UNIVERSITY OF BALTIMORE SCHOOL OF LAW

FALL SEMESTER

2015

SYLLABUS

RACE AND THE LAW

LAW 823-511 (5292)

MICHAEL HIGGINBOTHAM
COURSE DETAILS

Professor: Michael Higginbotham

Time: Designated Tuesdays (see schedule of classes) 9:00 -11:45 am

Course Category: Upper-Level Limited Enrollment Elective

Classroom: University of Baltimore School of Law Angelos Law Center AL 602

Office Hours: Tuesday noon – 1:00 pm Thursday 4:00 – 5:00 pm (or by appointment)

Office: University of Baltimore School of Law Angelos Law Center AL 1111

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Facsimile: 410-837-4560

TWEN: Syllabus, distributed materials, announcements, and assignments available on TWEN

Texts:

Required:


**Recommended:**


Douglas Blackmon, *Slavery By Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (New York: Doubleday, 2008.)


Orlando Patterson, *Slavery and Social Death* (Cambridge: Harvard University Press, 1982).


*Both required and recommended reading materials will be placed on reserve in the law library.*

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**COURSE REQUIREMENTS**

Race Law is a three-credit Limited Enrollment Elective Course. Class attendance is mandatory. Students who miss more than three class sessions, excused or unexcused, will not be permitted to submit a paper. Students are required to write a research paper in partial fulfillment of the course requirements. The paper must have a minimum length of not less than 20 pages plus endnotes and must be typed and double-spaced. There is no maximum length limitation. Students, who so desire, may submit a first draft for review. Students may use endnotes or footnotes, whichever they prefer. Those using footnotes should take this into consideration in satisfying suggested page-length guidelines for their papers.

Students may write on any topic of their choice as long as it is within the scope of the subject matter of the course. Students must discuss their research topics with and get approval from Professor Higginbotham. Individual topic discussion meetings may be arranged and a list of possible topics will be made available. Topics selected from this list receive automatic approval without request. Optional first drafts of papers are due October 13, 2015. Mandatory final papers are due December 10, 2015. Please submit papers via TWEN in the assignment drop box. Late papers will be accepted but will be reduced by one full letter-grade. There are no exceptions to these rules.

Generally, the assigned materials will be read by the entire class. However, for some specialized and more detailed inquiry, the class will be divided into four law firms. On various
days the members of each firm will represent a particular client or will comment on additional readings and their relevance to the materials being studied by the entire class. All students are required to thoroughly read the assigned materials for each class and are encouraged to read the supplemental materials. At least one member of each law firm should be prepared to discuss the assigned material for the firm. Such preparation will facilitate discussion and encourage the exchange of ideas. A list of the firm members will be distributed during the second week of class. During class sessions students are encouraged to sit with members of their law firms. Class discussion provides an opportunity to express your own views on issues, but you may also include comments which reflect the perspective held by political leaders, judges, or scholars.

The law firms will be as follows:

Firm A: The John Newton Firm

Firm B: The Harriet Tubman Firm

Firm C: The Daniel Inouye Firm

Firm D: The Lloyd Gaines Firm

Final grades will be based primarily on the quality of the research paper; however, class participation will be considered as well. Your final paper will count as 66 percent of the final grade. Class participation will count as 34 percent of the final grade.

COURSE DESCRIPTION

The course will examine the use of the law both to perpetuate and eradicate racial injustice in the United States from the inception and rise of slavery during the colonial period through the racial desegregation decision of the United States Supreme Court in Brown v. Board of Education in 1954 to the present. The goals of the course are to achieve an understanding of the role of law in its social context, especially with regard to the use of legal institutions and law in the creation and maintenance of systems of racial injustice; and, as a corollary, to examine the potential and limits of the use of law (especially litigation) as a tool for social change.

The course will begin with an examination of the analytical framework for the study of race and the law. Two subjects will be covered; racial prejudice and race classification.

The course will then focus on the role of law in the introduction and development of the slave system. The subsequent expansion and entrenchment of the institution of slavery in the new nation will be examined next through a case and statutory study of antebellum slavery law. Several cases from various northern courts will be studied as well. The major institutions focused upon will be the state courts and the state legislatures with regard to their role in the preclusion or allowance of traditional family relations, educational options, due process in the
courts, and other "rights" for slaves and free blacks.

