and too competitive to be allowed to remain.”<sup>165</sup> Hoffer explains that “behind the exclusionary impulse was a powerful ideology that combined law and ‘blood.’”<sup>166</sup> Judges and legislators assumed there was “a sort of Anglo-Saxon or Teutonic legal spirit, a spirit of enterprise and order that was carried in the blood of the ruling races, an ‘ethnic superiority of Anglo-Saxons as legal actors.’”<sup>167</sup> This “almost mystical legal spirit” permitted the “ruling races” to exclude “supposedly inferior peoples domiciled in the United States from the rights the ruling race had running in its blood.”<sup>168</sup> Hoffer mentions the 1917 and 1924 Immigration Acts; however, he fails to mention the “Asiatic Barred Zone” or the ineligibility of all Asian immigrants to naturalize in these later laws.<sup>169</sup> Like Friedman and White, he does not mention the internment of Japanese Americans. Unlike Friedman and White, he cited relevant cases—*Wong Kim Ark* and *Chae Chan Ping*—and recent scholarship on citizenship and immigration.<sup>170</sup>

---

159. *Id.* at 27.

160. *Id.* at 28.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at xi (quoting *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889)). On the significance of *Chae Chan Ping*, see Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, in *IMMIGRATION LAW STORIES* (David A. Martin & Peter H. Schuck eds., 2005).

165. HOFFER, *supra* note 153, at 29.

166. *Id.*

167. *Id.* at 29–30.

168. *Id.* at 30.

169. *Id.* at 26–32.

170. *See id.* at 27–29, 184 n.27–29.

V. MARGINS AND MAINSTREAMS<sup>171</sup>

Based upon the texts examined in this article, Asian American legal history scholarship has not fully entered the mainstream of American legal history. Two books failed to include any aspect of Asian American legal history. While the books under examination ranged in the publication dates from 1973 to 2013, the publication date is irrelevant in terms of coverage. The two books that ignored Asian American legal history were published in 2007 and 2013. The authors' ages or ethnicities are also irrelevant. All the authors are over 65; all of them except for Jamil Zainaldin are white.<sup>172</sup> Where the authors went to graduate school or law school also seems irrelevant.

Leaving aside the books that didn't include any aspect of Asian American legal history, some aspects of that history now appear to be part of the canon of American legal history based upon repeated appearances in these basic texts. These would include anti-Chinese legislation passed by states and municipalities, the Chinese exclusion laws, the Gentlemen's Agreement, and the internment of Japanese Americans during World War II. Several cases also are mentioned repeatedly and would appear to be canonical: *Yick Wo*, *Chae Chan Ping*, *Wong Kim Ark*, *Korematsu*, and *Hirabayashi*.<sup>173</sup>

There are at least three possible explanations for the limited coverage of Asian American history in American legal history texts. First, the political orientation of authors may limit the coverage of Asian Americans. Second, relevant scholarship and scholars have been marginalized. Mainstream scholars read mainstream scholarship. Third, there is just too much scholarship to read for scholars who are attempting the herculean task of creating an overall account of American legal history.

The amount of coverage of Asian Americans in American legal history texts may be influenced at the outset by what Robert W. Gordon calls the historian's "political vision" (conservative, liberal, or radical-populist).<sup>174</sup> "Conservative history," says Gordon, "returns to the legal past

---

171. See GARY Y. OKIHIRO, *MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE* (1994). Professor Okihiro argues that "the core values and ideals of the nation emanate not from the mainstream but from the margins—from among Asian and African Americans, Latinos and American Indians, women, and gays and lesbians." These groups' struggles for equality "have helped preserve and advance the principles and ideals of democracy and have thereby made America a freer place for all." *Id.* at ix–x. These observations, I believe, also apply to American legal history.

172. Zainaldin is of Lebanese descent. Mary J. Loftus, *Georgia's Jamil Zainaldin*, 31 *HUMANITIES* (May/June 2010).

173. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

174. See Robert W. Gordon, *The Politics of Legal History and the Search for a Usable Past*, 4 *BENCHMARK* 269 (1990). There aren't any basic legal texts written from a "radical-populist" perspective. It's not readily apparent that such a perspective necessarily would improve coverage of Asian American legal history.



as a source of authoritative tradition: the past is wiser than we, and we search it to reproach a decadent present with its wisdom.”<sup>175</sup> From that vantage point, a conservative historian would do well to ignore Asian Americans in our legal past. There is little wisdom to be discerned from the racist and white supremacist underpinnings of exclusionary and discriminatory legislation and court decisions.