We will also explore the political debates and the handling of the slavery issue in the formulation of those documents central to the federal government, e.g., the Declaration of Independence, the Articles of Confederation, and the Constitution. In addition, we will look at the federal judiciary's treatment of slavery and the status of blacks.

The foci will not be limited merely to the rules of law adopted by the courts or the legislatures. A major issue for exploration will be the values and principles of the individuals in power and a probing of how these priorities affected their choice of options and the rules of law adopted. We will analyze the "prejudices which judges share" as suggested by Oliver Wendell Holmes when he wrote:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. (emphasis added)

During the latter-half of the course, we will follow the role of American law in the attempted eradication of racial segregation and discrimination against African Americans, Asian Americans, Latinos/as, and American Indians, concentrating predominantly on their treatment by the Congress and the Supreme Court. Thus, the inquiry will focus on the successes as well as the failures of American legal institutions during the nineteenth and twentieth centuries and includes examination of the passage and subsequent judicial interpretation of the Thirteenth and Fourteenth Amendments. Subjects covered include citizenship, sovereignty, transportation, housing, education, marriage, employment, business, voting, and the criminal justice system. By applying our understanding of the magnitude and nature of slavery gained from earlier study, students may better comprehend what the amendments were designed to eliminate and evaluate the nature and extent of the legal system's endeavors in this regard.

Next, the course will examine Supreme Court confirmation controversies involving race. The course will also examine ongoing controversies involving race with specific focus on the administration of justice, immigration, and politics.

The course will conclude with student presentations on race, an examination of race and the future of America, and a summary on current race relations.

The rationale for this course was developed by the late Judge A. Leon Higginbotham, Jr., Chief Judge of the United States Court of Appeals for the Third Circuit, in his books, In THE MATTER OF COLOR and SHADES OF FREEDOM, and in the following articles: "Racism and the Early American Legal Process, 1619-1896," 407 ANNALS (May 1973), 1-17; Book Review of Race, Racism and American Law, by Derrick A. Bell, Jr., in the University of Pennsylvania Law Review, Vol. 122, No. 4 (April 1974); "The Impact of the Declaration of Independence," Crisis Magazine (Winter 1975), 82; "To the Scale and Standing of Men," The Journal of Negro
SCHEDULE OF CLASSES

Session #1: OVERVIEW: Discussion of the course subject-matter and requirements (Syllabus pp. 1-22; Race Law (Dedication, Foreword, Preface, History Timeline, and Introduction) pp. v, xxxiii-xlvi, 3-4, 771-780; Ghosts of Jim Crow (Preface) pp. 14-23. Please read this material prior to the initial session)

Aug. 18

PART ONE — ANALYSIS AND FRAMEWORK

THE RACIAL PREJUDICES THAT JUDGES SHARE

State v. Mann (1829)
(Race Law pp. 4-26) (read carefully pp. 5-7) (please read this material prior to the initial session)

Supplemental Readings:
Robert Cover, Justice Accused

RACE CLASSIFICATION

The Nature, Definitions, and Myths of Race
(Race Law pp. 26-50) (read carefully pp. 43-48)

People v. Hall (1854)
(Race Law pp. 50-66) (read carefully pp. 54-57) (please read this material prior to the initial session)

Supplemental Readings:
Joseph Graves, The Emperor’s New Clothes
Ariela Gross, What Blood Won’t Tell
J.A. Rogers, Sex and Race
Kevin Johnson, Mixed Race America
Nell Painter, The History of White People

Session #2: THE COLONIAL EXPERIENCE WITH SLAVERY AND FREE BLACKS

Aug. 25

Ghosts of Jim Crow
(Chapter 1, pp. 47-48)

The Earliest Protest Against Slavery (1688)
(Race Law pp. 748-749 or In The Matter of Color p. 267)

In The Matter of Color
(Chapter 2, pp. 22-30) (read carefully pp. 23-24, 28-29)

In The Matter of Color (Chapters 3, 4, 6, and 7)

Firm A: Massachusetts (Chapter 3) (pp. 89-98)
Firm B: Pennsylvania (Chapter 7) (pp. 299-305)
Firm C: Georgia (Chapter 6) (pp. 216-218, 252-256)
Firm D: New York (Chapter 4) (pp. 100-109)