Liberal historians would be more likely to explore Asian American legal narratives. Liberals tend to extol “the gradual emancipation of individual freedom and reason” as the present becomes the fulfillment, rather than a betrayal of the past.<sup>176</sup> Liberals may mention but downplay Asian American legal narratives. Liberal historians seem somewhat reluctant to go beyond the black-white binary.<sup>177</sup>

Some recent examples of conservative aversion of and liberal reluctance to Asian American legal history may be found in the work of the liberal historian Paul Finkelman and the conservative historian James Ely, two of the coauthors of *American Legal History: Cases and Materials*. Finkelman recently published a pamphlet entitled *Race and the Constitution from the Philadelphia Convention to the Age of Segregation*. In the introduction, Finkelman notes how by the end of the nineteenth century, blacks and Asians “had some basic rights, but substantial government-sanctioned discrimination at the state level was almost universally permitted.” He points out how “Asian immigrants and their American-born children often faced significant legal discrimination” and “federal laws and policies discriminated against Asian immigrants and prohibited them from becoming naturalized citizens.”<sup>178</sup> That said, Finkelman includes an endnote that explains:

This pamphlet focuses mostly on how the Constitution affected African Americans from the founding to the early twentieth century. Issues of race and the Constitution affected Asians, who began to arrive in the late 1840s. Space does not allow for a complete investigation of Asian Americans and the Constitution in the nineteenth century.<sup>179</sup>

After the introduction, Asian Americans are only mentioned twice.<sup>180</sup>

Ely has written a monograph on the “constitutional history of property rights,” which is currently in its third edition.<sup>181</sup> Ely seems averse to

175. *Id.*

176. *Id.* at 270–71.

177. See Juan F. Perea, *The Black/White Binary Paradigm of Race: The Normal Science of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997); ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE 48–49, 53–55, 58 (1999).

178. PAUL FINKELMAN, RACE AND THE CONSTITUTION FROM THE PHILADELPHIA CONVENTION TO THE AGE OF SEGREGATION 2 (2010).

179. *Id.* at 65.

180. *Id.* at 45, 57–59. In a bibliographic essay, Finkelman also states, “The story of the Chinese is particularly relevant to the history of race and the Constitution.” *Id.* at 77.

181. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed. 2007).

introducing race into this history. Other property scholars don't share this reluctance.<sup>182</sup> He mentions *Buchanan v. Warley* (1917), where the Supreme Court struck down an "ordinance forbidding black persons from occupying homes in neighborhoods in which the majority of homes were occupied by whites."<sup>183</sup> But Ely does not mention *Shelley v. Kraemer* (1948), where the Supreme Court held that states could not enforce racially restrictive covenants without violating the Equal Protection Clause of the Fourteenth Amendment.<sup>184</sup> Nor does Ely address state laws that prohibited Asian immigrants from owning land.<sup>185</sup>

Based upon a review of these American legal history texts, the Asian American legal scholarship considered essential for the study of American legal history is unclear. Only three items are cited more than once in these American legal history texts.<sup>186</sup> No scholarship published after 2005 is cited more than once, suggesting a time lag for citation.

There are some surprising omissions. Strangely, only Lawrence Friedman cites any work written by Asian American scholars. Friedman cites Bill Ong Hing, in the most recent edition of *A History of American Law*.<sup>187</sup> Friedman also cites Angelo N. Ancheta and Ronald T. Takaki in his *American Law in the 20th Century*.<sup>188</sup> No female Asian American scholar is ever cited, not even by Friedman. Every book under review overlooks seminal scholarship by Keith Aoki,<sup>189</sup> Sucheng Chan,<sup>190</sup> Gabriel J. Chin,<sup>191</sup>

182. See, e.g., ALFRED L. BROPHY ET AL., *INTEGRATING SPACES: PROPERTY LAW AND RACE* (2010).

183. ELY, *supra* note 181, at 113.

184. *Shelley v. Kraemer*, 384 U.S. 1 (1948). *Shelley* involved consolidated appeals. The restrictive clause in the Missouri case language prohibited occupancy of the property "by people of the Negro or Mongolian race." *Id.* at 5. The Michigan case contained language that restricted use of the property to "those of the Caucasian race." *Id.* at 6. For further examples of racially restrictive covenants, see Racial Restrictive Covenant Database, [depts.washington.edu/civilr/covenants.htm](https://depts.washington.edu/civilr/covenants.htm).