Supplemental Readings:
Mary Frances Berry, *Black Resistance/White Law*
Winthrop Jordan, *White Over Black*
Orlando Patterson, *Slavery and Social Death*
Orlando Patterson, *Freedom In The Making*

**THE ENGLISH EXPERIENCE WITH SLAVERY AND FREE BLACKS**

In The Matter of Color (Chapters 8 and 9) (read carefully pp. 320-329, 351-355)

Supplemental Readings:
Eugene Genovese, *Roll, Jordan, Roll*

**SLAVERY, FREE BLACKS, AND THE AMERICAN REVOLUTION**

In The Matter of Color (Chapter 11) (pp. 375-383)

Declaration of the Causes and Necessity of Taking Up Arms (1775) (Race Law pp. 749-750)

Declaration of Independence (1776) (Race Law pp. 750-753)

Supplemental Readings:
David Brion Davis, *The Problem of Slavery in the Age of Revolution*
Edmund Morgan, *American Slavery, American Freedom*

**SLAVERY, FREE BLACKS, AND THE CONSTITUTION**

The Articles of Confederation (1781) (Race Law pp. 754-755)

The Constitution (1789)
Supplemental Readings:
Max Farrand, *The Framing of the Constitution*
Max Farrand, *The Records of the Federal Convention*
Frank Tannenbaum, *Slave and Citizen*

Session #3: **THE NORTHERN APPROACH TO FREE BLACKS** (Connecticut and Massachusetts)

*Crandall v. The State of Connecticut* (1834)
(Race Law pp. 80-95, 740) (read carefully pp. 81-91)

*Roberts v. The City of Boston* (1850)
(Race Law pp. 95-102) (read carefully pp. 98-100)

Supplemental Readings:
Leon Litwack, *North of Slavery*

**THE SOUTHERN APPROACH TO SLAVERY AND FREE BLACKS** (Virginia)

*Hudgins v. Wrights* (1806)
(Race Law pp. 101-106; 110-112) (read carefully pp. 107-109)

Ghosts of Jim Crow
(Chapter 1, pp. 50-53)

*Souther v. The Commonwealth* (1851)
(Race Law pp. 106-110) (read carefully pp. 107-109)

Ghosts of Jim Crow
(Chapter 1, pp. 55-57)

Slave Auction Handbill (1852)
(Race Law pp. 112-113)

Supplemental Readings:
Mark Tushnet, *The American Law of Slavery*
John W. Blassingame, *The Slave Community*
Kenneth Stampp, *The Peculiar Institution*

Session #4: **SLAVERY, FREE BLACKS, AND THE UNITED STATES SUPREME COURT**
*United States v. The Amistad* (1840)
(Race Law pp. 113-122) (read carefully pp. 119-121) (Firms A and B)

*Prigg v. The Commonwealth of Pennsylvania* (1842)
(Race Law pp. 122-140, 167-169) (read carefully pp. 126-129) (Firms C and D)

Ghosts of Jim Crow
(Chapter 1, pp. 54-55)

*Dred Scott v. Sandford* (1857)
(Race Law pp. 140-167, 169-173) (read carefully pp. 144-156)

Northwest Ordinance (1787)
(Race Law pp. 755-756)

Fugitive Slave Act (1793)
(Race Law pp. 756-757)

The Missouri Compromise (1820)
(Race Law pp. 757-758)

The Fugitive Slave Act (1850)
(Race Law pp. 758-759)

Shades of Freedom
(Chapter 5, pp. 61-67)

Ghosts of Jim Crow
(Chapter 1, pp. 57-59)

**Supplemental Readings:**
John Hope Franklin, *Runaway Slaves*
Howard Jones, *Mutiny on the Amistad*
Don Fehrenbacher, *The Dred Scott Case*

**THE BEGINNING OF THE END OF SLAVERY**

*The Case of John Brown* (1859)
(Race Law pp. 173-180)

**Supplemental Readings:**
Frederick Douglass, *The Life and Times of Frederick Douglass*
W.E.B. DuBois, *John Brown*
PART THREE — RECONSTRUCTION, CITIZENSHIP, AND SOVEREIGNTY

Session #5: THE SUPREME COURT’S BETRAYAL OF RECONSTRUCTION
Sept. 15

Ghosts of Jim Crow
(Chapter 1, pp. 59-61)

The Emancipation Proclamation (1863)
(Race Law pp. 759-760)

The Freedmen’s Bureau (1865)
(Race Law pp. 760-761)

Apology For Slavery (2009)
(Race Law pp. 768-770)

Ghosts of Jim Crow
(Chapter 2, pp. 63-67)

*The Slaughterhouse Cases* (1873)
(Race Law pp. 181-215) (read carefully pp. 202-209) (Firms A and B)

*United States v. Cruikshank* (1875)
(Race Law pp. 215-237) (read carefully pp. 233-236) (Firms C and D)

Ghosts of Jim Crow
(Chapter 2, pp. 67-72)

The Black Code (1865)
(Race Law pp. 761-764)

*The Civil Rights Cases* (1883)
(Race Law pp. 237-254) (read carefully pp. 238-245)

Shades of Freedom
(Chapter 8, pp. 104-107)

Ghosts of Jim Crow
(Chapter 2, pp. 72-84)

Supplemental Readings:
Randall Robinson, *The Debt*
Robert Kaczorowski, *The Politics of Judicial Interpretation*
Session #6: RACE AND CITIZENSHIP  
Sept. 22

Ozawa v. United States (1922)  
(Race Law pp. 255-263) (read carefully pp. 260-263) (Firms A and B)

United States v. Thind (1923)  
(Race Law pp. 263-268) (read carefully pp. 264-267) (Firms C and D)

People v. De La Guerra (1870)  
(Race Law pp. 268-272)

Ping v. United States (1889)  
(Race Law pp. 272-276) (read carefully pp. 273-275) (Firms A and B)

United States v. Ark (1898)  
(Race Law pp. 276-280) (read carefully pp. 276-278) (Firms C and D)

Korematsu v. United States (1944)  
(Race Law pp. 280-298) (read carefully pp. 281-284)

Restitution For Internment (1988)  
(Race Law p. 768)

Supplemental Readings:
Ian Haney Lopez, White By Law  
Frank Wu, Yellow

RACE, AMERICAN INDIANS, AND SOVEREIGNTY

Johnson and Graham’s Lessee v. M’Intosh (1823)  
(Race Law pp. 298-306) (read carefully pp. 301-305) (Firms A and B)

Indian Removal Act (1830)  
(Race Law pp. 764-765)

The Cherokee Nation v. The State of Georgia (1831)  
(Race Law pp. 306-318) (read carefully pp. 306-309) (Firms C and D)

Elk v. Wilkins (1884)  
(Race Law pp. 318-334) (read carefully pp. 320-325)
Supplemental Readings:
David Wilkins, American Indian Sovereignty

PART FOUR — SEGREGATION

Session #7: CREATING THE SEPARATE BUT EQUAL DOCTRINE
Sept. 29

*Strauder v. West Virginia* (1880)

*Plessy v. Ferguson* (1896)

Shades of Freedom
(Chapter 9, pp. 108-115, 117-118)

Ghosts of Jim Crow
(Chapter 3, pp. 85-92)

Supplemental Readings:
C. Vann Woodward, *The Strange Career of Jim Crow*

EXPANDING THE SEPARATE BUT EQUAL DOCTRINE

*Berea College v. Commonwealth of Kentucky* (1908)
(Race Law pp. 356-371) (read carefully pp. 359-360)

Supplemental Readings:
Rayford Logan, *The Betrayal of the Negro*

Session #8: LIMITING THE SEPARATE BUT EQUAL DOCTRINE: RACIAL SEGREGATION AND HOUSING
Oct. 6

Ghosts of Jim Crow
(Chapter 3, pp. 92-109)

*Buchanan v. Warley* (1917)

Shades of Freedom
(Chapter 10, pp. 119-126)

Supplemental Readings:
Douglas Blackmon, *Slavery By Another Name*
David Oshinsky, *Worse Than Slavery*
Robert Weaver, *The Negro Ghetto*
Isabel Wilkerson, *The Warmth of Other Suns*