185. See, e.g., *Oyama v. California*, 332 U.S. 633 (1948); *Frick v. Webb*, 263 U.S. 325 (1923); *Webb v. O'Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923); *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952).

186. PETER IRONS, *JUSTICE AT WAR* (1983) was cited by HALL & KARSTEN, *supra* note 121, at 406 n.1; FRIEDMAN, *supra* note 92, at 532 n.58; and FRIEDMAN, *supra* note 62, at 643 n.2. John R. Wunder, *The Chinese and the Courts in the Pacific Northwest: Justice Denied?*, 52 PAC. HIST. REV. 191 (1983) was cited by FRIEDMAN, *supra* note 88, at 510 n.65; HALL, *supra* note 112, at 347 n.59; and HALL & KARSTEN, *supra* note 121, at 398 n.83, 429. LUCY SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995) is cited by FRIEDMAN, *supra* note 92, at 593; FRIEDMAN, *supra* note 62, at 625 n.42; HALL & KARSTEN, *supra* note 121, at 429; and HOFFER, *supra* note 153, at 184 n.28.

187. FRIEDMAN, *supra* note 92, at 532 n.57 (citing BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1830-1900* (1993)).

188. FRIEDMAN, *supra* note 62, at 625 n.44-46 (citing ANGELO N. ANCHETA, *RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE* (1997) and RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (rev. ed. 1998)).

189. Keith Aoki, *Foreign-ness & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1 (1996); Keith Aoki, *No Right to Own: The Early Twentieth-Century Alien Land Laws as a Prelude to Internment*, 19 B.C. THIRD WORLD L.J. 37 (1998).

Erika Lee,<sup>192</sup> Mae M. Ngai,<sup>193</sup> and Leti Volpp.<sup>194</sup>

What explains the paucity of citations to Asian American legal scholars? There are several possibilities. One possibility is that white scholars are marginalizing Asian American scholars. In articles published in 1984 and 1992, Richard Delgado suggested that white civil rights scholars failed to acknowledge civil rights scholarship written by minority civil rights scholars.<sup>195</sup> Delgado discovered a “scholarly tradition” of “white scholars’ systematic occupation of, and exclusion of minority scholars from, the central areas of civil rights scholarship.”<sup>196</sup> But Delgado believed that this “scholarly tradition” existed mainly in civil rights scholarship— “nonwhite scholars in other fields of law seem to confront no such tradition.”<sup>197</sup> Delgado was addressing whether white civil rights scholars were, in effect, protecting their turf when they failed to cite minority civil rights scholars. Here, generalists are failing to cite specialists. Also, other research has been more sanguine about citations by scholars of color in law review articles. For example, one study of three “elite” law journals found

190. Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, in *ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943* (Sucheng Chan ed., 1991).

191. Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 *HARV. C.R.-C.L. L. REV.* 1 (2002); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 *UCLA L. REV.* 1 (1998); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 *N.C. L. REV.* 273 (1996).

192. Erika Lee, *A Nation of Immigrants and a Gatekeeping Nation: American Immigration Law and Policy*, in *A COMPANION TO AMERICAN IMMIGRATION 5* (Reed Ueda ed., 2011); Erica Lee, *American Gatekeeping: Race and Immigration Law in the Twentieth Century*, in *NOT JUST BLACK AND WHITE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON IMMIGRATION, RACE, AND ETHNICITY IN THE UNITED STATES* 119 (Nancy Foner & George M. Fredrickson eds., 2004); ERIKA LEE, *AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943* (2003); Erika Lee, *Enforcing the Borders: Chinese Exclusion along the U.S. Borders with Canada and Mexico, 1882-1924*, 89 *J. AM. HIST.* 54 (2002); Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882-1924*, 21 *J. AM. ETHNIC HIST.* 36 (Spring 2002).

193. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2005); Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 *J. AM. HIST.* 67 (1999); Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 *LAW & HIST. REV.* 69 (2003).

194. Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 *U.C. DAVIS L. REV.* 795 (2000); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 52 *UCLA L. REV.* 405 (2005); Leti Volpp, “Obnoxious to Their Very Nature”: *Asian Americans and Constitutional Citizenship*, 8 *ASIAN L.J.* 71 (2001); Leti Volpp, *The Excesses of Culture: On Asian American Citizenship and Identity*, 17 *ASIAN AM. L.J.* 63 (2010).

195. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 *U. PA. L. REV.* 561 (1984); Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 *U. PA. L. REV.* 1348 (1992); see also Robert S. Chang, *Richard Delgado and the Politics of Citation*, 11 *BERKELEY J. AFR.-AM. L. & POL’Y* 28 (2009); Juan F. Perea, *Of Word Grenades and Impermeable Walls: Imperial Scholarship Then and Now*, 33 *LAW & INEQ.* 443 (2015).

196. Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 *U. PA. L. REV.* 561, 566 (1984).

197. *Id.*

that “[a]rticles by minority women were the most heavily cited, with 164 percent more citations than articles published by white men.”<sup>198</sup>

Almost all the research on citation patterns has involved examining the citation of law review articles in other law review articles. This situation involves examining books citing law review or history journal articles and also books citing other books. Jean Stefanic has suggested that new scholarship is “slowly being absorbed into casebooks.”<sup>199</sup> Exemplifying this concept, Lucy Salyer’s *Laws Harsh As Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (1995) was cited in the books under review four times while Erika Lee’s *At America’s Gates: Chinese Immigration during the Exclusion Era, 1882-1943* (2003) and Mae M. Ngai’s *Impossible Subjects: Illegal Aliens and the Making of Modern America* (2005) were not cited at all.<sup>200</sup> Comparing law review citations to all three books from 2005 to 2015, Salyer and Ngai have comparable numbers, which suggests that law review articles more quickly reflect new scholarship.<sup>201</sup> Since Salyer’s book is also the oldest, perhaps Stefanic’s suggestion about the slow absorption of new scholarship in casebooks applies. But Haney López’s book on naturalization cases, *White by Law: The Legal Construction of Race* (1996), which was published a year after Salyer’s book, also was not cited in any of these legal history texts.<sup>202</sup> Haney López’s book is highly regarded; however, it’s also associated with Critical Race Theory, which may be too much for these mainstream scholars.<sup>203</sup>

Like Asian American legal scholars, Asian American law journals are poorly represented in these legal history texts. There are two law journals dedicated to Asian American experiences and concerns: the *Asian American Law Journal* at Berkeley Law and the *Asian Pacific American Law Journal* at the UCLA School of Law. Both journals have published some important work on Asian American legal history.<sup>204</sup> Neither journal

198. Ian Ayres & Frederick E. Vars, *Determinants of Citations to Articles in Elite Reviews*, 29 J. LEGAL STUD. 427, 439 (2000); see also Deborah Jones Merritt, *Scholarly Influence in a Diverse Legal Academy: Race, Sex, and Citation Counts*, 29 J. LEGAL STUD. 345 (2000).

199. Jean Stefanic, *Needles in the Haystack: Finding New Legal Movements in Casebooks*, 73 CHI.-KENT L. REV. 755, 760 (1998).

200. See *supra* note 123 for the citations to Salyer’s book.

201. I ran the search in Hein Online and set the date parameters from 2005 (when Ngai’s book was published) to 2015. Salyer’s book had 105 citations; Ngai’s book had 98; and Lee’s book had 39.

202. IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996). Haney López’s book covers the legal construction of “white person” under naturalization law, including such cases as *In re Ah Yup*, 1 F. Cas. 223 (C.C.D. Cal. 1878); *Ozawa v. United States*, 260 U.S. 178 (1922); and *United States v. Thind*, 261 U.S. 204 (1923). Until 1952, immigrants who were racially categorized as Asian were unable to naturalize. See HANEY LÓPEZ, *supra* note 202, at 1.

203. Kevin R. Johnson, *Book Review, Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN’S L.J. 142 (1996); Frank H. Wu, *From Black to White and Back Again*, 3 ASIAN L.J. 185 (1996).