**LIMITING THE SEPARATE BUT EQUAL DOCTRINE: RACIAL SEGREGATION AND INTERSTATE COMMERCE**

*Morgan v. Commonwealth of Virginia* (1946)
(Race Law pp. 385-395) (read carefully pp. 386-390) (Firms A and B)

**Supplemental Readings:**
James Loewen, *Sundown Towns*
Genna McNeil, *Groundwork*

**LIMITING THE SEPARATE BUT EQUAL DOCTRINE: RACIAL SEGREGATION AND STATE ACTION**

*Shelley v. Kraemer* (1948)
(Race Law pp. 395-402) (read carefully pp. 396-401) (Firms C and D)

**Supplemental Readings:**
Loren Miller, *The Petitioners*
Gilbert Ware, *Grace Under Pressure*

**INTERPRETING THE SEPARATE BUT EQUAL DOCTRINE**

*Cumming v. County Board of Education* (1899)
(Race Law pp. 402-414, 422-434) (read carefully pp. 408-409) (Firms A and B)

*Lum v. Rice* (1927)
(Race Law pp. 414-419, 422) (read carefully pp. 417-419) (Firms C and D)

Shades of Freedom
(Chapter 9, pp. 115-117)

*Hernandez v. Texas* (1954)
(Race Law pp. 420-422)

**Supplemental Readings:**
George Fredrickson, *The Black Image In The White Mind*
Ediberto Roman, *Those Damned Immigrants*

**Session #9: APPLYING THE SEPARATE BUT EQUAL DOCTRINE**

*Missouri ex rel. Gaines v. Canada* (1938)
(Race Law pp. 438-445) (read carefully pp. 440-442)
McLaurin v. Oklahoma State Regents for Higher Education (1950)
(Race Law pp. 445-447)

Sweatt v. Painter (1950)
(Race Law pp. 448-450)

Shades of Freedom
(Chapter 12, pp. 164-166)

Ghosts of Jim Crow
(Chapter 3, pp. 109-116)

Supplemental Readings:
Gilbert Ware, From the Black Bar

ENDING STATE-MANDATED SEGREGATION

(Race Law pp. 450-462) (read carefully pp. 454-457)

Supplemental Readings:
Morton Horwitz, The Warren Court
Richard Kluger, Simple Justice
Gunnar Myrdal, An American Dilemma

APPLYING THE BROWN RATIONALE

Loving v. Virginia (1966)
(Race Law pp. 463-471) (read carefully pp. 466-468)

Shades of Freedom
(Chapter 4, pp. 44-45)

Supplemental Readings:
Rachel Moran, Interracial Intimacy

PART FIVE — ATTEMPTED ERADICATION OF INEQUALITY

Session #10: RACE-CONSCIOUS REMEDIES
Oct. 20

Executive Order 8802 (1941)
(Race Law pp. 765-766)

Brown v. Board of Education (Brown II) (1955)
(Race Law pp. 473-479) (read carefully pp. 475-476) (Firms A and B)
Ghosts of Jim Crow
(Chapter 4, pp. 119-134)

Civil Rights Act (1964) (Public Accommodations)
(Race Law p. 766)

Civil Rights Act (1964) (Federally Assisted Programs)
(Race Law p. 766)

Fair Housing Act (1968) (Housing)
(Race Law pp. 767-768)

(Race Law pp. 479-495) (read carefully pp. 486-489) (Firms C and D)

Ghosts of Jim Crow
(Chapter 4, pp. 134-139)

(Race Law pp. 496-508) (read carefully pp. 500-504) (Firms A and B)

(Race Law pp. 508-527) (read carefully pp. 511-521) (Firms C and D)

Parents Involved in Community Schools v. Seattle School District Number 1
(2007)
(Race Law pp. 527-540) (read carefully pp. 528-532) (Firms A and B)

Fisher v. University of Texas (2013)
(Race Law pp. 540-547) (read carefully pp. 543-546) (Firms C and D)

(Race Law pp. 547-570) (read carefully pp. 549-556)

Ghosts of Jim Crow
(Chapter 7, pp. 215-218)