204. See, e.g., Keith Aoki, *Foreign-ness & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1 (1996); Neil Gotanda,

has been cited in any of the legal history texts. For example, the third edition of Friedman's *A History of American Law*, published in 2005, has over 200 citations to law reviews; however, none are to the *Asian American Law Journal* or the *Asian Pacific American Law Journal*. The second edition of *The Magic Mirror*, which was published in 2009, has over fifty citations to law journals but also fails to cite to any articles published in either journal.

Similarly, articles from the *Journal of American Ethnic History* are overlooked.<sup>205</sup> Sociologists Tara J. Yosso and Daniel G. Solórzano have argued that citation patterns suggest that white scholars “do not often venture into ethnic-specific journals or texts to read the works of scholars of color.”<sup>206</sup> They contend that “racially selective citing” results from white scholars either not knowing where to go or knowing where to go but choosing to ignore the scholarship.<sup>207</sup>

Finally, there is a less political reason that might explain why Asian American scholarship has been overlooked: everyone has too much to read. Legal historian Barbara Y. Welke has perceptively addressed a similar failure of one group of scholars to cite another group of scholars. Welke found that, for works on law and the administrative state, leading works that privilege economy and politics did not cite works that privilege gender and vice versa. Welke offered a “simple, innocuous explanation for these silences—we all have too much to read.” Welke further suggested that “the greatest cost of the explosion in scholarship over the last few decades is the way it has encouraged intellectual balkanization as a survival strategy.”<sup>208</sup>

---

*New Directions in Asian American Jurisprudence*, 17 ASIAN AM. L.J. 5 (2010); Hrishi Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910-1950*, 9 ASIAN L.J. 1 (2002); Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 ASIAN L.J. 181 (1998); Brant T. Lee, *A Racial Trust: The Japanese YWCA and the Alien Land Law*, 7 ASIAN PAC. AM. L.J. (2001); Charles J. McClain, *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 ASIAN L.J. 33 (1995); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of Foreignness in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71 (1997); John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN AM. L.J. 55 (1996); Leti Volpp, “*Obnoxious to Their Very Nature*”: Asian Americans and Constitutional Citizenship, 8 ASIAN L.J. 71 (2001).

205. See, e.g., Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882-1924*, 21 J. AM. ETHNIC HIST. 36 (Spring 2002); Mae M. Ngai, *Legacies of Exclusion: Illegal Chinese Immigration during the Cold War Years*, 18 J. AM. ETHNIC HIST. 3 (Fall 1998); George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women under the Page Law, 1875-1882*, 6 J. AM. ETHNIC HIST. 28 (Fall 1986); Dorothee Schneider, *Naturalization and United States Citizenship in Two Periods of Mass Migration: 1894-1930, 1965-2000*, 21 J. AM. ETHNIC HIST. 50 (Fall 2001); William H. Siener, *Through the Back Door: Evading the Chinese Exclusion Act along the Niagara Frontier, 1900 to 1924*, 27 J. AM. ETHNIC HIST. 34 (Summer 2008).

206. Tara J. Yosso & Daniel G. Solórzano, *Conceptualizing a Critical Race Theory in Sociology*, in BLACKWELL COMPANION TO SOCIAL INEQUALITIES 135 (Mary Romero & Eric Margolis eds., 2005).

207. *Id.*

208. Barbara Y. Welke, *Willard Hurst and the Archipelago of American Legal Historiography*, 18 LAW & HIST. REV. 197, 198 (2000). Others have pointed out how law professors suffer from

Some legal historians may not read any scholarship about Asian American legal history because they narrowly think that it is just another subfield that's not related to their work.<sup>209</sup>

The texts that ignored or minimized Asian American legal history also ignored broader trends in legal historiography. Asian American history has been both a part of and apart from the remarkable increase in scholarship on immigration and citizenship in the last twenty years.<sup>210</sup> Two recent surveys of American legal historiography reflected this new scholarly interest by including chapters on immigration and citizenship.<sup>211</sup> When the American Historical Association recently published a series of pamphlets on American constitutional history, it included one on citizenship and immigration; when the same organization had published a similar series of

---

"unfortunate interdisciplinary ignorance"; legal scholarship has been "remarkably oblivious" to relevant political science scholarship. Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 252–53 (1997); see also Gerald N. Rosenberg, *Across the Great Divide (Between Law & Political Science)*, 3 GREEN BAG (2d Ser.) 267 (2000).