Supplemental Readings:
Jack Bass, Unlikely Heroes
Derrick Bell, Faces At The Bottom of the Well
Sheryl Cashin, The Failures of Integration
Christopher Edley, Not All Black and White
Gerald Jaynes and Robin Williams, A Common Destiny
Randall Kennedy, For Discrimination
James Patterson, Brown v. Board of Education
William Julius Wilson, *Declining Significance of Race*
William Julius Wilson, *The Truly Disadvantaged*
William Julius Wilson, *When Work Disappears*

Session #11: **MAINTAINING RACIAL INEQUITY**

Oct. 27

*Washington v. Davis* (1976)
(Race Law pp. 570-575) (Firms A and B)

Shades of Freedom
(Chapter 12, pp. 159-164)

(Race Law pp. 583-598) (read carefully pp. 584-591)

Shades of Freedom
(Chapter 13, pp. 178-182)

Voting Rights Act (1965)
(Race Law p. 767)

*Shaw v. Reno* (1993)
(Race Law pp. 599-608) (read carefully pp. 601-603) (Firms C and D)

Ghosts of Jim Crow
(Chapter 5, pp. 170-174)

*Shelby County v. Holder* (2013)
(Race Law pp. 608-628) (read carefully pp. 613-618)

(Race Law pp. 628-648) (read carefully pp. 633-637)

Supplemental Readings:
Henry Flores, *Latinos and the Voting Rights Act*
Lani Guinier, *The Tyranny of the Majority*
Randall Kennedy, *Race, Crime, and the Law*
Daria Roithmayr, *Reproducing Racism*

PART SIX — SUPREME COURT CONFIRMATION CONTROVERSIES

Session #12: **RACE, VALUES, AND JUSTICE THOMAS**

Nov. 3
The Jurisprudence of Justice Clarence Thomas  
(Race Law pp. 649-679)  

Supplemental Readings:  
Jill Abramson, *Strange Justice*  
Clarence Thomas, *My Grandfather’s Son*  

**RACE, VALUES, AND JUSTICE ALITO**  

The Jurisprudence of Justice Samuel Alito  
(Race Law pp. 679-688)  

**RACE, VALUES, AND JUSTICE SOTOMAYOR**  

The Jurisprudence of Justice Sonia Sotomayor  
(Race Law pp. 688-691)  

Supplemental Readings:  
Sonia Sotomayor, *My Beloved World*  

**PART SEVEN — ONGOING CONTROVERSIES**  

**RACE AND THE ADMINISTRATION OF JUSTICE**  

Arrests, Trials, and Beatings  
(Race Law pp. 693-710)  

Supplemental Readings:  
Michelle Alexander, *The New Jim Crow*  
Paul Butler, *Let’s Get Free*  
Ta-Nehisi Coates, *Between the World and Me*  
Toni Morrison, *Birth of a Nationhood*  

**RACE AND IMMIGRATION**  

History and Current Approach  
(Race Law pp. 710-720)  

Supplemental Readings:  
Nazli Kibria, et al, *Race and Immigration*  
Christina Greer, *Black Ethnics*  
Ronald Mize and Grace Delgado, *Latino Immigrants in the United States*  

**RACE AND POLITICS**
History and Current Approach
(Race Law pp. 720-727)

Supplemental Readings:
Ian Haney Lopex, *Dog Whistle Politics*

**PART EIGHT — APPENDIX**

Session #13: STUDENT PRESENTATIONS ON RACE
Nov. 10

Session #14: RACE AND THE FUTURE
Nov. 17

**Always Running**
(Chapter 1, pp. 14-25, Chapter 3, pp. 62-67, Chapter 4, pp. 83-84, Chapter 6, pp. 139-146, Chapter 10, pp. 235-246, and Epilogue, pp. 247-251) (to be distributed)

Ghosts of Jim Crow
(Preface, pp. 1-14, Introduction Chapter, pp. 25-42, Chapters 5, 6 and 7, pp. 175-177, 181-215, 219-221)

**Supplemental Readings:**
Hazel Markus, *Doing Race*
Luis Rodriquez, *Always Running*
Jody Vallejo, *Barrios To Burbs*
Tim Wise, *Colorblind*

**SUMMARY LECTURE:** What have we learned and where do we go from here?

**Shades of Freedom**
(Introduction Chapter, pp. xxiii-xxxii)

**Conclusion**
(Race Law pp. 729-734)

**Supplemental Readings:**
Michael Klarman, *Unfinished Business*