209. It doesn't help matters when Asian Americans are underrepresented in both the legal profession and law school faculties. The last time the American Association of Law Schools reported statistics on race and ethnicity on law faculties, 2.5% of law professors were Asian American. Meera E. Deo, *Looking Forward to Diversity in Legal Academia*, 29 BERKELEY J. GENDER, L. & JUST. 352, 358 (2014) (citing ASSOCIATION OF AMERICAN LAW SCHOOLS, 2008–09 AALS STATISTICAL REPORT ON LAW FACULTY, (2009)); see also Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549, 1564–66 (2011) ("Asian Americans historically have been severely underrepresented in the field of law in the United States and remain so today."). The 2010 Census reported, out of a total U.S. population of 308.7 million, 14.7 million people, or 4.8%, as "Asian alone" and another 2.6 million, or .9%, as "Asian in combination with one or more other races." Elizabeth M. Hueffel et al., *The Asian Population*, 2010 Census Briefs, U.S. Census Bureau (March 2012).

210. I borrow the phrase from Erika Lee, *A Part and Apart: Asian American and Immigration History*, 34 J. AM. ETHNIC HIST. 28 (Summer 2015). In addition to previously cited scholarship, some of the rich body of recent work on immigration and citizenship includes MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* (2009); CORRINE T. FIELD, *THE STRUGGLE FOR EQUAL ADULTHOOD: GENDER, RACE, AGE, AND THE FIGHT FOR CITIZENSHIP IN ANTEBELLUM AMERICA* (2014); MARTHA GARDNER, *THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870–1965* (2005); NANCY ISENBERG, *SEX AND CITIZENSHIP IN ANTEBELLUM AMERICA* (1998); DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007); HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996); KUNAL M. PARKER, *MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000* (2015); ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997); BARBARA YOUNG WELKE, *LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES* (2010); and ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* (2006). See generally Mae M. Ngai, *Immigration and Ethnic History*, in *AMERICAN HISTORY NOW* 358 (Eric Foner & Lisa McGirr eds., 2011).

211. Kunal M. Parker, *Citizenship and Immigration Law, 1800–1924*, in *CAMBRIDGE HISTORY OF LAW IN AMERICA, VOL. II: THE LONG NINETEENTH CENTURY (1789–1920)* 168 (Michael Grossberg & Christopher Tomlins eds., 2008); Barbara Young Welke, *Law, Personhood, and Citizenship in the Long Nineteenth Century*, in *CAMBRIDGE HISTORY OF LAW IN AMERICA, VOL. II: THE LONG NINETEENTH CENTURY (1789–1920)* 345 (Michael Grossberg & Christopher Tomlins eds., 2008); Tirres, *supra* note 6.

pamphlets on the bicentennial of the Constitution in the late 1980s, citizenship and immigration were ignored.<sup>212</sup> The *Law and History Review*, the journal of the American Society for Legal History, has published many articles in the last twenty years that also reflect this increased interest in immigration and citizenship.<sup>213</sup>

#### VI. CONCLUSION

To return to the question posed at the beginning of this article: Can you write about American legal history without Asian Americans? The answer is, apparently, yes, as some authors are obviously trying to do so. Asian American legal history, despite its importance for American legal history, has not fully entered the mainstream of American legal history as reflected by its basic texts and surveys. For a variety of reasons—the conservative tradition in American legal history, the reluctance to go beyond the white-black racial binary paradigm, a lag in incorporating recent scholarship—many of the standard texts minimize or ignore Asian American legal history. That’s a shame. When Asian Americans are rendered invisible, the history of American law becomes incomplete.

---

212. KUNAL M. PARKER, *THE CONSTITUTION, CITIZENSHIP, AND IMMIGRATION IN AMERICAN HISTORY, 1790–2000* (2013).

213. See, e.g., Theresa Alfaro-Velcamp & Robert H. McLaughlin, *Immigration and Techniques of Governance in Mexico and the United States: Recalibrating National Narratives through Comparative Immigration Histories*, 29 *LAW & HIST. REV.* 573 (2011); Cole & Chin, *supra* note 18; *Forum. Whiteness and Others: Mexican Americans and American Law*, 21 *LAW & HIST. REV.* 109–213 (2003); Kunal M. Parker, *State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts*, 19 *LAW & HIST. REV.* 583 (2001); Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 *LAW & HIST. REV.* 69 (2003).